

More Questions Than Answers with Signing of Agreement to Recognize Aboriginal Title on Private Land

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April 18, 2024

On April 14, 2024, barely two weeks following its public release,¹ the province of British Columbia (Province) announced an agreement (Agreement) had been signed by the Province and the Council of the Haida Nation (Haida Nation) to recognize the Haida Nation's Aboriginal title over all lands on Haida Gwaii – including privately owned lands.² This Agreement raises many serious questions regarding:

1. the protection of privately owned fee simple interests;
2. the effect of the Province recognizing a constitutionally protected Aboriginal right but attempting to limit its application by way of a non-constitutional agreement;
3. whether the Province is constitutionally capable of unilaterally recognizing Aboriginal title; and
4. whether the Province is in breach of its own legislation including the *Land Title Act*.³

The Province and the Haida Nation are also working on legislation which would implement the Agreement.⁴ This Cassels Comment provides important updates from our [earlier analysis](#).

It appears that the Province has not 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 which the Supreme Court of Canada has said is inherent in section 35 of the *Constitution Act, 1982*.

The Crown is entitled to proactively recognize Aboriginal title rather than force Indigenous groups to litigate for its recognition. Recognition, however, must not strain the Canadian legal and constitutional structure and must support a cogent understanding of the law.

The Agreement

The Agreement recognizes and affirms the Haida Nation has Aboriginal title to Haida Gwaii, protected under Section 35, *Constitution Act, 1982*.⁵ It provides that “Haida Title” includes “ownership of and a right of jurisdiction over Haida Gwaii.”⁶ It also defines “Aboriginal title” as having the meaning given to that term in the common law.⁷

In spite of broad assurances set out in the Province's communications and in the Agreement that fee simple rights on Haida Gwaii will not be disturbed, significant concerns remain. Simply put, it is not enough for the Province and its surrogates to say that the Agreement protects private interests in the face of constitutional law to the contrary.

Fee Simple Lands

The Agreement contains irreconcilable provisions as to the recognition of Aboriginal title over fee simple lands. Specifically, the Agreement adopts a definition of Aboriginal title consistent with the common law (which would grant the Haida Nation, among other things, exclusive use and occupation of land and the right to consent to its development), yet goes on to state that private property would not be affected by the recognition of the Haida Nation's Aboriginal title.

According to the Province, 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."⁸ Given the Province's recognition of Aboriginal title acknowledges a constitutionally protected right and the Agreement contains mere contractual commitments that, on their face, cannot limit or fetter the acknowledged Aboriginal right, the feasibility of these contractual assurances is quickly called into question. The rights in land which flow from both a fee simple interest and Aboriginal title interest (which is constitutionally defined and protected) include exclusive rights to use, occupy, and manage lands. The two interests are fundamentally irreconcilable over the same piece of land.

The Agreement provides that all lands on Haida Gwaii are vested in the Haida Nation's Aboriginal title, "*consistent with the rights and interests in Fee Simple Lands.*"⁹ Interestingly, this clause does not provide that Aboriginal title on Haida Gwaii is "*subject to*" the rights and interest in Fee Simple Lands.

The Agreement states that nothing contained therein is intended to derogate from "**Fee Simple Interests**" on Haida Gwaii. Fee Simple Interests are defined as follows:

"Fee Simple Interests" means all Fee Simple Lands and all rights, titles, estates, interests and charges in existence on the Effective Date and includes everything contained in the original grant or disposition from British Columbia or any statutory provision, all in respect of any Fee Simple Lands.¹⁰

Through the Agreement, the Haida Nation "consents to Fee Simple Interests on Haida Gwaii continuing under British Columbia's jurisdiction."¹¹ This is fundamentally irreconcilable with recognition of Aboriginal title over said fee simple lands. In addition to the uncertainty such recognition creates, the Province has not identified what would occur in the future if the Haida Nation and subsequent generations revoked consent for Fee Simple Interests to continue under provincial jurisdiction or otherwise terminated the Agreement.

The law is clear: Aboriginal title, once established by agreement or judicial declaration, requires the Crown to seek the consent of the Aboriginal title holder for development on all lands subject to Aboriginal title.

The indefeasibility of fee simple title is an *essential* element of the real property system on which landowners and our economy rely. Significant questions remain regarding whether the Province has undermined the indefeasibility of fee simple title and whether this breaches fundamental aspects of statutes such as the *Land Title Act*.

Other Existing Interests

The Agreement provides that decisions related to “**Other Existing Interests**” will be made *in accordance with* Haida Aboriginal title. Other Existing Interests is defined as follows:

“Other Existing Interest” means any interest, right or designation with respect to land, water, air, or subsurface resources on Haida Gwaii other than Fee Simple Interests, that was created by British Columbia and is in existence on the Effective Date, including any tenure, permit, license or lease, road dedication, and interests or rights related to public infrastructure such as Highways, hospitals, and schools that are held by British Columbia or a government reporting entity.¹²

This provision would likely require any Crown decision related to existing interests to be made in accordance with the consent or justification requirement outlined by the Supreme Court of Canada in *Tsilhqot'in v. British Columbia*:

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. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.

[...]

Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal

title.¹³

This is likely to impose a significant burden on those with existing interests in Crown land. In addition, following *Tsilhqot'in*, it is possible that existing authorizations may have to be revoked, if the Crown felt their continuance would unjustifiably infringe the recognized Aboriginal title of the Haida Nation.

Decision-Making

The Agreement provides that land and resource management decisions on Haida Gwaii under provincial jurisdiction will be made consistent with Haida Aboriginal title.¹⁴

While the Agreement purports to protect Fee Simple Interests, this provision would, on its face, require the Crown to follow the consent or justification process highlighted above and in *Tsilhqot'in* with respect to development on Fee Simple Lands: 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.¹⁵ This is the bundle of rights associated with constitutionally-protected Aboriginal title. A government cannot contractually limit the scope of an Aboriginal right unless by way of treaty or land claim agreement.

The Agreement is not a Treaty

The Agreement specifically provides that the Agreement is not a “treaty” within the meaning of section 35 of the *Constitution Act, 1982*, yet purports to recognize and affirm the highest form of Aboriginal right protected by the Constitution – the right to land.¹⁶

The Agreement purports to limit the scope and application of Aboriginal title – something which would appear, on its face, to be beyond the jurisdiction of the Province acting unilaterally in contract with the Haida Nation.

A treaty between Canada, British Columbia and the Haida Nation could limit the scope, content, and application of recognized Aboriginal title but Canada is not a party to the Agreement and the Agreement is not a treaty protected by section 35, *Constitution Act, 1982*.

This raises a core question behind the Agreement: *is the Province constitutionally competent to reach an agreement and legislate over the unilateral recognition of Aboriginal title?*

Section 91(24), *Constitution Act, 1867* provides to the Parliament of Canada (the federal government) exclusive legislative jurisdiction over “Indians, and lands reserved for the Indians.” While the Supreme Court of Canada has, to some extent, moved away from the strict application of federal and provincial and

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provincial authorities in favour of a more cooperative version of Canadian federalism, significant questions remain about Provincial authority to take positive action to legislate the recognition of the highest form Aboriginal right.

Regardless of the Province's capacity or legislative competence, significant inconsistencies between fee simple and Aboriginal title interests remain.

No Infringement Permitted

The Agreement provides a mechanism by which the Province or the Haida Nation can submit a particular subject for negotiation. Either party may provide a written notice of its readiness to negotiate a particular subject matter for inclusion as a schedule to the Agreement.¹⁷ The Province and the Haida Nation will seek to reach agreement on a schedule within twelve (12) months of such a notice.¹⁸

Crucially, however, it would appear the Province has, through the Agreement, fettered its ability to justify any infringements to Haida Nation Aboriginal title in the resolution of issues included in a schedule to the Agreement. Appendix "A" provides:

For greater certainty, the resolution of a Schedule may not:

[...] infringe on the constitutionally protected rights of the Haida Nation.¹⁹

Justification for infringement, in the furtherance of broader societal interests, is a *core governing tool* developed by the Supreme Court of Canada for the Crown to use to *balance* Aboriginal and non-Aboriginal interests and their respective claims, interests, and ambitions.²⁰ It recognizes that governments must legislate for societies *as a whole* (this is similar, in kind, to section 1 of the *Canadian Charter of Rights and Freedoms* which allows for reasonable limits (infringements) to be placed on rights where they are demonstrably justified in a free and democratic society).

By fettering any discretion to reconcile Aboriginal and non-Aboriginal interests in the resolution of items submitted as a schedule to the Agreement, the Province appears to have determined that, on Haida Gwaii, an Aboriginal interest takes priority over *any* consideration of competing non-Aboriginal or broader societal interests.

Conclusion

The Agreement introduces significant uncertainty for those with fee simple lands on Haida Gwaii and for those who rely on the stability and long-term nature of Crown land use authorizations for their business

operations. The Agreement also creates uncertainty regarding what else the Province is considering to further their version of “reconciliation.” For example, does the Agreement give any insight into the Province’s views on the rights of private property owners in the face of other Aboriginal title claims?

Contrary to the assertions of the Province, the Agreement creates even greater uncertainty than litigation by fashioning a version of Aboriginal title which is unknown at law and may not be within the legislative competence of the Province to recognize.

The Province has attempted to assuage concerns that fee simple interests on Haida Gwaii could be impacted by such a sweeping recognition of Aboriginal title but does not appear to have considered the fundamental inconsistency which exists between fee simple and Aboriginal title interests in land.

The Agreement provides no mechanism for engagement with non-Aboriginal interest holders on Haida Gwaii and it is unclear, to date, how the Province intends to engage private landowners with regard to the potential impacts of the recognition of Aboriginal title over fee simple lands, including impacts on land values and financing, project development, or other land use activities.

The Haida are entitled to work with the Crown to resolve historic differences and have their Aboriginal title recognized, but the Crown, who is duty-bound to govern on behalf of all British Columbians, must articulate an understanding of Aboriginal title which is consistent with Canadian law and the rights and interests of other landowners.

It is not enough for the Province and its surrogates to say that the Agreement protects private interests in the face of constitutional law to the contrary. It has become increasingly clear that there is a palpable need for a long-term sustainable public policy approach to these issues *that is respectful of Canadian law*, and which balances the rights of Indigenous peoples with the rights of non-Indigenous peoples in a fair and reasonable way. These issues do not lend themselves well to election-cycle decision-making but rather demand a longer-term, strategic, and thoughtful approach.

¹ Haida Title Lands Agreement Between the Haida Nation and British Columbia ([online](#)) [Agreement].

² Office of the Premier, Haida Nation, B.C. recognize Haida Aboriginal title, a historic first in Canada ([online](#)).

³ *Land Title Act*, R.S.B.C. 1996, c. 250.

⁴ Province of British Columbia, General Fact Sheet on Draft Agreement ([online](#)).

⁵ Agreement at 2.1.

⁶ *Ibid.* at 9.1.

⁷ *Ibid.* See for example *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

⁸ Province of British Columbia, Draft Agreement on Haida Aboriginal Title: March 15, 2024 ([online](#)); see also Agreement at 1.2a and 4.6.

⁹ Agreement at 8.7.

¹⁰ *Ibid.* at 9.1; “Fee Simple Lands” means all fee simple estates in land held by indefeasible title, as defined in the *Land Title Act*, or other means.

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¹¹ *Ibid.* at 4.5.

¹² Agreement at 9.1.

¹³ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras. 90, 92.

¹⁴ Agreement at 4.19.

¹⁵ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 90.

¹⁶ See Agreement at 8.8: This Agreement is not a treaty but is part of a reconciliation process.

¹⁷ Appendix A, at 3.

¹⁸ Appendix A at 4.

¹⁹ Appendix A at 9b.

²⁰ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 1.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.