BIG HAMMER? Gitxsan band members react to the ruling

CHUCK STOODY—CP

Our Home and NATIVE LAND

A Supreme Court decision gives native peoples potent weapons in the battle to decide nontreaty land claims

By ANDREW PURVIS

FOR THE PAST THREE DECADES, AS Canada's native peoples tried through the courts to gain title to land their ancestors had occupied for centuries, they ran into a legal wall. Western judicial culture demanded paper trails; in many cases, native cultures lacked formal written records. Touchstones of native history, from oral traditions to linguistic and archaeological evidence, were dismissed by the courts as no substitute for documentation. If there was no formal treaty to back the claims, "it's as if we didn't exist," said Phil Fontaine, grand chief of the aboriginal umbrella organization the Assembly of First Nations. In years of negotiations over disputed nontreaty lands, which could amount to more than 15% of national territory, provincial and federal negotiators consistently held the upper hand.

Not any more. In a unanimous decision, Canada's Supreme Court last week not only declared that such aboriginal title exists and is protected under the country's constitution but also ruled that in considering the claims, governments need to respect native tradition and history as evidence. Once established, the court added, aboriginal title permits native peoples to enjoy full use of the land, including mineral and timber rights. "It's a stunning decision and long overdue," said Brian Slattery, a constitutional-law expert at Toronto's Osgoode Hall law school. "Now when native people go to the bargaining table they will have a whole lot more chips. For the first time they will be going as equals."

The court's decision dealt primarily with a claim, first brought in 1984 by the Gitxsan and Wet'suwet'en peoples, over 58,000 sq km of mountains and forest in isolated northwestern British Columbia. The area is sizable enough, but the ruling will also reverberate across the country, wherever colonial or Canadian governments failed to sign land treaties, and where new treaty negotiations are under way. Exclaimed Gitxsan spokesman Herb George: "We've been given a diamond for Christmas instead of a lump of coal!"

Not everyone was so pleased. In British Columbia, government officials as well as mining and forestry executives warned that the ruling could undermine development in a province that still depends heavily on natural resources. In Ottawa, government officials kept their reactions muted.

Exactly what the decision will mean in concrete terms remains unclear. In the case of the Gitxsan and Wet'suwet'en, two native groups that total fewer than 10,000 members, the court did not rule one way or the other on title to the disputed lands; it simply referred the case back to a lower court. But in so doing, it set a new test for what constitutes title, as well as noting that the judge who originally heard the case, British Columbia supreme court justice Allan McEachern, erred in dismissing tribal oral histories and other kinds of evidence specific to native culture. These should not get short shrift "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case," wrote Chief Justice Antonio Lamer in his decision. At the same time, Lamer urged both parties to try to avoid further litigation. Instead, he said, they should go back to the bargaining table. There, 20 months of talks between the Gitxsan and provincial and federal governments broke off early last year over how to define land that would form part of the settlement. "Let us face it," Lamer wrote in conclusion. "We are all here to stay."

Heedful of Lamer's injunction, both sides indicated willingness to negotiate further. The bands' position, however, is clearly going to be a lot stronger. "Until now the government saw aboriginal title as something vestigial that could be traded away," explained lawyer Louise Mandell, who helped represent the Gitxsan in the case. "This decision says those title rights are contemporary and real." The ruling further stipulates that both sides must enter negotiations "in good faith." That is a legal term, usually applied to labor negotiations, that carries very concrete requirements and prohibitions. As a result, says Osgoode Hall's Slattery, "the governments' inducement to settle has been greatly increased."

TOM HANSON—CP

LAMER: Along with the ruling, an exhortation to "face it. We are all here to stay."

Maybe other governments as well. The landmark ruling has sparked new hope among hundreds of native groups across Canada that are pursuing claims on lands not yet covered by treaty. Disputed areas could include most of British Columbia, where colonial treatymakers ran out of cash for completing settlements in the late 1800s, as well as a patchwork of territory in the far north. In British Columbia today, more than 40 native groups representing 130 of the province's 200 bands—or 70% of the native population—are negotiating treaties with provincial and federal governments.

The other huge swath of lands in contention are on the other side of the continent. So-called "peace and friendship" accords were signed there by natives and the British Crown in the 18th century, but the documents were designed only to "preserve the Indian way of life," not rights to the land. In the past three decades, Mi'kmaq peoples have filed claims for all of Nova Scotia, as well as parts of New Brunswick, Prince Edward Island, the southern tip of Newfoundland and Quebec's Gaspé Peninsula. Joe B. Marshall, head of the Union of Nova Scotia Indians in Halifax, says the Supreme Court decision will provide his band with "a bigger hammer to hang over [the governments'] heads."

If the hammer proves big enough, the size of any settlement, in land or other compensation, is nonetheless hard to predict. Even before last week's decision, a Vancouver accounting firm estimated the total cost of settling claims in British Columbia alone at more than $4.5 billion. Talks will probably go on for "a very long time," says Slattery. "Every claim has to be considered on its merits." In the meantime, federal and provincial negotiators responded to the decision with caution. Ottawa's Indian Affairs Minister Jane Stewart praised the justices' support only for negotiation, not litigation. So did her British Columbia counterpart, minister for aboriginal affairs John Cashore. But Cashore's colleague British Columbia attorney general Ujjal Dosanjh conceded in an interview that "the court obviously did not assist us to a large degree. They're saying, 'Here's some guidance, but you're on your own.'"

Forestry and mining groups, for their part, were outraged. Ken Sumanik, director of environment and land use for the Mining Association of British Columbia, warned that by raising new questions about land ownership, the ruling will discourage investment. "We had hoped that once and for all the landlord would be decided," he said. "God knows what's going to happen now."

Native groups wisely decided to offer a temperate reply. "We're not into displacing anyone or dispossessing anyone," said First Nations grand chief Fontaine. "What we are interested in is negotiating a more fair and just deal than has been possible until now." In Halifax, even Marshall switched imagery from a hammer to a more surgical implement. "We just want to carve out a better life for our people," he said. The lines of that new life may someday redraw the legal map of Canada. *—With reporting by Maggie Sieger/Vancouver and Alexandre d'Aragon/Montreal*