William v. BC: Aboriginal title and rights brought to life by recent BC Supreme Court land claim ruling

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On November 21, 2007, BC Supreme Court Justice David Vickers made Canadian legal history by stating that the Tsilhqot'in Nation is entitled to Aboriginal title to about 2,000 square kilometres of the Caribou-Chilcotin region in BC's southern interior.

After a trial that consumed 339 hearing days spread over four and a half years, Justice Vickers found that a number of specified "sites and their interconnecting links set out definite tracts of land in regular use by the time of [Crown] sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title." While those words do not exactly leap off the page and fall short of the blanket declaration of Aboriginal title to the Claim Area sought by the Tsilhqot'in, they are words never before written in a Canadian court judgment.

Vickers also determined that the provincial *Forest Act* does not apply to Aboriginal title land, that the province has no jurisdiction to extinguish Aboriginal title, that the Tsilhqot'in people have Aboriginal rights to hunt and trap animals and birds throughout the Claim Area and to trade in skins and pelts, and most importantly for government planners and ministry officials, that provincial land use planning and forestry activities have unjustifiably infringed Tsilhqot'in Aboriginal title and rights.

The *William* case was launched late in 1989 when Chief Roger William of the Xeni Gwet'in First Nation — also known as the Nemiah Valley Indian Band and forming part of the Tsilhqot'in Nation — sued to block proposals to harvest timber in the Claim Area. Over the next 14 years a number of other actions asserting Aboriginal title and rights in the Claim Area on behalf of the Tsilqot'in were commenced, amended and combined into a consolidated action that finally went to trial in November 2002.

The roots of this litigation run much deeper than 1989, as the trial judge makes clear in a historical review that makes for compelling reading. His understated summary of the conclusion of the Caribou Gold Rush conflict often referred to as the "Chilicotin War" is worth repeating:

> In August 1864 Lha Ts'as?in and some of the other Tsilhqot'in warriors surrendered under circumstances that remain to this day the subject of disagreement and debate. They were tried for murder by Chief Justice Begbie and were convicted. They were subsequently hanged at Quesnellemouth. Lha Ts'as?in's final words are reported to be: "We meant war, not murder!"

This landmark case revolved around "a fundamental dispute between the Province and the Tsilhqot'in people on the issue of land use," Vickers wrote at page 25 of his 473-page judgment. "The result of this litigation has been to bring logging in the Claim Area to a halt."

After ruling that the "all or nothing" nature of the Tsilqot'in claim prevented him from granting Aboriginal title to the entire Claim Area, Justice Vickers concluded that the Tsilqot'in people are entitled to Aboriginal title to specified tracts of land inside the Claim Area (making up about 45 per cent of their traditional territory). He went on to provide detailed opinions on the strength of the Tsilquot'in claim to a number of other sites outside the Claim Area.

It is important to note that the *William* decision is not a binding declaration of Aboriginal title, and that no damages or other remedies were awarded to the Tsilhqot'in Nation. Those and other issues will be settled by further litigation and by negotiation.

Indeed, much of Justice Vickers's carefully researched and powerfully written judgment is devoted to providing a backdrop and impetus for treaty negotiations that start with recognition of Aboriginal title. Vickers challenged politicians and their negotiators to broaden their title perspective:

> The impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a 'postage stamp' approach to title, cannot be allowed to pervade and inhibit genuine negotiations … Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided "cultural security and continuity" to Tshilqot'in people for better than two centuries …
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> Given this basic recognition, how are the needs of a modern, rural, Indigenous people to be met? How can their contemporary needs and interests be balanced with the needs and interests of the larger society? That is the challenge that lies in the immediate future for Tshilqot'in people, Canada and British Columbia.

Almost acknowledging the inevitability that his ground-breaking decision will be appealed, Justice Vickers pleaded for "early and honourable reconciliation with the Tsilhqot'in people:"

> After a trial of this scope and duration, it would be tragic if reconciliation with the Tsilhqot'in people were postponed through seemingly endless appeals. The time to reach an honourable resolution and reconciliation is with us today.

The trial judge was blunt in his assessment of the limited role to be played by any court — including his own — in that reconciliation process:

> This case demonstrates how the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill equipped to effect a reconciliation of competing interests. That must be reserved for a treaty negotiation process.

As noted earlier, the practical essence of this case is control of access to land and land use planning. Justice Vickers was both dismissive and sharply critical of the province's approach to land use planning in the Claim Area:

> It is sufficient to note that none of the three plans took into account any Aboriginal title or Aboriginal rights that might exist in the claim area …
>
> At every stage of land use planning, there were no attempts made to address or accommodate Aboriginal title claims of the Tsilhqot'in people, even though some of the provincial officials considered those claims to be well founded. A statement to the effect that a decision is made "without prejudice" to Aboriginal title and rights does not demonstrate that title and rights have been taken into account, acknowledged or accommodated.

Vickers was careful to confine the scope of his findings to the Claim Area, and to avoid predicting the future. Still, he offered pointed suggestions for BC's approach to sustainability:

> It is not possible to predict the future in this changing environment. The need to protect Tsilhqot'in Aboriginal rights throughout the Claim Area brings with it the need for a fresh approach to sustainability. This challenge can be met through the development of cooperative joint planning mechanisms taking into account the needs that must be addressed on behalf of the Tsilhqot'in community and the broader British Columbia and Canadian communities.

What will this extraordinary decision mean on the ground for BC mineral exploration and mining industries?

In the short run, not much will change. Provincial forest and mining tenures, fee simple titles and third party rights to land in the Claim Area were not invalidated; they were simply prevented from extinguishing Aboriginal title. Resource legislation remains in full force and effect — subject to the court's rulings that provincial land use planning and forestry activities unjustifiably infringe Tsilhqot'in Aboriginal title and rights. The damage and compensation implications of that infringement will be determined by future litigation and negotiation.

In the long run, there will be sweeping implications for treaty negotiations, for land use planning and for environment and resource management. So much is at stake that appeals are almost inevitable — indeed, notices of appeal were filed in the BC Court of Appeal on behalf of the provincial and federal governments on December 14, 2007.

Much will depend on whether and how the BC government embraces the challenges posed by the *William* case to its treaty mandate and its land use planning and sustainable resource management policies.

On the treaty front, early indications are mixed. In a meeting the day after the decision was released, Chief Roger William extended both an invitation and an ultimatum to Premier Gordon Campbell. The Tsilqot'in leader asked the BC government leader to join him in a horseback tour of the Nemiah Valley (deep in Tsilqot'in traditional territory); and to negotiate a resolution of the Tsilqot'in land claims, or meet again in court. Campbell was noncommittal on both counts. Minister of Aboriginal Relations and Reconciliation Mike de Jong confirmed the BC government is prepared to review its treaty-negotiating mandate in light of the *William* ruling, but downplayed the significance of the judgment: "What did they get? Sorry – they got an opinion."

As for the land use and sustainability fronts, there are encouraging signs that that BC may be well advancing its development of "cooperative joint planning mechanisms" along the lines called for by Justice Vickers.

A year ago the Integrated Land Management Bureau released a policy paper called *A New Direction for Strategic Land Use Planning in BC*. The paper included specific commitments to "ensure that planning processes are jointly developed, address capacity, decision-making and dispute resolution, and are mutually acceptable."

And last December, BC and the Haida Nation signed the Haida Gwaii Strategic Land Use Agreement. The agreement calls for the establishing and further testing of ecosystem-based management objectives to "ensure the vital balance between healthy ecosystems and vibrant communities," according to a news release issued jointly by the Office of the Premier, the Ministry of Agriculture and Lands and the Council of the Haida Nation.

Most industry leaders already know that secure access to the land base is about building mutually beneficial and respectful relationships between the governmental, Aboriginal and business communities. As BC Supreme Court Justice Stephen O'Neill said in a recent speech to the Canadian Aboriginal Minerals Association:

> When you give respect, you receive it. The industry has to gain an understanding of the treaty making process, learn a little bit about history

> and take the time to build consensus. Industry is taking the lead. There needs to be good, effective communication and overall I would say that the successes are outweighing the failures.

Some of those success stories — and their underlying ingredients — are outlined in the case studies included in AME BC's *Aboriginal Community Engagement Guidebook*. Look for an updated edition of the ACE Guidebook to be published in the fall of 2008. Assessment of *William v. British Columbia* and other recent court cases will be provided, along with new case studies and updates on the treaty, land use planning and resource management fronts.

If you have suggestions for improvement of the ACE Guidebook, please forward them to:

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