BREAKING CASE LAW

Tsilhqot'in Nation v. British Columbia

This Issue

Aboriginal Title in British Columbia

Tsilhqot'in Nation v. British Columbia
2014 SCC44

In June the Supreme Court of Canada rendered judgment in *Tsilhqot'in Nation v. British Columbia*.[1] The Court upheld the trial decision of the British Columbia Supreme Court, which had declared that the Tsilhqot'in Nation of Indian peoples held Aboriginal title in a defined area of central British Columbia and that the Province had breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations within the claimed area prior to the recognition of title. The decision marks the first, conclusive recognition of Aboriginal title in Canada. Since rights associated with Aboriginal title have constitutional protection,[2] the Court's reasons describe both the correct legal test for proof of Aboriginal title and also the legal implications arising from proof of title. The legal implications arising from proof of title is the focus of this essay.

British Columbia is unique amongst the provinces of Canada, in that it has evolved to have many Aboriginal land claims, but few historical or modern Treaties. The challenges of protecting asserted Aboriginal rights prior to proof of their existence in law was addressed by the Supreme Court in its 2004 decision in *Haida Nation v. British Columbia (Minister of Forests)*.[3] Here the Court Crown recognized the constitutional obligation of governments, before undertaking conduct which may adversely affect an asserted Aboriginal right, to consult and, where necessary, accommodate Aboriginal peoples in an effort to effect reconciliation. The Court emphasized that the process of consultation and accommodation did not give Aboriginal groups a veto over land use pending final proof of the claim; but was, rather, "a process of balancing interests, of give and take."[4] The constitutional doctrine of consultation and accommodation was subsequently extended by the Court to rights defined in historical and modern Treaties.[5] It is fully operative in domestic law today, and is a key development enabling Canada's endorsement[6] of the *United Nations Declaration on the Rights of Indigenous Peoples*.[7]

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[1] Tsilhqot'in Nation v. British Columbia, 2014 SCC 44.
[2] The Constitution Act, 1982, section 35, Schedule B to the Canada Act 1982 (UK), 1982, c 11
[3] Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73, at paragraph 25.
[4] Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73, at paragraph 48.
[5] Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 S.C.R. 388; Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 S.C.R. 103.
[6] See: Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142
[7] United Nations Declaration on the Rights of Indigenous Peoples, at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

Suite 2250
10104 – 103 Avenue
Edmonton, Alberta
T5J 0H8

Tel 780.448.9275
Fax 780.423.0163
shoresjardine.com

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The importance of consultation and accommodation prior to proof of title was re-emphasized by the Court in Tsilhqot'in Nation v. British Columbia, and is evident from an examination of the legal consequence of proof of Aboriginal title. Once proven, the Aboriginal title holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits, provided these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land.[8] This interest in land is communal, or sui generis, and present use of the interest cannot deprive future generations of the benefits of the land. The Court confirms that, once title is proven to exist in law, use of such lands must either enjoy the consent of the Aboriginal title holders or be justified by a public interest which has a compelling and substantial objective and which also furthers both the Aboriginal interest and the broader public objective.[9] Consultation and accommodation is one of the justification criteria.

The immediate practical impact of Tsilhqot'in Nation v. British Columbia, then, is continued emphasis upon reconciliation through consultation and accommodation, and renewed emphasis on the importance of consultation and accommodation prior to and after proof of Aboriginal title. Land use prior to proof of Aboriginal title requires consultation and accommodation -- but not, in every case, Aboriginal consent. Continuing land uses which have not been reconciled with Aboriginal interests may, after proof of Aboriginal title, unjustifiably infringe these constitutionally protected interests, and may require cancellation.

The word may is especially important. The Court opines that uses which could justify infringement of Aboriginal title include "development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations."[10] This is ultimately a question of fact that will be examined on a case-by-case basis. In this respect, the Court continues to emphasize that Aboriginals and non-Aboriginals are "all here to stay"; and that Courts will use contextual analysis to determine whether the interests engaged have been appropriately balanced, in any given case, so as to further the interests of reconciliation.

Suite 2250
10104 – 103 Avenue
Edmonton, Alberta
T5J 0H8

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shoresjardine.com

[8] Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 at paragraph 67 and 73-4
[9] Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 at paragraphs 77 and 82
[10] Tsilhqot'in Nation v. British Columbia, 2014 SCC 44 at paragraph 83, citing Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, at paragraph 165