

Citizen Action Monitor

Supreme Court of Canada ruling shifts the legal landscape and massively empowers aboriginal peoples

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Implications of the ruling are open-ended and potentially enormous for governments and resource industries

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"The Supreme Court decision states that the government has a duty to consult and accommodate First Nations even as the land claim is underway. 'This clarification really changes everything across the country,' said Pamela Palmater, a Mi'kmaq lawyer with the Centre for Indigenous Governance at Ryerson University. 'So, 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.'" — **Amber Hildebrandt**, CBC News

[Supreme Court's Tsilhqot'in First Nation ruling a game-changer for all \(http://www.cbc.ca/news/aboriginal/supreme-court-s-tsilhqot-in-first-nation-ruling-a-game-changer-for-all-1.2689140?ref=fh,content.ighome.com\)](http://www.cbc.ca/news/aboriginal/supreme-court-s-tsilhqot-in-first-nation-ruling-a-game-changer-for-all-1.2689140?ref=fh,content.ighome.com) by Amber Hildebrandt, [CBC News \(http://www.cbc.ca/news/cbc-news-online-news-staff-list-1.1294364\)](http://www.cbc.ca/news/cbc-news-online-news-staff-list-1.1294364), June 27, 2014

A case of 'national importance' empowers First Nations, but may complicate big resource projects

The Supreme Court decision on Thursday granting the land claim of a B.C. First Nation is not only a game-changer for many aboriginal communities across the country, but also for the government and the resource industries.

The unanimous ruling granted the Tsilhqot'in First Nation title to a 1,700-square-kilometre area of traditional land outside its reserve, marking the end of a decades-long battle.

But it also clarified major issues such as how to prove aboriginal title and when consent is required from aboriginal groups, which will affect negotiations on major projects such as the Northern Gateway pipeline.

The traditional territory in question is located to the south and west of Williams Lake and Alexis Creek in B.C.'s Interior. (CBC)

"This is a case of national significance and national importance, bulletproof in its legal reasoning," says Bill Gallagher, a former treaty rights negotiator and author of *Resource Rulers* (<http://www.firstperspective.ca/index.php/news/356-resource-rulers-required-reading-for-mining-execs>).

While it was heralded among First Nations as a "game-changer" and one of the most important Supreme Court decisions, others warn that it will further complicate approval for resource projects such as Northern Gateway.

Here's a look at who is affected by the ruling and how.

Tsilhqot'in First Nation

First and foremost, the Tsilhqot'in First Nation is celebrating a major victory for itself.

The battle began in 1983 when B.C. granted a logging licence on land southwest of Williams Lake in the province's Interior that served as the Tsilhqot'in Nation's traditional hunting land outside the boundaries of the reserve.

The area in question is sparsely populated, with 200 of the 3,000 Tsilhqot'in people living there.

Lower courts disagreed on whether the semi-nomadic Tsilhqot'in Nation, a group of six aboriginal bands, had title to lands. The Supreme Court said they do and laid out for the first time how to determine whether a First Nation can prove title.

The Supreme Court decision not only granted title to the Tsilhqot'in, but found the province breached its duty to consult with the First Nation before approving the logging licence.

Even without a declared land title, the province must consult with aboriginal groups about uses of the

land in dispute and accommodate their interests, the top court said.

Hundreds of claims in B.C.

Across most of Canada, indigenous people signed land treaties with the Crown that gave up their claim to land in exchange for reserves and other promises. But for the most part, that didn't happen in British Columbia.

There are hundreds of indigenous groups across British Columbia with unresolved land claims. That means the Tsilhqot'in win sets a precedent that many others in the province will be watching closely.

"There are many, many other First Nations in B.C. that will read this court case, get their lawyers in the room and rightly say, 'How close to this set of facts is our set of facts?'" said Gallagher.

"Some will be quite close and some will not be remotely close, but for those First Nations that are close, they will be able to use this as a precedent."

Grand Chief Stewart Phillip of the Union of B.C. Indian Chiefs said the ruling marks the start of a "genuine dialogue of reconciliation that has eluded us for so long."

"I truly believe a rising tide carries all boats," said Phillip. "And in that regard we have an opportunity to participate in the economic future of this province as equal partners."

Meanwhile, the B.C. Justice Department said the province is studying the legal implications of the decision.

Implications for the rest of Canada

The ruling is also likely to have implications in other parts of the country, particularly in Quebec, through the East Coast and in areas where land treaties don't exist.

Veteran aboriginal rights lawyer James O'Reilly believes the high court's ruling could be applied to 40 per cent of **Quebec's territory**.

"I think it has wide sweeping consequences ... for virtually every set of negotiations with aboriginal nations in Quebec," he said.

O'Reilly has spent decades working on First Nations claims in Quebec, from the Cree on James Bay to Innu along the northeastern shore of the St. Lawrence River, and he said about nine groups are currently involved in land claim negotiations.

The decision could also encourage more bands to assert their rights. However, the Supreme Court ruling focuses on lands still in use for traditional purposes such as hunting and fishing, meaning it likely rules out most developed parts of the province.

In the **East Coast**, it's a different set of circumstances, but one that could lead to the same result.

The Crown often asked for "peace and friendship" treaties, an agreement aimed at ending hostilities. Gallagher notes the British were "massively outnumbered" and thus more concerned with co-operation than settlements.

Fifteen years ago, the Supreme Court ruled on those treaties and found that they didn't settle land

ownership issues on unceded land, said Gallagher. Thursday's ruling by the top court sets a precedent for those claims as well.

"It's now open to those First Nations to make those assertions," said Gallagher.

Industry groups and government

The high court's decision is expected to further complicate approvals for resource projects such as the \$7-billion **Northern Gateway pipeline** proposal by Enbridge to move Alberta crude oil to the B.C. coast. That proposed route crosses no less than four territorial claims.

'This is not merely a right of first refusal with respect to Crown land management or usage plans.'—Supreme Court of Canada ruling

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"This clarification really changes everything across the country," said Pamela Palmater, a Mi'kmaq lawyer with the Centre for Indigenous Governance at Ryerson University. **"So, 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."**

Now that the top court has established the Tsilhqot'in First Nation's aboriginal title on the land in dispute, it has the right to determine "the uses to which the land is put and to enjoy its economic fruits," the court said.

"This is not merely a right of first refusal with respect to Crown land management or usage plans," the ruling written by Chief Justice Beverly McLachlin said. "Rather, it is a right to proactively use and manage the land."

If the First Nations group does not consent, the government can only go against its wishes if it proves it's justified under the Constitution.

The ruling also said that once title is established, it may be necessary for the government to reassess its prior conduct in light of its new obligations. For example, **if it starts a project without consent, it may be required to cancel the project if it would be "unjustifiably infringing."**

"It means that if you're a **miner or a forester or a B.C. hydro transmission company or a pipeliner**, that the legal landscape ... has shifted," said Gallagher.

Gallagher stresses that if industries want to exploit resources on First Nations land, "We have to realize that they lie in the traditional territories of the most disadvantaged communities in the country.

"And they have been massively empowered by this ruling ... and their expectations have just increased exponentially."

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