

## A Real Game Changer: An Analysis of the Supreme Court of Canada *Tsilhqot'in Nation v. British Columbia* Decision

by Ravina Bains



### SUMMARY

- The *Tsilhqot'in Nation v. British Columbia* judgment represents the first time Aboriginal title has been recognized (outside an Indian Reserve) to a First Nation in Canada. The unanimous judgment recognized Aboriginal title to over 1,700 square kilometers of land in the interior of British Columbia.
- Despite having fee simple characteristics, Aboriginal title represents communal ownership, not individual property rights.
- This judgment provides a clear test for when Aboriginal title can be recognized on traditional territory.
- Where Aboriginal title has been recognized, economic development will require the consent of the First Nation that holds title. However, the Crown can push through development, without

the consent of the First Nation, if it is able to demonstrate a compelling and substantial public purpose for the proposed activity.

- The judgment reaffirms that consultation processes and the justification of infringements of Aboriginal rights and title are the responsibility of the Crown and not project proponents. It will mean that if development is to occur on Aboriginal title land against the wishes of the First Nation, governments will have to be advocates for third party projects.
- Where there is no consent, and the potential infringement cannot be justified, proposed projects may be set aside by the court. This is also true for existing development projects. This puts current and potential development at risk and results in increased uncertainty for economic development in British Columbia.

## Introduction

The recent Supreme Court of Canada decision in *Tsilhqot'in Nation v. British Columbia* has been described as a game changer, a historic decision, and precedent setting—and rightly so. This is the first time in Canada's legal history that Aboriginal title has been declared to exist on specific lands outside an Indian reserve. The Supreme Court of Canada has clarified the test for recognizing Aboriginal title. It has provided guidance to provincial and federal governments on when they can infringe an Aboriginal title right, and what the role of governments is in regulating land subject to Aboriginal title.

As this bulletin demonstrates, this decision will have significant ramifications for treaty negotiations, and for future and current economic development in Canada. It may well encourage further litigation, as First Nations choose to seek relief through the courts, rather than at treaty or other negotiation tables. This is particularly important in British Columbia, where there are only a handful of historic and modern treaties, where one-third of the country's First Nations have their homes, and where claims cover over 100 percent<sup>1</sup> of the land in the province.

## Background

Six individual First Nation communities in British Columbia's interior representing about 3,000 people comprise the Tsilhqot'in Nation. They are the Tl'etinqox First Nation, Xeni Gwet'in First Nation, Tsi Del Del First Nation, Tl'esqox First Nation, ?Esdilagh First Nation, and Yunesit'in First Nation, all located near Williams Lake.

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<sup>1</sup> Over 100 percent of the land in British Columbia is under claim due to overlapping claims by First Nations.

In 1983, the British Columbia government granted Carrier Lumber Ltd. a commercial logging license on land that the Tsilhqot'in Nation considered part of their traditional territory. The local First Nation community, Xeni Gwet'in, objected to the logging licenses and when talks with the provincial government reached an impasse, Chief Roger William turned to the courts for a remedy.

In 1989, on behalf of all the communities in the Tsilhqot'in Nation, Chief William filed a claim in the British Columbia Supreme Court seeking recognition of Aboriginal title on over 1,700 square kilometers of land in British Columbia's interior. The trial lasted 339 days over a span of five years. The trial judge found that the Tsilhqot'in Nation were "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" (2014 SCC 44, para 7). With the support of the Tsilhqot'in Nation, Chief William appealed the British Columbia Supreme Court decision and in 2012 the British Columbia Court of Appeal found that the entire claim to title had not been established by the First Nation. The judgment stated that Aboriginal title can only be recognized in small parcels of land where exclusive occupation can be identified and cannot extend to all traditional territories. With that statement the court also opened up the possibility for the Tsilhqot'in people to prove title to specific sites within the identified claim area and thus claim title to them.

Chief William and the Tsilhqot'in people chose to appeal the 2012 British Columbia Court of Appeal ruling and take their case to the Supreme Court of Canada. Here, they sought declaration of Aboriginal title for over 1,700 square kilometers of land and confirmation that the

“issuance of forestry licences on the land unjustifiably infringed their rights under that title” (2014 SCC 44, para 9). In its unanimous decision, the Supreme Court of Canada supported both claims and granted Aboriginal title over the claim area.

## Aboriginal title

The 2014 Supreme Court of Canada judgment is a “game changer” for many reasons. One of the most significant is that this case represents the first time in Canadian history that a declaration of Aboriginal title has been recognized outside of an Indian reserve. In doing so, the Supreme Court of Canada also clarified how the courts should determine when title should be recognized on a First Nation’s traditional territory. The Supreme Court of Canada stated that in order for Aboriginal title to be recognized, a First Nation needs to demonstrate: “sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation” (2014 SCC 44, para 30). The judgment also cautioned that when applying this test courts need to be mindful of the Aboriginal perspective and not force “ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights” (2014 SCC 44, para 32). Furthermore, the Court explicitly rejected the British Columbia Court of Appeal’s suggestion that Aboriginal title could only be confined to specific sites and supports the assertion that the regular use of traditional territories for activities such as fishing, hunting, and trapping can be used as grounds for recognizing Aboriginal title.

What does it mean to have Aboriginal title? The Supreme Court of Canada confirmed that Aboriginal title includes the rights to:

- decide how the land will be used;
- the right of enjoyment and occupancy of the land;
- the right to possess the land;
- the right to the economic benefits of the land; and
- and the right to pro-actively use and manage the land (2014 SCC 44, para 73).

Although it may appear that this judgment moves towards providing fee simple<sup>2</sup> property rights to First Nations communities, the Court is very clear that the land title is held as a collective for current and future generations. Despite recognizing Aboriginal title and exclusive right of lands in British Columbia, the Court was prescriptive on the land being held as a communal title.

If the Supreme Court of Canada’s judgment had not been definitive that Aboriginal title land represents only communal ownership, this judgment may have allowed individual property rights to be extended to First Nation members. Research in this area demonstrates that First Nations who have some form of property rights on reserve have a higher standard of living and better housing conditions on reserve than those who don’t (Flanagan, 2013). Had this judgment allowed for Aboriginal title to include individual property rights for First Nation members, it would have helped extend the right to own property to on-reserve members of First Nations, a right that all other Canadians, including First Nations who live off reserve, currently enjoy.

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<sup>2</sup> Fee simple refers to a form of freehold ownership and absolute title to land.

There are around 200 First Nations bands in British Columbia, which represents a third of the First Nations bands in Canada. British Columbia has only a handful of historic or modern treaties. Many current treaty negotiations have been open since the creation of the British Columbia Treaty Commission in 1992. These are lengthy and costly negotiations; the average treaty negotiation takes 15 years to complete and costs tens of millions of dollars in negotiation costs. In total, current claims from First Nations cover more than 100 percent of the land in British Columbia. To state that this judgment will have ramifications for these negotiations is an understatement. Now that the Supreme Court of Canada has established a clear test for Aboriginal title that trial judges should use, this judgment may encourage further litigation as First Nations choose the courts rather than the treaty and negotiating tables. This judgment will be viewed as an alternative to the other forms of negotiation, allowing First Nations to have Aboriginal title recognized through the court system rather than negotiate with governments for it. If the federal and provincial governments want British Columbia's First Nations to continue negotiating, they will have to reform their treaty negotiation process so that treaties are finalized in a more reasonable time frame.

## Provincial or federal laws of application?

Since this is the first time Aboriginal title has been granted, the Supreme Court of Canada also clarified whether provincial or federal laws of application apply on Aboriginal title land. The judgment is clear in stating that “provincial laws of general application apply to lands held under Aboriginal title” (2014 SCC 44, para 101). However, the Court does qualify this general

application by stating that the provincial laws will not apply if they are “unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights” (2014 SCC 44, para 151). This clarification of application of provincial laws is important because it ensures that lands under Aboriginal title are still generally governed by regulations such as environmental protection regimes.

## From consultation to consent

Throughout the judgment, the Supreme Court of Canada makes it very clear that the duty to consult with and accommodate First Nations is the responsibility of the Crown and the Crown alone. Once Aboriginal title has been recognized, as it has been with the *Tsilhqot'in Nation*, consultation alone is not enough to pursue development projects. Consent will now be required. The judgment states that “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” (2014 SCC 44, para 90). If consent is not received but the Crown wishes to pursue the development, then the government needs to pass the following tests: that it has discharged its duty to consult; the project in question represents a “compelling and substantial public purpose”; and that the government continues its fiduciary duty to the Aboriginal group. The judgment states that in order 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” (2014 SCC 44, para 82). Specifically, the judgment turns to *Delgamuukw*, which attempts to define objectives that would allow for the infringement of Aboriginal title:

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 those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. (para 165)

Therefore, development can occur on land where Aboriginal title has been recognized without the consent of First Nations. However it will be the responsibility of governments to demonstrate that these projects are in the greater good of the public. The judgment makes it clear that the responsibility of demonstrating the need to infringe Aboriginal title in order to pursue projects, including resource development, will be the responsibility of the Crown, not project proponents. This will result in governments playing a more active role than they now do in projects that they deem are of national importance. However, despite these clear instructions from the Supreme Court of Canada, governments will likely attempt to offload this duty to project proponents, as they have following previous “duty to consult” decisions such as the 2004 *Haida Nation v. British Columbia (Minister of Forests)* decision. This decision clearly stated that the Crown has a “duty to consult with Aboriginal peoples and accommodate their interests” ([2004] 3 S.C.R. 511, para 16) and that this duty does not apply to project proponents other than the Crown and cannot be delegated by the Crown to third parties. However, this did not stop governments from offloading their duty to project proponents and third parties. If, however, provincial and federal governments are willing to uphold their responsibility, they

will likely need to provide some clarity on what they deem to be in the “broader public objective” in anticipation of potential projects being proposed across the country.

## Ramifications for current economic development projects

The implications of the *Tsilhqot'in Nation v. British Columbia* judgment discussed above relate specifically to potential development projects on Aboriginal title lands. However, the ramifications of this judgment are just as severe for current development and resource projects that are found in claim areas. The judgment clearly states that the application of consent from First Nations is applicable to all future Aboriginal title lands. Therefore, once title is recognized, if there is a project on that land that the First Nation does not support then the government “may be required to cancel the project... if continuation of the project would be unjustifiably infringing” (2014 SCC 44, para 92).<sup>3</sup> In provinces such as British Columbia, where over 100 percent of the land is under claim by First Nations, there is a possibility that already existing economic development projects may be suspended or shut down. A potential penalty for this infringement may be additional compensation to the First Nation group for the continuation of the economic development project. Regardless, the result is increased uncertainty and a potential increase in cost for economic development in British Columbia.

## Conclusion

Although the Supreme Court of Canada judgment in *Tsilhqot'in Nation v. British Columbia*

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<sup>3</sup> Unless the Crown can prove that the project is of compelling and substantial public purpose.

was focused on a specific First Nation group in that province, the ramifications of the judgment will be felt throughout Canada. It is a judgment that will be written about, analysed, and discussed for decades to come. In the short term it will have impacts on treaty negotiations in British Columbia and it has created a higher standard of engagement with First Nations who have Aboriginal title. Over the longer term, it will result in an environment of uncertainty for all current and future economic development projects that may end up being recognized as on Aboriginal title lands. Needless to say, this judgment is a real game changer.



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