



# Risks and opportunities in Aboriginal title ruling

Originally Published in The Mining Journal, August 22, 2014 <http://www.mining-journal.com/>

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On June 26, 2014, the Supreme Court of Canada changed Canada. The court granted a declaration that the Tsilhqot'in Nation, a relatively small First Nation in British Columbia, has Aboriginal title to more than 1,700km<sup>2</sup> of the province – and that only addressed a small portion of the Tsilhqot'in's traditional territory.

Given the court's ruling that Aboriginal title is territorial in nature, and not limited to small areas such as village sites, it's not hard to imagine what a map of British Columbia and other areas of Canada where Aboriginal Title still exists could look like.

There are some commentators who have suggested that it's still just business as usual for the mining industry. It's not. The Supreme Court has irrevocably changed Canada – legally, politically, economically and socially. The question isn't whether it's business as usual; the question is how mining companies and others will respond to this new reality.

Numerous articles have already been written about the Tsilhqot'in decision. In short, the court confirmed that, unless an Aboriginal group has already given up its title, it has title to any area that it can establish sufficient, continuous and exclusive occupation of since before the time that European sovereignty was asserted over the area. This part wasn't news. The significant part of the decision is that, in determining what constitutes sufficient occupation, the Court found that Aboriginal title can be established on a territorial basis over whatever land was regularly used by an Aboriginal

group, rather than only small areas like village sites or enclosed fields.

In the Tsilhqot'in case, the Tsilhqot'in were able to establish title to over 1,700km<sup>2</sup>, even though the case only addressed around 5% of their claimed traditional territory. Aboriginal title means ownership, including the right to decide how the land is used, the right to benefit from those uses, and the right to exclude third parties. The only limitation is that the use of the land must be consistent with the communal nature of Aboriginal Title – it's a group interest that is held by the Nation as a whole – and the land can't be used in a way that would substantially deprive future generations of the benefit of the lands.

## INCREASED GOVERNMENT INVOLVEMENT

Given that title must be proven in court, and cases take years to go through the court process, it's unlikely that there will be many other successful claims in the next few years. However, the Tsilhqot'in decision will still have immediate consequences.

Prior to title being established, the government is required to consult with any Aboriginal group asserting title about proposed uses of the land and, if appropriate, to accommodate those interests. Some people might argue that this essentially what the government has already been doing, but it seems clear that the decision imposes greater obligations on government.

*Continued on page 2*

At a minimum, there is a difference between consulting about the potential effects of a proposed activity on Aboriginal rights and an additional obligation to consult about the potential effects of that activity on title. The Court also made it clear that, if an Aboriginal group puts forward a strong title claim, the government may be required to postpone any decisions involving the area until the claim is resolved. If the government does allow activity to take place and title is subsequently proven, government may be required to reassess its conduct and cancel the activity in question.

After title is established, an Aboriginal group's right to decide what title lands can be used for means that government must seek the consent of the title holders before authorising uses of these lands. Absent consent, government can still authorise intrusions on title lands but only if it can satisfy its duty to consult and accommodate, prove that its proposed actions are required by a compelling and substantial objective, and establish that the proposed action is consistent with its fiduciary obligation to the Aboriginal group involved.

Both the British Columbia and federal governments appear to have recognised that a renewed approach to addressing Aboriginal claims may be required. The BC government almost immediately arranged a meeting between the BC cabinet and First Nation leaders. The federal government has also announced a renewed interest in treaty discussions.

## WIDER IMPACT

Mining companies in Canada already have various tools to work with local Aboriginal communities, but these may need to be adjusted – and new tools may need to be added – to respond to the court's decision.

In the short-term, Aboriginal groups are feeling both vindicated and emboldened, both in areas where Aboriginal Title might exist and elsewhere. Recognising this, and avoiding situations that might provoke a heightened response in the near term, may ultimately be more productive than aggressively pursuing short-term activities.

Once the dust settles, a range of potential responses might be considered. The traditional approach of consulting, minimising impacts and working towards an agreement of some kind is still available. However, the potential risks and timelines associated with aboriginal title may mean that working to reach some form of definitive agreement with potential title holders earlier in the exploration and development process may be appropriate in some circumstances.

Regardless, if there is some prospect of a successful claim to Aboriginal title, governments, mining companies and Aboriginal groups will have to consider how mining activities could be compatible with the inter-generational limits on Aboriginal title, ie the uses can't destroy the ability of future generations to benefit from the lands. While activities that permanently alter the landscape aren't necessarily incompatible with this limit, this issue will ultimately need to be addressed.

Similarly, these parties may need to be alive to different interests within Aboriginal communities.

It's impossible to know exactly what Canada will look like now that a territorial approach to Aboriginal title has been confirmed. This depends partly on how government, Aboriginal groups and industry respond to this new reality. However, it does appear clear that there is likely to be a much greater focus on consensual resolutions to issues than in the world that existed prior to June 26, 2014. Whether this consensus can be achieved remains to be seen.