

Aboriginal Title and Sustainable Development: A Case Study

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Abstract

In June 2014, the Supreme Court of Canada held that Aboriginal title should be granted to the Tsilhqot'in Nation over a portion of its traditional territory in British Columbia.¹ This was the first time that a Canadian court had granted Aboriginal title to a specific land area. The court noted that Aboriginal title is collective title held for present and future generations and that, consequently, the land cannot be developed in a way that would "substantially deprive" future generations of its benefit. The court also noted that a government seeking to use Aboriginal title land for development or other purposes must seek the consent of the title holders; if the title holders do not give their consent, the government must establish that the proposed use is justified under Canada's *Constitution Act, 1982*. These norms give Aboriginal title holders a prima facie legal right not to have their land used by the government for development or other purposes without their consent, or so I argue. I then turn to the United Nations Declaration on the Rights of Indigenous Peoples. Several UN member countries, including Canada, did not sign the Declaration when it was approved by the General Assembly in 2007. Canada had concerns about provisions which it interpreted as giving indigenous peoples a "free, prior and informed consent" veto over state measures affecting their land. I argue, partly by reference to recent work on consent by the Oxford philosopher Derek Parfit, that indigenous peoples occupying ancestral lands within the borders of a broader state should not be treated as having a veto over state use of their land, but should be treated as having a prima facie moral right that the state not use their land without their consent. This right, being prima facie, can be overridden. I propose a set of candidate override conditions which, I claim, would be considered plausible if judged from the perspective of an ethic of sustainable development broadly conceived in a way I outline. These conditions are based in part on those that the *Tsilhqot'in* judgment says the state must show to be satisfied if it is to be justified in using Aboriginal title land for development or other purposes in circumstances in which it has consulted with the title holders but they have not consented to the proposed use.

¹ *Tsilhqot'in v. British Columbia* [2014] 2 SCR 257, 2014-06-26.

Introduction

The Tsilhqot'in Nation is a semi-nomadic community of some 3,000 people comprising six bands with a shared culture and history (*Tsilhqot'in* 2014, 259). Their name means "people of the blue water." At the time of the Supreme Court of Canada's judgment they were "one of hundreds of indigenous groups in British Columbia with unresolved land claims" (4).² In describing the judgment's "Historic Backdrop," the court wrote:

The issue of Tsilhqot'in title lay latent until 1983, when the Province granted Carrier Lumber Ltd. a forest license to cut trees in part of the territory at issue. The Xenigwet'in First Nations government (one of the six bands that make up the Tsilhqot'in Nation) objected and sought a declaration prohibiting commercial logging on the land.... Talks between the Ministry of Forests and the Xenigwet'in ensued, but reached an impasse over the Xenigwet'in claim to a right of first refusal to logging. In 1998, the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people. (5)

The title claim was opposed by the provincial and federal governments (6). In 2002, the issue went to trial in the British Columbia Supreme Court. The trial lasted for more than 300 days over a period of five years (7). The judge "found that the Tsilhqot'in people were in principle entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area. However, for procedural reasons ... he refused to make a declaration of title" (7).

The case went to the British Columbia Court of Appeal, which held in 2012 that the title claim had not been established (8). The Tsilhqot'in then appealed to the Supreme Court of Canada, asking for "a declaration of Aboriginal title over the area designated by the trial judge" with the exception of lands that were privately owned or under water (9).

When I speak hereafter of "the Tsilhqot'in judgment," I will mean the Supreme Court of Canada's judgment.

The judgment explained that there were three requirements for Aboriginal title. The occupation of the claimed land must have been *sufficient* prior to the assertion of European sovereignty; it must have been *continuous*, in cases where present occupation was relied upon, and it must have been *exclusive* prior to European sovereignty (30, 50, 58). At the heart of the Supreme Court appeal was the issue of what counted as sufficiency of occupation (33). The trial judge had held that sufficient occupation was proved by "showing regular and exclusive use of sites or territory" (27). The Court of Appeal disagreed, and held that to prove sufficient occupation an Aboriginal group must prove that "its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty" (28). The Supreme Court sided with the trial judge on this issue (50). Further, it held that the Tsilhqot'in met all three requirements for title, and therefore granted them a declaration of title over the area at issue (51-66).

² Unless otherwise indicated, in this paper a citation comprising one or more parenthetical numerals refers to one or more numbered paragraphs in the Supreme Court of Canada's *Tsilhqot'in* judgment.

The *Tsilhqot'in* judgment makes frequent references to “the Crown.” This is because Canada is a constitutional monarchy: the country’s head of state is Queen Elizabeth II. For executive purposes, the Crown is the Queen-in-Council, meaning the executive branch of government.

Aboriginal title

The *Tsilhqot'in* judgment explains the nature of aboriginal title as understood in Canadian law. Four points are noteworthy for my purposes.

(i) Aboriginal title is in effect superimposed on an underlying title which the Crown acquired when European sovereignty was asserted (69). But the view that no one *owned* the land prior to the assertion of European sovereignty (the doctrine of *terra nullius*) never applied in Canada. On the contrary, the Royal Proclamation by King George III of England in 1763 affirmed that Aboriginal people who occupied and used the land before European settlement had pre-existing legal rights,³ and this fact gave rise to a fiduciary duty on the part of the Crown (69) – a duty “owed by the Crown to Aboriginal people when dealing with Aboriginal lands” (71). For now, I will simply note that this duty is a feature of the Crown’s underlying title to Aboriginal title land; I will say more about it later. There is a second feature: the Crown has “the right to encroach on Aboriginal title” if it can justify doing so under Canada’s Constitution Act of 1982 (71). I elaborate below.

(ii) Notwithstanding the Crown’s underlying title, Aboriginal title holders “have the right to the benefits associated with the land – to use it, enjoy it and profit from its economic development” (70).

Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group - most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice. (75)

(iii) However, Aboriginal title “comes with an important restriction – it is collective title held not only for the present generation but for all succeeding generations” of the title holders (75). This means that the land cannot be developed by the title holders in a way that would “substantially deprive future generations” of its benefit (75).

(iv) Aboriginal title also imposes a restriction on the Crown: “[a]fter Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding group to developments on the land” (90). If the title-holders do not consent, the Crown cannot proceed with the contemplated development unless it fulfills its “duty to consult and accommodate” (77).

³ An excerpt from the Royal Proclamation: “... it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds” (Assembly of First Nations 2013).

The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title.... The required level of consultation and accommodation is greatest where title has been established (78-79).

There is a further requirement. If the title holders do not consent to the proposed development, the development cannot proceed unless the Crown “can justify the intrusion on title under ... the *Constitution Act, 1982*” (90). The relevant provision of this Act is section 35, to which I now turn.

Section 35

Section 35 of the 1982 Constitution Act recognizes and affirms “the existing aboriginal and treaty rights of the aboriginal peoples of Canada” (Canada 1982). In *Tsilhqot’in* the court said that “it took some time for the meaning of this section to be fully fleshed out” (11). The fleshing out occurred in a series of Supreme Court judgments beginning in 1984.

In a general summary of its *Tsilhqot’in* judgment, the court wrote:

Where Aboriginal title has been established, the Crown must not only comply with its procedural duties, but must also justify any incursions on Aboriginal title lands [not consented to by the title-holders] by ensuring that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires demonstrating both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group (p. 261).

These requirements jointly constitute what I will call the s. 35 justification test. I will consider them in turn.

A compelling and substantial objective

The *Tsilhqot’in* court, in agreement with the British Columbia Court of Appeal, asserted that “the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public” (81).

[T]he process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d’être* of the principle of justification.... To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective. (82)

The court asked: “What interests are potentially capable of justifying an incursion on Aboriginal title?” (83). In response, the court quoted remarks by then Chief Justice Lamer in *Delgamuukw*:⁴

⁴ *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 1997-12-11.

In the wake of *Gladstone*,⁵ the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive [A]boriginal societies exist within, and are part of, a broader social, political and economic community” (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support these aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. (83; *Gladstone*, para. 165. Emphasis added, and emphasis in original deleted, in *Tsilhqot’in*.)

The Crown’s fiduciary duty towards Aboriginal people

The Crown’s fiduciary duty towards Aboriginal people is a constraint on the Crown’s underlying title to Aboriginal title land, and “[t]his impacts the justification process in two ways” (85).

First, the government must respect the fact that “Aboriginal title is a group interest that inheres in present and future generations.... This means that incursions on Aboriginal title land cannot be justified if they would substantially deprive future generations of the benefit of the land” (86). Thus, there is a future-generations restriction on the Crown in respect of development on Aboriginal title land, just as there is on Aboriginal title holders themselves (74).

Second, the Crown’s fiduciary duty to Aboriginal people includes an implicit justification requirement with the following components (87). There must be a “rational connection” between the government’s proposed incursion on Aboriginal title land and the government’s goal – that is to say, the incursion must be necessary to achieve the goal. Next, there must be “minimal impairment” of “the Aboriginal interest” – that is to say, the government must “go no further than necessary” to achieve its goal. Finally, there must be “proportionality of impact”: it must be the case that “the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest.” (87)

The s. 35 justification test and the Oakes test

The s. 35 justification test is modelled in part on a test that the Supreme Court of Canada developed following the enactment of the *Constitution Act, 1982*. Part 1 of this Act is a *Charter of Rights and Freedoms*. The rights and freedoms set out in the *Charter* are not absolute. Rather, as the first section of the *Charter* asserts, they are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (Canada 1982).

⁵ *R. v. Gladstone* [1996] 2 SCR 723, 1996-08-21.

To determine whether a law which infringes a *Charter* right or freedom is a reasonable limit, the Supreme Court of Canada developed a test. The test is called the *Oakes* test, after the case in which it was developed.⁶ For a law which infringes a *Charter* right or freedom to pass this test, it must serve an objective which relates to “concerns which are pressing and substantial in a free and democratic society” and it must be rationally connected to this objective; the limit which it imposes on the right or freedom it infringes must be minimal (that is, no greater than necessary for the law to achieve its objective), and the law’s effects must be proportional to its objective, meaning that “[t]he more severe [its] deleterious effects..., the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.”⁷

The s. 35 justification test resembles the *Oakes* test in having an “objective” requirement and a rational connection, minimal impairment, and proportionality requirement.

Justification and reconciliation

To justify development on Aboriginal title land to which the title holders have not consented, the government must show that the proposed incursion has a “compelling and substantial” objective. As noted above, “[t]o constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective” (82). More specifically, the goal to be furthered is “the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty” (83). Reconciling these two realities “entails the recognition that ‘distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community’” (83). Government objectives which, “in principle, can justify the infringement of [A]boriginal title” include “the development of agriculture, forestry, mining, and hydroelectric power” (83). The idea appears to be that the realization of such objectives can, in principle, benefit the broader community within which Aboriginal societies exist, and benefit the Aboriginal societies themselves. But the need for a s. 35 justification arises in circumstances in which the Aboriginal group concerned has not consented to the proposed incursion on its title land. If the government nevertheless proceeds with the incursion, having provided what it takes to be an adequate s. 35 justification for it, this will surely not further the goal of reconciliation.

Questions

The *Tsilhqot’in* account of the s. 35 justification test prompts some questions. For example, are there formal justification proceedings? If so, what is the standard of proof? Are the Aboriginal title holders concerned party to the proceedings? Can the resulting decision be appealed, either by the government or by the title holders? In the course of my research for this paper, I put these questions to two members of a Toronto

⁶ *R. v. Oakes* [1986] 1 SCR 103, 1986-02-08.

⁷*R. v. Oakes*, paras. 69-71. In *Oakes* this proportionality requirement is one of “three components of a proportionality test”; the other two components are the rational connection and minimal impairment requirements (para. 70).

law firm specializing in aboriginal, environmental, and energy law.⁸ They said that it remains to be seen how justification will proceed in a case where an Aboriginal group has title to the land in question. Because the Supreme Court's *Tsilhqot'in* decision was the first finding in Canada of Aboriginal title to land, this is uncharted territory.⁹

A justification test has been in place since a Supreme Court judgment in 1990,¹⁰ but the lawyers I consulted told me that there is no formal hearing to consider justification unless the matter is challenged through a court action or application. Rather, the procedure has been one of consultation, pursuant to the Crown's s. 35 duty to consult and accommodate. The government's preference is that a company proposing an incursion on traditional Aboriginal territory consult with the group concerned and obtain the group's consent if possible. If a permit is released authorizing an incursion to which the group has not consented, the group could challenge the permit by an application for judicial review in court.

Consent

As we have seen, the idea of consent figures prominently in the *Tsilhqot'in* judgment:

After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*.¹¹ (90)

Partly on the basis of this passage, the following argument can be made. In virtue of having legal title to land, Aboriginal title holders in Canada have a legal right against the Crown that the Crown not undertake development of their title land without their consent. But this right can be overridden on certain conditions, and so it is not an absolute right. Rather, it is a *prima facie* right – that is, a right admitting of exceptions.

⁸ Willms & Shier Environmental Lawyers LLP. www.willmsshier.com.

⁹ The lawyers also said, in connection with the future-generations restriction on Aboriginal title, that it remains to be seen how governments (including First Nations governments) or courts will determine whether a particular use of Aboriginal title land by the title holders would be prejudicial to the interests of future generations of their people. This too is uncharted territory.

¹⁰ *R. v. Sparrow* [1990] 1 SCR 1075, 1990-05-31.

¹¹ At para. 76, the court says: “The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must *obtain the consent* of the Aboriginal title holders” (italics added). This must have been a drafting error: instead of “obtain” the court should have said “seek” (or used an equivalent term). The sentence as written is inconsistent with a central tenet of the *Tsilhqot'in* judgment expressed in the immediately following sentence in para. 76: “If the Aboriginal group does not consent to the use, the government’s only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.” If the government were required to “obtain the consent of the Aboriginal title holders,” then, if the title holders did not consent, the government would have no recourse – it could not undertake the proposed incursion.

The right is overridden in a particular case if and only if the Crown has fulfilled its duty to consult the title holders and can provide a (successful) s. 35 justification for the intrusion on title.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

Here too the idea of consent is prominent. Articles 19 and 32.2 of the Declaration prescribe that “[s]tates shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free ... and informed consent” prior to “adopting and implementing legislative or administrative measures that may affect them” (in the case of Article 19) or (in the case of Article 32.2) before approving “any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources” (UNDRIP 2007, 2008).

Suppose that states consult with the indigenous peoples concerned in order to obtain their consent but fail to obtain it. Does this mean, under these articles, that the action or project for which consent is sought may not proceed? If it does, then under these articles, indigenous peoples have an implied right that states not adopt and implement measures of the sort specified in Article 19, or approve a project of the sort specified in Article 32.2, without the free, prior and informed consent of the peoples concerned.

The Declaration was adopted by the United Nations General Assembly in 2007. Australia, Canada, New Zealand, and the United States voted against it (UN 2015). Canada did so partly because it had “significant concerns” about the wording of certain provisions in the Declaration, including the provisions on “free, prior and informed consent when used as a veto.”¹² The Canadian statement cites Article 19 by way of example, but Article 32.2 is not relevantly different in its consent wording; Canada evidently interpreted these articles as prohibiting actions or projects of the specified kinds absent consent. In 2010, however, Canada issued a statement of support for UNDRIP as “an aspirational document,” but reiterated its 2007 concerns (Canada 2010, 2012). The statement didn’t mention Article 46 in the Declaration, and neither did Canada’s 2007 statement. Under Article 46.2, the exercise of the rights set forth in the Declaration is subject to limitations that meet certain specified conditions:

The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

¹² “Canada’s position has remained consistent and principled. We have stated publicly that we have significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, member States and third parties” (McNee 2007).

Assuming, as Canada did, that Article 32.2 gives indigenous peoples a right to veto proposed projects affecting their territories, this right is *implied* rather than “set forth” (i.e., explicitly asserted), and so might be argued to be exempt from an Article 46.2 limitation. If, however, it is not exempt, then it is a *prima facie* right – a right that is overridden when the Article 46.2 limitation conditions are met.

Australia endorsed the Declaration in 2009, and New Zealand and the United States announced their support in 2010 (Hansen 2009). Development in Australia’s Northern Territory requires indigenous consent if the land concerned is subject to a land claim, but the 1976 *Aboriginal Land Right Act* permits an exemption in the national interest (Boutilier 2015; Australia 1976). In New Zealand, development on Maori territory requires Maori consent in certain cases (Boutilier 2015; New Zealand n.d.). The United States has strong consent requirements for activities on tribal lands (Boutilier 2015; Harvard 2014; Royster 1994; Ruckstuhl, Carter, Easterbrook, et al. 2013), but only a small proportion of native American traditional territory is recognized as tribal land (Boutilier 2015; Frantz 1998).

The 144 countries that voted for the Declaration in 2007 included the Philippines and Belize (UN 2015). In the Philippines, a 1997 Act requires free, prior and informed consent for incursions on ancestral indigenous land, but enforcement is weak (Boutilier 2015; Oxfam America 2013; UN Commission on Human Rights 2003). In Belize, a 2007 Supreme Court judgment ordered informed consent in respect of government action affecting the territory of the Maya people, but the government has failed to respect the ruling (Boutilier 2015).

Among the other countries that voted for the Declaration were Ecuador, Norway, and the Republic of the Congo (UN 2015). These countries require that the consent of indigenous peoples be *sought* for development on their land, but they do not require that it be obtained.¹³

As these examples illustrate, among the countries that voted for the Declaration in 2007, or later announced support for it, there are different protocols with respect to whether consent is required for state development on indigenous lands.

Ethical issues

In 2011, the Oxford philosopher Derek Parfit published a two-volume work titled *On What Matters*. The first volume includes a chapter on consent, in which Parfit considers a principle he calls the Veto Principle. According to this principle, “[i]t is wrong to treat people in any way to which they either do in fact, or would in fact, refuse consent” (Parfit 2011, 192). This principle, as Parfit remarks, is “clearly false”: it would forbid a state to punish a person rightfully convicted of a crime unless the person consented to be punished. There is, however, a much weaker version of the Veto Principle which Parfit says we could plausibly accept. He calls this principle the Rights Principle, and states it as follows: “Everyone has rights not to be treated in certain ways without their actual consent” (ibid., 194). Parfit says that “[w]hen we claim

¹³ Boutilier 2015; Ecuador 2008 (20 October); Shearman and Sterling LLP 2013 (5 November), 13; Norway 2005, section 6; Congo Republic 2011, 1.

that people have *rights* not to be treated in certain ways, we mean in part that, without these people's consent, such acts would be wrong" (ibid.). He adds that "[w]e can call these the *veto-covered* acts" (ibid.).

Parfit says that "it would often be hard to decide which are the acts that people have a right to veto" (ibid.). But he thinks it may be that "most kinds of direct interference with our bodies" are wrong "because some people do not, or would not, actually consent to them" (ibid., 200). He then says:

Another much larger group of cases involve ownership. People do not always have a right to veto how we use their property, since we could justifiably use or even destroy many kinds of property, despite the owner's refusal of consent, if that is our only way to save someone else from death or injury. (Ibid.)

Suppose that, as Parfit holds, we could, on certain conditions, justifiably use many kinds of property despite the owner's refusal of consent. Then people do not have an absolute right (that is, a right admitting of no exceptions) that we not use their property without their consent, because it may be that on certain conditions we could justifiably do this. This view is consistent, however, with the view that people have a *prima facie* right (that is, a right admitting of exceptions) that their property not be used by others without their consent.

The Rights Principle attributes consent rights to everyone – that is, to every person. In what follows I will assume, in conformity with UNDRIP, that a *group* of persons may have rights – *collective* rights. On this assumption, indigenous peoples may have rights. In speaking of indigenous peoples, I shall be referring to peoples who self-identify as indigenous and occupy ancestral territories within the borders of a broader state – territories to all or part of which they may, or may not, have title by agreement with the state or by judicial declaration.

Do indigenous peoples have an absolute right, or do they have a *prima facie* right, that the state not use their land, or permit it to be used by others, for development or other purposes without their consent? Consider the following argument. On the view that indigenous peoples have an absolute right that the state not use their land or permit it to be used by others for development or other purposes without their consent, these peoples have a veto over such uses, and so, without their consent, such uses would always be wrong. This view rules out the possibility of cases in which such uses would be justified even if the indigenous peoples concerned refused consent. But, the argument continues, this possibility should *not* be ruled out, for there may be cases of justified use without the consent of the indigenous people concerned, just as cases may arise in which it would be justifiable for others to use a person's property without his or her consent. This being so, indigenous peoples should not be said to have an absolute right that the uses in question not occur without their consent. However, this right *should* be said to be a *prima facie* right of theirs. Why? There are two thoughts here. The first is that the land in question is ancestral territory – territory which the indigenous peoples concerned have occupied over many generations. On the present argument, this fact provides a warrant for treating indigenous peoples as having moral title to the land. The second thought is that if indigenous peoples are treated as having moral title to the ancestral land they occupy, then they should also be treated as having a moral right that the state not use their land or permit it to be used by others for development or other purposes without their consent. But, for the reason I have given, this right should not be considered an absolute right; rather, it should be considered a *prima facie* right. To respect this right – to take it seriously – the state must consult with the indigenous people concerned, attempt to

accommodate any concerns they may have, and seek their consent to the state's using the land or permitting it to be used by others for development or other purposes. If they don't consent, the state may nevertheless proceed with, or permit, the contemplated use, but only if it succeeds in justifying so doing by morally acceptable criteria, in which event the right is overridden.

On what conditions would it be morally permissible to override this right? I will approach this question from the perspective of an ethic of sustainable development broadly conceived.¹⁴ On a broad conception, sustainable development pertains not just to the natural environment but also to human society. An ethic of sustainable development broadly conceived will value not only the protection of the natural environment but also the protection and development of social environments (communities and cultures) which provide robust conditions for the promotion of human well-being. Such an ethic will have a particular concern for the protection of indigenous communities, partly because it will hold that "the development process [should be] egalitarian in effect" (Jacobs 1999, 38). In addition, it will favour participatory democracy, hence public participation in social and political decision-making.

Since a sustainable development ethic of this sort will value the protection of indigenous communities, it will require states (in countries with indigenous populations) to respect the prima facie moral consent right attributed above to indigenous peoples, hence to seek their consent to use their land for development or other purposes. Absent consent, the state may proceed with the proposed use if and only if certain conditions are satisfied. The following are candidate conditions, drawn in part from the s. 35 justification test and the *Oakes* test.

(1) The proposed use must not be one that would prevent future generations of the indigenous people concerned from benefiting from the land.

(2) The state must have an objective which is compelling and substantial from the perspective of an ethic of sustainable development of the envisaged sort.

(3) There must be a rational connection between the proposed use and the state's objective. On a s. 35 interpretation of "rational connection," this would mean that the proposed use must be necessary to achieve the state's objective. But to show that this condition was met in a given case, the state would have to show that there was no alternative possible use that would be sufficient to achieve the objective, and this might be onerous (and costly). Accordingly, I will interpret the rational-connection condition differently in this context, namely as meaning that the proposed use must be a feasible way of furthering or achieving the state's objective.

(4) The proposed use must be one that would minimally impair the interests of the indigenous people concerned.

(5) There must be proportionality of impact. As we have seen, the s. 35 justification test has a proportionality condition, namely: the benefits that may be expected to flow from the government's goal in undertaking or permitting the proposed incursion must not be "outweighed by adverse effects on the Aboriginal interest" (*Tsilhqot'in* 2014, para. 87). This condition would be met if the benefits and the adverse effects were equal in weight; it would also be met if the adverse effects were very substantial but were nevertheless outweighed by the benefits. Suppose that the expected benefits amounted to many billions of dollars over a number of years. Suppose too that the adverse effects could be given a dollar value and amounted to billions of dollars, but fewer billions than the expected benefits. On these assumptions, the

¹⁴ My account of such an ethic draws upon (Jacobs 1999, 35-38).

s.35 proportionality condition would be satisfied. By way of contrast, recall the *Oakes* proportionality condition: “[t]he more severe the deleterious effects of a measure [which limits a right or freedom set out in the Canadian *Charter of Rights and Freedoms*], the more important the objective [of the measure] must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.”¹⁵ A roughly parallel condition for the indigenous case would be that the more severe the deleterious effects on an indigenous group of a proposed state use of their land, the more important the state’s objective must be if the use is to be morally justified. This condition would presumably imply that if the adverse effects of a proposed use were very substantial and the expected benefits were equal in weight, or not much greater, this would not be sufficient for proportionality. Accordingly, this adapted *Oakes* condition would (presumably) be stronger than the s. 35 proportionality condition, and from the perspective of a sustainable development ethic of the envisaged sort it would, I think, be an acceptable condition.

From the perspective of such an ethic, the conditions I have listed would, I believe, be considered plausible candidates for being ones on which the prima facie indigenous moral consent right in question could justifiably be overridden.

I want next to consider an assumption I made in the paragraph before last in connection with the s. 35 proportionality condition, namely that the adverse effects of some proposed incursion on Aboriginal title land could be given a dollar value. From the perspective of the Aboriginal people concerned, this assumption might be untenable; they might think that the adverse effects could not be assigned a monetary value in any currency. Suppose this were the case. Then, from the perspective of these people, the adverse effects and the expected benefits would be incommensurable on a monetary scale, and so, from their perspective, the respective weights of the adverse effects and expected benefits could not be compared in monetary terms. However, from the Aboriginal perspective concerned, these effects and benefits might be comparatively assessable on a *non-monetary* scale – for example, in terms of their relative importance. If so, the idea of comparing their respective weights would be viable from that Aboriginal perspective.

The incommensurability scenario I have just described is not fanciful – it’s based on an actual case.¹⁶ At the beginning of May 2015, an announcement was made that a joint venture led by a Malaysian state-owned company called Petronas had offered \$1 billion to obtain the consent of the Lax Kw’alaams First Nation in British Columbia to build a liquefied natural gas export terminal on the group’s traditional territory. The money would be paid to the community over a 40-year period. In addition, the British Columbia government would contribute 2,200 hectares of Crown land located near the site of the terminal; this land would become the property of the Lax K’walaams people; it would be for them to use for industrial and residential purposes and would have a value of \$108 million. For the 3,600 members of the Lax K’walaams community, the total offer had a value of approximately \$320,000 per person.

¹⁵ *R. v. Oakes*, para. 71.

¹⁶ The following information about this case is from (Hunter & Jang 2015) and (Jang 2015).

In the course of three rounds of voting, the community rejected the offer unanimously. They feared that the project would harm juvenile salmon in sensitive eelgrass beds near the proposed terminal. The Lax K'walaams Council issued a statement saying that the vote sent "an unequivocal message: this is not a money issue. This is environmental and cultural" (Jang 2015, A16). However, the Council also said that it would support the project under the right conditions. Lax K'walaams, the Council said, "is open to business, to development, and to LNG" (ibid.), and would be open to good-faith negotiations if a proposal were made by the joint venture to build the terminal on a different site, not too close to the eelgrass beds. The Council added that there had been suggestions that the relevant governments and the joint venture might try to proceed without the consent of the Lax K'walaams. That, the Council said, would be "unfortunate" (ibid.).

Conclusion

I have argued that indigenous peoples living on ancestral land within the borders of a broader state should be treated as having moral title to their land and, consequently, as having a moral right that the state not use their land for development or other purposes without their consent. I have also argued, however, that this right should not be construed as an absolute right (a right to which there can be no exceptions) but as a prima facie right, hence as a right that can be overridden. In the argument I have made, the claim that the right is overridable rests on the conceivability of cases in which, under certain conditions, it would be morally permissible for the state concerned to use the land in some way without the consent of the group concerned. I have proposed candidate conditions which, I believe, would be judged to be plausible override conditions from the perspective of an ethic of sustainable development of the sort I have envisaged. Of course, from the perspective of such an ethic the overriding of the right would be "unfortunate." It would obviously be far better, from this perspective, if state incursions on indigenous land occurred with the consent of the people concerned. In the case of government incursions on Aboriginal title land in Canada, the same would be true from the perspective of Canadian jurisprudence on Aboriginal title as articulated in the *Tsilhqot'in* judgment.

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