Aboriginal title does not overrule private property, but B.C. limited on what it can do with Crown land: experts

Our legislative reporter Rob Shaw's Q & A on landmark court decision

BY ROB SHAW, VANCOUVER SUN JUNE 28, 2014 8:08 AM

'In theory parks are up for grabs in an aboriginal title claim,' said lawyer Dominique Nouvet. "The First Nation, if it wins, would get to decide how they want to use the land, and … would not be confined to keeping it as a park.'

A historic Supreme Court of Canada decision this week on the land title rights of the Tsilhqot'in First Nation has left aboriginal leaders, governments and legal experts analyzing the ramifications of what some have called the most important court ruling on First Nations land rights in the province's history.

The high court granted title to more than 1,750 square kilometres of rugged land to the Tsilhqot'in, in the process leaving profound implications for pipelines, mines, forestry operations and other resource projects already built or proposed for land that may be part of future aboriginal title claims.

Here are some questions and answers about the court decision:

Q: What does this mean for houses or businesses that are on land that might be part of future First Nations land claims?

A: "This decision has no effect on private property rights," said Dominique Nouvet, an aboriginal lawyer at Woodward & Company in Victoria that acted on behalf of the Tsilhqot'in at the Supreme Court.

The few homes and business in the lands near Alexis Creek that the Tsilhqot'in won title over were deliberately excluded from the court case.

Generally, aboriginal title doesn't overrule private property anyway, say legal experts.

The high court didn't specifically address the issue, but it may form part of future rulings for land title claims in urban areas.

"Whether it would trump private land interests is a question we don't know the answer to," said Rosanne Kyle, a Vancouver lawyer who practices aboriginal and environmental law.

Regardless, courts have vast discretion to impose "remedies" on rulings, so that a judge could limit the impact of land title claims on private landowners, or order compensation.

Q: What does the court ruling mean for the treaty process between First Nations and the provincial and federal governments?

A: Experts are split on the issue, with some saying it will jump-start the slow-moving and often-criticized treaty process, while others admitting there's the potential First Nations could sidestep that log-jammed process in favour of land title claims.

There have been only four treaties signed in B.C. in about 20 years, and First Nations have criticized the process as expensive, bureaucratic and flawed.

Still, treaties provide much more certainty over self-governance, legal issues and on-the-ground management than a land title claim, said Thomas Isaac, who leads the aboriginal law group for law firm Osler, Hoskin & Harcourt LLP and is a former chief treaty negotiator for the B.C. government.

"The good thing about a treaty is that you know what you've signed for all parties involved," he said. "It's not actually clear what aboriginal title will translate into, at least on Day 1."

The Tsilhqot'in land title case took more than 20 years of expensive legal fighting that put huge demands on the First Nation to provide adequate evidence of title, said Isaac.

Other aboriginal lawyers say the Supreme Court decision is the latest in several court rulings that clearly tell the B.C. and federal governments to do a better job of treaty negotiations and reconciliation.

"It would be a complete travesty if government forced every First Nation to fight this out in the court," said Nouvet. "It's a waste of everybody's money."

Q: How does all of this affect Crown land owned by the government on behalf of the B.C. public?

A: "The court reconfirmed an existing principle that has been established some time ago, that aboriginal title predates Crown title," said David Bursey, who leads the aboriginal law group in the firm Bull Housser.

That means much of B.C.'s Crown land is "in play" for First Nations that want to pursue title claims, said Isaac.

Nothing changes immediately, he said, and for anything to happen on the land, first an aboriginal group has to win a title claim or sign a treaty.

"British Columbia must be very thoughtful in its reaction to this, and whatever its answer is it has to be sustainable over the long term," said Bursey. "The issue isn't going away and there won't be a quick fix to this."

More than 94 per cent of land in B.C. is considered Crown land.

B.C. is now limited in what action it can take on Crown land — whether logging, mining or other resource extraction — when that land is subject to a strong title claim by a nearby First Nation, Nouvet said. The stronger the claim, the more consultation and accommodation is required by government, the court ruled.

“If a First Nation has a strong aboriginal title claim and the government is contemplating approving a mine that would wreck an area, I would say under this decision that is not allowed,” said Nouvet.

Q: What about Crown land already being used for a purpose? Or even a provincial park?

A: There’s nothing stopping a First Nation from claiming title over Crown land currently being used, or over a park.

“In theory parks are up for grabs in an aboriginal title claim,” said Nouvet. “The First Nation, if it wins, would get to decide how they want to use the land, and the First Nation would not be confined to keeping it as a park.”

But the high court also reconfirmed that there are some land uses that are so important to the larger public good — such as power generation and environmental protection — that a government can justifiably infringe upon an aboriginal claim and force a project, if it follows the right process, including engagement and accommodation.

The court ruled B.C. laws generally apply to land under aboriginal title, but some things, like timber, are now the property of the First Nation.

Going forward, the government will have to consult with First Nations before renewing logging or other leases on Crown land that could be subject to a claim, said Nouvet.

Q: What about lands that are disputed between First Nations?

A: B.C.’s more than 200 First Nations have land claims that cover most of the province, and in some cases overlap.

“It’s already a major problem and this doesn’t help resolve that” said Gordon Christie, a University of B.C. law professor. “If anything it might make it a larger problem.”

First Nations will need to argue their historical claims on land using the criteria set out in the court, which includes exclusive historical occupation.

Q: If a First Nation has already signed off on using land for a project, can it come back and cancel that project after winning land title?

A: It was specifically addressed by the court, but generally legal experts believe if a First Nation has already given informed consent to a project, such as a mine or pipeline, then that’s binding. However, the Supreme Court also said governments may have to revisit approvals for activities they have already allowed on land if there wasn’t sufficient accommodation to the First Nation before it won title.

rshaw@vancouversun.com

Follow me: @RobShaw_VanSun