

THE SUPREME COURT OF CANADA IMPOSES SUSTAINABILITY RESPONSIBILITY ON ABORIGINAL TITLE

On June 26, 2014, the Supreme Court of Canada decided *Tsilhqot'in Nation v. British Columbia*, (2014) SCC 44. In the weeks since, much has been written and said about the impact of that decision on the recognition of Aboriginal title. One aspect of the decision, which builds on what had been said by the Court in *Delgamuukw*, in our view, deserves particular mention: that is what the Court said about how the rights of future generations must be taken into account in the exercise of Aboriginal title rights.

Madame Justice McLachlin, writing for the unanimous Court, said this:

In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out – that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. (Emphasis added)

Madame Justice McLachlin, earlier in the judgment, spoke to this point in more detail:

Aboriginal title, however, comes with an important restriction – it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes – even permanent changes – to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

The statement of the Court, just repeated above, bears much in common with the generally accepted statement of sustainable development found in the Brundtland Commission Report *Our Common Future*:

Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. ...

The authorities speak often, including the Court in *Tsilhqot'in Nation*, about the fiduciary nature of the Crown's responsibility to Aboriginal peoples. It can be seen from what is stated above that we may be witnessing the emergence of a fiduciary type responsibility of Aboriginal title holders to future generations. Indeed, the Crown will now be taken to be aware of the responsibility of Aboriginal title holders to future generations, and, as such, may be held to be responsible if the Crown facilitates uses which are inconsistent with the protection of rights of future generations.

This articulation by the Court of Aboriginal title "restriction" is profound and significant. No doubt structures will have to be devised to take this restriction into account. One can foresee that "sustainability opinions" might become part of resource exploitation agreements. It may be that in some circumstances it will be deemed to be appropriate to appoint *amicus curiae* to represent the interests of future generations, and, indeed, in some circumstances it may be appropriate to make application to the Court for directions or a declaration with respect to whether a particular use meets the now imposed sustainability obligation.