July 10, 2014

The 'Inherent Limit' Post-*Tsilhqot'in*: Where Indigenous Law and Land-Use Planning Meet

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Case commented on: *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44

The focus of this post, the fourth in a series of ABlawg posts on the Supreme Court of Canada's *Tsilhqot'in* decision (see here, here, and here), is the concept of the "inherent limit" pursuant to which Aboriginal title lands "cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands" (*Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, at para 125). From conversations with my colleagues here at the law school, there appear to be at least three concerns about this aspect of Aboriginal title law: that it is paternalistic, that it has never been satisfactorily sourced or rooted in indigenous laws (a complaint going back to *Delgamuukw*), and that it creates uncertainty for development. In this post, I propose an approach to what the Chief Justice in *Tsilhqot'in* described as the "negative proposition" (at para 15) that addresses each of these concerns (perhaps especially the latter two), while also addressing a more general concern with respect to Canadian Aboriginal law, which is to say the absence of any role for indigenous laws.

For the purposes of this post, the most relevant passages from *Tsilhqot'in* are the following:

> [74] Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. *Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes – to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.*
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> [75] The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. *Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group —*

> *most notably the right to control how the land is used.* However, these uses are not confined to the uses and customs of pre-sovereignty times; like other land-owners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.
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> (Emphasis added)

To the extent that the "inherent limit" is now an entrenched fixture of Aboriginal title law, I suggest that title holding groups may wish to make it work for them. By this I mean they could use their own laws respecting the natural world and resource use, which generally speaking "saw and understood the checks and balances that were exhibited by the cycle [of life]," to prescribe how their traditional territories should be used (M. Wilson, "Wings of the Eagle," in J. Plant and C. Plant, eds., *Turtle Talk* (Philadelphia: New Society Publishers, 1990). See also *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply Services, 1996), vol. 2, c. 4, s. 1; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press: Toronto, 2002)). Doing so could represent a small first step towards creating, as Nigel Bankes and Jennifer Koshan have described it, "a space within which indigenous laws can operate."

How would such laws operate in "modern times"? In my view, the Tsilhqot'in (and future title holders) might consider creating and implementing a land-use plan for their title lands that would allow for some development while at the same time preserving the land's benefits for future generations. By doing so at the outset, title-holding groups would reduce the uncertainty associated with the "inherent limit," as any reviewing court would be loathe to interfere with land-use decisions properly based on such a scheme. Such an approach, if properly carried out, should also reduce the potential for conflict over development within the title-holding group (see *e.g. Behn v. Moulton Contracting Ltd.*, 2013 SCC 26).

Finally, land-use planning is actually something that Canada's Aboriginal peoples have considerable experience and expertise in (see *e.g.* CIRL Occasional Paper #38). Indeed, the controversies surrounding the more recent *Lower Athabasca Regional Plan* (LARP) in Alberta and the *Peel Watershed Land Use Plan* in the Yukon suggest that First Nations better understand the principles and processes behind land use planning than provincial and territorial governments do. Without minimizing the time, effort, and money that such an endeavor would require, the *Tsilhqot'in* decision offers Aboriginal peoples the opportunity to engage in land-use management on their own terms. Should they choose to accept it, my sense is that all Canadians would benefit.