

B.C. NDP ties the hands of its successors on land rights

Vaughn Palmer: B.C. government seeks to have it both ways in secretive land rights approach

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Drummers at a May 9, 2023, event at the legislature in Victoria celebrating the passage by the B.C. NDP of provincial legislation on the Haida Nation's inherent right of governance of the archipelago. Photo by Don Craig /Government of B.C.

VICTORIA — The New Democrats last month asked B.C. Supreme Court to constitutionally entrench Aboriginal title for the Haida Nation lest a change of government undo what the province had already recognized in legislation.

“If the legislature makes a law, it can unmake that law,” government lawyer Brent Olthuis told the court during the hearing on Sept. 5.

The province recognized Haida Aboriginal title over all Haida Gwaii in an accord and subsequent legislation last year.

However Olthuis argued — successfully along with the Haida and the federal government — for a court declaration that would affirm title under Section 35 (1), the Aboriginal rights clause of the Canadian Constitution.

The province's lawyer made his comments after a presentation by David Paterson, lawyer for the Haida Nation which took the lead in seeking the court declaration.

According to a transcript of the Sept. 5 court hearing, provided by one who shall remain nameless, Paterson explained to B.C. Supreme Court Justice Christopher Giaschi "how it is that Canada and B.C. and the Haida Nation decided that we should come to court and sort this thing out."

"There are agreements in place, but agreements can be revoked. There is legislation — at least provincial legislation in place, but legislation can be repealed.

"I don't suppose you've followed the public discussion on this," Paterson said in an aside to the judge. "There are people who would like to repeal this legislation. There are people who would like to see this arrangement not succeed. Fortunately, I think they're a small number, but nonetheless it's a consideration."

Maybe not that small a number. Opposition Leader John Rustad has argued that private property rights were undermined by the province's blanket recognition of Aboriginal title over Haida Gwaii.

In any event, the Haida Nation and its government partners wanted the court to eliminate any doubts.

"The relief that we're seeking is constitutional protection of the Aboriginal title of the Haida Nation," said Paterson. "It is really the linchpin that provides that we won't be here 20 years later arguing whether or not we have title and whether or not the province can revoke its legislation."

The provincial and federal agreement recognizing Aboriginal title for the Haida was itself "groundbreaking" and "unprecedented in this country's history" said the lawyer.

"We need to — if I can put it ineloquently — tie a ribbon around this agreement to ensure that it does obtain the constitutional protection that all of us have referred to. But we can't say for certain without a declaration from this court that we've actually achieved that end.

"This step here is a profoundly important one in the history of the Haida Nation and in the history of the very, very long-standing struggle to achieve reconciliation between Canada's Indigenous peoples and its newcomers."

With all three parties in agreement, Giaschi promptly issued the sought-after declaration that "the Haida Nation has Aboriginal title, recognized and affirmed under section 35 (1) of the Constitution Act, to the terrestrial areas of Haida Gwaii."

The Haida then issued a statement celebrating an "historic day" in the life of their nation.

But neither the provincial nor the federal government said anything — not about the reasons for joining the Haida in court, nor why the declaration was necessary, unprecedented and historic.

After the news broke courtesy of the Haida, the province argued that the court declaration posed no threat to private property.

"The order says in many places that this agreement will have no impact on private property," said Indigenous Relations Minister Spencer Chandra Herbert.

Last year's agreement did include a commitment from the Haida to respect private property. But the court declaration does not say it in so many words.

Just as a future provincial government could have undone last year's agreement and legislation, so could future Haida leaders disavow the provisions of an agreement that were not entrenched in the Constitution.

Besides, the province has been trying to have it both ways on the status of private (fee simple) land under Aboriginal title.

In the Haida agreement, the New Democrats argued that the two could coexist. They argued the opposite in the landmark proceeding where the Cowichan nation won Aboriginal title over a tract of land in Richmond.

The B.C. government said that “Aboriginal title and fee simple title cannot coexist because both include the right to exclusive use and occupancy,” according to B.C. Supreme Court Justice Barbara Young in ruling for the Cowichan Nation.

I recently asked Indigenous Relations Minister Spencer Chandra Herbert why he and his ministry did not tell the public in advance about B.C.’s decision to go to court in support of the Haida Nation and its reasons for doing so.

He replied that he could not have disclosed the decision to intervene because he wasn’t told himself and only learned about it after the fact.

Thus the latest evidence of this government’s hidden agenda on Indigenous relations. It’s not just the public being kept in the dark. The NDP’s own ministers aren’t told what is being done and why.

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