TSILHQUOT'IN NATION V BRITISH COLUMBIA 2014 SCC 44

26 June 2014, Rights and limitations of Aboriginal title, Supreme Court of Canada

McLachlin CJ with LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ concurring

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It may be surprising to Australian audiences that the decision in the Tsilhquot'in (Chilcotin) case is the first time that a Canadian Court has made a positive declaration of Aboriginal title. In the past the court has fallen short of declaring that title exists on some technicality preferring to see cases resolved through negotiation. The case began in 2002 and in this decision, the Canadian Supreme Court allowed an appeal from the Court of Appeal for British Columbia and granted a declaration of Aboriginal title in relation to approximately 4,380km2 of land claimed by the Tsilhquot'in Nation.

The Tsilhquot'in case is one of the most significant Aboriginal rights cases in Canadian history; the Court held, like Mabo, that terra nullius did not form part of the law of Canada (although the understanding of terra nullius is somewhat limited). Perhaps most importantly, the Court took an expansive view of Aboriginal title, akin in some ways to Australian native title law, although there are aspects of the formulation of the recognition that could provide a useful point of comparison. The Canadian Supreme Court also declared that British Columbia breached the duty to consult that it owed to the Tsilhquot'in Nation.

Background

This matter has a long history, beginning with the centuries that the Tsilhquot'in Nation had lived in in a remote valley bounded by rivers and mountains in what would come to be known as central British Columbia. The Tsilhquot'in Nation is a grouping of six bands sharing common culture and history, living in villages and who managed and defended their lands from settlers, including setting terms for European traders to come onto their lands.

In 1983, the Province granted a forest licence to cut trees, under the British Columbia Forest Act. One of the Tsilhquot bands sought a declaration of prohibition to stop the commercial logging, which led to a blockade that was lifted only after the Premier promised no further logging without consent. In 1998 the claim was amended to include a claim for Aboriginal title for all Tsilhquot'in territory.

The federal and provincial governments opposed the claim and in 2002, the matter went to Court. Following five years of hearings, Justice Vickers of the Supreme Court of British Columbia found that the Tsilhquot'in people were in principle entitled to a declaration of Aboriginal title. However, in 2012, the British Columbia court of Appeal held that the Tsilhquot'in might be able to prove title to specific sites within the area claimed, but for the rest, were confined to Aboriginal rights to hunt, trap and harvest.

Jurisprudence

The Supreme Court followed a long line of authority in coming to the decision in this case, including *Calder, Guerin, Sparrow, Delgamuukw and Haida Nation* to establish the following propositions:[1]

- Aboriginal land rights survived European settlement, unless extinguished by treaty or otherwise.[2]
- The radical title acquired by the Crown upon sovereignty was burdened by pre-existing legal rights held by Aboriginal people.[3]
- Content of Aboriginal title includes the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures; and it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.[4]
- All existing Aboriginal rights were recognised and affirmed in s 35 of the Constitution Act 1982.[5]
- A fiduciary duty is owed by the Crown with respect to those rights.
- Aboriginal title can only be infringed by governments if they establish a 'compelling and substantial' public interest purpose and only then if the government fulfils its fiduciary obligation, which requires involvement of the affected Aboriginal group in decisions about its land.[6]
- Involvement of the affected Aboriginal group in decisions about its land is extended to situations where development is proposed on land over which Aboriginal title is asserted but has not yet been established. And, the Crown has a legal duty to negotiate in good faith to resolve land claims.[7]

The Test for Aboriginal Title

In overwhelming support for the reasons provided by the trial judge, the full bench of the Canadian Supreme Court affirmed the test for recognising Aboriginal title. Their Honours reiterated that Aboriginal title:

- flows from occupation in the sense of regular and exclusive use of land; and
- 'occupation' must be sufficient, continuous (where present occupation is relied on) and exclusive.

In determining what would constitute sufficiency of occupation, the Supreme Court preferred the trial judge's finding that regular and exclusive use established title to village sites, to areas maintained for harvesting of roots and berries and to larger territories which ancestors had used regularly and exclusively for hunting, fishing and other activities.

With respect to the issue of exclusivity of occupation, the Supreme Court stated, at [59]:

> Most of the Province's criticisms of the trial judge's findings on the facts are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title.

The Supreme Court affirmed the trial judge's finding of continuity of occupation, based on evidence of more recent occupation alongside archaeological evidence, historical evidence and oral evidence from Aboriginal elders about their legal traditions and relationship to their traditional territories, through legal title, use and occupation.

Content of Rights

The Supreme Court affirmed that Aboriginal title is *sui generis* or unique. The title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development. Following the line of precedent discussed above, the Supreme Court, at [73]-[74], affirmed that Aboriginal title is similar to fee simple[8], except it is collective title held for all succeeding generations. Therefore, the land must not be used, encumbered or developed in ways that would substantially deprive future generations of its benefit.

Crown encroachment on Aboriginal title

The consequence of the finding that Aboriginal rights to lands survive colonisation is that the Crown does not retain a beneficial interest in Aboriginal title land. The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it. What remains is:

- a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands; and
- the right to encroach on Aboriginal title, but only if the government can justify this in the broader public interest.

While the Court declared that terra nullius was not part of the Canadian law of Aboriginal title because the land rights of the Indigenous inhabitants survived; like Australia, the vestiges of the Doctrine of Discovery remain firmly in place in this decision. The Court recognised that the Crown retained the right to 'encroach' on Aboriginal lands (what we would call extinguishment) based on the Crown's underlying or radical title. Unlike Australian courts, however, the Canadian Courts have recognised that this power to encroach gives rise to a fiduciary duty. The Supreme Court ruled that the fiduciary obligation owed by the Crown required the government to:

1. respect the nature of Aboriginal title, in that the beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land (at [86]); and
2. ensure the incursion is necessary, goes no further than necessary, and that any benefit is not outweighed by the adverse effect on the Aboriginal interest (at [87]).

Failure to Consult

The Court held that the Crown is required to consult in good faith about proposed uses of the land with any Aboriginal groups asserting title to the land and, if appropriate, accommodate the interests of such claimant groups. The Supreme Court discussed, at [91]-[92], that the extent of the duty corresponds to the extent of the interest. Therefore, the duty to consult increases as the strength of the claim increases.

The Court held that the strong *prima facie* claim to the land held by the Tsilhquot'in meant the Province had a duty to consult that fell at the high end of the spectrum. However, the Province did not consult and, therefore, breached its duty to consult when it granted licences allowing forestry activities on Tsilhquot'in land.

Provincial Laws – Application of the Forest Act to Aboriginal Title

The Court considered, at [98]-[148], whether the *Forests Act,* under which the licences had been granted, and which were of general application, had force with respect to Tsilhquot'in land. This included an examination of the power to regulate, the limitation imposed by s 35 of the Constitution Act 1982, and whether the *Forest Act* is ousted from Aboriginal lands by operation of the Federal Constitution.

Provincial governments may regulate with respect to all land within the province, including lands held under Aboriginal title. However, s 35 of the Constitution Act 1982 requires any limitations or impact on Aboriginal title to be undertaken only pursuant to compelling and substantial government objectives, consistent with the Crown's fiduciary relationship with title holders.

The Court held that all three factors of the following test must be applied in order to determine whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to a breach:

1. whether the limitation imposed by the legislation is unreasonable; and
2. whether the legislation imposes undue hardship; and
3. whether the legislation denies the holders of the right their preferred means of exercising the right.

It is interesting to note that, at [105], the Court considered that laws of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will normally meet this test. However, spurious claims to environmental purposes, such as were argued by the Province, would not be entertained. The finding was, therefore, that:

> granting rights to third parties to harvest timber on Tsilhquot'in land is a serious infringement that will not lightly be justified.

The Court's reasoning with respect to the application of the Provincial laws was somewhat inconsistent with the principles of Aboriginal title. The Court, at [116], expressed a view that the land remained Crown land until such time as it was confirmed aboriginal land by agreement of Court order; only then was the beneficial title vested in the Aboriginal group rather than the Crown. This reasoning is inconsistent with the notion that aboriginal peoples' right to land survives the acquisition of sovereignty and Aboriginal title is not dependent

on Crown recognition. On this view, the Court found that the *Forest Act* did apply to lands under claim, up to the time title is confirmed by agreement or court order. In Australian law we understand that where native title still exists to be determined by the Court, it has always existed. As such, the burden on the Crown underlying title was enlivened at the point at which sovereignty was asserted.

The Federal Government's constitutional power with respect to 'Indians, and Lands reserved for the Indians', under s 91(24) of the Constitution Act 1867 also has application to this matter. With Federal Indian powers and state land management powers both at play, forestry on Aboriginal title lands falls under both the provincial and the federal jurisdiction. Where there is a jurisdictional conflict, the doctrine of paramountcy and the doctrine of interjurisdictional immunity may apply to ensure the two levels of government can operate without interference in their core areas of exclusive jurisdiction. Like Australian constitutional law, where there is a conflict or inconsistency between two laws, federal law prevails. The Court found there was no inconsistency in this case and thus there was no paramountcy consideration.

The Court did, however, look to whether provincial legislation such as the *Forest Act* is ousted pursuant to interjurisdictional immunity. The purpose of the doctrine is to resolve conflict between provincial and federal powers generally, rather than in relation to any particular conflicting legislation. The Supreme Court overturned the findings in *Delgamuukw* as applied by the trial judge that interjurisdictional immunity applied to Aboriginal title and thus no provincial jurisdiction applies. They argued that this was a practical compromise:

> The result of its [the Forest Act's] application is a protection of Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society. (at [139]).

This limitation under s 35 of the Constitution Act applies to both levels of government. Therefore, in this case, the powers were held not to be competing. Rather, the Court found there is a tension between the right of Aboriginal title holders to use their land and the province in regulating that land. The Court suggested, at [147], that to apply the doctrine of interjurisductional immunity could produce 'a legal vacuum'. This view clearly disregards previous Supreme Court decisions that have recognised that where Aboriginal title exists so too does a form of Indigenous jurisdiction. This is a step backward in the jurisprudence of Canadian Aboriginal title.

Conclusion

The Appeal from the decision by the Court of Appeal for British Columbia was upheld, the Court granted a declaration of Aboriginal title over the area and the Court declared that British Columbia breached its duty to consult.

The Court also created precedent by determining that provincial governments are constitutionally permitted to infringe Aboriginal rights where such infringement is justified pursuant to s 35 of the Constitution Act 1982 and, where s 35 of the Constitution Act 1982 applies, there will be no application of interjurisdictional immunity. The Court's promise that terra nullius is not a part of Canadian law is only partially fulfilled by this decision. Canadian Indigenous peoples have much to look to in the Tsilhquot'in decision, but the adherence to the Doctrine of Discovery and the power of Provincial governments to encroach on Aboriginal lands and jurisdiction, with its resonance with Australian native title jurisprudence, continue to hold back the reconciliation of Aboriginal peoples pre-existing rights and the assertion of Canadian sovereignty.

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[1] *Tsilhqot'in Nation v British Columbia* 2014 SCC 44, [18]

[2] Calder v. Attorney General of British Columbia, [1973] SCR 313.

[3] Guerin v. The Queen, [1984] 2 S.C.R. 335.

[4] Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010.

[5] Section 35 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11.

[6] R. v. Sparrow, [1990] 1 S.C.R. 1075.

[7] Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511.

[8] An 'estate in fee simple' is a term with historical links to landholdings under feudal English law. In very simple terms, holding land in fee simple is as close to complete ownership of land as the common law system allows.