



Tsilhqot'in Nation v British Columbia, 2014

In *Tsilhqot'in*, the Supreme Court of Canada for the first time settled a native land claim and spelled out the constitutional status of a First Nation that had not just claimed native title but received an authoritative ruling from the courts that it held native title over most of the land it had claimed.

The case was triggered by the Xení Gwet'in First Nation, one of six bands of the Tsilhqot'in Nation who have lived for centuries in the mountainous interior of northwest British Columbia. The Xení Gwet'in barricaded a bridge to stop a lumber company from logging on their lands. The case went before Judge Vickers of BC's Supreme Court (the province's highest trial court) to determine whether the Tsilhqot'in people have Aboriginal title to the area in question, which is approximately five percent of what the Tsilhqot'in regard as their traditional territory. It took Judge Vickers five years to study the claim area and hear evidence from elders, historians, and other experts. In the end he decided that the Tsilhqot'in had title to a large portion of the claimed area.

At the British Columbia Court of Appeal, the federal government intervened and persuaded the appellate court that native title applied only to the village sites where the Tsilhqot'in had their permanent settlements. If the federal government's argument had prevailed, it would have rendered native title virtually meaningless and made it easy to weave a pipeline around First Nations communities.

The Supreme Court of Canada dashed any hopes Prime Minister Harper might have had that with a majority of his appointees now on the Supreme Court bench, the court would be prepared to roll back the jurisprudence it had developed on native title in *Delgamuukw*.¹ In a unanimous decision written by Chief Justice McLachlin and supported by a bench of eight justices, five of whom were appointed by Harper, the court repudiated the B.C. Court of Appeal's ruling on the limited application of native title. Applying its decision in *Delgamuukw*, it ruled that Aboriginal title is not confined to specific sites of settlement, but extends to tracts of land that were regularly used for hunting, fishing, or exploiting resources over which the group exercised effective control at the time of the assertion of European sovereignty. The Supreme Court granted the appeal and granted a declaration of Aboriginal title over the area at issue.

The court explained that the rights of Aboriginal title holders are significantly greater than those of Aboriginal title claimants. In *Haida Nation*,² the Supreme Court held that governments wishing to sponsor resource developments on land subject to Aboriginal title claims had to consult with the Aboriginal people and try to accommodate their interests. But on lands where native title is not just claimed but is recognized by Canadian authorities

1 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

2 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511.

(in this case, the Supreme Court of Canada), governments must have the consent of the Aboriginal titleholders for any development they wish to support on their lands. The Aboriginal landowners have the “right to proactively use and manage the land.” In this context, the appropriate role of non-Aboriginal governments is not to lean on the Aboriginal owners to accommodate projects proposed by outside interests, but to work with the Aboriginal people in managing the land so as to increase the benefits they can derive from it. The Supreme Court continues to recognize the power of governments, federal or provincial, to infringe on Aboriginal rights, but drops its blasé tone about what could justify such an infringement. The justification requires circumstances that from both an Aboriginal perspective and that of the general public will make a compelling case for infringing native title. In no way did the harvesting of trees by the Carrier Company in Tsilhqot’in territory meet that standard.

In terms of the division of powers, the court points out that constitutionally protected Aboriginal rights operate as limits on both federal and provincial legislative powers. The doctrine of federal/provincial interjurisdictional immunity plays no role with respect to Aboriginal rights because section 35 rights are not part of the legislative jurisdiction of either the federal Parliament or the provinces. In answering the specific question of whether B.C.’s *Forest Act*,³ as a law of general application, applies to land held under native title, the court says that it could apply if the legislature made it clear that it was intended to apply to native-title land to deal with a mutually recognized environmental challenge.

The Supreme Court’s decision in *Tsilhqot’in* may mean that many First Nations with unsettled claims will prefer to go to court to secure recognition of their native title rather than negotiate a settlement with federal and provincial governments. The Supreme Court’s recognition of the Tsilhqot’in people’s title to their lands comes without any extinguishments attached. If the federal government insists on using land claims agreements as instruments of extinguishment, First Nations’ leaders will have a hard time convincing their people that it is better to negotiate than to litigate. ~

3 R.S.B.C. 1996, c. 157.

Discussion Questions

1. Do the rights of native titleholders recognized in this case come close to making the recognized holders of native title a third order of government in Canada?
2. What is the likely impact of this decision on land claims negotiations in Canada?

TSILHQOT’IN NATION v. BRITISH COLUMBIA 2014 SCC 44, [2014] 2 SCR 257

Hearing: November 7, 2013; Judgment: June 26, 2014.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

On appeal from the Court of Appeal for British Columbia

The judgment of the Court was delivered by

THE CHIEF JUSTICE:

I. Introduction

[1] What is the test for Aboriginal title to land? If title is established, what rights does it confer? Does the British Columbia *Forest Act*, R.S.B.C. 1996, c. 157, apply to land

covered by Aboriginal title? What are the constitutional constraints on provincial regulation of land under Aboriginal title? Finally, how are broader public interests to be reconciled with the rights conferred by Aboriginal title? These are among the important questions raised by this appeal.

[2] These reasons conclude:

- Aboriginal title flows from occupation in the sense of regular and exclusive use of land.
- In this case, Aboriginal title is established over the area designated by the trial judge.
- Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it.
- Where title is asserted, but has not yet been established, s. 35 of the *Constitution Act, 1982* requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests.
- 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.
- In this case, the Province's land use planning and forestry authorizations were inconsistent with its duties owed to the Tsilhqot'in people.

II. The Historic Backdrop

[3] For centuries, people of the Tsilhqot'in Nation—a grouping of six bands sharing common culture and history—have lived in a remote valley bounded by rivers and mountains in central British Columbia. They lived in villages, managed lands for the foraging of roots and herbs, hunted and trapped. They repelled invaders and set terms for the European traders who came onto their land. From the Tsilhqot'in perspective, the land has always been theirs.

[4] Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations and other promises, but, with minor exceptions, this did not happen in British Columbia. The Tsilhqot'in Nation is one of hundreds of indigenous groups in British Columbia with unresolved land claims.

[5] The issue of Tsilhqot'in title lay latent until 1983, when the Province granted Carrier Lumber Ltd. a forest licence to cut trees in part of the territory at issue. The Xení Gwet'in First Nations government (one of the six bands that make up the Tsilhqot'in Nation) objected and sought a

declaration prohibiting commercial logging on the land. The dispute led to the blockade of a bridge the forest company was upgrading. The blockade ceased when the Premier promised that there would be no further logging without the consent of the Xení Gwet'in. Talks between the Ministry of Forests and the Xení Gwet'in ensued, but reached an impasse over the Xení Gwet'in claim to a right of first refusal to logging. In 1998, the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people.

[6] The claim is confined to approximately five percent of what the Tsilhqot'in—a total of about 3,000 people—regard as their traditional territory. The area in question is sparsely populated. About 200 Tsilhqot'in people live there, along with a handful of non-indigenous people who support the Tsilhqot'in claim to title. There are no adverse claims from other indigenous groups. The federal and provincial governments both oppose the title claim.

[7] In 2002, the trial commenced before Vickers J. of the British Columbia Supreme Court, and continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts. He found that the Tsilhqot'in people were in principle entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area. However, for procedural reasons which are no longer relied on by the Province, he refused to make a declaration of title (2007 BCSC 1700, [2008] 1 C.N.L.R. 112).

[8] In 2012, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established, but left open the possibility that in the future, the Tsilhqot'in might be able to prove title to specific sites within the area claimed. For the rest of the claimed territory, the Tsilhqot'in were confined to Aboriginal rights to hunt, trap and harvest (2012 BCCA 285, 33 B.C.L.R. (5th) 260).

[9] The Tsilhqot'in now ask this Court for a declaration of Aboriginal title over the area designated by the trial judge, with one exception. A small portion of the area designated by the trial judge consists of either privately owned or underwater lands and no declaration of Aboriginal title over these lands is sought before this Court. With respect to those areas designated by the trial judge that are not privately owned or submerged lands, the Tsilhqot'in ask this Court to restore the trial judge's finding, affirm their title to the area he designated, and confirm that issuance of forestry licences on the land unjustifiably infringed their rights under that title.

III. The Jurisprudential Backdrop

[10] In 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European settlement and remain

valid to the present unless extinguished by treaty or otherwise: *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313. ...

[18] The jurisprudence just reviewed establishes a number of propositions that touch on the issues that arise in this case, including:

- Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
- Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
- Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group.
- Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
- Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Against this background, I turn to the issues raised in this appeal. ...

V. Is Aboriginal Title Established?

A. The Test for Aboriginal Title

[24] How should the courts determine whether a semi-nomadic indigenous group has title to lands? This Court has never directly answered this question. The courts below disagreed on the correct approach. We must now clarify the test. ...

[26] The test was set out in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, *per* Lamer C.J., at para. 143:

In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[27] The trial judge in this case held that "occupation" was established for the purpose of proving title by showing regular and exclusive use of sites or territory. On this basis, he concluded that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their

ancestors used regularly and exclusively for hunting, fishing and other activities.

[28] The Court of Appeal disagreed and applied a narrower test for Aboriginal title—site-specific occupation. It held that to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.

[29] For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty. ...

[32] In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court 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. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

1. Sufficiency of Occupation

...

[37] Sufficiency of occupation is a context-specific inquiry. "[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (*Delgamuukw*, at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted. Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only about 400 people must be considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out.

[38] To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation

be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic. ...

[41] In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question—its laws, practices, size, technological ability and the character of the land claimed—and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession—which requires an intention to occupy or hold land for the purposes of the occupant—must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law. ...

2. *Continuity of Occupation*

[45] Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises—continuity between present and pre-sovereignty occupation.

[46] The concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact (*Van der Peet* [R v., [1996] 2 S.C.R. 507], at para. 65). The same applies to Aboriginal title. Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times. ...

3. *Exclusivity of Occupation*

[47] The third requirement is *exclusive* occupation of the land at the time of sovereignty. The Aboriginal group must have had “the *intention and capacity to retain exclusive control*” over the lands (*Delgamuukw*, at para. 156, quoting McNeil, *Common Law Aboriginal Title* [(Oxford: Clarendon Press,

1989)], at p. 204 (emphasis added)). Regular use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive.

[48] Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control. ...

4. *Summary*

[50] The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) “sufficient occupation” of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

B. Was Aboriginal Title Established in This Case?

[51] The trial judge applied a test of regular and exclusive use of the land. This is consistent with the correct legal test. This leaves the question of whether he applied it appropriately to the evidence in this case. ...

[55] The evidence in this case supports the trial judge's conclusion of sufficient occupation. While the population was small, the trial judge found evidence that the parts of the land

to which he found title were regularly used by the Tsilhqot'in. The Court of Appeal did not take serious issue with these findings.

[56] Rather, the Court of Appeal based its rejection of Aboriginal title on the legal proposition that regular use of territory could not ground Aboriginal title—only the regular presence on or intensive occupation of particular tracts would suffice. That view, as discussed earlier, is not supported by the jurisprudence; on the contrary, *Delgamuukw* affirms a territorial use-based approach to Aboriginal title.

[57] This brings me to continuity. There is some reliance on present occupation for the title claim in this case, raising the question of continuity. The evidence adduced and later relied on in parts 5 to 7 of the trial judge's reasons speak of events that took place as late as 1999. The trial judge considered this direct evidence of more recent occupation alongside archeological evidence, historical evidence, and oral evidence from Aboriginal elders, all of which indicated a continuous Tsilhqot'in presence in the claim area. The geographic proximity between sites for which evidence of recent occupation was tendered, and those for which direct evidence of historic occupation existed, further supported an inference of continuous occupation. Paragraph 945 states, under the heading of "Continuity," that the "Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion." I see no reason to disturb this finding.

[58] Finally, I come to exclusivity. The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding. ...

[66] I conclude that the trial judge was correct in his assessment that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty. There was ample direct evidence of occupation at sovereignty, which was additionally buttressed by evidence of more recent continuous occupation.

VI. What Rights Does Aboriginal Title Confer?

[67] As we have seen, *Delgamuukw* establishes that Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes" (para. 117), including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits (para. 166).

[68] I will first discuss the legal characterization of the Aboriginal title. I will then offer observations on what Aboriginal title provides to its holders and what limits it is subject to.

A. The Legal Characterization of Aboriginal Title

...

[71] What remains, then, of the Crown's radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements—a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act, 1982*. ...

[76] The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

C. Justification of Infringement

[77] To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural 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 group: *Sparrow* [, *R v.*, [1990] 1 S.C.R. 1075]. ...

[80] Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

[81] I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. ...

[82] As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a

whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are “all here to stay” and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective. ...

[87] Second, the Crown’s fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown’s fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government’s goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida’s* insistence that the Crown’s duty to consult and accommodate at the claims stage “is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” (para. 39).

[88] In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out—that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown’s procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown’s fiduciary duty to the Aboriginal group. ...

[94] With the declaration of title, the Tsilhqot’in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.

VIII. Provincial Laws and Aboriginal Title

[98] As discussed, I have concluded that the Province breached its duty to consult and accommodate the Tsilhqot’in interest in the land. This is sufficient to dispose of the appeal.

[99] However, the parties made extensive submissions on the application of the *Forest Act* to Aboriginal title land. This issue was dealt with by the courts below and is of pressing importance to the Tsilhqot’in people and other Aboriginal groups in British Columbia and elsewhere. It is therefore appropriate that we deal with it.

[100] The following questions arise: (1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how? (2) Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title? and (3) If the *Forest Act* on its face applies, is its application ousted by the operation of the Constitution of Canada? I will discuss each of these questions in turn.

A. Do Provincial Laws of General Application Apply to Land Held Under Aboriginal Title?

[101] Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

[102] As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province.

[103] Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act, 1982*. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown’s fiduciary relationship with title holders. Second, a province’s power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over “Indians, and Lands reserved for the Indians” under s. 91(24) of the *Constitution Act, 1867*.

[104] This Court suggested in *Sparrow* that the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (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 (p. 1112). All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of

Aboriginal title. As stated in *Gladstone* [, *R v.*, [1996] 2 S.C.R. 723]:

Simply because one of [the *Sparrow*] questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. [para. 43]

[105] It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. And it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both. This said, when conflicts arise, the foregoing template serves to resolve them.

[106] Subject to these constitutional constraints, provincial laws of general application apply to land held under Aboriginal title.

B. Does the Forest Act on its Face Apply to Aboriginal Title Land?

[107] Whether a statute of general application such as the *Forest Act* was *intended* to apply to lands subject to Aboriginal title—the question at this point—is always a matter of statutory interpretation. ...

[114] It seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain “Crown land” under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement. To proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands of hectares and represent a resource of enormous value. Looked at in this very particular historical context, it seems clear that the legislature must have intended the words “vested in the Crown” to cover at least lands to which Aboriginal title had not yet been confirmed.

[115] I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order*. To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based. Once Aboriginal title is confirmed, however, the lands are “vested” in the Aboriginal group and the lands are no longer Crown lands.

[116] Applied to this case, this means that as a matter of statutory construction, the lands in question were “Crown land” under the *Forest Act* at the time the forestry licences were issued. Now that title has been established, however, the beneficial interest in the land vests in the Aboriginal group, not the Crown. The timber on it no longer falls within the definition of “Crown timber” and the *Forest Act* no longer applies....

C. Is the Forest Act Ousted by the Constitution?

[117] The next question is whether the provincial legislature lacks the constitutional power to legislate with respect to forests on Aboriginal title land. Currently, the *Forest Act* applies to lands under claim, but not to lands over which Aboriginal title has been confirmed. However, the provincial legislature could amend the Act so as to explicitly apply to lands over which title has been confirmed. This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands is ousted by the Constitution.

1. Section 35 of the Constitution Act, 1982

[118] Section 35 of the *Constitution Act, 1982* represents “the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights” (*Sparrow*, at p. 1105). It protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.

[119] Section 35(1) states that existing Aboriginal rights are hereby “recognized and affirmed.” In *Sparrow*, this Court held that these words must be construed in a liberal and purposive manner. Recognition and affirmation of Aboriginal rights constitutionally entrenches the Crown's fiduciary obligations towards Aboriginal peoples. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty. ...

[123] General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it will be reasonable, not impose undue hardship, and not deny the holders of the right their preferred means of exercising it. In such cases, no infringement will result.

[124] General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties. The issuance of timber licences on Aboriginal title land for example—a direct transfer of Aboriginal property rights to a third party—will plainly be a meaningful diminution in the Aboriginal group's ownership right and will

amount to an infringement that must be justified in cases where it is done without Aboriginal consent.

[125] As discussed earlier, to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the right holders and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

[126] While unnecessary for the disposition of this appeal, the issue of whether British Columbia possessed a compelling and substantial legislative objective in issuing the cutting permits in this case was addressed by the courts below, and I offer the following comments for the benefit of all parties going forward. I agree with the courts below that no compelling and substantial objective existed in this case. The trial judge found the two objectives put forward by the Province—the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation—were not supported by the evidence. After considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle. ...

2. *The Division of Powers*

[128] The starting point, as noted, is that, as a general matter, the regulation of forestry within the Province falls under its power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. To put it in constitutional terms, regulation of forestry is in “pith and substance” a provincial matter. Thus, the *Forest Act* is consistent with the division of powers unless it is ousted by a competing federal power, even though it may incidentally affect matters under federal jurisdiction.

[129] “Indians, and Lands reserved for the Indians” falls under federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. As such, forestry on Aboriginal title land falls under both the provincial power over forestry in the province and the federal power over “Indians.” Thus, for constitutional purposes, forestry on Aboriginal title land possesses a double aspect, with both levels of government enjoying concurrent jurisdiction. Normally, such concurrent legislative power creates no conflicts—federal and provincial governments cooperate productively in many areas of double aspect such as, for example, insolvency and child custody. However, in cases where jurisdictional disputes arise, two doctrines exist to resolve them.

[130] First, the doctrine of paramourty applies where there is conflict or inconsistency between provincial and federal law, in the sense of impossibility of dual compliance or frustration of federal purpose. In the case of such conflict or inconsistency, the federal law prevails. Therefore, if the application of valid provincial legislation, such as the *Forest Act*, conflicts with valid federal legislation enacted pursuant to Parliament’s power over “Indians,” the latter would trump the former. No such inconsistency is alleged in this case. ...

[141] The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.

[142] The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers. The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I *Charter* rights, are held *against* government—they operate to *prohibit* certain types of regulation which governments could otherwise impose. These limits have nothing to do with whether something lies at the core of the federal government’s powers. ...

[151] For these reasons, I conclude that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s. 35 *Sparrow* approach should govern. Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982*.

[152] The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government—an issue appropriately dealt with by the doctrines of paramourty and interjurisdictional immunity where precedent supports this—but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The

appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act, 1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.

IX. Conclusion

[153] I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.