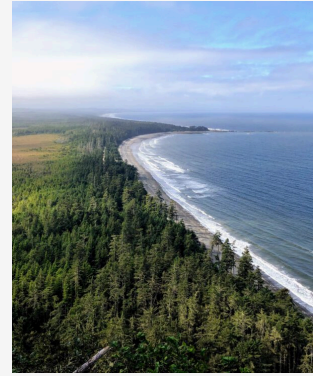


B.C. recognizes Haida Nation's title to Haida Gwaii — what the historic agreement makes clear, and questions remaining

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On April 14, 2024, the province of British Columbia (B.C.) entered into an agreement with the Council of the Haida Nation (Haida Nation) recognizing Haida Nation's Aboriginal title over Haida Gwaii, an island region of approximately 10,000 square kilometers off the northern coast of B.C. The *Gaayhlxid • Gihlagalgang "Rising Tide" Haida Title Lands Agreement* (the Agreement)^[1] [PDF] is the first agreement of its kind and is a significant development in B.C.'s implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.^[2]

This Update (i) provides a summary of the legal background and context of Aboriginal title generally, and the history of Haida Nation's clam for Aboriginal title over Haida Gwaii (ii) identifies the key aspects of the Agreement and (iii) highlights outstanding questions that still need to be resolved.

Background

1. What is "Aboriginal title"

"Aboriginal title" confers upon an Indigenous group the right to exclusive use and control of the land, and to reap the economic benefits flowing from it.^[3] Where Aboriginal title is established, incursions on the land are only allowed with the consent of the Indigenous group, or if the Crown can establish the incursion is justified by a compelling and substantial public purpose consistent with the Crown's fiduciary duty to the Indigenous group.^[4]

In practice, courts and governments give great deference to Aboriginal title as it effectively recognizes the Indigenous community's legal authority to determine how, and by whom, the subject lands may be used.^[5] Aboriginal title is similar to, but not the same as, a fee simple interest in land (the highest form of common law interest in private land, granting the holder complete rights to use, possess, and transfer the property indefinitely).^[6] One important difference is that Aboriginal title is a "collective title held for all succeeding generations".^[7] This means Aboriginal title land cannot be alienated (e.g., sold) except to the Crown, or used or encumbered in ways that would prevent future generations of the group from using and enjoying it.^[8]

The concept of Aboriginal title was discussed extensively by the Supreme Court of Canada (SCC) more than 26 years ago in *Delgamuukw v British Columbia*.^[9] *Delgamuukw* established a three-part test still relied upon today for Aboriginal title, which requires that Indigenous claimants establish (i) the land has been occupied prior to sovereignty (ii) there is continuity between present and pre-sovereignty occupation (if present occupation is relied on as proof of occupation pre-sovereignty) and (iii) the occupation of those lands has been exclusive at the time of sovereignty.^[10] These factors are often difficult to meet in practice. Prior to April 2024, only one case had actually established Aboriginal title.^[11]

2. Brief history of the Haida Nation's legal claims to Haida Gwaii

The Agreement must be understood in the context of the decades-long dispute between Haida Nation and the B.C. Crown over Haida Gwaii land use and title. The land has been the subject of extensive litigation, including the SCC's 2004 decision in *Haida Nation v British Columbia (Minister of Forests) (Haida)* — the landmark SCC decision regarding the Crown's duty to consult.^[12]

Haida Nation has asserted title over Haida Gwaii for more than a century, and led strong evidence in *Haida* establishing continuous occupation since at least 1774. In *Haida*, the SCC noted that the Haida people had never been conquered, never surrendered their ways under a treaty, and had never had their rights extinguished by federal legislation.^[13] The SCC accordingly found that Haida Nation had established a strong prima facie case for Aboriginal title and that B.C. had failed to meet its duty to consult in relation to the subject forestry licences.^[14] The case did not establish Haida Nation's Aboriginal title to Haida Gwaii at law. However, the Court acknowledged the strength of Haida Nation's claim and strongly suggested that the B.C. government negotiate towards reconciliation.^[15]

In the 20 years since *Haida*, B.C. and Haida Nation have repeatedly sought resolution to the question of Haida Nation's Aboriginal title claim to Haida Gwaii. Negotiation efforts resulted in several earlier agreements between Haida Nation, B.C., and Canada,^[16] which included recognizing Haida Nation as the rightful governing and representative body of the Haida people and holder of "Haida Title and Rights," yet stopped short of establishing full Aboriginal title.

Alongside negotiations, litigation has also proceeded. On November 14, 2002, Haida Nation initiated a civil claim against B.C. and Canada (the Haida Title Case) seeking a declaration of Haida Nation's Aboriginal title over Haida Gwaii and an accounting of all profits, taxes, stumpage dues, royalties, and other benefits acquired by B.C. and Canada, or their servants, agents, and contractors, in respect to Haida Gwaii.^[17] The Haida Title Case is still ongoing, with a hearing date set for May 4, 2026.

The new Agreement

The Agreement has two stated purposes:

- First, to recognize that Haida Nation has Aboriginal title to the entirety of Haida Gwaii land.^[18] This is the first such agreement where any Crown (federal or provincial) has proactively acknowledged Aboriginal title to an area without reservation. On the one hand, this is simple in principle and fundamentally resolves the basic issue of whether Haida

Nation's Aboriginal title to Haida Gwaii exists. On the other, and as discussed below, details of what this means in practice — for example, in relation to Haida Nation's claims to other traditional territory and coastal waters, shared jurisdiction between Haida Nation and B.C., or damages and compensation arising from occupation of those lands — remains to be seen.

- Second, to create a transition process to reconcile overlapping jurisdiction between B.C. and Haida Nation on Haida Gwaii, in light of Haida Nation's Aboriginal title. To this end, the Agreement makes some positive steps, but leaves many issues to be determined through an extensive implementation process which the Agreement ambitiously estimates will be completed within the next two years (Transition Process).

The following sets out what the Agreement makes clear, and what remains to be determined through future negotiations or litigation.

What the Agreement makes clear

- **Private fee simple property interests are protected:** the common law is unclear on how to reconcile legal rights in land that is simultaneously granted as fee simple to private parties, and subject to Aboriginal title. The Agreement aims to fill this gap in law by providing the following guarantees:
 - Haida Nation agrees to honour private property rights on Haida Gwaii and private property rights continue to be governed under B.C. jurisdiction, while B.C. recognizes that Aboriginal title underlies the private property interest;^[19]
 - any fee simple lands that do ultimately escheat back to B.C. will be transferred (as fee simple) to Haida Nation; and^[20]
 - any fee simple interests acquired by Haida Nation only will be acquired on a willing seller basis, by gift or will, or following the above-mentioned final escheat. This appears to safeguard against existing Haida Gwaii private property being taken against the will of its owners.^[21]

While some have raised concerns that simultaneously recognizing Aboriginal title and fee simple property interests is legally incoherent and may lead to uncertainty, the issue of private property rights is unlikely to have significant practical effect given that only 2.2% of Haida Gwaii is privately owned.^[22]

- **Delivery of provincial public services remain status quo:** the Agreement does not intend to derogate from B.C.'s provision of public services on Haida Gwaii.^[23] This includes the ongoing provision of public services by B.C. and local governments, including health, education, transportation, maintenance of provincial public highways, and fire and emergency services.^[24]
- **Federal jurisdiction persists:** Canada, as the federal Crown, is not party to the Agreement. As such, the Agreement does not address or derogate from the federal Crown's interests on Haida Gwaii, including in marine areas, the Gwaii Haanas National Park, lands used for national defence purposes, or federal public infrastructure.^[25]

- **Haida Nation is entitled to negotiations for return of Crown lands no longer needed by B.C.:** the Agreement provides that B.C. and Haida Nation will negotiate the return of fee simple interests and other existing interests held by B.C. for public infrastructure, the provision of public services, or other public purposes, where those lands are no longer needed by B.C.^[26]
- **Third-party interests continue during the Transition Process:** The Agreement has no effect for the duration of the Transition Process on non-fee simple property interests, such as tenures, permits, licences, or leases relating to the land, water, air or subsurface resources and any rights or property interests in public infrastructure, such as highways and hospitals (defined under the Agreement as Other Existing Interests).^[27] However, Haida Nation may discontinue such interests held by it.^[28] Moreover, any further decisions made on such Other Existing Interests by B.C. will be made in accordance with the rights of Aboriginal title; namely, with Haida Nation's consent and in accordance with B.C.'s duty to consult.^[29] New legislation and rules affecting Other Existing Interests may be expected during the Transition Period, which will take effect upon coming into force.
- **Provincial jurisdiction regarding administration of natural resources remains unaffected until transferred through the Transition Process:** Under the Agreement, Haida Nation and B.C. will focus on negotiating a decision-making process with respect to land and natural resources, including subsurface resources on Haida Gwaii.^[30] Until then, B.C. will continue to oversee recovery of natural resources in Haida Gwaii. Pursuant to s. 4.11(c) of the Agreement and Haida Nation's Aboriginal title, projects that seek to operate in Haida Gwaii will likely require B.C. to seek consent from the Haida Nation.

Questions that remain:

- **Exercise, administration, and allocation of overlapping Haida Nation and B.C. jurisdiction:** a key question that remains to be seen is how exactly B.C. and the Haida Nation will reconcile their overlapping jurisdiction on Haida Gwaii. While the Agreement expects negotiations to resolve these matters during the Transition Process, it does not identify any clear endpoints or anticipated structure for how jurisdiction over the practical and legal administration of the land and natural resources will be shared between the two parties. For example, yet to be determined is whether Haida Nation will have full jurisdiction over all Other Existing Interests which are currently administered by the province (including the issuance of tenures, permits, licenses or leases on Haida Gwaii, such as forestry or mineral resources), or what form the exercise of this jurisdiction may take.

Jurisdiction over protected areas (i.e., Haida Gwaii sites designated under Haida and provincial law as Haida heritage sites, parks, conservancies or ecological reserves), fishing lodges, and forestry will be the priority negotiation topics during the Transition Process.^[31] Further negotiation topics are related to jurisdiction over freshwater on Haida Gwaii, fiscal arrangements, provincial taxation matters, and "any other matters as may be agreed to by the parties".^[32]

- **Federal jurisdiction:** as noted above, Canada is not bound by the Agreement. This leaves Canada's interests on Haida Gwaii, such as income tax, fisheries, marine matters (including

water column and navigation), and governance resourcing, redress and compensation, and “other matters of federal jurisdiction” open to separate negotiation or litigation.^[33]

- **The Haida Title Case:** the Agreement expressly states that it is not intended to delay the commencement of the Haida Title Case “for issues that have not been resolved through negotiation.”^[34] Though the Agreement does not explicitly state what has not been resolved through negotiation, based on the relief sought in the Haida Title Case, it is likely that Haida Nation will still be seeking recourse, including recognition of Aboriginal title for certain areas of Haida Gwaii not covered by the Agreement (i.e., beyond the terrestrial areas as defined in the Agreement),^[35] and compensation for damages.

Conclusion

The Agreement represents an unprecedented step in the realm of Aboriginal title claims. The Agreement is one of very few instances in which Aboriginal title has been formally recognized, and is the first formal recognition of Aboriginal title to occur through negotiation and settlement instead of by court intervention.

While the Agreement is an historic step in furtherance of reconciliation, the extent to which this Agreement can serve as a blueprint for future Aboriginal title claims remains to be seen. Haida Nation’s claim is exceptional in a number of ways: Haida Gwaii is geographically isolated with no competing claims for Aboriginal title from other Indigenous peoples; extensive unceded territory remains on Haida Gwaii;^[36] the Haida people have led strong evidence of continuous occupation since at least 1774;^[37] and, perhaps most uniquely, the strength of the Haida people’s title claim has been acknowledged by Canada’s highest court, which expressly directed resolution through negotiation.

Nonetheless, the Agreement remains significant as it demonstrates the possibility for Aboriginal title to be recognized through direct, collaborative negotiations between governments, instead of through lengthy adversarial court processes. It marks a positive step away from protracted litigation that has characterized Aboriginal title claims, toward greater cooperation and legal certainty.

[1] The Haida Nation and His Majesty the King in Right of British Columbia, “Gaayhlxid • Gíhlagang “Rising Tide” Haida Title Lands Agreement” (14 April 2024) [Agreement].

[2] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, s 3.

[3] *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at paras 2 and 67 [*Tsilhqot’in*].

[4] *Tsilhqot’in* at paras 2 and 76.

[5] *Tsilhqot’in* at para 73

[6] 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. See *Tsilqot'in* at para 73.

[7] *Tsilqot'in* at para 74.

[8] *Tsilqot'in* at para 74.

[9] [1997] 3 SCR 1010 ["*Delgamuukw*"]. Though we note that Aboriginal title has been recognized as a common law concept prior to *Delgamuukw* in, for example, *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313.

[10] *Delgamuukw* at para 143.

[11] *Tsilqot'in*. Recently, the British Columbia Supreme Court issued a decision on April 17, 2024 recognizing that small tracts of land on Nootka Island met the test for Aboriginal title by the Nuchatlaht. This case is anticipated to be appealed by the Nuchatlaht to claim title over the full 201 square kilometers of Nootka Island.

[12] 2004 SSC 73 ["*Haida*"].

[13] *Haida* at para 69.

[14] *Haida* at para 71.

[15] *Haida* at para 38.

[16] Including the *Nang K'uula • Nang K'úulaas Recognition Agreement* (PDF).

[17] Action No L020662 [Haida Title Case].

[18] Agreement, s 1.1(a)

[19] Agreement, ss 2.1 and 4.4-4.6.

[20] Agreement, s 4.7.

[21] Agreement, s 4.8.

[22] Pierce Lefebvre Consulting, "Socio-Economic Assessment of Haida Gwaii/Queen Charlotte Islands Land Use Viewpoints – Final Report" at PDF 64 (31 March 2006), online (pdf): <https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/land-use-plans-and-objectives/westcoast-region/haidagwaii-slua/socio_economic_assesstment_land_use_viewpoints.pdf>.

[23] Agreement, s 1.2.

[24] Agreement, s 4.15.

[25] Agreement, s 7.2.

[26] Agreement, s 4.18.

[27] Agreement, s. 4.11(a).

[28] Agreement, s. 4.11(b).

[29] Agreement, s. 4.11(c).

[30] Agreement, Appendix A, s 2.

[31] Agreement, Appendix A, s 2.

[32] Agreement, s 6.1.

[33] Agreement, s 7.1.

[34] Agreement, s 6.2.

[35] Which include lands above and below the surface and submerged lands. See Agreement, s 9.1, definition of “Haida Gwaii”.

[36] *Haida* at para 1. See also *Council of the Haida Nation et al v Minister of Forests et al*, 2000 BCSC 1280 at para 25. See also the Agreement at Recital G.

[37] *Haida* at para 69.