

Aboriginal Title in British Columbia Examined Under the New Liberal Agenda

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THE FEDERAL LIBERAL GOVERNMENT under Trudeau has made many commitments to First Nations peoples – commitments they have yet to honour.

Now they are looking at a renewed nation-to-nation relationship with “reconciliation” as their objective. They have committed to recognizing and implementing Indigenous rights, possibly through a federal act, as opposed to having First Nations go to court to assert these rights or by respecting rights voluntarily, as they are compelled to under their fiduciary obligations.

The federal government has begun a number of initiatives for achieving reconciliation and implementation of rights, but many of these initiatives demonstrate a lack of commitment to resolve the issue of title to lands, water and natural resources.

Therefore, this policy brief addresses the question: how do the new Liberal government initiatives affect aboriginal title in British Columbia (BC)?

REFORMS TO THE *COMPREHENSIVE LAND CLAIMS POLICY, 1986*

For many years, First Nations have been asking for major reforms to the Comprehensive Land Claims Policy. First Nations in BC have been very vocal in this regard due to their ongoing negotiations in the BC Treaty Process.

One of the major issues with the Comprehensive Claims process of 1986 is that it requires extinguishment of rights and title. The BC Claims Taskforce upon which the BC Treaty Process was based clearly indicated that, *“First Nations should not be required to abandon fundamental constitutional rights simply to achieve certainty for others. Certainty can be achieved without extinguishment.”*

However, the Final Agreements of land claims settlements achieved to date under the BC Treaty Process establish settlement lands as fee simple ‘plus’ lands. They all have similar provisions that “modify” or “exhaust” Aboriginal title lands in ways that fundamentally alter their collective, inherent, *sui generis* status under both Canadian and Indigenous law.

The [Tsawwassen decision](#), for example, states: 12. This Agreement **exhaustively** sets out the Section 35 Rights of Tsawwassen First Nation, their attributes, the geographic extent of those rights, and the limitations to those rights to which the Parties have agreed, and those rights are: a) the aboriginal rights, including aboriginal title, **modified** as a result of this Agreement, in Canada, of Tsawwassen First Nation in and to Tsawwassen Lands and other lands and resources in Canada.¹ (*emphasis added*)

Is the effect of modification not the extinguishment of aboriginal rights and title, as it replaces them with rights as defined in the Final Agreements? They no longer exist as they once were, which logically means they have been extinguished. The land First Nations have accepted are fee simple 'plus,'² and the underlying title to fee simple lands is Crown title. Aboriginal title no longer exists.

The [Eyford Report in 2015](#) recommended principles that led to former Prime Minister Stephen Harper's interim policy on comprehensive claims.³ Section 3 states that, "Canada recognizes that the reconciliation of Section 35 rights is not limited to comprehensive modern treaties, but may include other forms of agreements and constructive arrangements, without the need for extinguishment."

The current Liberal government of Justin Trudeau has stated that his government would be replacing its policy on comprehensive claims — modern day treaties — that required extinguishment. Not much more detail has been given, but he puts a lot more emphasis on his proposed [Recognition and Rights Framework](#) that would define Aboriginal rights. The question that remains unanswered is whether this would include First Nations title to the lands, waters and resources – an area that Trudeau has avoided.

In addition, if Canada had lived up to the interim policy, why do the Final Agreements of Tsawwassen, Maa-nulth, tla'amin, and Yale First Nations still say that Aboriginal rights and title are "modified"? What a court may say about whether Aboriginal rights and title are extinguished remains to be seen.

What kind of changes would First Nations desire from tables where the federal government is currently demanding extinguishment or modification? They would want it clearly stated that Aboriginal title continues within the territory of the First Nation; that Aboriginal title can be defined in the Final Agreement and it would include the right to free, prior and informed consent on any development within lands that are not settlement lands; and, that they maintain full jurisdiction and management on settlement lands. They would further want Aboriginal title to mean the ownership of land by the First Nation and to clearly state in the Final Agreement that there be no extinguishment of rights and title.

First Nations would want to clearly state that Aboriginal rights continue in perpetuity and that the Final Agreement will serve to define these rights. For those rights that are not defined, these will continue even without definition.

The Land Claims policy would no longer say that the Final Agreement exhaustively sets out Section 35 rights.

Many First Nations in BC are not involved in the treaty process. Those that have been opposed to the process have done so on several grounds. One is that a true nation-to-nation relationship would mean that BC is not a party to the agreement and does not have jurisdiction to negotiate treaties. Those opposed to the "modern treaty" process also say that what is being negotiated is not a treaty. This is the BC Treaty Process and what is actually negotiated are Final Agreements.

Those that are opposed to the BC Treaty Process also do not want to settle for under 5 percent of their title lands – the average amount of land turned over in fee simple to negotiating groups through the process – and do not want to spend the time and money negotiating when they will end up with so little. Nor do they want to accumulate debt to pay for the negotiations.

The Liberal Government announced in the 2018 Budget that they may forgive treaty loans. For those First Nations who did not get involved in treaty negotiation because they refused to incur heavy debt that would affect future generations, perhaps things will change. Though there may be other options now, such as the nation-to-nation reconciliation tables, or going to court like the Tsilhqot'in.

The [United Nations Declaration on the Rights of Indigenous Peoples \(UNDRIP\)](#) has provisions about the right of Indigenous peoples to their lands and resources, including the right to not have them taken away.⁴ Both the Government of Canada and BC have committed to implement the Declaration. The Government of BC has stated that they recognize the unceded territories of Indigenous peoples in BC. With such strong statements from the governments, the issue of Aboriginal title should be easily resolved. The problem is that they don't like to give up lands and resources or sharing the wealth they have achieved from the dispossession of First Nations from their lands.

The governments, courts, and the [Truth and Reconciliation Calls to Action](#),⁵ do not recognize that First Nations lands were not taken legally. There were no treaties, no war, and there was certainly no discovery. All of these government institutions and commissions have stated that First Nations need to prove their title, when the onus should be on the federal government to prove how they legally took the lands.

The BC treaty process was meant to remove the need to prove title, but the question of who owns the land remains unresolved and will continue to hinder nation-to-nation and reconciliation efforts until it is resolved.

Recognition and implementation of Aboriginal title cannot be achieved when colonial concepts are being used to empower the governments. Clearly resolving Aboriginal title in BC will take a lot more effort and movement on the federal and provincial governments to create certainty on the land. If the Comprehensive Land Claims policy is set aside, First Nations' consent must be obtained on any new kinds of final agreements moving forward.

ENDNOTES

¹ Tsawwassen First Nation Final Agreement, https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/tfnfa_1100100022707_eng.pdf. See, Chapter 2, section 13.

² Tsawwassen First Nation Final Agreement, https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-BC/STAGING/texte-text/tfnfa_1100100022707_eng.pdf. See Chapter 4, section 2.

³ Douglas R. Eyford, "A New Direction: Advancing Aboriginal and Treaty Rights," Report by Ministerial Special Representative to Minister Valcourt, Aboriginal Affairs and Northern Development Canada, Feb. 20, 2015.

⁴ See Articles 2(b), 10, 25, 26, 32 amongst others.

⁵ See Truth and Reconciliation "Call to Action" #52.