COLLABORATION OR CHAOS?

By Robin Brunet

Will Tsilhqot'in inspire government and First Nations to work together, or will it cause a big investment chill?

Court decisions involving First Nations inevitably inspire dramatic newspaper headlines The Supreme Court of Canada granting the Tsilhqot'in First Nation title to 1,700-square-kilometres of traditional land outside its reserve is no exception.

According to CBC News, the June 26 8-0 ruling is 'A game-changer for all' and will apply wherever there are unresolved land claims.

Pamela Palmater, a Mi'kmaq lawyer with the Centre for Indigenous Governance at Ryerson University, told reporters: "This clarification really changes everything across the country. It's not just about the duty to consult anymore, this really changes it to a requirement to get consent over all unceded territory in this country."

Observers worry that the ruling will complicate high-profile energy projects such as the Northern Gateway pipeline, as well slow the permitting process for logging. "So far the flow of cutting permits is normal, but there's a great deal of uncertainty about the future, and frankly I think my job will become more complicated," says Bill Markvoort, TLA Past President and Vice President of Probyn Log Ltd.

However, Roy Nagel, former Executive Director of the Central Interior Logging Association, said, "Within five weeks of the court decision, contractors began reporting that the issuance of cutting permits out of the Williams Lake forest district had come to a virtual halt as Ministry staff tried to assess the implications to forestry operations." Nagel continued, "Our hope is that the Ministry gets clarification quickly, before logging operations under the current cutting permits are completed and the industry grinds to a complete stop."

Observers also think the decision will weigh heavily on unresolved land claims in BC, which unlike other provinces has not signed treaties with most First Nations.

From an Aboriginal perspective, of course, the ruling is long overdue. Keith Atkinson, CEO of the BC First Nations Forestry Council, says, "It validates the fair treatment we've been asking from government for decades. It's a huge win because the highest court in the land basically portrayed the provincial government as a bad kid dragging its feet. Now we have to implement the decision and move forward."

But those who have studied the decision are not convinced it represents a massive win for First Nations or a huge loss for the resource industries. "Is the ruling historic? Without a doubt. Has it changed the law of the land? Not much, at least in terms of Aboriginal title claims," says Jeff Waatainen, a forestry lawyer and associate of Davis LLP. "It's just an application of the law that exists, and the Court makes it clear that the Crown still holds underlying title to Aboriginal lands."

The Tsilhqot'in ruling is the first time in Canada a declaration of Aboriginal title has been granted outside a First Nations reserve. Unlike previous judgments, it states that title can extend to all traditional territories and is not limited to specific village sites.

Moreover, once Aboriginal title has been recognized, project development will require the consent of the First Nation holding title, except where the government can demonstrate a compelling public purpose for the project.

The ruling caps a battle that began in 1983, when BC granted a logging licence on land southwest of Williams Lake that was the Tsilhqot'in's traditional hunting grounds outside the boundaries of the reserve. The Xeni Gwet'in government (one of six bands that make up the seminomadic Tsilhqot'in Nation) sought a declaration prohibiting logging; subsequently, the Tsilhqot'in launched a claim for Aboriginal title.

Although a five year BC Supreme Court trial found that the First Nation was in principle entitled to a declaration of title to portions of land within and outside the claim area, it refused to make the declaration. The BC Court of Appeal subsequently decided that the claim to title had not been established.

In overruling this decision, the Supreme Court of Canada laid out how to determine whether a First Nation can prove title. Drawing heavily on the 1997 Delgamuukw decision (which established that Aboriginal title gives "the right to exclusive use and occupation of the land . . . for a variety of purposes," not confined to traditional or "distinctive" uses) as well as the *Constitutional Act* of 1867 and other sources, a quorum of judges stated that the provisions are: "sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation."

Chief Justice Beverley McLachlin wrote, "To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group."

McLachlin also wrote, "I agree with the Court of Appeal 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…… Aboriginals and non-Aboriginals are "all here to stay" and must by necessity move forward in a process of reconciliation. 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."

The general consensus amongst forest industry leaders is that their sector is in a far better position to move forward than other resource industries. "We've developed good relationships and partnerships with First Nations and will continue to improve upon them," says James Gorman, President and CEO of

the Council of Forest Industries.

But Gorman declined to speculate on how the Tsilhqot'in decision would affect business, stating that COFI needs to study the Supreme Court's findings further: "The sooner there's clarity, the better it'll be for investment."

The same cautious stance has been taken by Rick Jeffrey, President and CEO of the Coast Forest Products Association. He referred Truck LoggerBC to a June 26 CFPA press release, which states: "While the decision adds further direction regarding aboriginal title and how the application of provincial law and regulation will apply on First Nations title lands, the case is complex. An in-depth analysis is needed to fully assess the implications for BC's coastal forest industry as well as for the people and communities who depend on it."

The release also states that the coastal forest industry has been cooperatively engaged with coastal First Nations to negotiate and implement numerous business agreements: "We believe this model of engagement and reconciliation is a practical and proven path that is supportive of aboriginal rights and title interests that exist in Canada."

As for the nightmare prospect of the Tsilhqot'in decision creating havoc for investors, a BC forest policy analyst speaking on condition of anonymity told Truck LoggerBC, "I tend to agree that our industry has positioned itself well, and partnerships with First Nations are thriving. And even on a larger scale, I don't see the decision as a clear win for Aboriginal peoples. For one thing, they still have to demonstrate use of land and prove exclusive use of land in order to gain title, and this will be very hard to do.

"Complicating the situation for them is the fact that most land claims in this province overlap and are competing against each other. In other words, this practically ensures long and expensive court battles—and I doubt the government will be willing to fund more cases of the magnitude of Tsilhqot'in. I think the idea of more court battles may even inspire some bands to opt for the treaty process."

The analyst offers further food for thought. "The Tsilhqot'in decision could lead to interesting outcomes. For example, if an Aboriginal group gains title of land, perhaps the government would no longer be required to build or maintain roads on that land. If there was another infestation like the mountain pine beetle, would the government have a right to infringe on Aboriginal land? And who would have the right to fight forest fires?

"There's a lot of potential give and take that Tsilhqot'in has opened the door to. Frankly, I believe Aboriginal peoples want to give resource investors certainty just as much as we do, simply because as land owners they'll be beneficiaries to any business activity."

Jeff Waatainen agrees with some of these points. "I think many First Nations will be more inclined to settlement rather than dragging cases through the courts. We have to keep in mind that a lot of their notices of eviction and so forth are merely designed to draw attention to serious issues. In reality, there's no doubt they want to participate in resource development: unemployment in some of their communities is as high as 80 per cent."

To which Keith Atkinson remarks, "We want to avoid conflict and gain engagement, be more involved in operational issues and land management." Atkinson says Premier Christy Clark celebrating the Tsilhqot'in decision publicly would be an indication that BC is taking the Supreme Court's ruling seriously, "and it could be the leadership the forest sector needs to break through the barriers of uncertainty created by unresolved treaties and titles in BC."

Waatainen remarks, "A challenge for First Nations will be to decide who's in charge of the land they hold title to: Will it be the hereditary chiefs, the elected chief and council, or other bodies? Because aboriginal title rights are collectively held rights according to the Tsilhqot'in decision, and aboriginal title can't be exploited in a manner that would prevent future generations from profiting from it."

The best intentions of all parties notwithstanding, there's a palpable expectation that in the short-term at least, Tsilhqot'in will create a chill on business activity if the provincial permit system slows down. "I don't think the prospect of more court battles will inspire bands to reach settlements, because they've been fighting tooth and nail in the courts for decades at both the taxpayer and First Nations' expense," says Bill Markvoort, who is well respected for his ability to broker deals with First Nations and non-First Nations loggers alike.

Markvoort adds, "I want the best for both sides too, but I think it's inevitable that we'll see more cases and more lawyers, which will guarantee time and expense at a time when our industry has been trying to reduce the cost of doing business."

Like his counterparts at the Council of Forest Industries and Coast Forest Products Association, Dwight Yochim, a past TLA Executive Director, is hesitant to speculate on what impact this court decision may have on the forest industry. However, he will say this: "TLA members, and the forest industry in general, have worked hard over the last twenty years to build long-term, respectful business partnerships with First Nations. On top of that, we currently have successful First Nations forest companies operating within the industry. I believe this gives forestry an edge. We're farther down this path than other natural resource industries."