Constitutional Applicability of Provincial Resource Legislation to Aboriginal Title Lands

Prepared For: Centre for Constitutional Studies
In association with
Legal Education Society of Alberta
Constitutional Law Symposium

Presented by:
John J.L. Hunter QC
Hunter Litigation Chambers
Vancouver, British Columbia

For Presentation In:
Edmonton – October 3, 2014

CONSTITUTIONAL APPLICABILITY OF PROVINCIAL RESOURCE LEGISLATION TO ABORIGINAL TITLE LANDS

INTRODUCTION

One of the challenging aspects of fitting aboriginal title into a federal constitutional structure that contemplates two levels of government is to determine the relationship between provincial laws of general application and aboriginal title lands. The challenge arises both because of the uncertainty as to the legal status of aboriginal title lands in relation to traditional common law concepts of title and because laws in relation to "Indians and Lands reserved for the Indians" fall under federal authority.

Do aboriginal title lands constitute a federal enclave within provinces where only federal laws can apply or do provincial laws apply subject to a limitation derived from section 35 of the Constitution Act, 1982? In *Tsilhqot'in Nation v. British Columbia*[1], the Supreme Court of Canada has provided guidance at the level of general principle, but the actual workings of this new constitutional order will take some time to settle.

SCOPE OF ABORIGINAL TITLE

The *Tsilhqot'in* judgment was the first judgment to determine that an Aboriginal nation had Aboriginal title over a specific tract of land. Prior to this, the principle of aboriginal title had been explained[2], but no land had actually been designated as Aboriginal title land, either by negotiations or judicial determination. The *Tsilhqot'in* judgment also resolved a longstanding controversy over the geographic scope of Aboriginal title.

The Tsilhqot'in presented their case on what was characterized as a "territorial" basis. A very large area was claimed, not as large as the traditional territory of the Tsilhqot'in, but larger than could be supported through evidence of intensive use, which was the standard proposed by the British Columbia Government. In a previous judgment of the Court, *R. v. Marshall*[3], the Court had indicated that to establish Aboriginal title the Aboriginal group must show the "intention and capacity to control" the land, typically established "by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources"[4]. The trial judge in *Tsilhqot'in* concluded that a territorial claim was available to the Tsilhqot'in and determined a large area over which Aboriginal title had

[1] *Tsilhqo'tin Nation v. British Columbia*, 2014 SCC 44 ("*Tsilhqo'tin SCC*")
[2] in *Delgamuukw v. The Queen*, [1997] 3 S.C.R. 1010
[3] *R. v. Marshall,* [2005] 2 S.C.R. 220 ("Marshall")
[4] *Marshall*, paras 72-75