Lands After Tsilhqot’in: An Uncertain Future

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On November 10, 2007 the B.C. Supreme Court determined that the Tsilhqot’in Nation had proven aboriginal title to certain defined tracts of land in the Chilcotin area, and had also proven certain aboriginal rights. While a declaration of aboriginal title could not be made given the nature of the relief claimed by the Tsilhqot’in, the decision is a landmark in that it confirms the criteria required for establishing aboriginal title and highlights the potential legal quandary for certainty in land ownership and rights to land use.

The decision is lengthy at 485 pages, but highly interesting as an historical review and reflects the evidence heard over 339 days of trial. While the original court application was brought in order to challenge proposed forestry activities in the claimed area, the action was modified to seek declarations of aboriginal title and rights. The decision with respect to aboriginal title qualifies as the opinion of the court only, since the Tsilhqot’in had applied for an “all or nothing” declaration of title over a specific area. The court found aboriginal title had been established over some portions of the claimed area, and some lands outside the claimed area, but not the claimed area in its entirety. The court also found that aboriginal rights to hunt and trap had been proven.

This article focuses on the implications for local governments of the case, both with respect to lands owned by municipalities and regional districts, and to their land use regulatory jurisdiction over privately-held lands.

Local Government Lands

All lands in British Columbia not owned by the federal government were transferred at some point from provincial ownership by way of Crown grant. The Tsilhqot’in decision clarifies that where such lands were not granted or transferred with the consent of First Nations claiming aboriginal title or, at minimum, the lands were granted or transferred without the level of consultation required to be conducted by the Crown, that grant or transfer may have involved a breach of trust by the Crown or may have been outside the authority of the Crown, on the basis that a person cannot sell what he or she does not own.

Subsequent to an original Crown grant, many lands have of course been subdivided, transferred or sold through a succession of owners. The Tsilhqot’in decision does not attempt to reconcile the implications of a finding of aboriginal title with the rights of any current land owner. The

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potential for conflicting ownership entitlements presents a legal dilemma which may take many years to resolve once a live case is before the courts.

The key issue for local government ownership of land is that certainty regarding that ownership may be in question if and when aboriginal title is proven. A wide variety of statutory and common law legal and equitable principles apply to property entitlement. The scope of those principles is too broad for a simplistic review, but a key principle long recognized in law is that a bona fide purchaser who acquires land for value, without notice of a competing claim, is considered to be an innocent purchaser who, in equity, should not be deprived of his or her acquisition. The determination of entitlement when aboriginal title is proven in respect of privately-held land may involve many considerations, including but not limited to who owns the lands, whether it was acquired for fair market value, the current uses of the land and whether it can be restored to traditional aboriginal uses, the scope and nature of the historical aboriginal uses on the land, and similar factors.

Land has a long-standing special status as a property interest, given its significance to people as home, history and sustenance. It is of interest that federal and provincial negotiators in treaty talks have consistently maintained that privately-held lands in British Columbia are not considered as available for settlement purposes, except in certain situations where voluntary acquisition is feasible. This position may not, however, extend quite so completely to lands owned by local governments.

Through Bill 12, the Musqueam Reconciliation, Settlement and Benefits Agreement Implementation Act, the Province recently expropriated park lands owned by Metro Vancouver, for no compensation, and transferred those lands to the Musqueam First Nation (either directly through a designated corporation or to Canada for addition to reserve) to facilitate the Province settling litigation claims brought by the Musqueam. This extraordinary step suggests that local government-owned lands may be regarded by the Province as much more “public” in nature than other privately-held lands, and therefore available for settlement of aboriginal title claims or other types of claims.

The combination of the Tsilhqot’in decision and Bill 12 presents some legitimate concerns for the security of land ownership entitlement of local governments, and their taxpayers, especially to undeveloped lands such as parks. It is likely not too remote to suggest that a court adjudicating competing claims between local government ownership and aboriginal title may share the same apparent view as the province regarding the “public” quality of local government land entitlement, notwithstanding that local governments are independent entities not operating as agents of the provincial government and that lands owned by local governments are as “privately-held” in legal terms as the land upon which you, the reader, reside.

Land Use Regulation

The Tsilhqot’in decision creates a future legal scenario of competing land entitlements between First Nations able to prove aboriginal title, and existing private owners. It is important to note that local governments have no legal jurisdiction to determine property entitlement in such circumstances. Notwithstanding that lack of jurisdiction, local governments are likely to come
under greater pressure to consider aboriginal title and rights claims in their land use regulatory processes. It is unclear whether local government land use regulations could be used to preserve undeveloped lands in a relatively pristine state, but it is clear that local governments cannot legally freeze all uses of privately-held land, nor can they legally require owners to yield any land interests or rights to use land to third parties, including First Nations.

When local governments do consult with First Nations, for example in certain official community plan amendments, they must be cautious not to create expectations which cannot be met. While considering compatible uses to reserve or other First Nations developments may be entirely legitimate, considering the potential future ownership of lands as a factor in deciding permitted uses is likely not a defensible planning purpose objective. In this regard, as local governments do not have the legislative authority to accommodate First Nations title and rights claims, it may be prudent to establish at the outset the scope and purpose of any consultation that local governments do undertake.

The Tsilhqot’in decision raises more questions than answers, creating an uncertain legal future for private property rights in British Columbia until a future court, or possibly several levels of court, untangle this Gordian knot.