

Mapping Tsilhqot'in and Keewatin in Treaty Land

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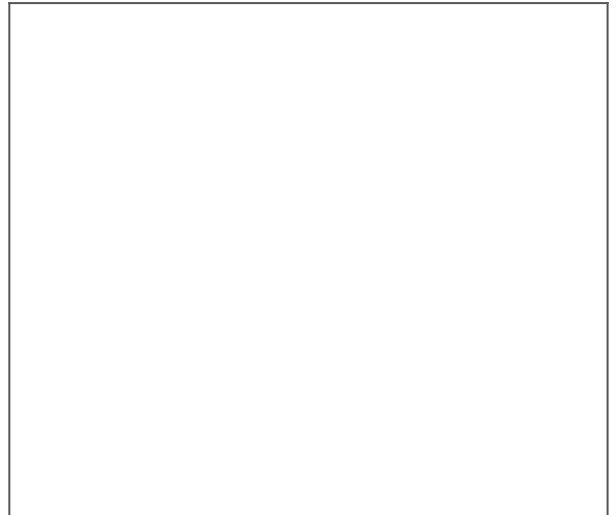
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The newsletters, conferences and webcasts are all still abuzz with the Supreme Court of Canada's 2014 decisions in *Tsilhqot'in Nation v. British Columbia* (June 26) and *Grassy Narrows First Nation v. Ontario (Natural Resources)* ["Keewatin"] (July 11). The two cases will frame the discussion surrounding Aboriginal land and treaty rights and the duties of the Crown in relation to the land rights of First Nations for years to come.

The two cases dealt with different circumstances. *Tsilhqot'in* dealt with the Aboriginal title claims of First Nations in British Columbia whose peoples are not parties to a treaty with the Crown. *Keewatin*, on the other hand, dealt with the Grassy Narrows First Nation, a party to Treaty No. 3, one of the numbered treaties that cover Northwest Ontario and the three Prairie Provinces.

In the *Tsilhqot'in* decision, the Court held that the Tsilhqot'in Nation has Aboriginal title to roughly 1700 square kilometres of land in central British Columbia. That title is essentially equivalent to ownership. In *Keewatin*, on the other hand, the Court was quick to point out that Grassy Narrows had ceded its Aboriginal title under the Treaty; unoccupied Crown land within its territory used for the exercise of Treaty rights could validly be "taken-up" by the Province of Ontario for resource development (subject to the duties of the Crown to undertake consultation and, where appropriate, provide accommodation).

Some commentators have suggested that the decisions create a "two-tiered" categorization of First Nations: those holding Aboriginal title, with effective ownership of their traditional lands; and those who entered treaties having only a right of consultation and accommodation. Some suggest that the Courts will not allow the continuation of a system with what are arguably two classes of First Nations. Others note that in most treaty territory the benefits that a First Nation may enjoy from resource development within its traditional lands may depend upon whatever arrangements it may negotiate with the developer of those resources. This is far from a recipe for certainty for anyone concerned.



Look instead at the following common and ongoing themes that may be taken from the two cases and those that preceded them:

- once aboriginal title is established, there is an exclusive right of use and occupation in favour of the First Nation and the right on the part of the First Nation to decide how the land is used;
- provincial laws, including those related to natural resource development, apply to lands for which Aboriginal title is claimed or is proven, subject to justification and the constitutional protection against unreasonable infringement;
- the Crown (federal and provincial) may, with justification and on satisfying the honour of the Crown, encroach upon Aboriginal and treaty rights for public purposes;
- where government seeks to intrude upon Aboriginal land rights then, unless consent is obtained, it must justify the intrusion under section 35 of *The Constitution Act, 1982*;
- where there is a potential adverse effect on Aboriginal or Treaty rights resulting from government activities, policies or approvals, a duty of consultation and accommodation lies with the Crown.

The two decisions place the burden of reconciling the sometimes competing public interest in resource development with the public interest in the protection of Aboriginal and Treaty rights at the doorstep of government. In most cases this will be the provincial governments, as the provinces have jurisdiction over natural resources within their boundaries.

What is almost certain is that there will be continued effort on the part of First Nations who are parties to numbered treaties to assert their own interpretations of those treaties, both inside and outside the Courts. It should be no surprise to anyone in the resource industries that many First Nations have maintained for decades that their own oral histories surrounding the negotiation of the numbered treaties do not support Canada's interpretation that all right and title in the treaty lands were forever given up by the First Nations in exchange for reserves and payments. Which version of events will be accepted and what the repercussions will be are unknown.

Rather than rely upon the delegation of consultation duties and a patchwork of impact-benefit agreements (no two being the same), focus should now shift toward the need to deal with these complex and sometimes competing interests in a comprehensive manner. This is a task that can only be undertaken by the provincial governments, who hold both the public trusteeship over natural resources and the fiduciary obligation toward Aboriginal peoples. Over the long term it will result in a more certain, equitable and beneficial environment for both Aboriginal and non-Aboriginal resource users.

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