Woodward & Company LLP Newsletter SPECIAL EDITION July 2014

Commentary on the Tsilhqot'in Aboriginal Title Win

Tsilhqot'in Nation v British Columbia, 2014 SCC 44.

On June 26, 2014, the Supreme Court of Canada unanimously declared that the Tsilhqot'in Nation have Aboriginal title to approximately 1,700 square kilometres of land southwest of Williams Lake, BC. The Court also declared that British Columbia breached its duty to consult the Tsilhqot'in Nation when it issued logging licences on their traditional lands nearly 20 years ago.

This court decision, the first in Canadian history to formally recognize Aboriginal title, is a victory for the Tsilhqot'in people, who have been fighting for control over their traditional lands for one-hundred and fifty years.

Woodward & Company LLP has been the Tsilhqot'ins' legal counsel for nearly 25 years. We fought the 339-day trial in the BC Supreme Court on their behalf and represented them at the Court of Appeal and the Supreme Court of Canada. We are honoured and grateful to represent such a courageous Nation to the culmination of this victory.

The test for Aboriginal Title

The Supreme Court of Canada affirmed the test for Aboriginal title as set out in *Delgamuukw v British Columbia* which requires an Aboriginal group to show the land was exclusively occupied prior to sovereignty. In applying the test, a court:

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Upcoming Events:

July 10: Woodward and Company LLP celebration of SCC judgment.

Images from the SCC Title Win

David Rosenberg Q.C., Chief Roger William, David Robbins and Jay Nelson in Vancouver for the SCC announcement June 26, 2014.

Chief Roger William and Jack Woodward Q.C. at the Tsilhqot'in celebration at the Nemiah Valley rodeo grounds.

Community drumming following speeches to celebrate the win!

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> … must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights.

This is an important change from the Court of Appeal decision which held that an Aboriginal group must demonstrate that its ancestors intensively used a definite tract of land with reasonably defined boundaries at the time of European sovereignty. The Supreme Court rejected the "postage-stamp" theory and held that Aboriginal title is not confined to specific sites of settlement but also includes broad territorial tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources.

Significantly, the Court reiterated a critical direction from the *Haida Nation* case, once again stating that governments are under a positive duty to negotiate in good faith to resolve claims to ancestral lands.

Powers of Aboriginal Title holders

As recognized holders of Aboriginal title, the Tsilhqot'in Nation now has the right to decide how Aboriginal title lands will be used; the right of enjoyment and occupancy of the land; the right to possess the land and the right to the economic benefits of the land. The Court unanimously decided that this is not merely a right to first refusal but the right to proactively control and manage the land.

The Supreme Court found that while Aboriginal title confers ownership rights similar to fee simple, there are limits to the right. Firstly, the title lands may only be alienated to the Crown. Secondly, as title is a collective right held for both the present and future generations, the land cannot be used in a way that would substantially deprive future generations of the benefits that flow from the land.

Role of Crown in respect of Aboriginal Title Lands

The Court held that once Aboriginal title is established by a court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group before approving developments on their land.

Absent consent, development of title land cannot proceed unless the Crown satisfies the demanding test for justifying infringement of Aboriginal title.

The test for justification requires the government to show: (1) that it discharged its duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the Aboriginal group.

The compelling and substantial objective must be considered from the Aboriginal perspective as well as from the perspective of the broader public. To constitute a compelling and substantial objective, it must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective. In our opinion, it will be very difficult to justify any infringement without the consent of an Aboriginal title-holder.

Before Aboriginal title is established in the courts or recognized by the Crown, the Crown must consult with any Aboriginal groups that assert title to the land about the proposed land uses, and if appropriate, accommodate those groups. The level of consultation and accommodation required in each case will continue to be determined on the standard set out by the Court in *Haida Nation.* However, once title is established, the Crown action will be judged on the higher fiduciary standard of justified infringement. Once title is proven, it may be necessary to revisit past Crown decisions to determine if the Crown has met this higher fiduciary duty.

Application of provincial laws to Aboriginal Title lands

The Court found that British Columbia laws of general application may apply to Aboriginal title lands, as long as any infringements are justified under the *Sparrow* test. In other words, Aboriginal groups can no longer challenge provincial laws on the basis of s. 91(24) of the *Constitution Act*, 1867, or the doctrine of interjurisdictional immunity.

Laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will probably not infringe Aboriginal title. In respect of the *Forest Act,* under which BC issued the initial logging licences which initiated this legal battle, the Court found that as a matter of interpretation of the statute, the legislature intended it to apply to lands claimed as title lands until title is proven in court. However, once title is confirmed, the lands were held to be "vested" in the Aboriginal group and are no longer Crown lands.

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What this Means for First Nations

There are a number of important implications that should immediately guide the decisions of First Nations' governments and other governments:

1. If British Columbia and industry proponents were negotiating and consulting based on the postage stamp view of Aboriginal title, and we expect they were, they will need to re-evaluate their negotiation positions and mandates.

2. The SCC has now cautioned the Crown twice (in *Haida Nation* and *Tsilhqot'in Nation*) that it is not enough to simply consult and accommodate about unresolved land claims. The Crown has a positive legal duty to actively take steps to implement the direction in *Tsilhqot'in Nation* about Aboriginal title and resolve outstanding claims through negotiations.

3. First Nations currently engaged in consultation processes should re-assess the strength of their claims to title based on *Tsilhqot'in Nation* and determine whether they wish to submit new evidence and whether the level of consultation and accommodation they are receiving is appropriate.

4. First Nations wishing to protect traditional lands from unsustainable exploitation and development now have a much larger tool in their toolbox. We expect that, within this new context, injunctions are more likely to be found in favour of a First Nation with a strong Aboriginal title claim.

5. Given the potential benefits of an Aboriginal title finding, First Nations will likely want to weigh the cost of obtaining a declaration of title against the potential benefits that would arise from recognized land ownership that includes a broad spectrum of economic benefits and rights.

At the trial level, the Tsilhqot'in also obtained a right to hunt and trap, and to trade the products of these activities, to maintain a moderate livelihood throughout the entire claim area. This means that the Crown cannot use the lands that were not declared Aboriginal title lands in ways that will interfere with the meaningful exercise of those rights – there must be sufficient protected natural habitat to provide a harvestable surplus of the species on which the Tsilhqot'in depend.

While further implications will arise in the future, it is fair to say the Tsilhqot'in have won a major victory for First Nations to protect, enjoy, and control their traditional lands.

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