



Proposed Aboriginal Title and Rights Legislation: Implications for Local Governments

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The Province and the Council of B.C. Indian Chiefs have reportedly been negotiating the terms of proposed new legislation, the tentatively titled "Recognition and Reconciliation Act" (the "Act") which the Province is preparing for introduction to the Legislature following the provincial election on May 12 in accordance with the "Discussion Paper on Instructions for Implementing the New Relationship" (the "Discussion Paper").

Legislation Pending

The proposed Act has not yet received first reading, so information regarding the contents of the legislation is derived from the Discussion Paper. Potential implications for local governments can only be speculative until the legislation is introduced.

Key Features

It is anticipated the key legal issues and features of the Act will likely include:

- legal recognition that aboriginal rights and title exist in B.C. throughout the territory of each Indigenous Nation without requirement of proof or strength of claim;
- recognition of approximately 23 to 30 Indigenous Nations, being First Nations grouped by common historical components such as language, culture, location and other connection;
- enabling of shared decision-making in planning, management and tenure decisions over lands and resources; and
- enabling of revenue and benefit sharing agreements between the Indigenous Nations and the Province.

The proposed Act will apply within the current legislative framework by:

- applying to all ministries and provincial agencies, in particular those that have any direct or indirect role in the management of lands and resources;
- taking priority over all other provincial statutes dealing with these matters;
- not affecting constitutional and common law aboriginal rights and title or treaty rights;
- not creating new constitutional rights of law-making authority;
- not affecting federal or provincial division of powers under the *Constitution Act* or the jurisdiction of either;
- not affecting the status of existing provincial crown granted interests or tenures in land or resources, including fee simple title.

Three levels of participation by the Indigenous Nations are proposed under the legislation, which probably represents the need for First Nations connected by historical ties to first “re-constitute” those larger indigenous groups. The map attached to the Discussion Paper can be located on the Ministry of Aboriginal Recognition and Reconciliation website and shows the general division of the province into the territorial boundaries of these indigenous groups. The three levels of participation will reflect the increased coordination which may be achieved through the re-building of indigenous groups, and are described as:

- Comprehensive: this level will involve the comprehensive application of recognition principles via shared decision-making and revenue-sharing agreements throughout the territory;
- Interim: this level will involve shared decision-making and revenue-sharing agreements for certain development projects and defined “strategic decisions”, established by regulation to the Act following agreement between the Province and the First Nations Leadership Council. At this level, decision makers will be able to exercise their discretion in accordance with agreements with an Indigenous Nation; and
- Default: this level will reflect the honour of the Crown consultation principles recognizing aboriginal rights and title, and treaty rights. This level is intended to improve the current application of the Crown’s duty, analyzing the impacts of potential decisions on those aboriginal rights, title and treaty rights.

Origins of the Legislation

The Act may be a direct response to the recent *Tsilhqot’in* decision of the B.C. Supreme Court in 2008. The court found that the Tsilhqot’in First Nation had successfully proven aboriginal title to various tracts of land in their traditional territory. The court was unable, however, to grant the declaration sought by the Tsilhqot’in regarding aboriginal title as the relief claimed encompassed the entire territory, but not one or more portions of the territory. The case is under appeal.

The implications of a finding of aboriginal title are far-reaching, however, so understanding the differences in entitlement between reserve lands, treaty settlement lands, and aboriginal title lands can be useful. Briefly,

- Reserve lands are held in trust by the federal government for First Nations, the lands cannot be sold or surrendered except to the federal government, and except for some rights available under federal titling legislation, the land may only be alienated (leased or otherwise granted) with the approval of the federal government;
- Treaty settlement lands are held in fee simple, can be sold, leased or otherwise transferred or encumbered without other approval, and no limits apply to their use; and
- Aboriginal title lands are communally held, may not be sold or transferred except to the federal government, and may only be used in a manner consistent with historical uses (modernized to reflect present circumstances).

A finding of aboriginal title may act as a “veto” power, since the consent of the owner is normally required at law for any proposed use of land. To that extent, there is both an economic benefit attached to a finding of aboriginal title, as well as significant leverage in negotiations with the province in either treaty negotiations or for other land or resource rights. The *Tsilhqot’in* decision clarified that the Province is without jurisdiction to affect aboriginal title under section 35 of the *Constitution Act*, although there may be an uncertain ability to limit or otherwise affect other

aboriginal rights.¹ This means that likely the Province is without authority to expropriate aboriginal title lands, even for a significant provincial purpose. The federal government, having constitutional authority in respect of Indians and lands reserved for Indians, may have a greater power to infringe aboriginal title and rights, subject always to the limitations determined by the courts. Since the Province is without authority to impose the provisions of the draft legislation on B.C.'s First Nations, the legislation contemplates further agreements between Indigenous Nations and the Province.

There are likely a large number of unresolved First Nation court claims for declarations of aboriginal title and rights, and these claims will be strengthened by the findings of the court in the *Tsilhqot'in* decision. The financial implications to the taxpayers of the Province and Canada of multiple and very lengthy court proceedings is doubtless a factor in the Province's desire to bring forward the proposed legislation.

Importantly, the *Tsilhqot'in* decision makes it clear that "privately-held" lands² are not immune from a finding of aboriginal title, although the implications of such a finding have not been fully articulated. The general view of the court is that the Crown could not grant that which it did not own, which therefore calls into question the legality of fee simple ownership of land in British Columbia which is subject to a successful claim of aboriginal title. Whether owners of such lands would have a claim against the Province is unclear, as the ultimate limitation period under the *Limitation Act* is 30 years. This finding of the court may explain what appears will be a stated limitation in the proposed Act, in that it will not affect the status of existing provincial granted interests or tenures in land or resources, including fee simple title. This may be a preventative step to forestall the legal upheaval which could arise over the status of privately-held interests if those decisions are to be made by a court.

Implications for Local Governments

The Discussion Paper suggests the proposed Act would apply to all decisions affecting Crown lands and resources not otherwise already granted, licensed or presently encumbered, to the extent of those granted rights. No limitation is so far expressed on the future of such granted rights when they terminate, or are eligible for renewal or replacement. The Act would apply to all ministries and Crown agents. While local governments are not agents of the Provincial Crown, the Act would take priority over all provincial statutes dealing with lands or resources. As a result, the Act would likely take precedence over the *Community Charter* and *Local Government Act* regarding land use decisions for certain lands.

Some implications of the proposed legislation which may affect local governments include:

- the legislation may apply to all land use or resource decisions of local governments with respect to Crown lands within their geographic boundaries (where those lands are not already exempt from local government land use regulations by virtue of section 14 of the *Interpretation Act*³);

¹ The issue of constitutional jurisdiction with respect to abridgement of aboriginal title and rights protected under section 35 of the *Constitution Act* is complex, and the case law has been uneven in findings, which increases the complexity and uncertainty of the law in this arena.

² The expression "privately-held" here is intended to mean lands in British Columbia which exclude Crown lands, or lands held or owned by an agent of the provincial or federal Crowns. It may be of interest to note that only approximately 7% of the B.C. land mass is held in fee simple title by parties other than the provincial or federal Crown.

³ The potential implications of the Act vis-à-vis the Provincial exemption in section 14 of the *Interpretation Act* from enactments which would otherwise affect the use or development of government land and

- the legislation may apply to all future uses or change in uses of Crown lands tenured or licensed to third parties (i.e., non-Crown agents) where local government approvals for land use changes are required;
- the legislation could potentially apply to local government lands and resources if the Province includes these “quasi-public” lands as subject to the Act⁴;
- the legislation would likely apply to affect local government interests in Crown lands such as statutory rights of way, easements and licences which local governments may currently hold, or wish to obtain, for infrastructure and other purposes; and
- the legislation would likely not apply to other privately-held lands within the geographic jurisdiction of local governments, in respect of which local governments have land use decision-making authority.

Implications of the proposed legislation may be more significant for regional districts than municipalities, given the larger concentration of Crown lands. However, all local governments with rights through Crown lands, or seeking to acquire rights through Crown lands for infrastructure or other purposes, may find it more difficult to acquire or renew those rights.

improvements, is at this point uncertain. If the Act is to take priority over all provincial statutes dealing with land and resources, then theoretically the Act would supersede the Crown exemption.

⁴ The Province appeared to reverse its long-standing position that privately-held lands, which include municipally-owned lands since municipalities and regional districts are not agents of the Province, are not available for treaty settlement lands except through voluntary acquisition with the adoption of Bill 12, the *Musqueam Reconciliation, Settlement and Benefits Agreement Implementation Act*, which expropriated two parcels of park lands owned in fee simple by Metro Vancouver and by law precluded Metro Vancouver from seeking compensation.