



# ASSEMBLY OF FIRST NATIONS

## BACKGROUNDER: WILLIAM CASE

### APPEAL TO THE SUPREME COURT OF CANADA – ROGER WILLIAM. XENI GWT'IN FIRST NATION GOVERNMENT AND THE TSILHQOT'IN NATION V. BRITISH COLUMBIA

#### Context:

More than two decades ago, the Tsilhqot'in Nation in British Columbia started direct action and legal measures to gain recognition from Canada of their Aboriginal title and rights to their land. Aboriginal title is a right of collective ownership, which would give the Tsilhqot'in people the primary rights to decide how the lands would be used and to the economic benefit of the lands and resources.

The action by the Tsilhqot'in Nation culminated with the Roger William litigation (2002), in which the Xenigwet'in First Nation Government and the Tsilhqot'in Nation asserted that commercial logging activity would infringe on their Aboriginal rights and title. In court, the Xenigwet'in claimed Aboriginal title and Aboriginal rights to hunt and trap within 4,381 square kilometres of land in British Columbia.

In a major precedent-setting decision in November 2007, Justice David Vickers of the British Columbia Supreme Court ruled that the Tsilhqot'in (also spelled "Chilcotin" on Canadian maps) had proven Aboriginal title to approximately 200,000 square hectares (about half of the claim area) in and around the remote Nemiah Valley, south and west of Williams Lake, British Columbia.

Although the court did not make a declaration of Aboriginal title it did make numerous declarations regarding specific Aboriginal rights for the Tsilhqot'in Nation. While the BC Supreme Court decision did not find Aboriginal title because of an issue related to the pleadings of the case, it did express its opinion that the Tsilhqot'in Nation could prove Aboriginal title to parts of its claimed traditional territory.

This was the first time in Canadian history that Aboriginal title was recognized by a court on the ground, putting into practice how the legal definition could be applied. The court's comments regarding where Aboriginal title might exist are not legally binding.

Justice Vickers made a number of important findings that will impact future relations between the governments of Canada and British Columbia and First Nations, including:

1. The Tsilhqot'in people have Aboriginal rights, including the right to trade furs to obtain a moderate livelihood, throughout the Claim Area.



# ASSEMBLY OF FIRST NATIONS

2. British Columbia's Forest Act does not apply within Aboriginal title lands.
3. British Columbia has infringed the Aboriginal rights and title of the Tsilhqot'in people and has no justification for doing so.
4. Canada's Parliament has unacceptably denied and avoided its constitutional responsibility to protect Aboriginal lands and Aboriginal rights, pursuant to s. 91(24) of Canada's Constitution.
5. British Columbia has been violating Aboriginal title in an unconstitutional and therefore illegal fashion ever since it joined Canada in 1871.

In June 2012, the BC Court of Appeal overturned the BC Supreme Court's ruling on Aboriginal title. It fully endorsed the BC Supreme Court's ruling on Tsilhqot'in Aboriginal rights to hunt, trap and trade; however, as a matter of law, the Court of Appeal held that First Nations can never hold Aboriginal title to more than specific, intensively used sites, such as permanent villages, salt licks, or particularly effective rocks used for gaffing salmon.

On September 24, 2012 Roger William and the Tsilhqot'in Nation sought leave to appeal the BC Court of Appeal's decision. The Supreme Court of Canada gave leave to hear the appeal on January 25, 2013.

On July 3, 2013, the AFN was granted intervention status for the Supreme Court of Canada hearing of appeal. The William case is currently one of the most important cases in the history of Aboriginal law with major implications for First Nations in BC and across the country. A number of First Nations and First Nation organizations were also granted leave to intervene.

On Nov. 7, 2013, the Supreme Court of Canada will hear the historic appeal of this case. The sole issue before the Supreme Court of Canada will be Aboriginal title. The outcome of this case is expected to profoundly shape the future for Canada and Aboriginal peoples. A caravan of Tsilhqot'in Elders, citizens and supporters travelled from their traditional territory to Ottawa to be present for the Supreme Court hearing.

## **Importance of this case for First Nations:**

This case raises highly significant issues in regard to Aboriginal title and land rights that are of serious and ongoing concern to First Nations and all of Canada, including the proper approach for full review of First Nation lands at the time the Crown asserted sovereignty. The outcome of this appeal can be expected to profoundly shape the future of Canada's Aboriginal peoples. This case could and should dispel the doctrine of discovery and the myth of terra nullius.

The BC Court of Appeal's adoption of a "postage stamp" model of Aboriginal title seeks to confine Aboriginal title to very specific, small sites that were occupied year-round or used



# ASSEMBLY OF FIRST NATIONS

intensively for specific purposes, such as hunting, fishing or ceremony. This standard ignores the distinctive ways that First Nation people traditionally used and occupied the land, and the laws and jurisdictions Indigenous nations exercised over their traditional lands.

The BC Court of Appeal model of Aboriginal title unjustly minimizes the title rights of First Nations in their ancestral lands, and may further entrench the dispossession of Canada's First Nations through discriminatory legal doctrines.

The BC Court of Appeal justified its "postage stamp" approach expressly because of its stated desire to avoid "unnecessarily interfering with Crown sovereignty and the well-being of all Canadians." This justification is not consistent with the principles of reconciliation but is instead a denial of First Nations' rights, including Aboriginal title.

The AFN will argue on the appropriate role of the courts with respect to Aboriginal title. The correct role of the courts in identifying title lands is not to balance competing interests of Aboriginal peoples and all Canadians, but to give full effect to title where it is proven.