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Supreme Court of Canada Releases Landmark Aboriginal Title Decision *Tsilhqot'in v. British Columbia*

On June 26, 2014, the Supreme Court of Canada granted the first ever declaration of Aboriginal title, a significant victory for Aboriginal peoples across Canada. The decision recognized that the Tsilhqot'in Nation holds title to over 1750 square kilometres of land in the interior of British Columbia. This was only 5% of the Tsilhqot'in's traditional territory, and about half the area they had claimed in the case. The court also found that the government had failed to meet its duty to consult with the Tsilhqot'in over timber licences and forestry planning in the area. The Tsilhqot'in Nation is a group of six bands with common culture, history and language located in central BC. They launched this case back in 1983 over concerns about the rapid advance of commercial logging in their territory.

The court recognized that Aboriginal title can exist over large tracts of land, not just traditional village sites or farms. The court also made some important findings about the rights that come with Aboriginal title. The court found that holders of Aboriginal title have similar rights to private property owners. They have the right to: decide how the land will be used; the enjoyment and occupancy of the land; possession of the land; the economic benefits of the land; and the use and management of the land. Aboriginal title is a collective right, so the land cannot be used by Aboriginal title holders in a way that would prevent the use and enjoyment of the land by future generations, but that does not mean that uses are restricted to traditional practices. Aboriginal title holders may put the land to modern uses if that is their choice.

As a result of this case, once Aboriginal title is recognized over land, by agreement or in the courts, the government and any individuals or companies must get the Aboriginal group's consent to use the land. If they cannot get consent, government can only use the land if they have fulfilled their duty to consult and accommodate the Aboriginal group, they have a "compelling and substantial objective" behind their actions, and their actions are consistent with the Crown's fiduciary obligation towards the Aboriginal group. This means the government's action must respect the interests of the Aboriginal people and cannot deprive future generations of Aboriginal title holders of the use of the land. The court said that the action must also be necessary to achieve the government objective and go only as far as required to achieve that objective. The benefits of the government action must not be outweighed by the negative effects on the Aboriginal people.

The court also said some important things about how the government must deal with land that is subject to an Aboriginal title claim. Even where title is not yet proven, the government has a duty to consult and accommodate the Aboriginal group. Where the claim to title appears to be strong, this will require a high level of consultation and possibly accommodation. Where the claim is particularly strong, the government may have an obligation to preserve the land until the claim is resolved. While consent is not required where Aboriginal title has not yet been recognized, the court encouraged governments and industry to get consent from Aboriginal groups if they want to avoid legal wrangling in the courts over failure to consult.

This case provides Aboriginal peoples in Canada with some important legal tools to prevent government action on lands subject to Aboriginal title claims and a clear way forward for First Nations who wish to seek recognition of their title to traditional lands. The decision also highlights the importance of meaningful consultation to address impacts to First Nations' rights, including both Aboriginal rights and Treaty rights. In some cases, that duty will require the Crown to take steps to preserve the First Nations' interests.

Initial practical steps that First Nations may take in response to this decision include:

1. Ensuring that in any consultation process, the Crown is put on notice, in writing, of the First Nation's claim of Aboriginal title and the need to ensure that the land is preserved pending resolution of any such claim;
2. Informing the Crown during consultation processes how the government's proposed action will substantially deprive future generations of the use of land subject to Aboriginal title; and
3. Consider compiling existing evidence of Aboriginal title (such as reports, maps, studies, oral histories and similar information) and sending that material to the Crown (ideally on a cd-rom) as part of any consultation record.

If you would like to discuss the Supreme Court's findings with a JFK Law lawyer, please feel free to contact us. For a full listing of our lawyers, see our website at www.jfklaw.ca.

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