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The *Tsilhqot'in Nation v. British Columbia* Case

What it Means and What it Doesn't Mean

What It Means:

- after 339 days of hearings over five years, and at a cost of almost $30 million, a court in British Columbia has expressed its opinion that the Tsilhqot'in Nation has aboriginal title to approximately 2,000 square kilometres of land, but stopped short of making that opinion legally binding by granting a declaration of aboriginal title;
    - further court proceedings will be needed to make the "opinion" legally binding;
    - no further steps are likely for some time, as the Tsilhqot'in Nation and the Province have agreed not to proceed with an appeal of the decision for four months to provide time to consider alternatives like negotiations;
- if aboriginal title is declared to exist, the Tsilhqot'in Nation will have the exclusive right to use and occupy those lands;
    - this would be the first case in Canada to recognize aboriginal title to specific lands;
- if aboriginal title is declared to exist, the provincial *Forest Act* will not apply to those lands, for two reasons:
    - the *Forest Act* only applies to provincial Crown lands, and lands held under aboriginal title do not fall within the definition of Crown lands under the Act; and
    - the provincial Legislature does not have the power to make laws that conflict with the Tsilhqot'in Nation's exclusive right to determine how to use the land and the resources on the land;
- the granting of fee simple title to land by the provincial government does not extinguish any aboriginal rights or title that may exist in or on that land;
- the Tsilhqot'in Nation was declared to have hunting and trapping rights, the right to capture wild horses, and the right to trade skins and pelts as required to secure a moderate livelihood; those rights were declared to have been unjustifiably infringed by the provincial forestry and land use planning regimes; and

- First Nation expectations with respect to the extent of aboriginal title lands in B.C. have been heightened significantly by the decision, which ironically will likely make the negotiation of treaties much more difficult.

What It Doesn't Mean:

- the Tsilhqot'in Nation do not have aboriginal title to any land as yet:
  - no declaration has been made, and the decision may yet be appealed — very likely that the "decision" is not the final word on the scope of aboriginal title lands in British Columbia;
- even if the Tsilhqot'in Nation is ultimately recognized as holding aboriginal title to all or some of the lands in the Claim Area, that does not give it unlimited rights on the land:
  - aboriginal title brings the right to use the land for a variety of purposes, but does not allow a First Nation to use the land for mining, forestry, or other developments that are inconsistent with its attachment to the land;
  - if the Tsilhqot'in Nation wants to develop land held under aboriginal title for an inconsistent purpose, it will have to surrender its aboriginal title to the federal government — for example, through a negotiated treaty;
- the decision does not mean that other First Nations in British Columbia may also hold aboriginal title up to 45 percent of their traditional lands — this case dealt with a relatively remote area of the province where there are no overlapping claims from other First Nations and the Tsilhqot'in Nation had a relatively strong case for continued existence of aboriginal title;
  - other First Nations seeking to establish title will have to prove their own cases independent of any factual findings in this case;
- the decision does not mean that provincially-granted forest tenures, mining tenures, fee simple titles and other third party rights to land in the Claim Area are invalid, only that those grants cannot cause aboriginal title to be extinguished;
  - the validity of third party interests within the Claim Area was not at issue in this case;
- the decision does not affect the validity of provincial resource legislation — at most, the decision brings into question whether certain provincial laws will apply to resources or activities on certain lands; and

- the decision does not suggest that third parties who have received tenures from the provincial government in good faith and who have conducted themselves in accordance with those tenures are in any way liable to the Tsilhqot'in Nation, even if their activities have affected the Tsilhqot'in Nation's aboriginal rights or title.

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.

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