November 2007

Aboriginal Title Declaration Dismissed, for Now

Tsilhqot'in Nation v. British Columbia

Introduction

On November 21, 2007, the Supreme Court of British Columbia released the decision of Mr. Justice Vickers in *Tsilhqot'in Nation v. British Columbia*.[1] The decision dealt with a claim brought by Chief Roger William of the Xeni Gwet'in First Nation, on behalf of the Xeni Gwet'in First Nation and the Tsilhqot'in Nation. Initially, the Tsilhqot'in's claim, against the Province and a number of forest companies, was brought to stop timber harvesting in their traditional territory (located in the Cariboo-Chilcotin region of British Columbia). The proceedings evolved over time, so that when the trial began in 2002, the forest companies had been released from the proceedings, the federal government had been added as a party to the proceedings, and the issues before the Court focused on the Tsilhqot'in's claim for aboriginal title and rights in a portion of their traditional territory (referenced as the "Claim Area"). The trial took over five years to complete, occupying 339 days of court time.

Vickers J. declined to make any declaration granting the Tsilhqot'in aboriginal title over the Claim Area, but went on at length to provide his non-binding opinion that the evidence put before him proved aboriginal title to a significant portion of the Claim Area (amounting to approximately 200,000 hectares, slightly less than ½ of the Claim Area). Vickers J. did grant a declaration that the Tsilhqot'in had aboriginal rights to hunt and trap birds and animals in the Claim Area; to capture wild horses in the Claim Area; and to trade skins and pelts from the Claim Area. Vickers J. further decided that these aboriginal rights had been unjustifiably infringed by forest harvesting activities authorized by the Province. However, Vickers J. declined to award any damages for this infringement on the basis that the Tsilhqot'in's claim for damages had been framed as compensation for infringement of aboriginal *title,* not aboriginal *rights*.

Given the significance of the decision, it is likely to be appealed, despite the fact that Vickers J. devotes a significant portion of his reasons for judgment urging the parties to engage in the process of reconciliation outside the courtroom. In doing so, Vickers J. indicates that he views the opinions

[1] 2007 BCSC 1700. A copy of the decision is available at http://www.courts.gov.bc.ca/Jdb-txt/SC/07/17/2007BCSC1700.pdf

expressed in his reasons for judgment as being part of the process of reconciliation, designed to assist the parties to reach a negotiated agreement.

Aboriginal Title

With respect to aboriginal title, Vickers J. concluded that:

- the presence of the Tsilhqot'in in the Claim Area was uninterrupted and continuous before Britain acquired sovereignty over British Columbia in 1846;
- the Tsilhqot'in exercised control over the portions of land inside and outside of the Claim Area in or around 1846, or could have excluded other First Nations from that land had they so desired; and
- other First Nations generally recognized that portions of the Claim Area were Tsilhqot'in territory, as did early Europeans in the area.

Significantly, Vickers J. held that evidence established that Tsilhqot'in occupied portions of the Claim Area and certain other lands near the claim area to a degree sufficient to establish aboriginal title, despite their semi-nomadic lifestyle. In order to reach this finding, Vickers J. considered not only the existence of seasonal camp sites that were occupied on an occasional basis but also hunting grounds, gathering sites, fishing sites, as well as the foot trails, horse trails and water courses that connected these sites. This approach (of including the "interconnecting links" between significant sites) represents a significant departure from previous court decisions considering occupation of lands by aboriginal people, and permitted the Vickers J. to form the non-binding opinion that a much larger portion of the Claim Area was "occupied" by the Tsilhqot'in in or around 1846 and, therefore, should be subject to the Tsilhqot'in's claim of aboriginal title.

Despite the fact that Vickers J. concluded that the evidence established that the Tsilhqot'in had aboriginal title to certain lands, he determined that he could not, because of the way the action was set out in the Statement of Claim, make any formal declaration of aboriginal title. Nevertheless, Vickers J. went on to consider how a declaration of title might affect forestry activities and other matters.

Applicability of Provincial Legislation

Vickers J. held that provincial forestry legislation (the *Forest Act*) is inapplicable to lands subject to aboriginal title, as these lands are more akin to private lands and therefore do not fall under the definition of "Crown lands." Furthermore, he held that the Province does not have constitutional jurisdiction over aboriginal title lands. Such lands and their resources fall under the exclusive legislative jurisdiction of the federal government. These concepts apply where the lands meet the

test for aboriginal title. Where aboriginal title is merely alleged, provincial legislation will apply subject to the duty to consult.

Third Party Interests

Vickers J. addressed the issue of third party interests on Aboriginal title lands by reasoning that, as only the federal government has the jurisdiction to extinguish aboriginal title, the Province cannot and has not extinguished these rights. Therefore any private interests, whether they are fee simple title, range agreements, water licences, or any other interest derived from the Province, have not extinguished and cannot extinguish Tsilhqot'in rights, including aboriginal title. Vickers J. does not offer any suggestion on how such a dilemma is to be resolved; rather he simply states that it is not clear what the consequences of underlying aboriginal rights, including title, are for the various private interests that exist in the Claim Area.

Aboriginal Rights

It was found that the Tsilhqot'in people have aboriginal rights to hunt and trap birds and animals for certain purposes throughout the Claim Area along with the right to capture wild horses. They also have the right to trade skins and pelts in order to secure a moderate livelihood. The enactment of the *Forest Act* itself was not seen as an infringement on these rights, but the associated land use planning and forestry activities were held to be an unjustified infringement. Forestry activities caused habitat destruction and wildlife disturbances that the Province failed to justify. The consultation efforts of the Province were held to be inadequate, as they failed to acknowledge Tsilhqot'in aboriginal rights.

Conclusion

The Tsilhqot'in Nation does not have aboriginal title to any land yet. No declaration has been made, and the decision will probably be appealed. Nonetheless, the decision will likely have widespread ramifications for forestry and other resource industries in British Columbia.

For more information on the Tsilhqot'in Nation decision and how it may affect your company, please contact any of the following members of Lawson Lundell's Aboriginal Law practice group.

Vancouver

Brad Armstrong, Q.C.	604.631.9126	barmstrong@lawsonlundell.com
Keith B. Bergner	604.631.9119	kbergner@lawsonlundell.com
Sara J. Gregory	604.631.6785	sgregory@lawsonlundell.com
Clifford G. Proudfoot	604.631.9217	cproudfoot@lawsonlundell.com

Calgary

Ruth A. Johnson	403.781.9457	rjohnson@lawsonlundell.com
John M. Olynyk	403.781.9472	jolynyk@lawsonlundell.com

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