

BC Supreme Court Confirms Aboriginal Title Over Haida Gwaii

Thomas Isaac, Jared Enns, Devon Campbell

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On September 5, 2025, the British Columbia Supreme Court (BCSC) pronounced an order (Haida Title Order), pursuant to which the following declarations were issued:

- the Haida Nation has Aboriginal title (Haida Title Declaration), recognized and affirmed under s. 35(1) of the *Constitution Act, 1982*, to the terrestrial areas of Haida Gwaii (Haida Gwaii Terrestrial);
- the Haida Nation, Canada, and British Columbia will give effect to the declaration of Aboriginal title in accordance with the terms and conditions of the “Rising Tide Agreement” and the “Big Tide Agreement” (Haida Title Agreements)¹;
- to provide adequate time for legislative amendments, the effect of the declaration of Aboriginal title is suspended in relation to the Attorney General of Canada for a period of 24 months from the date of the Haida Title Order, in respect of its application to:
 - certain national parks, conservation areas and heritage sites;
 - any estate, title or interest held by Canada on the Haida Gwaii Terrestrial; and
 - lands on the Haida Gwaii Terrestrial that are “reserves” within the meaning of the *Indian Act*, including lands on Haida Gwaii that may set apart as reserves after the date of the Haida Title Order.

Importantly, Canada and BC consented to the Haida Title Order which, as noted by the BCSC in brief reasons accompanying the Haida Title Order, marks the first time a declaration of Aboriginal title has been issued by consent.²

A brief timeline of events, following the execution of the Agreements pursuant to which Canada and British Columbia recognized the Haida Nation’s Aboriginal title to the Haida Gwaii Terrestrial, is as follows:

- **April 2024:** BC and the Haida Nation signed the Rising Tide Agreement that recognizes Aboriginal title over Haida Gwaii, including private land.³
- **May 2024:** The BC legislature assented to the recognition of Haida title as contemplated in the Rising Tide Agreement.⁴
- **December 2024:** Canada and the Haida Nation signed the Big Tide Agreement that reflects similar commitments to the Rising Tide Agreement.⁵
- **September 2025:** The BCSC issued the Haida Title Order, by consent, declaring Aboriginal title over Haida Gwaii Terrestrial in accordance with s. 35(1) of the *Constitution Act, 1982*.

Overview of the Reasons

As noted above, Canada and British Columbia consented to the Haida Title Order. Even in the unprecedented context of an application for “a declaration of Aboriginal title by consent,” the BCSC held that declaratory relief is a discretionary remedy⁶ and requires satisfaction of the following conditions:

- there is evidence to support the declaration;
- the court has jurisdiction to hear the dispute;
- the dispute before the court is real and not theoretical;
- the party raising the issue has a genuine interest in its resolution; and
- the respondent has an interest in opposing the order sought.⁷

In addition, the BCSC noted that declarations should not be issued in circumstances “where there is no practical effect or utility to the declaration or ‘where there exists an adequate alternative statutory mechanism to resolve the dispute or protect the rights in question.’”⁸

The Court questioned whether a declaration recognizing Aboriginal title was necessary, noting that the declaration’s practical utility was diminished by both the unanimous consent provided, and the statutory recognition of Aboriginal title as contemplated in the Haida Title Agreements. Referencing *Shot Both Sides v Canada*,⁹ a recent Supreme Court of Canada (SCC) decision, the BCSC held that, although there was no conflict between the parties, the Haida Title Declaration would provide practical utility because it would “recognize and promote reconciliation and uphold the honour of the Crown.”¹⁰ The Haida Title Declaration would also assist in informing the undecided issues in the litigation, including damages for potential infringement and interference with Haida title, and the recognition of marine-related rights.¹¹

Discussion

The Haida Title Order must be considered in light of the BCSC’s recent *Cowichan Tribes v Canada* (AG) decision (*Cowichan Tribes*), which recognized Aboriginal title over fee simple/private-owned lands for the first time.¹² The Court found that both interests may coexist, however, Aboriginal title is superior, and the Aboriginal title holder may take steps to enforce their claim over fee simple title.¹³ The Court also held that key provisions in the BC *Land Title Act* (ss. 23, 25) do not protect fee simple owners from actions for land recovery in the Aboriginal title context.¹⁴

The Haida Title Agreements recognize and affirm Haida’s Aboriginal title, while simultaneously providing that overlapping fee simple interests will remain unaffected.¹⁵ However, these commitments to the Haida Nation (as holder of Aboriginal title) and to the fee simple owners are incompatible: Aboriginal title confers an exclusive right to the land itself, except for justifiable infringements.¹⁶

The Haida Title Agreements are not constitutionally-protected treaties but rather contracts. It is therefore also unclear whether the Haida Nation's commitments that conflict with the nature of Aboriginal title are enforceable.¹⁷ It is not known how overlapping fee simple interests may be impacted if (i) the Haida Nation breaches or terminates the Haida Title Agreements; or (ii) an appeal court finds that fee simple interests and Aboriginal title cannot coexist.

The Haida Title Declaration raises a number of questions:

- As fee simple title holders are not privy to the Haida Title Agreements, what recourse, if any, will private parties have against the Crown or Haida Nation if there is a breach of the Haida Title Agreements that affects their overlapping fee simple title interests?
- What recourse might fee simple title holders have against the Crown if they suffer losses or damages as a result of the Haida Title Agreements and/or the Haida Title Declaration? (i.e. inability to mortgage or sell land, requirements for additional security to obtain a mortgage or Haida Nation withholding consent for Crown authorizations)
- The question of whether Aboriginal title can be recognized over fee simple lands is currently before the BC Court of Appeal (BCCA) in *Cowichan Tribes*. Should the BCCA determine that Aboriginal title cannot coexist with fee simple lands, will the commitments in the Rising Tide Agreement and/or the Haida Title Declaration remain valid and binding?
- In *Cowichan Tribes*, BC opposed the Aboriginal title declaration sought on the basis that Aboriginal title and fee simple *could not* coexist because both include a right to exclusive use and occupancy.¹⁸ However, the BCSC specifically references the Haida Title Agreements in which BC concedes that they *could* coexist. Will this concession limit BC's ability to defend future Aboriginal title claims where declarations are sought against fee simple lands? What impact will this have on BC's economy and certainty of title across the province?¹⁹

Though the full commercial implications of the Haida Title Agreements and the associated Haida Title Order remain uncertain at this time, the SCC's jurisprudence is clear: Aboriginal title confers a right of exclusive use and occupation.²⁰ The recognition of Aboriginal title over fee simple lands in the Haida Title Agreements, combined with the BCSC's recent declarations recognizing the same, make it presently unclear as to how these exclusive interests in land interact. Uncertainty will burden fee simple interests subject to Aboriginal title claims – including those impacted by the Haida Title Agreements – until courts provide clarity on the interaction between these competing land rights.

¹ Cassels previously published a commentary that considers implications and uncertainties surrounding the Rising Tide Agreement, which can be found [here](#).

² See *The Council of the Haida Nation v British Columbia*, [2025 BCSC 1806](#) [Reasons].

³ British Columbia and Haida Nation, *Gaayhlxid • Gíihlagalgang "Rising Tide" Haida Title Lands Agreement* (14 April 2024) [Rising Tide Agreement].

⁴ See *Haida Nation Recognition Amendment Act, 2024*, [SBC 2024, c 23](#).

⁵ Canada and Haida Nation, *Chiix?uujin / Chaaw K?awgaa "Big Tide (Low Water)" Haida Title Lands Agreement* (4 December 2024) [Big Tide Agreement].

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⁶ Reasons at para 4.

⁷ Reasons at paras 4-5, referencing *Ewert v Canada*, [2018 SCC 30](#) at paras 81-83 [*Ewert*] and *Both Sides v Canada*, [2024 SCC 12](#) at para 67 [*Shot Both Sides*].

⁸ Reasons at para 6, quoting *Ewert* at para 83.

⁹ *Shot Both Sides*.

¹⁰ See Reasons at para 10; *Shot Both Sides* at paras 72-74 (Note: *Shot Both Sides* concerned a declaration in the context of Aboriginal treaty rights and had a different conceptual basis compared to the recognition of Aboriginal title).

¹¹ Reasons at para 11.

¹² [2025 BCSC 1490](#) [*Cowichan Tribes*]. Note: The Cowichan Tribes decision is subject to appeal. Cassels previously published a commentary that summarizes this decision and its potential impacts, which can be found [here](#).

¹³ *Cowichan Tribes* at paras 2205-2208, 3588-3589.

¹⁴ *Cowichan Tribes* at para 3551; *Land Title Act*, [RSBC 1996, c 250](#) at ss 23, 25.

¹⁵ Rising Tide Agreement at arts 1.2, 4.4-4.6; Big Tide Agreement at arts 1.2, 4.16-4.17.

¹⁶ For a description of the interests conferred by Aboriginal title, see *Tsilhqot'in Nation v British Columbia*, [2014 SCC 44](#) at para 70 [*Tsilhqot'in*].

¹⁷ Rising Tide Agreement at art 8.8; Big Tide Agreement at art 8.7 (Note: This is because treaty rights flow from treaties themselves, not Section 35, see *Shot Both Sides* at para 32).

¹⁸ *Cowichan Tribes* at para 3564.

¹⁹ In other words, recognition of Haida's title in the Haida Title Agreements might have a much broader impact than to the Haida Gwaii Terrestrial lands.

²⁰ *Delgamuukw v British Columbia*, [1997 CanLII 302](#) at para 117 (SCC); *Tsilhqot'in* at para 70.

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