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Aboriginal Rights: Unresolved Issues Create Problems for Business

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Unresolved issues concerning Aboriginal rights and title are creating problems for the business community across Canada. Businesses operate best in environments where legal rights and rules are known and respected.

In British Columbia, where most of the land base is not subject to a treaty, it was hoped that the *Tsilhqot'in v. British Columbia* case would bring more certainty to the issue of where, and under what circumstances, Aboriginal title might be found.

Unfortunately this case, decided late in 2007 by Mr. Justice Vickers of the Supreme Court of British Columbia, may have only added to the confusion.

Although the *Tsilhqot'in* case was a massive undertaking, it was not the longest Aboriginal title case in B.C. At 339 days of evidence and argument, it fell short of the 374 days taken up by the trial in *Delgamuukw*. But the *Tsilhqot'in* case was almost certainly the most expensive Aboriginal case to be heard in Canada. It is estimated that the cost of the litigation that was funded by the Canadian taxpayers was \$30 million.

However, where the *Tsilhqot'in* case really stands out is in the amount of *obiter dicta* in the reasons for judgment. Obiter dicta is defined as "an incidental and collateral opinion that is uttered by a judge, but is not binding." The vast majority of the 473 pages of the judgment in the *Tsilhqot'in* case are expressly intended to set out only the opinion of the trial judge, but to have no binding or legal effect.

In the *Tsilhqot'in* case, an Indian band with less than 400 members sought a declaration of Aboriginal rights and title over an area of B.C. forming part of what is known as the Chilcotin – a remote area of the province between Williams Lake and Bella Coola about 200 kilometres north of Vancouver that has no paved roads or even electrical power. It is one of the few areas of the world where wild horses still run free.

The court dismissed the claim for a declaration of Aboriginal title to the claimed area. However, that was only for a technical reason, relating to the "all or nothing" way the claim was pleaded. The judge determined that he could not find Aboriginal title to the entire area, but went on in *obiter dicta* spanning several hundred pages about what he would have found had the case been presented slightly differently.

What the judge said he would have found if the pleadings had allowed it was that about half of the claimed area was Aboriginal title land, and provincial legislation purporting to regulate that land would be of no effect. It is reasonable to conclude that if his obiter dicta were to be accepted as the law, then the forestry and mining rights held by businesses over about half of the province of B.C. could be invalid, and rights to private land throughout the province, that are also based on provincial legislation, would be thrown into question.

In what would appear to be considerable understatement, the judge observed, "I am aware of the serious implications this conclusion will have on British Columbia."

The judge ended his reasons by stating that he hoped that the parties would not appeal his judgment, and instead would use his reasons as a basis to negotiate a settlement that would lead to reconciliation. The almost immediate reaction of the Aboriginal community to the judgment was to issue a declaration in which they demanded complete recognition of their claimed rights and title as a precondition to any further treaty negotiations.

It is difficult to see how a non-binding opinion of a judge that puts fundamental issues of jurisdiction over land into question, without any solutions, could lead to a reconciliation of Aboriginal issues throughout

http://www.jdsupra.com/post/documentViewer.aspx?fid=68d7313c-9a6e-4aad-9fba-afc7fc6ed219 the country. It would be fair to say that the decision has not so far furthered the reconciliation process, but has rather added to the already huge uncertainty concerning the nature and extent of Aboriginal rights and title in British Columbia.

The issues in this case are not only of great importance to the approximately 300 people living in the claims area, but also to the more that 4 million people living in British Columbia, and the almost 35 million people living in Canada.

At this point, all of the parties have filed notices of appeal, but are engaged in settlement discussions as suggested by the judge.

It is not clear how one appeals an opinion as opposed to a judgment, but assuming the parties get over that hurdle, it is hard not to think that the interests of all of the people in Canada would be best served if the settlement discussions are not successful and this case is appealed to the Supreme Court of Canada, which is the body that actually makes the laws on what Aboriginal rights and title mean in this

With the greatest of respect to the Honourable Mr. Justice Vickers, we already have many opinions as to what Aboriginal rights and title might be. In order to achieve certainty in this highly charged area what we – Aboriginal and non-Aboriginal alike – need are legal precedents telling us what the law actually is.

Keith Clark is a partner in the Litigation Group in Vancouver. Contact him directly at 604-691-7454 or kclark@lmls.com.

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