Cassels

A Great Unknown: Government of British Columbia Creates Considerable Uncertainty with Recognition of Aboriginal Title to Private Land

Thomas Isaac, Mackenzie Hayden, Jared Enns, Emilie Cox

March 21, 2024

On March 15, 2024, the Government of British Columbia (Province) announced that a draft agreement (Agreement) has been reached with the Council of the Haida Nation (Haida Nation), which will recognize Haida Nation's Aboriginal title over all lands on Haida Gwaii – including privately owned lands.

According to the Province, the intention is to finalize the Agreement this spring. The Haida Nation and the Province are also working on legislation to implement the Agreement.[1]

This announcement raises significant questions about the implications of acknowledging Aboriginal title in a contract versus a treaty or land claim agreement. It also raises concerns regarding the legal consequences of recognizing Aboriginal title over privately owned fee simple lands, and the effects of such a recognition on the property rights and economic interests of private parties.

It is unclear whether the Province has contemplated the impact that recognizing Aboriginal title, through the Agreement, will have on private property interests and existing interests in Crown land. Through the Agreement, the Province has fashioned a version of Aboriginal title which is unknown at law, creates considerable uncertainty, and does not promote the reconciliation of Aboriginal and non-Aboriginal interests inherent in section 35 of the *Constitution Act, 1982*.

Background

According to information disclosed by the Province, the Haida Nation and the Province have been preparing for a court case regarding Aboriginal title on Haida Gwaii while also attempting to reach a negotiated settlement for over 20 years.[2] The Agreement has been put forward as a solution but is in draft form and has not been approved or released to the public. If approved, the Agreement – along with supporting legislation – would "formally" recognize Haida Aboriginal title over all lands on Haida Gwaii.

In support of the Agreement, the Province states that: (i) the Haida Nation has a strong case for Aboriginal title on Haida Gwaii;[3] (ii) the Province was concerned that the litigation would create ongoing uncertainty for residents and businesses; and (iii) the ongoing litigation could result in an outcome dictated by the courts.[4]

The Province suggests that the Agreement will resolve these concerns because, in the Province's view, it will provide "stability for all residents and a path forward for the orderly, incremental approach to implementation of Haida Aboriginal Title."[5]

In reality, the Agreement does not create the certainty the Province seeks and instead raises significant questions which remain unanswered.

Key Aspects of the Agreement

While the Agreement is not yet public, according to the Province, if the Agreement is approved, it would:

- Recognize and affirm that Haida Nation has Aboriginal title *throughout all of Haida Gwaii, including over private land*.
- Enable the Haida Nation and BC to determine how the two governments' laws work together to guide decisions about land and resources on Haida Gwaii.
- Include a transition period where the Haida Nation and the Province continue to use their existing shared decision-making bodies and processes to make the necessary land and resource decisions.
- Enable the Haida Nation and the Province to negotiate subsequent agreements that provide clarity for managing the land base to ensure the sustainability of Haida Gwaii for all residents and generations to come.[6]

The Province notes that the Agreement also provides that:

- Private property (residential, commercial, or industrial) will not be affected by the recognition of Haida Aboriginal title. Privately owned land (fee simple property) will continue under provincial jurisdiction, and the recognition of Haida Aboriginal title will not change any rights associated with fee simple land.
- Existing interests and approvals on Crown land on Haida Gwaii (e.g., permits, leases, park use permits, etc.) will continue through the transition period.
- Local government (municipal) decision-making and administrative processes such as business licences, building permits, zoning or taxation will continue.
- Infrastructure such as airports, ferry terminals and highways will continue to be operated and maintained by the Province.
- Provincial and municipal services provided on Haida Gwaii, including health, education, transportation, fire, and emergency services, will continue.[7]

Impacts on Existing Resource and Land Use Decisions

According to the Province, provincial laws will continue to apply and leases, permits or other approvals to use Crown lands, will remain in effect.[8] Over time, the Haida Nation and the Province will work together to

negotiate how provincial laws and Haida Nation governance can work together, following “extensive engagement” with local governments, residents, and others.[9] Until such devolution, the Province notes all land and resource decisions will continue to be made through existing provincial regulatory processes.[10]

Impact on Crown Lands on Haida Gwaii

According to the Province, recognizing Haida Nation Aboriginal title will mean provincial Crown land on Haida Gwaii is recognized as Haida Nation Aboriginal title lands. The Province notes that over time, the Province and the Haida Nation will negotiate agreements regarding how different aspects of governing land will shift to the Haida Nation.

Despite the Province’s assurances, the Agreement (and the rights that it contemplates) does not appear to be consistent with the law of Aboriginal title, and the nature of the rights which flow from Aboriginal title.

The Law of Aboriginal Title

Aboriginal title is the Aboriginal right to land. Aboriginal title is a *sui generis* (unique) interest in land. There are a number of core dimensions of Aboriginal title, including its inalienability and its communal nature.

Inalienability

Lands held pursuant to Aboriginal title cannot be sold, transferred, or surrendered to anyone other than the Crown and are accordingly inalienable to third parties.[11]

The Agreement appears to conflict with this core dimension of Aboriginal title by recognizing Aboriginal title over fee simple lands while contending that the private property interests of landowners remain unaffected.

Communal Nature

Aboriginal title is held communally, which distinguishes it from normal proprietary interests. Aboriginal title possesses inherent limits such that lands held pursuant to Aboriginal title cannot be put to uses that are irreconcilable with the nature of the Aboriginal group’s relationship with the land.

In *Delgamuukw* the Supreme Court of Canada (SCC) held that if occupation of land held pursuant to Aboriginal title was based on hunting, Aboriginal peoples could not use such land if that use destroyed its value as a hunting ground, for example by strip mining the land. If an Aboriginal group claims a special bond with a parcel of land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship, for example by turning it into a parking lot.[12]

In *Tsilhqot'in* the SCC tempered the language of *Delgamuukw* by holding that lands held under Aboriginal title cannot be used or developed in a manner that would substantially deprive future generations of the lands' benefits, although changes in the land, including permanent changes, may be possible.[13]

Private, fee simple property ownership (including the associated rights to convey, sell, or transfer property) would appear to conflict with these crucial elements of Aboriginal title. By recognizing Aboriginal title while preserving the rights of private landowners to sell their properties, the Province appears to have, in effect, allowed Aboriginal title lands to be developed in a manner which would substantially deprive future generations of the lands' benefits, in direct conflict with the law of Aboriginal title.

Exclusive Use and Occupation

Aboriginal title encompasses the right to exclusive use and occupation of the land.[14] Aboriginal title includes conferring *the right to decide how the land will be used*, the right of enjoyment and occupancy of the land, the right to possess the land, the right to the economic benefits of the land, and the right to pro-actively use and manage the land, etc.[15] In this respect, Aboriginal title expressly conflicts with private fee simple land ownership—that is, two conflicting exclusive rights to land.

The Crown's Fiduciary Duty

The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders.[16] If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified, using the framework established in *R. v. Sparrow*.[17]

The Difficulty with the Province's Recognition of Aboriginal Title to Fee Simple Land

The Province contends that the recognition of Aboriginal title to private land will not affect the private property rights of landowners. This position conflicts with the law of Aboriginal title. Aboriginal title cannot coexist with a fee simple interest because the Crown's beneficial interest (the exclusive right to possess, control, and benefit from the land, among other things), a necessary component of Aboriginal title, has been granted to another party, namely private fee simple landowners. In these cases, the appropriate remedy can include compensation from the Crown, but no right to repossess the private lands.

The Province appears to have permitted, though the maintenance of private fee simple property interests, the alienation of Aboriginal title lands to third parties, thereby depriving future generations of the benefits of Aboriginal title lands. This is a significant departure from a core tenet of Aboriginal title. Further, once

Aboriginal title is established, the Aboriginal group has the right to decide the use to which lands are put. This would, on its face, require private landowners to receive the consent of the Haida Nation to develop their private lands, a proposition offensive to the very nature of the proprietary interest in fee simple lands.[18]

The Crown has a fiduciary duty to the Aboriginal title holders in respect of decisions taken regarding Aboriginal title lands. Where a private property owner seeks an approval or authorization from the Crown over fee simple lands, given the recognition of Aboriginal title to those lands, the Province will be required, as a matter of law, to obtain the consent of the Aboriginal title holders. Where this consent is withheld, the Province will be required to justify any infringement which may be an exceedingly difficult task in the face of proven or recognized Aboriginal title.

Authorizations sought by individual landowners over fee simple parcels may not be sufficiently “compelling and substantial” public purposes which would justify overriding the constitutionally protected rights of Aboriginal title holders. All of this will create substantial confusion for private landowners, and commercial interests more generally, despite assurances that the Province has provided.

Finally, the Province seems to be relying on the Agreement’s provision that fee simple lands will not be affected by the recognition of Aboriginal title. While such provisions may carry some weight within the context of a constitutionally protected treaty or land claim agreement, such assurances or provisions in an agreement can have no effect on constitutionally protected Aboriginal title. In short, such assurances in a contract or agreement are meaningless in the face of a constitutionally protected Aboriginal right to land and a Crown recognition of such title.

Impacts to those with Interests in Crown Land

The Province has noted that until jurisdiction is transferred to the Haida Nation in respect of Crown land on Haida Gwaii, decisions regarding permits, leases, park use permits, and other approvals on Crown land will continue to be made under existing provincial approval mechanisms.

This creates considerable uncertainty for those who rely on the long-term use and stability of Crown land authorizations for their businesses including mining and forestry operations. The Province has created considerable uncertainty regarding the long-term viability of Crown land tenures on Haida Gwaii, and elsewhere in British Columbia where the Province may choose to unilaterally recognize Aboriginal title.

Conclusion

Regardless of any agreement to delay the application of Haida Nation governance, Aboriginal title holders have a right, at law, to require consent or strict justification on the day Aboriginal title is recognized.

Through the Agreement, the Province appears to have attempted to contractually limit the scope and content of a constitutionally recognized Aboriginal right, something that it cannot do except by way of a treaty or land claim agreement under Section 35, *Constitution Act, 1982*.

The Agreement also appears to contradict legal arguments made by the Province in defending against other declarations for Aboriginal title. The Province has historically argued that the granting of fee simple interest in land has the legal effect of *displacing* Aboriginal title, such that it could have no effect on private lands. The Province offers no justification for this significant departure in its position on the enforceability of Aboriginal title against private lands.

The Province's position with respect to the Agreement, and its departure from defending private property interests creates significant uncertainty for those with private lands everywhere in British Columbia, including Haida Gwaii, and for those who rely on the stability and long-term nature of Crown land use authorizations for their business operations. Contrary to the assertions of the Province, the Agreement creates even greater uncertainty than litigation by fashioning a version of Aboriginal title which is, to date, unknown at law.

---

[1] Province of British Columbia, General Fact Sheet on Draft Agreement (online).

[2] Province of British Columbia, Draft Agreement on Haida Aboriginal Title: March 15, 2024 (online)

[3] Province of British Columbia, Minister's update on Haida Nation Aboriginal Title agreement: March 15, 2024 (online). We note that the Province apparently does not believe there are any justifiable infringements of Aboriginal title or examples of extinguishment of Aboriginal title in respect thereof.

[4] *Ibid*.

[5] *Ibid*.

[6] Province of British Columbia, Draft Agreement on Haida Aboriginal Title: March 15, 2024 (online).

[7] *Ibid*.

[8] *Ibid*.

[9] *Ibid*.

[10] *Ibid*.

[11] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 113 (*Delgamuukw)*. See also *Tsilhqot'in, 2014 SCC 44* at para. 74 *(Tsilqot'in)*.

[12] *Ibid.* at para. 128.

[13] *Tsilhqot'in*, *supra* at para. 74.

[14] *Ibid*. at para. 70.

[15] *Ibid*. at para. 73.

[16] *Ibid*. at para. 89-90.

[17] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[18] Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*: *Tsilqot'in*, *supra* at paras. 89-90.