TFN Treaty Society

Frequently Asked Questions about Aboriginal Title

I heard we already have title, why do we have to prove it in court?

Aboriginal title exists as an inherent Aboriginal right from our historical use of the land, however, until it is proven either through the courts or accepted through negotiations, the Crown will not take our title seriously. This is why logging, mining and all sorts of other activities continue on our lands without our consent. A First Nation cannot claim ownership over land unless they can prove title. Once Aboriginal title is proven then the Crown must seek our consent. It is important to understand that our effort to negotiate treaties is an alternative to going to court to assert our title.

First Nations people have fought many legal battles to win their land claims in court. The *Tsilhqot'in* decision was the first time a First Nation was granted title over a specific parcel of land, but it does not mean every case after it will have the same result. Proof of title requires historical research and archeological evidence that we occupied our territory exclusively since the assertion of Crown sovereignty. Our research and evidence must be exhaustive and compelling. "Exclusive use and occupation" is very difficult to prove due to overlapping claims and it's important to note that archaeologists will not work where competing claims exist.

Do treaties require us to "cede, release and surrender" our Aboriginal title and rights and what does this mean?

No. Historically treaties required First Nations to "cede, release and surrender" their Aboriginal rights and title, however with the introduction of the BC Treaty Process in British Columbia and an updated Comprehensive Land Claims Policy for the rest of Canada in 1993, First Nations do not need to surrender their rights and title to negotiate a treaty. Our Aboriginal rights and title are "recognized and affirmed" by section 35 of the Canadian Constitution which states under sub section 3 ""treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired".

The exact location and nature of Aboriginal rights comes from our historical use and occupation. They are not the same for every First Nation group nor are they clearly defined except for those Nations that have historical or modern treaties. A common misconception is that in signing a treaty First Nations will no longer be able to hunt or fish throughout their traditional territory, this is simply not true.

Will we be surrendering our Aboriginal Rights & Title to 95% of our traditional territory through a Treaty?

No, this is a common misunderstanding. Based on what the Supreme Court of Canada has said in both the *Delgamuukw* and *Tsilhqot'in* decisions, Aboriginal title is a unique kind of Aboriginal right, one that amounts to exclusive ownership of the lands. All other Aboriginal rights include the right to use the land for various activities, such as the right to hunt or fish, but do not include the right to exclude others. First Nations have Aboriginal rights throughout their traditional territory, but they only have Aboriginal title on some percentage of it. Similarly in a treaty, a First Nation will legally own a percentage of its traditional territory and be able to exclude others from some of those lands if it chooses to do so. The First Nation will also continue to have rights, including the right to hunt and fish throughout the entire territory.

So what percentage of traditional territory does an Aboriginal group hold through Aboriginal title?

The Courts have never suggested that Aboriginal title is based on a percentage of traditional territory, rather the Courts have insisted Aboriginal title continues to be based on the traditional use of lands by a First Nation. First Nations hold title on lands that were of "central significance" to them and where they made "regular use" the courts have said. Even with the *Tsilhqot'in* case, it is unclear how much land a First Nation may hold through Aboriginal title and would likely be decided on a case by case basis by the courts.

The Tsilhqot'in Aboriginal title lands represent 5% of their traditional territory and does not include any private lands or overlapping claims by other First Nations. When comparing lands recognized through Aboriginal title or a treaty, First Nations must consider the value of the land. The Tsawwassen, through their treaty, received 724 hectares of land for just over 200 people. The urban lands in greater Vancouver were valued at $120 million just before treaty and quickly rose to $249 million after treaty. Ruling out lands based on size without consideration of value is not beneficial to the First Nation. More land does not necessarily mean more value. Through the negotiation process Treaty Settlement Lands are selected based on their value and long-term benefit to the First Nation.

Does our negotiated land settlement remain under the jurisdiction of the province of BC?

Treaty settlement lands will be under the jurisdiction of the First Nation, British Columbia and Canada. The Final Agreement will clarify which governing authority of the three takes priority in the event of a conflict. While laws created by the First Nation will be enforced on treaty lands, others such as the federal Criminal Code and provincial laws will still apply.

Is it true that if our over-lap issues are not resolved the province of BC will get the land?

While First Nations may have inherent Aboriginal title, where they hold title is unclear until it has been negotiated or litigated (proven in court). Aboriginal title relies on "exclusive use and occupation" of the land. Overlapping claims prevent anything from happening on the land. While our Aboriginal title is a burden on Crown title, if we do not negotiate a treaty or prove Aboriginal title in court (which is no easy feat) everything will remain exactly as it is today, we will be not be full participants in the use and benefit of our lands.

What is fee simple land ownership? Is this a land grab effort by the Federal government?

Fee simple is the highest level of property rights an individual can have. Through treaty negotiations a First Nation is granted treaty settlement lands as Fee Simple "Plus". The First Nation will have law-making authority over the lands and they will own the sub-surface resources. This differs from Aboriginal title.

The nature and meaning of Aboriginal title is still evolving. At this point it can be said that Aboriginal title is similar to fee simple ownership, with some very important distinctions. First, Aboriginal title lands cannot be used in a manner that would deprive future generations from its use. In other words, it cannot be sold or leased for development purposes, except to the Crown. Second, Aboriginal title is owned collectively and does not lend itself to individual ownership. Some people are critical of the concept of Treaty Settlement Lands on the premise it undermines traditional concepts of communal land ownership. The legal nature of Fee Simple ownership does not mean traditional land stewardship will no longer exist. The goal of the treaty negotiations is to assume legal authority over the land, derive economic benefit from the land and protect parcels of land.

A common myth regarding Fee Simple land is that the land would in turn be sold off parcel by parcel. This is not the case. The First Nation will pursue occupation and use arrangements similar to any municipality in Canada. Given the nature of authority given to a First Nation of their treaty settlement lands it is clearly not a "land grab", it is the reason we are negotiating treaties.