



JFK LAW CORPORATION

“Aboriginal Law Update - A Review of Recent Significant Cases”

Presented by Karey Brooks and Jeff Langlois - JFK Law Corporation to the Environmental Managers Association of British Columbia, September 18, 2014

Introduction

- Purpose of this presentation is to discuss two recent Supreme Court of Canada decisions that provide important clarifications on matters affecting resource development, including:
 - The extent and scope of Aboriginal title
 - The duty to consult
 - The role of the Province in establishing laws over the land base and taking up land

Introduction

- *Tsilhqot'in* (June) and *Grassy Narrows* (July) were decided around the same time
- Cases deal with separate and distinct issues
 - provincial powers to take up treaty lands (*Grassy*) and
 - Aboriginal title in non-treaty areas (*Tsilhqot'in*)
- However – SCC confirmed same legal principles regarding provincial powers and the duty to consult

Outline

- Brief Introduction to:
 - Aboriginal Title
 - Duty to Consult
 - Law making constraints on the province
- How has *Grassy Narrows/Tsilhqot'in* changed or clarified the law with respect to these matters ?
- What are the potential implications of these decisions on resource development?

What is Aboriginal Title?

- Arises from use and occupation of lands before arrival of European settlers
- British assertion of sovereignty – asserted title to all lands in British Columbia (1846)
- Disregarded sovereignty of First Nations and their use and occupation of lands
- If there is no treaty signed with First Nations – do they have rights to use and occupy lands?

What is Aboriginal Title?

- *Calder* (1973):
 - Aboriginal rights exist unless “extinguished”
 - Can be extinguished by treaty or other agreement
 - Problem for BC: almost none of the province is subject to treaty
- *Delgamuukw* (1994):
 - Aboriginal Title is a type of Aboriginal Right: right to exclusive use/occupation and benefit of lands
 - Requires proof of pre-European occupation that is (1) sufficient, (2) continuous and (3) exclusive
 - Clarified law, but did not make declaration of title

What is the Duty to Consult?

- Power to take up / regulate land use is not unconditional
- Crown must meet the requirements of the duty to consult, and if appropriate, accommodate
- Duty to consult is a constitutional duty
- The broader goal of consultation is reconciliation
- Duty is triggered when the Crown has real or constructive knowledge of the potential existence of aboriginal rights or title and contemplates conduct that might adversely affect it

Provincial Constraints

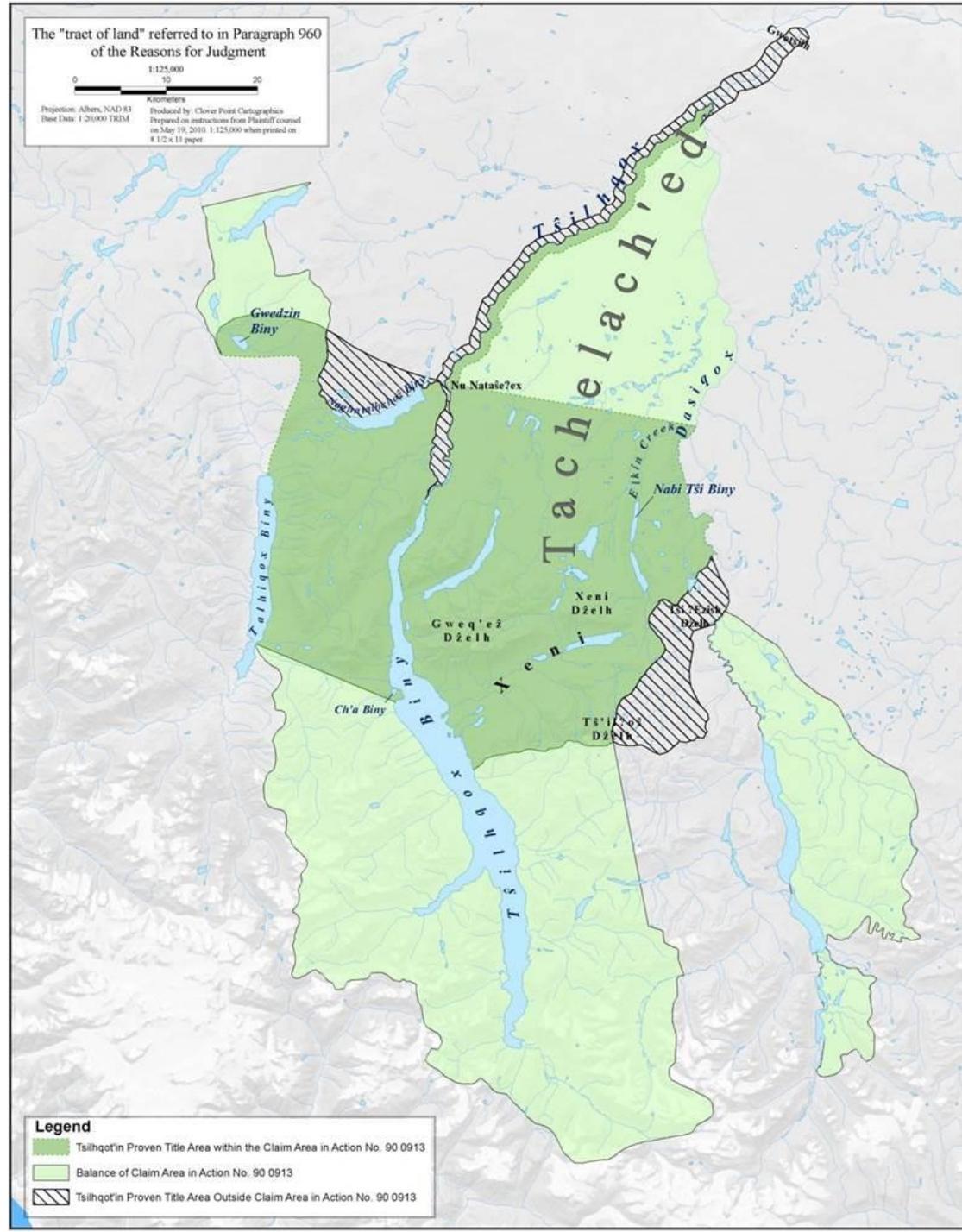
Provinces are subject of certain constraint when passing laws or taking up lands in a way that interferes with Aboriginal Rights through:

- The division of powers
- Aboriginal rights protections under s.35 of the *Constitution Act, 1982*
- The wording of any treaty

Tsilhqot'in - Background

- Claim brought in 1983 – objection to clear cutting;
- Litigation later amended (after *Delgamuukw*) to seek declaration of title as a way to prohibit logging
- Evidence of occupation prior to European contact
 - unresolved land claims
 - no treaty
 - no surrender of rights,
 - had actively repelled other First Nations from lands and had engaged in war with European settlers over encroachments on territory
 - Villages, hunting/fishing/trapping areas, trails connecting sites

Claimed title to 5%
of the traditional
territory of the
Tsilhqot'in Nation
[1900 sq km]



Tsilhqot'in - Background

- 339 days of trial over 5 years
- Trial Court – 2007
 - First Nation had proved title to portion of claim area
 - but no declaration granted (due to a technicality)
- 2012 – BC Court of Appeal
 - overturned trial judge
 - First Nation had not proved ***intensive*** use of a ***definite tract of land***
 - ***i.e. “site specific occupation” vs territorial occupation***
- Issue: if occupation is proved, does a FN get title to a territory or to only “small islands” in a sea of other rights (e.g. hunting, fishing etc)?

Tsilhqot'in - Background

SCC – June 2014 - restored trial judgment – granted first declaration of aboriginal title

Title requires:

- “sufficient pre- sovereignty occupation”
 - Not confined to continuously occupied villages
 - Can include tracts of land regularly used for hunting, fishing or other use
 - As long as control of those territories was exercised by First Nation
- “continuity of occupation”
- “exclusive historic occupation”

Grassy Narrows – Background

- SCC released its decision July 11, 2014
- Treaty 3 (1873) – FNs surrendered Aboriginal rights and title to traditional lands in return for treaty rights
- Treaty states FNs have the right to hunt and fish throughout tracts surrendered except on tracts taken up by “Canada”
- Issue: whether reference to Canada meant that Ontario did not have taking up power

Grassy Narrows Background

- Trial Court
 - only Canada had the power to authorize activities which significantly interfered with T3 harvesting rights
 - Ontario required to seek federal approval before taking up land
- Court of Appeal
 - reversed TC decision
 - Treaty partner is with Crown or responsibility devolved to Ontario when land transferred from Canada to Ontario
 - Ontario has the right to manage and regulate activities on treaty lands

Grassy Narrows Background

- SCC – Canada or Ontario?
 - “Ontario and only Ontario” has the power to take up lands under T3
 - Treaty implementation to be carried out in accordance with division of powers in constitution
 - As Ontario has exclusive authority under the Constitution to take up lands for forestry, mining, settlement and other matters, only Ontario has the right to take up lands under T3

How has Keewatin/Tsilhqot'in changed or clarified the law?

- Aboriginal Title
- Role of Provincial/Federal governments
- Duty to Consult

Aboriginal Title

SCC clarified the test for Aboriginal Title and the content of Aboriginal Title

- Underlying title remains in the Crown
- But First Nation is owed all beneficial interest
- “Right to exclusive use and occupation of the land”
- “Use it, enjoy it, profit from its economic development”
- But: inherent limit – it is *collective* title
- Cannot be sold, except to the Crown, or developed in a way that is irreconcilable with use in future
- This said, “permanent changes” may be possible

Role of Provincial / Federal Government

- *Tsilhqot'in* made it clear that Provincial laws of general application (e.g. Forest Act) apply to Aboriginal title lands – no constitutional constraint
- *Grassy* put to rest any argument Canada has a supervisory role in taking up treaty lands by province – either under Treaty 3 or under the division of powers

Duty to Consult

- *Tsilhqot'in* – clarified role of duty relating to title
- Before declaration of title: Crown must consult – if claim is strong, higher level of consultation to preserve title
- As claim progresses, level of consultation increases
- Once title is established, Crown must either:
 - obtain **consent** of First Nation to develop lands; or
 - fulfill duty to consult AND **justify** infringement of title
 - Compelling purpose
 - Consistent with reconciliation and fiduciary duty of Crown

Duty to Consult

- *Grassy* – confirms Crown’s right to take up lands under treaties is subject to the duty to consult and accommodate as set out in *Mikisew*
- Also adds the Crown must inform itself of the impact its action will have on the First Nation’s exercise of rights under the treaty and communicate with the First Nation
- Crown must deal with FNs in good faith and with the intention of substantially addressing their concerns

Duty to Consult

- *Grassy* – it is the level of government with the power to regulate that must consult and accommodate, and that the involvement of both levels of government is not required if the matter is purely within one level of government's jurisdiction
- Provincial govt's reminded their power to take up lands under treaty is subject to obligations grounded in the honour of the Crown

Where does this leave us?

- Potential for increased leverage for First Nations?
 - If dissatisfied with consultation, prove title
 - Very expensive to do
- Increased expectations from consultations
 - Consent – only with declaration of title, but this will appear to be within reach of some First Nations
- Fork in the Road – more litigation or more negotiation?

Where does this leave us?

- Limits to How Much Land can be Taken Up
 - A taking up that leaves FN with no meaningful right may constitute an unjustifiable infringement
 - Left unanswered whether taking up a significant portion of lands (not entire lands) would constitute an infringement of treaty rights
 - Expect future cases on this issue as more lands become subject to forestry and mining

Where does this leave us?

- Increased certainty for resource development on treaty land
 - Confirms provinces have the ability to take up lands for resource development projects within provincial jurisdiction
 - Gives provinces ability to govern provincially regulated projects without federal consent

Where does this leave us?

- Duty to Consult Critical
 - Crown required to ensure duty to consult is met
 - Where province intends to take up lands, it must inform itself of the impact the project will have on the exercise of FNs rights and communicate its findings to them
 - Communication must be in good faith and with the intention of addressing the FNs' concerns
 - Where title is involved, First Nations may expect negotiation of agreement approaching consent
 - Emphasis of court – can avoid uncertainty by obtaining consent

Where does this leave us?

- Both decisions show the SCC is balancing the constitutional protections afforded to Aboriginal and treaty rights with the ability of governments to manage resources



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