

# Opinion: Questions about land title are surely no joke

BY GORDON GIBSON, SPECIAL TO THE VANCOUVER SUN    SEPTEMBER 24, 2014



A group of First Nations drummers gathered outside the Hotel Vancouver where the All Chiefs Summit was being held Thursday, Sept. 11, 2014. They sang and drummed traditional songs over the lunch hour outside, because they weren't allowed inside.

**Photograph by:** Kim Stallknecht, Vancouver Sun

At first I thought it was a mistake or a joke when a letter to the editor in this newspaper stated that official city policy was "Acknowledging that the City of Vancouver is unceded aboriginal land."

Turns out to be no joke.

City council passed, on June 24 a Vision motion (seconded by Mayor Gregor Robertson) stating "the modern city of Vancouver was founded on the traditional territories of the Musqueam, Squamish and Tsleil-Waututh First Nations and that these territories were never ceded through treaty, war or surrender."

Say what? Who owns Vancouver then? Let us examine the most recent law of the Supreme Court of Canada on this matter. The *Tsilhqot'in* judgment (a case launched by the 200-person band, part of the six-band *Tsilhqot'in* Nation) sheds a bit of disconcerting light. As is well known, the court awarded aboriginal title over 1,700 square km of Caribou land. Claims on behalf of the other bands have not yet been launched.

Aboriginal title is stronger in some ways than the fee-simple ownership of land that most homeowners have. For example, it cannot be expropriated for public purposes (a highway, say) unless governments can bring a very strong case of attempted consultation, accommodation, and ultimately a need to "infringe." We have no real idea of what the court meant by that.

For most practical purposes, the collective owners of aboriginal title have a veto as to land use, which will be extremely important for resource development (or its lack) throughout the province. How much land? Well, the chief justice referred to "the vast areas of the province that are potentially subject to

Aboriginal title.”

But what about in the city, which is mostly so-called private property? The Tsilhqot'in plaintiffs very wisely excluded from their claim the few small parcels of private land in their territory. The argument would have gone nuclear, and the real estate reward was too small to justify that kind of fight. Indeed, some native leaders have said that private lands are “off the table.” I don't doubt their word but no court has ever confirmed this, and besides, no chief can bind another.

While the court did not directly pronounce on the matter, it did have something to say about what the Crown (i.e. the provincial government in this case) owned after the extension of British sovereignty in 1846. Recall that all private lands in the province came from the Crown by way of sale of grant or other forms of alienation. What did the Crown have to sell or give back then?

Said the court (paragraph 70): “The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it.” What this could mean is that essentially all of Vancouver was and is still burdened by aboriginal title. The claim would be simple in our city as long as the three Nations agree on boundaries. Where would that leave us? Who owns what?

The court could say, no problem, and discover some concept of adverse possession or draw from other areas of their invented Indian law. (Remember, their mere word is, literally, law.) Or they could decide affected private property won't be seized but rather converted to leases. We have no idea.

Let's also look at governance of areas subject to title. In the Tsilhqot'in case, forest licenses awarded pre-judgment were left undisturbed but no more licenses may be issued by the province. By analogy, if aboriginal title is sought and proven in Vancouver, the city could no longer award building permits in such areas and of course no bank would make a construction loan without some sort of guarantees. That's just a guess; only the Supremes know.

Some things are certain, though. We do know the feds can't sell any of their Vancouver property without native approval (the Sinclair Centre sale was frustrated), same for the province (which recently paid a small Coquitlam band almost \$10 million for the right to sell Burke Mountain property). This policy applies to all federal and provincial land throughout B.C., and by extension to municipalities as well.

And what about the many people living on city-owned leased land; False Creek, for example? You'd better bet that when those leases come to an end, one or more First Nations is going to demand ownership or compensation.

You can't blame the natives demanding all they can get after how they have been treated for the past 100 years. But we don't pay public officials like the mayor to roll over to every demand. There must be balance.

I guess Robertson doesn't care about these great questions. That “these territories were never ceded through treaty, war or surrender” was his motion. So who owns it all now? Without even a court case, he compromised the city's legal position on a very fundamental issue. Thanks for that.

*Gordon Gibson is a longtime policy analyst and author of A New Look at Canadian Indian Policy.*

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