REPRESENTING THE PUBLIC INTEREST REGARDING FIRST NATIONS TITLE (2015)

A body of jurisprudence, including the recent Tsilhqot'in decision of the Supreme Court of Canada (SCC)[1], clarifies First Nations title rights. They provide a framework for government, industry and First Nations to address these rights. Such clarifications should increase certainty for investors and the public.

First Nations, at times, appear to be the only prominent voice discussing the implications of court decisions affecting aboriginal title. They also appear, at times, to be further asserting aboriginal title in ways that address neither the letter nor the spirit of the full court decisions and the body of jurisprudence. The province has been silent on important aspects of the Tsilhqot'in decision. Most discussion has focused solely on the court's declaration of aboriginal title and the powers and authority such a declaration provides to a First Nations. Not enough has been said about how the Tsilhqot'in decision emphasizes the rights and powers of the province, of particular importance is the right to infringe aboriginal title where justified in the public interest, and the court's unequivocal finding that provincial law applies in title and territorial areas.

- In 1990, this Court held that s. 35 of the Constitution Act, 1982[2] constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982, and imposed a fiduciary duty on the Crown with respect to those rights: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The Court held that under s. 35, legislation can infringe rights protected by s. 35 only if it passes a two-step justification analysis: the legislation must further a "*compelling and substantial*" purpose and account for the "*priority*" of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown (pp. 1113-19).[3]
- Once Aboriginal title is established, s. 35 of the Constitution Act, 1982 permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.[4]

Balanced discussion of the rights accorded by the SCC both to the province and to First Nations is essential. Not managing expectations in regard to public interest and First Nations rights can plant new seeds of discord, as well as create uncertainty for investors and the public on how the province will represent the interests of all British Columbians.

An example of unmanaged expectations are First Nations so-far uncontested assertion that their own mining policies and laws will apply in their asserted territories rather than the province's and ongoing demands for Impact Benefit Agreements, payments to consult or to even access lands (among other things). None of this seems to have a firm foundation in the body of aboriginal title decisions by the courts. The province is the only appropriate body to address this.

1 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do
2 https://zoupio.lexum.com/calegis/schedule-b-to-the-canada-act-1982-uk-1982-c-11-en
3 SUPREME COURT OF CANADA, Citation: Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256 Date: 20140626 ; Docket: 34986, Paragraph 13
4 SUPREME COURT OF CANADA, Citation: Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256 Date: 20140626 ; Docket: 34986, Paragraph 2

The courts have been clear that First Nations do not hold a veto over projects or developments even where aboriginal title is proven, let alone on asserted territorial lands where overriding public interest can be demonstrated and an infringement of title can be justified according to a long-established legal principles:

In the *Delgamuukw* decision the SCC confirmed that infringements of Aboriginal title can be justified under s. 35 of the Constitution Act, 1982 pursuant to the Sparrow test and described this as a "*necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part*" (at para. 161), quoting *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para. 73. While Sparrow had spoken of *priority* of Aboriginal rights infringed by regulations over non-aboriginal interests, Delgamuukw articulated the "different" (at para. 168) approach of involvement of Aboriginal peoples — varying depending on the severity of the infringement — in decisions taken with respect to their lands. [5]

[1] What interests are potentially capable of justifying an incursion on Aboriginal title? In Delgamuukw, this Court, *per* Lamer C.J., offered this:

In the wake of Gladstone, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the 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 to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para. 165.][6]

Constructive engagement is important, which is why the province's silence on the issue is such a concern.

The implications of this silence are clear. For example, international investors are being advised to avoid investing in B.C. because of the uncertainties surrounding these issues. At a so-called 'Canada Day' event at a March 2015 "Mines and Money" conference in Hong Kong attended by over 2000 people, several speakers specifically advised investors not to invest in Canada or B.C. because of the Tsilhqot'in decision. It seems a safe assumption this sentiment is not restricted to the mining sector.

B.C. stands on the cusp of remarkable opportunity, particularly as the world's economic centre of gravity shifts back to Asia. Our location on the Asia Pacific Rim positions us well to capitalize on emerging market opportunities.

But our ability to capitalize on these opportunities depends upon our ability to attract investment – and that depends upon establishing certainty surrounding First Nations land and title issues, the public interests and government's ability to respond and reconcile such issues in a timely, fair and just manner.

THE CHAMBER RECOMMENDS

5 SUPREME COURT OF CANADA, Citation: Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256 Date: 20140626 ; Docket: 34986, Paragraph 16

6 SUPREME COURT OF CANADA, Citation: Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256 Date: 20140626 ; Docket: 34986, Paragraph 83

ABORIGINAL RELATIONS AND RECONCILIATION

That the Provincial Government;

1. acknowledge and accept that the courts have given the province the right to uphold public interest rights where justified in the public interest in accordance with long-established legal principles in matters of aboriginal title;

2. develop a plan and institutional process for how to uphold public interest rights in regard to First Nations interest;

3. pro-actively manage public interest expectations in regard to First Nations and the appropriate guidance provided by the jurisprudence, and

4. publicly state how it will use the public interest rights and obligations afforded it by the courts with respect to aboriginal title and land claims in asserted territories.