

The decision of the British Columbia Court of Appeal (BCCA) in *William v. British Columbia* issued June 27, 2012, is the most recent pronouncement on Aboriginal title. The decision goes to the heart of Aboriginal title and rights, and will have important implications for Aboriginal groups, government and project proponents who are undertaking development in areas where Aboriginal title is claimed.

To date, there have been few cases that have considered the scope of Aboriginal title. Claims to Aboriginal title generally arise where the Aboriginal group has not

For those unfamiliar with the case, it was precipitated by forestry activities proposed or occurring within the territory claimed by the Tsilhqot'in Nation as its traditional territory, located in the Chilcotin region of central B.C. Former chief Roger William was the representative plaintiff on behalf of the Tsilhqot'in people, who asserted Aboriginal title and rights to their traditional territory and sought a declaration of Aboriginal title and rights to hunt, trap and trade in areas known as the Brittany Triangle and the Nemiah Trapline Territory. This, the "Claim Area," encompasses approximately 438,100 hectares. The Tsilhqot'in

test for Aboriginal title to almost half of the Claim Area, and additionally to areas outside the Claim Area, but declined to grant a declaration of Aboriginal title based upon the way the claim was pleaded. He did, however, find that Aboriginal rights to hunt, trap and trade in skins and pelts to secure a moderate livelihood, as well as to capture and use horses, were recognized and affirmed throughout the entire Claim Area.

On appeal, the BCCA rejected the theory put forward by the Tsilhqot'in that "occupation" for the purpose of an Aboriginal claim could be established by showing that the Tsilhqot'in moved

through the territory in various patterns at and around the date of the assertion of sovereignty (which in B.C. is determined to be 1846). Instead, the BCCA accepted the theory that Aboriginal title must be established over definite tracts of land (such as village sites, cultivated field and specific trapping or fishing sites) that were occupied by an Aboriginal group intensively and, if not continuously, at least regularly. Aboriginal title cannot be simply claimed on a territorial basis; there must be proof of intensive occupation of particular sites.

Where traditional use and occupation of a tract of land is less intensive or regular, recognition of Aboriginal rights other than title may be sufficient to fully preserve the rights of Aboriginal groups to continue their traditional activities and lifestyles. The BCCA upheld the ruling of the trial judge, which found that extensive Aboriginal rights (apart from title) existed in respect to the traditional lands of the Tsilhqot'in.

The BCCA has made it clear that there continues to be a high threshold to meet in proving claims for Aboriginal title. In order to be successful, Aboriginal groups will need to marshal evidence to demonstrate intensive or regular use over definite tracts of land at the time of Crown sovereignty. This may mean that Aboriginal title may only be found to exist in smaller defined areas. ■

Aboriginal title revisited

WILLIAM v. BRITISH COLUMBIA

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surrendered or ceded its interest in the relevant lands. This particular decision provides further clarification on specifically what constitutes "occupation" for the purpose of proving Aboriginal title.

Given the differing perspectives put forward in this case, it would not be surprising if this decision were appealed to the Supreme Court of Canada, which would be a welcome development as it would provide further guidance in a highly complex area of law with considerable uncertainty. This guidance is needed in areas across Canada where Aboriginal title is claimed (including most of British Columbia), and where Aboriginal groups are nomadic or semi-nomadic. At this juncture, however, the BCCA has found that a high threshold must be met in order to establish Aboriginal title.

people were semi-nomadic and moved with the seasons over various tracts of land within the territory.

The complexity of the claim is demonstrated by the fact that the trial of this action took 339 days to be heard with significant expert, documentary and oral evidence. During the trial, the Tsilhqot'in characterized the arguments put forward by British Columbia and Canada as the "postage stamp" approach to Aboriginal title (meaning that the Tsilhqot'in people had to prove Aboriginal title to specific or definite tracts of land). Conversely, the Tsilhqot'in argued that the proper approach to determining Aboriginal title was the "cultural security and continuity" approach, which could include an entire territorial area.

At the conclusion of the trial, Vickers J. found that the Tsilhqot'in had met the