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## “If At First You Don’t Succeed” - Historic Case Recognizes Aboriginal Title for the Second Time in Canadian Jurisprudence After Retrial on a Narrower Claim Area

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On April 17, 2024, the British Columbia Supreme Court (the BCSC) issued its decision in *The Nuchatlaht v. British Columbia*<sup>1</sup> (Decision) recognizing Aboriginal title, only the second time such a recognition has been made by a Canadian court and 10 years after Aboriginal title was recognized for the first time in *Tsilhqot’in Nation v. British Columbia*<sup>2</sup> (*Tsilhqot’in*). The BCSC concluded the Nuchatlaht had met the criteria to establish Aboriginal title over roughly 11.33 sq km of land located off the west coast of Vancouver Island, including the northern portion of Nootka Island. The Decision builds off the BCSC’s earlier decision in *The Nuchatlaht v. British Columbia*<sup>3</sup> (Earlier Decision) which dismissed the Nuchatlaht’s initial claim to Aboriginal title over approximately 201 sq km of land but left the possibility open for the Nuchatlaht to seek a declaration of Aboriginal title over a smaller area.<sup>4</sup>

Although the area over which the Nuchatlaht were ultimately able to establish Aboriginal title is modest, the Decision is noteworthy for a number of reasons:

- The Decision is the first time since *Tsilhqot’in* that a court has found the test to establish Aboriginal title has been met;
- The Nuchatlaht were offered a second opportunity to prove Aboriginal title and, other than some minor exceptions, British Columbia conceded the area over which Aboriginal title was ultimately recognized in the Decision;
- The evidence and hearings for the Earlier Decision and Decision were significantly shorter than previous Aboriginal title litigation and the Decision itself is a notably brief 37 paragraphs;
- The Decision provides insights as to what inferences about territorial boundaries, in the absence of unequivocal evidence, can be drawn in the context of a coastal First Nation’s Aboriginal title claim; and
- The Decision stopped short of making a formal declaration of Aboriginal title in favour of an agreement being negotiated by the parties.

### The Earlier Decision and Sufficient Occupation

On May 11, 2023, the BCSC released the Earlier Decision regarding the Nuchatlaht’s Aboriginal title claim

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over 201 sq km of land on Nootka Island on the west coast of Vancouver Island. The Nuchatlaht's claim did not include Aboriginal title to the foreshore or the seabed and did not include a claim to any activity-based Aboriginal rights.<sup>5</sup> Relying on the test to establish Aboriginal title set out in *Tsilhqot'in*, the Nuchatlaht asserted sufficient and exclusive historical occupation of the claim area at the time of the assertion of sovereignty by the British Crown and did not seek to rely on any present occupation to advance their claim.<sup>6</sup> Instead, the Nuchatlaht relied solely on documentary evidence and expert reports. No oral history evidence or other community member evidence was advanced, greatly expediting the trial.<sup>7</sup>

To establish Aboriginal title under Canadian law and pursuant to the *Tsilhqot'in* test, the Nuchatlaht had to prove their historic occupation of the claim area at the time of the assertion of sovereignty was both sufficient and exclusive.<sup>8</sup> In the Earlier Decision, the BCSC held the Nuchatlaht had demonstrated an intention and capacity to control the land they occupied for the purposes of establishing exclusivity.<sup>9</sup> Thus, the determinative issue was whether the Nuchatlaht had demonstrated sufficient occupation.

The Nuchatlaht sought to rely on establishing territorial boundaries, via a historical map and expert evidence, as proof that the claim area was within Nuchatlaht traditional territory and invited the BCSC to draw an inference of their sufficient use and occupation.<sup>10</sup> The Nuchatlaht also provided evidence of physical occupation of specific portions of the claim area, relying on evidence of Nuchatlaht villages and settlements located on the coast and the presence of culturally modified trees and other archaeological sites in certain interior areas.<sup>11</sup> The BCSC accepted that this evidence was sufficient to establish Nuchatlaht occupation in those areas.<sup>12</sup>

However, the BCSC ultimately held that the Nuchatlaht had not provided adequate evidence for the BCSC to conclude they had established sufficient occupation over the entire claim area. The BCSC found the Nuchatlaht's territorial boundary argument was insufficient on its own to show a "strong presence over the land."<sup>13</sup> Further, most of the local village settlements and camps adduced by the Nuchatlaht had already been converted into Indian reserves and were therefore excluded from the claim.<sup>14</sup> Finally, the BCSC held the Nuchatlaht had not presented sufficient evidence regarding their historical use of the interior of the claim area and that there were too many gaps to conclude that the whole coastal area was sufficiently occupied.<sup>15</sup> The BCSC thus held that these evidentiary gaps were too numerous to support a finding of Aboriginal title over the Nuchatlaht's entire claim area.<sup>16</sup>

Despite the BCSC's conclusion the Nuchatlaht had not proved Aboriginal title to the overall claim area, the Earlier Decision noted that this was demonstrative of the "peculiar difficulties of a coastal Aboriginal group meeting the current test for Aboriginal title" and that there "*may* be areas of sufficient occupation or use that are near the reserves or fee simple land over which the [Nuchatlaht] *may* be able to establish its claim to Aboriginal title."<sup>17</sup> The BCSC left open the door for the Nuchatlaht to bring an amended claim which formed the basis for the recognition of their Aboriginal title over the smaller claim area.

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## The Decision and the Smaller Claim Area

In August 2023, the Nuchatlaht obtained the consent of the defendants, BC and Canada, to bring a claim for Aboriginal title over a limited area, based on the evidence presented and considered in the Earlier Decision. In March, 2024, the BCSC heard arguments relating to this smaller claim area, which included certain archaeological and culturally modified tree sites and areas near and adjacent to certain reserves that had previously been village sites or settlements.<sup>18</sup> In the Earlier Decision, these areas had been identified as showing evidence of Nuchatlaht occupation and as areas where the Nuchatlaht “*may* be able to establish its claim to Aboriginal title.”<sup>19</sup> Notably, BC conceded “there is an evidentiary basis for the court to draw inferences of Aboriginal Title near or adjacent to reserves and accepted settlements.”<sup>20</sup>

The Nuchatlaht also advanced four additional arguments, two novel and two it had advanced in the Earlier Decision, seeking a larger area than that conceded by BC. The BCSC, however, rejected all these arguments.<sup>21</sup> Thus, the BCSC found the Nuchatlaht met the criteria for establishing Aboriginal title over most of the areas BC conceded, with some minor exceptions.<sup>22</sup> The BCSC did not issue a formal declaration, in favour of the parties reaching an agreement as to such a declaration’s terms.<sup>23</sup> The Nuchatlaht have indicated that they intend to appeal the Decision to the British Columbia Court of Appeal in order to seek an expansion of the claim area over which their Aboriginal title is recognized.

## Implications

The Decision represents the first time since *Tsilhqot’in* that a Canadian court has recognized Aboriginal title, albeit over a relatively small geographic area. Nearly 10 years after *Tsilhqot’in*, there is still little known about what consequences recognizing Aboriginal title has over other interests in land, such as fee simple ownership, Crown tenures, and utility rights of way, and whether those interests are displaced by, unaffected by, or otherwise can co-exist with Aboriginal title. Unfortunately, the Decision does not address these uncertainties in any way.

The Decision is also an example of a court providing a claimant a second opportunity to advance their claim of Aboriginal title. The BCSC provided the Nuchatlaht with a rare opportunity to amend their claim and seek Aboriginal title over any “specific areas where sufficient occupation in 1846 had been established.”<sup>24</sup> While the BCSC emphasized it was not “pre-judging any of the issues” and that it was “merely leaving it open to the plaintiff to come back before me to canvass these issues should it wish to do so,”<sup>25</sup> the Nuchatlaht likely had reasonable confidence in their likelihood of success, particularly as BC conceded the vast majority of the amended claim area.

Another notable aspect of both the Earlier Decision and the Decision is their length and the evidence relied upon by the Nuchatlaht in establishing their claim. Since the Nuchatlaht did not rely on present occupation,

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but instead on the historical record and expert evidence, very little oral testimony was adduced at trial. This provided for a significantly shorter trial. The BCSC noted that the trial “was likely the shortest one in Canada in which a declaration of Aboriginal title has been advanced” at only 54 days compared to the usual greater than 100-day trials.<sup>26</sup> The success of the Nuchatlaht, given the speedy trial and the limited evidentiary record, will likely inspire other Indigenous groups to bring forward claims on a similarly expedited basis.

However, it should also be noted that the Nuchatlaht’s limited evidentiary record proved fatal to their ability to establish Aboriginal title over a larger claim area. The BCSC declined, both in the Earlier Decision and the Decision, to adopt a territorial boundary approach to establishing sufficient occupation. The BCSC, in the absence of evidence of Nuchatlaht occupation of the interior of the claim area, refused to infer that the boundary between the Nuchatlaht’s territory and that of their neighbours shown on historical maps and the watersheds adjacent to Nuchatlaht occupied areas could and should be relied upon to delineate the rest of the Nuchatlaht’s territory, including the interior areas.<sup>27</sup> In so doing, the BCSC refused to broaden the scope of the sufficient occupation prong of the *Tsilhqot’in* test.

The BCSC’s decision not to issue a formal declaration, instead asking the parties to negotiate an agreement as to the terms of the establishment of the Nuchatlaht’s Aboriginal title over the amended claim area, is an example and encouragement for Indigenous groups and federal and provincial governments to work together to come to consensus and agreement on recognition of Aboriginal title, rather than relying on litigation and the courts.<sup>28</sup> While advancing the goals of reconciliation through the agreement and collaboration of parties in recognizing Aboriginal title is laudable, such an approach can leave great uncertainty as to the effects of such recognition on the land interests in question. It remains to be seen what terms the Nuchatlaht and BC can agree to that are fair, equitable, and balanced for all involved.

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<sup>1</sup> *The Nuchatlaht v. British Columbia*, [2024 BCSC 628](#) [Decision].

<sup>2</sup> *Tsilhqot’in Nation v. British Columbia*, [2014 SCC 44](#) [*Tsilhqot’in*].

<sup>3</sup> *The Nuchatlaht v British Columbia*, [2023 BCSC 804](#) [Earlier Decision].

<sup>4</sup> Earlier Decision at para. 499.

<sup>5</sup> Earlier Decision at para. 2.

<sup>6</sup> Earlier Decision at paras. 3 and 14.

<sup>7</sup> Earlier Decision at paras. 3, 5, 14, and 54.

<sup>8</sup> Earlier Decision at paras. 15 and 422, citing *Tsilhqot’in* at para. 50.

<sup>9</sup> Earlier Decision at para. 494.

<sup>10</sup> Earlier Decision at paras. 483—441.

<sup>11</sup> Earlier Decision at paras. 436 and 462—479.

<sup>12</sup> Earlier Decision at paras. 478—479.

<sup>13</sup> Earlier Decision at paras. 443, citing *Tsilhqot’in* at para. 38.

<sup>14</sup> Earlier Decision at para. 447.

<sup>15</sup> Earlier Decision at paras. 482—483.

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<sup>16</sup> *Earlier Decision* at paras. 481, 484—485, and 495.

<sup>17</sup> *Earlier Decision* at paras. 496—497.

<sup>18</sup> *Decision* at para. 11.

<sup>19</sup> *Earlier Decision* at paras. 449, 478, and 496.

<sup>20</sup> *Decision* at para. 13.

<sup>21</sup> *Decision* at para. 17—32.

<sup>22</sup> *Decision* at paras. 33—36.

<sup>23</sup> *Decision* at para. 37.

<sup>24</sup> *Decision* at para. 6 referring to *Earlier Decision* at para. 478.

<sup>25</sup> *Earlier Decision* at para. 499.

<sup>26</sup> *Earlier Decision* at paras. 5—6.

<sup>27</sup> *Decision* at paras. 18—25 and 29—30.

<sup>28</sup> *Decision* at para. 37.

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