MORE THAN MEETS THE EYE: THE LEGAL IMPLICATIONS OF BRITISH COLUMBIA’S AGREEMENT TO RECOGNIZE ABORIGINAL TITLE OVER HAIDA GWAIU

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On April 14, 2024, British Columbia’s Premier David Eby and Minister Murray Rankin signed an agreement to “recognize and affirm” that the Haida Nation holds Aboriginal title over the entirety of Haida Gwaii (formerly known as the Queen Charlotte Islands) and surrounding waters (the “Agreement”).[1] The Agreement follows a BC law passed in 2023 (the Haida Nation Recognition Act) that recognized the Haida Nation has “inherent rights of governance and self-determination.”[2]

The signing of the Agreement followed a Haida Nation Council referendum in which 95% of Haida Nation voters voted in support of the Agreement.[3]

No referendum was held for the residents of Haida Gwaii who are not members of the Haida Nation, though section 1 of the BC Referendum Act would have allowed the BC Cabinet to do so.[4]

Eight days later, the government introduced Bill 25 to implement the Agreement.

The Agreement and Bill 25 raise a number of important legal questions about the potential impact on private property owners, businesses and others.

What is Aboriginal Title?

Aboriginal title is the strongest form of Aboriginal right recognized in Canada and affirmed by s. 35 of the Constitution Act, 1982.[5] The Supreme Court of Canada has called it “the right to choose to what uses land can be put,”[6] and added:

Aboriginal title confers ownership rights similar to those associated with fee simple, including: 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 proactively use and manage the land.[7]

To establish Aboriginal title a group claiming it must be able to show it had exclusive use and occupancy of a
specific area at the time of the assertion of British sovereignty in BC (1846) and that such title was not extinguished by the Crown (directly or implicitly through actions) prior to 1982 when s. 35 was added to Canada’s constitution.[8]

To date, Aboriginal title has been judicially declared in only one place in Canada. It is an area of approximately 1,750 sq. km in the central interior of BC, for which the Supreme Court of Canada held in 2014 that the Tsilhqot’in Nation had demonstrated it had proven a case for Aboriginal title over a portion (but not all) of its claimed territory.[9] Importantly, even within the area where the Supreme Court of Canada found the test for Aboriginal title to have been met, it expressly excluded private lands from the declaration.[10]

Aboriginal title does not displace Crown title or undermine Crown sovereignty. Instead, it is considered a “burden on Crown title” and places significant constraints on the ability of any government – federal or provincial – to manage and regulate Aboriginal title lands.

Once Aboriginal title is determined to exist, federal and provincial laws that interfere with it will only be valid if they can meet a rather stringent “justification” test. This would require the government to:

- demonstrate a compelling and substantial governmental objective;
- go no further than necessary to achieve it (minimal impairment);
- ensure the benefits are not be outweighed by adverse effects on the Aboriginal interest;

or obtain the Indigenous group’s consent.[11]

**The Preliminary Question – Does BC Even Have the Power to Do This?**

Under Canada’s constitution, the province is only able to make laws in relation to certain subject matters. Similarly, the federal government has such powers for other areas.

More specifically, under s. 91(24) of the Constitution Act, 1867, only the federal government has the power to make laws that are “in pith and substance” related to “Indians, and lands reserved for the Indians” (as those terms were used in 1867).[12]

While the courts have, especially in recent years, allowed provinces to pass laws that have some incidental effects on federal jurisdiction (and vice versa), there is a legitimate question as to whether a law specifically directed at the recognition and implementation of Aboriginal title[13] would be found unconstitutional if passed only by a provincial legislature. It is in part for this reason that modern-day treaties are given legal effect through matching federal and provincial implementing laws.

**Questions About Fee Simple Land**
The Agreement says “The Haida Nation consents to and will honour Fee Simple Interests.” But how does one reconcile this with the fact that the Supreme Court of Canada has said Aboriginal title is a “communal” right, and that it is not something an Indigenous group can transfer, sell, or surrender, except to the Crown (i.e., it is “inalienable to third parties”)?

Even if a fee simple title can be “consented to” by a First Nation where Aboriginal title exists, what rights will the fee simple ownership really give people when Aboriginal title includes the “right to choose the use to which the land is put?” Will the Haida Nation’s ability to regulate uses of private fee simple land be similar to local government’s zoning powers? If so, how will this reconcile with the local government powers? Will it matter that non-Haida residents cannot vote in Haida elections?

All this may raise questions as to whether banks, credit unions or other lenders will be willing to continue to issue mortgages for the purchases of “fee simple” lands on Haida Gwaii, and if so on what terms and at what rates they may be issued.

Questions About Other Interests

What about people and companies that hold interests other than fee simple ownership, for example mineral or forestry tenures, permits, leases, licenses and rights-of-way?

Bill 25 provides that laws related to Crown land continue to apply on the land that is subject to aboriginal title, and other interests and rights are “continued”. But this is included in a section entitled “Interim measures in relation to land” and for which the opening statement is this:

The government of British Columbia acknowledge[s] that the measures set out in this section are interim measures and that changes to the laws of the Haida Nation and the laws of British Columbia are necessary to reconcile systems of law and governance on Haida Gwaii.

Bill 25 also states that laws related to Crown land “are to be administered consistently with that aboriginal title”. Will this mean the minister responsible for the Land Act can only issue, amend or extend Land Act tenures when and as the Haida Nation directs?

Questions About the Implications for the Federal Government

The Agreement is between the Haida Nation and:

**HIS MAJESTY THE KING IN RIGHT OF BRITISH COLUMBIA**, as represented by the Premier of British Columbia and the Minister of Indigenous Relations and Reconciliation (“British Columbia”).
Does this mean Aboriginal title has now been acknowledged by the Crown as a whole, given that the Crown is considered indivisible?

What if the federal government takes a different view on whether and where Aboriginal title is established on Haida Gwaii? Will that trump the BC recognition? Will the federal government be caught by BC’s recognition and thus be subject to a higher standard of legislation going forward (i.e., the need to meet the “justification” test or get Haida Nation consent)?[19]

Questions About the Process Going Forward

The Agreement provides that “The exercise of Haida Nation and British Columbia jurisdictions will be reconciled through the Transition Process described in Appendix A.”[20] That appendix states:

1. The Parties will undertake an incremental Transition Process, estimated to take two years, ... to enable the reconciliation of Haida Nation and BC jurisdictions and laws consistent with Haida Aboriginal title.[21]
2. The initial focus of the Transition Process will be on land and resource decision-making on Haida Gwaii, and the Parties will begin by addressing Protected Areas, fishing lodges and forestry...[22]

Will non-Haida Nation residents and businesses have a right to participate in or be consulted in respect of those processes? There is nothing in Schedule A that speaks to any consultation with the public or potentially affected people or businesses.

Conclusion

The Agreement and Bill 25 raise some important legal and practical issues, which may be of concern to commerce and industry operating on Haida Gwaii, to non-Haida British Columbians living on Haida Gwaii, as well as to individuals within the Haida Nation who may hold fee simple land themselves or through businesses. But will it affect others, beyond Haida Gwaii? Will the same model be applied in other areas of BC?

The answer appears to be “yes” as Premier David Eby was recently quoted in a Canadian Press report stating:

The stars are aligned in this moment, and if we can — on both sides — demonstrate that this is successful, then I think it makes it more possible to do it in other places in British Columbia, and also in Canada because it’ll provide a bit of a template for everybody about what the world of the possible is.[23]

[1] See GAAYHLLXID • GÍIHLAGALGANG “RISING TIDE” HAIDA TITLE LANDS AGREEMENT BETWEEN THE HAIDA NATION AND BRITISH COLUMBIA.
[8] Supra note 7 at paras 117 and 143.
[9] Tsilhqot’in Nation v. British Columbia, 2014 Supreme Court of Canada 44. The BC Supreme Court also recently concluded that the Nuchatlaht First Nation has a basis to establish Aboriginal title over a portion of its claimed territory, though no formal declaration has been made at this time “because the Province wanted to make submissions with respect to its terms, and in favour of a delay in to its coming into effect”. The Nuchatlaht v. British Columbia, 2024 BCSC 628
[14] Supra note 1 s. 4.4.
[16] Ibid at para 113.
[17] Section 4.4
[18] Ibid.
[20] Ibid s. 3.3.
[21] Ibid Appendix A s. 1.
[22] Supra note 1 s. 2.

by Robin Junger, Tim Murphy, Cory Kent, Joan Young, and Sasa Jarvis

**A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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