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Today's Word on the Street – "Consent", Brought to You by the Supreme Court of Canada

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

On June 26, 2014, the Supreme Court of Canada (SCC) granted the Tsilhqot'in Nation a declaration of Aboriginal title over 1,750 square kilometres of its territory. That the SCC has granted the first ever declaration of Aboriginal title in Canada, in and of itself, makes this a decision of great significance (see Jonnette Watson Hamilton's post on that issue here). However, through its unanimous decision, the SCC has done much more than this – it has refocused the discussion around the infringement of Aboriginal title away from its current pre-occupation with consultation towards consent. In this respect the decision is momentous – not only for Aboriginal title holders but for all Canadians. For this reason, this decision may indeed mark, in the words of Tsilhqot'in Nation Tribal Chair Joe Alphonse, the beginning of a "new Canada" (see here).

Consent – as a Starting Point

Of course, in *Tsilhqot'in* the SCC has not gone so far as to endorse the concept of free, prior and informed consent, as articulated in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (see: Articles 10, 28, 29, 32). It has not said that the consent of Aboriginal title holders is always required before their land can be used by others. However, in its decision, the SCC has emphasized consent as the starting point:

> [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.

The SCC goes on to emphasize the importance of consent repeatedly in the discussion that follows (see paras 88, 90, 92, 97 and 124).

This emphasis on consent stands in contrast to the approach of earlier SCC decisions. Most notably, in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, Lamer CJ's leading judgment commences the discussion of infringement of Aboriginal title by pointing to the vulnerability of Aboriginal title, as follows:

> [160] The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments. However, s. 35(1) requires that those infringements satisfy the test of justification.

Indeed, Lamer CJ only refers to "consent" once in his analysis. The reference comes in the context of satisfying the fiduciary relationship between the Crown and Aboriginal peoples by involving Aboriginal peoples in decisions taken with respect to their lands (at para 168). Lamer CJ first states that there is "always a duty of consultation" and explains that the "nature and scope of the duty of consultation will vary with the circumstances" before going on to state that "[s]ome cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands." (at para 168).

What's in a Word? Are We Really Talking about Consent post -*Tsilhqot'in*?

Tsilhqot'in does, however, recognize that in the absence of consent the government could justify its incursion on Aboriginal title land under s. 35 of the *Constitution Act, 1982*. At first blush, the end result appears, therefore, to be not unlike that in *Delgamuukw*. Given this, is it really accurate to suggest that *Tsilhqot'in* moves the justification process towards consent?

In my view, the answer is yes. Why is this? Well, absent consent from Aboriginal title holders, the SCC tells us in *Tsilhqot'in* that the Crown must show three things to justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good (at para 77):

> (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 government action is consistent with the Crown's fiduciary obligations to the group.

With consultation and accommodation identified as a separate procedural duty, numbers two and three on this list appear to mirror the two-step infringement test articulated by Lamer CJ in *Delgamuukw* (and earlier established in *R v Sparrow*, [1990] 1 SCR 1075). But look a little closer at each of these requirements and it becomes clear that in *Tsilhqot'in* the SCC has left much less room for the Crown to justify its incursion on Aboriginal title land in the absence of consent.

> *(1) that it discharged its procedural duty to consult and accommodate*

In *Tsilhqot'in*, the SCC characterizes the duty to consult as "a procedural right that arises from the honour of the Crown prior to confirmation of title" (at para 78). The SCC confirms that the degree of consultation and accommodation lies on a spectrum – with the required level of consultation and accommodation greatest where title has been established. McLachlin CJ makes no mention of the passage from *Delgamuukw* referred to above where Lamer CJ states that the duty to consult in "[s]ome cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands." Perhaps this is because in his judgment Lamer CJ articulated the duty to consult in the context of discharging the fiduciary duty, rather than as a separate procedural step? Regardless, it is clear that a very high level of consultation and accommodation is required once Aboriginal title is proven – particularly when the government contemplates action that would have a serious adverse impact on the claimed right. And, meeting that high level and ensuring adequate

consultation or accommodation is of course crucial – as where it is found to be inadequate, the SCC confirms that "the government decision can be suspended or quashed" (at para 79).

(2) that its actions were backed by a compelling and substantial objective;

When Aboriginal title is proven, in addition to the procedural duty imposed on the Crown to consult, and where appropriate accommodate, the Crown must also demonstrate that the proposed government action is consistent with its duties under s. 35 of the *Constitution Act, 1982*. This requires first that the Crown show that the government action has a compelling and substantial objective. This is, of course, not new and *Tsilhqot'in* draws from *R v Gladstone*, [1996] 2 SCR 723 to explain that the objectives which can be said to be compelling and substantive (*Gladstone* at para 72, cited in *Tsilhqot'in* at para 81):

> … will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown.
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> (Emphasis added)

Also not new is the list of interests potentially capable of justifying an incursion on Aboriginal title – with McLachlin CJ restating Lamer CJ's now familiar passage in *Delgamuukw* suggesting that the range of legislative objectives that can justify infringement of Aboriginal title "is fairly broad" and could include, in Lamer CJ's opinion (*Delgamuukw* at para 165, cited in *Tsilhqot'in* at para 83):

> … 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 …

However, there is a subtle difference in the reasoning. Lamer CJ in *Delgamuukw* framed the objective of reconciling Aboriginal peoples' interests with the broader community from the perspective of the broader community, of which Aboriginal societies are a part. Quoting from his judgment in *Gladstone*, Lamer CJ said:

> [161] Because . . . distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.
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> (Emphasis added in *Delgamuukw*; "equally" emphasized in *Gladstone*)

In *Tsilhqot'in*, McLachlin CJ instead accepts 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" (at para 81). This means that "[t]o 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" (at para 82). Following *Tsilhqot'in*, it would seem that the reconciling of Aboriginal title holders' s. 35 rights with the broader community, in order to justify infringement, is no longer a one way street.

> *(3) that the government action is consistent with the Crown's fiduciary obligations to the group.*

Even if a substantial and compelling objective is established, the government must also show that a proposed incursion is consistent with the Crowns' fiduciary duty. And, it is in McLachlin CJ's articulation in *Tsilhqot'in* of what this demands that the limitations on government actions on Aboriginal title land, absent consent, become most obvious.

In *Delgamuukw* Lamer CJ suggested, in *obiter*, that the fiduciary duty might be satisfied through priority in the allocation of resources; involvement of Aboriginal peoples in decisions taken with respect to their lands, most commonly through consultation and accommodation; and, compensation (at para 169). In *Tsilhqot'in* the SCC makes clear that acting in a manner consistent with the Crown's fiduciary duty towards Aboriginal title holders demands much more. This is so in relation to title because "the Crown's underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group" (at para 85). This impacts the justification process in the following two ways:

> [86] First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations [...] This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.
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> [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" (at para 39).

Both of these points suggest very substantial limitations on the type of acts that might be undertaken on Aboriginal title lands without consent and each deserves comment.

First, *Tsilhqot'in* makes clear that going forward the government cannot justify incursions on Aboriginal title if the result would be to substantially deprive the Aboriginal title holders' future generations the benefit of the land. The SCC leaves no room for exceptions: no matter the economic case or the political desire, the government cannot justify an interference with Aboriginal title that deprives future generations of their s. 35 rights to the land. What will this look like going forward? That, of course, remains to be seen. In the immediate future, it certainly seems to call into question government approvals of projects, such as Northern Gateway, where uncertainties remain regarding the socio-ecological effects on the land, at least

as that approval relates to Aboriginal title land (for a recent blog on this issue by Shaun Fluker see here).

Second, even if an incursion on Aboriginal land will not substantially impact the land into the future, *Tsilhqot'in* tells us that the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. This means that the incursion must be necessary to achieve the government's goal; the government can go no further than necessary to achieve it; and the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest. Again, it isn't possible to say how this will look going forward. When will an incursion be "necessary" to achieve the government's goals? Arguably never when there is another alternative. What does the principle of minimal impairment – that the government go no further than is necessary – require? Perhaps that all available measures are required to be taken to minimize the potential impact of an incursion on the land, no matter the economic implications? And finally, in what circumstances will an incursion that is being forced on otherwise unwilling Aboriginal title holders have benefits that do not outweigh the adverse impact on the Aboriginal interest? While difficult to say in the abstract, what is clear is that asking Aboriginal title holders to bear a disproportionate adverse impact on their land for the benefit of the greater Canadian public will not meet this test.

Interestingly, the test for justification of incursions on Aboriginal title set out at para 87 is very similar to the test used to justify infringements of *Charter* rights under s 1. While the SCC introduced the justification test for s. 35 violations in *Sparrow* (and see the post by Bankes and Koshan on the problems with that reading of s 35 here), some of the elements articulated in *Tsilhqot'in* are new to s. 35, in particular the rational connection and proportionality of impact considerations. These elements are part of the test for s 1 *Charter* justifications, and in fact the proportionality of impact consideration gained new significance only recently under the *Charter* in *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, 2009 SCC 37. Again, however, there are some subtle differences here. Most importantly, the rational connection test under the *Charter* only requires a logical link between the government's goal and the incursion, while *Tsilhqot'in* appears to set the bar higher by requiring a necessary link. And will this newly articulated justification test apply to violations of Aboriginal and treaty rights more broadly? What will become of the other factors mentioned in *Sparrow* as relevant to justifying the violation of Aboriginal rights, including the priority to be accorded to Aboriginal interests?

Returning to the focus of this post, are we really talking about requiring the consent of Aboriginal title holders for incursions on their land post-*Tsilhqot'in*? The answer is yes, unless of course the Crown: engages in the high level of consultation and accommodation required for proven Aboriginal title; demonstrates a substantial and compelling legislative objective that furthers the goals of reconciliation from both the Aboriginal and broader public perspective; demonstrates that future generations of the community holding Aboriginal title will not be substantially deprived of the benefit of the land; and, shows that the incursion is necessary to achieve the government goals, has a minimal impairment and does not ask the Aboriginal title holders to bear disproportionate adverse impact. Or, put another away, the answer is yes, except in what appears to be quite exceptional circumstances.

Do We Really Need to Think About Consent Now?

At present, only the Tsilhqot'in Nation has been granted a declaration of Aboriginal title, with a handful of other Nations having agreements recognizing their Aboriginal title. A much more substantial amount of land is the subject of claimed, but as yet unproven, Aboriginal title. *Tsilhqot'in* confirms that prior to the establishment of title by either court declaration or

agreement, the Crown is required to consult and, where appropriate accommodate, Aboriginal groups asserting title to land in accordance with the principles established by cases such as *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650 (at para 89). It is only after Aboriginal title is established that, absent consent, the Crown must ensure that its actions are substantially consistent with the requirements of s. 35 of the *Constitution Act, 1982* (at para 80).

So, what does this mean in the immediate future when dealing with Aboriginal groups that claim, but have not yet established, Aboriginal title over land? Is there any role for consent at this stage? As McLachlin CJ, herself, said in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 in the context of the duty to consult:

> [48] This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in Delgamuukw is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

However, *Tsilhqot'in* casts this statement in a new light:

> [92] Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

Given this paragraph, in my opinion, it is no longer enough to simply discharge the procedural duty to consult pending final proof of a claim. To begin a project without the consent of Aboriginal title holders, or ensuring that the incursion is not unjustifiably infringing, risks its long term viability.

So, in light of what the SCC has said in *Tsilhqot'in*, today's word on the street - consent.