

Recognition and Erasure of Indigenous Oceanic Rights and Title

by Michaela M. McGuire - Jaad Gudgihliwah and Rosanna Carver

CANADA'S COLONIZATION of oceans and waterways, like its colonization of land, has relied on violent exclusion and dispossession of marine space (Todd et al., 2019; Wilson, 2021). Carver et al. (2024) emphasize that “the colonial imagination of the ocean as *mare nullius* — a space vacant of Indigenous tenure and authority — has remained more persistent than that of *terra nullius*” (p. 66; see also: Mulrennan and Scott, 2000, p. 682). The State and industry often frame the ocean as a culturally and socially empty space compared to land. Oceanic components of resource projects are therefore often considered by industry to be comparatively less contentious than land-based infrastructure.

Industry and governments may view the use of oceanic infrastructure as a means of avoiding engaging with Rights and Title cases, and for reducing the potential for contention with Nations along the coast. Of course, this view overlooks the oceanic rights and jurisdictions that exist and are in some cases shared between Indigenous Nations.

This discussion is all the more pressing in the current moment, as Indigenous Nations challenge the interpretation of *mare nullius* and *terra nullius* in court. One project in particular is the Prince Rupert Gas Transmission (PRGT) pipeline, which will transport fracked liquefied natural gas (LNG) to its floating processing facility Ksi Lisims. These facilities — both in B.C. — have, or are on the verge of, regulatory approval and set to begin construction.

The Erasure of Indigenous Marine Rights

In Canada, recognition of Indigenous jurisdiction over the ocean varies. There is limited legal precedent in relation to marine title. Colonial dispossession involved the splintering of Indigenous territories into discrete territorial units defined by the State (Wilson, 2021). If these territorial units bordered waterways, they were often designated to extend only to the water's edge (R.v. Lewis 1996). The coast became “an effective border between land and the ocean (Mulrennan and Scott, 2000, p. 681)... [with] Indigenous Rights [and Title] therefore only considered to exist up to the coastline, despite the interconnected nature of these spaces and their relations” (Carver et al. 2024, p. 6; George and Weibe, 2020).

Questions of Rights and Title in the ocean space have focused heavily on activities (such as fishing rights) suppressing Indigenous potential to engage with new and emerging (including those that are technologically intensive) activities based on “prevailing concepts of race and racial difference.” In other words, the State attributes Rights and ownership to those whom they determine have the “capacity, will and technology to appropriate” the ocean space (Bhandar, 2018, p. 4). This has been used as a way of delimiting Indigenous sovereignty over the ocean and has meant that the concept of Indigenous Rights is “frozen” in time (Carver et al. 2024; Coulthard, 2014).

The Supreme Court of Canada similarly determined in *R. v. Marshall* (1999) that Mi'kmaq Treaty rights did not extend to offshore mining, oil or gas

exploitation (Carver et al. 2024). Moreover, while courts recognized in *Ahousaht et al v. Canada* (2009) that there is a right to sell fish commercially, it came with conditions. In 2018, the courts excluded geoduck from the T'aaq-wiihak fisheries due to the technological intensity of geoduck fishing. Meanwhile, on the other side of the country, Saugeen First Nation and Chippewas of Nawash Unceded First Nation challenged the province of Ontario's plans in the Great Lakes, asserting they held marine title. In 2021, the court disagreed, citing a lack of "exclusive occupation." In other words, the court felt the First Nations could not prove they were there (Carver et al. 2024).

But the ocean is full of Indigenous relationships, despite the government, industry, and the courts failing to see it.

The Haida Nation, LNG, and Oceanic Rights and Title

Another Nation impacted by this discussion is the Haida. Haida territory encompasses all of Haida Gwaii and "the surrounding waters, sub-surface and the air space, including the entire Dixon entrance, half of the Hecate Straits, halfway to Vancouver Island and Westward into the abyssal ocean depths" (Constitution of the Haida Nation, 2023, p.1).

The proposed LNG shipping route for PRGT crosses through Haida territorial waters, despite the long history of Haida opposition to oil and gas.

In 2002, the Haida filed their Title Case statement of claim. As a result, inherent and underlying Haida Title and Rights to Haida Gwaii were recognized at both Provincial and Federal levels in 2024.

Provincially, the Gaayhllxid/Gíihlagalgang "Rising Tide" Haida Title Lands Agreement (2024) was approved by the Haida Nation and the Provincial government. The Agreement, which recognized Haida title and was converted to legislation in *Bill 25*, received royal assent in May 2024. Federally, the Chiixuujin/Chaaw Kaawgaa "Big tide (low water)" Haida

Title Lands Agreement was passed between the Federal government and the Haida Nation (The Haida Nation and Canada, 2024). *Bill S-16* received royal assent in November 2024 (Prime Minister of Canada, 2025).

Despite this recognition, both the Provincial and Federal agreements are limited to terrestrial Haida Gwaii. Title to the ocean space is yet to be settled. The Haida Laas (2023) notes that Marine Title and Rights will be negotiated where possible; however, some issues may need to "be litigated under the Title Case" (p. 23). What this means for navigation and the right of passage is yet to be determined. Given that the Haida are in ongoing Title negotiations, and that the LNG shipping route is proposed to pass through their waters, this project will violate Haida Rights and potentially even ocean Title.

Challenging PRGT

The fact that components of LNG projects may be offshore does not bypass the need for recognition of Indigenous Rights and Title, law and governance, nor the need for consent or compensation relating to oceanic infrastructure — for the Haida or other Nations with asserted marine title. As LNG projects proliferate in B.C., proponents are looking at harnessing more flexible (and mobile) infrastructure, such as Ksi Lisims LNG's proposed floating natural gas liquefaction facility. Floating facilities are enticing to industry because they are movable, and there is increasing interest in the use of LNG as a marine fuel for container ships and other vessels (Bromley et al. 2020). However, this infrastructure can also be a way of circumventing Indigenous Rights and Title, and bypassing environmental, social, and governance concerns.

While the PRGT pipeline and Ksi Lisims begin preparing for construction, the opposition of Indigenous Nations whose territory the pipeline crosses may be paired with opposition of those who will be impacted by its marine elements. And despite the State's position on marine title, it will continue to be an area of law that Nations refuse to cede to the narrative of *mare nullius*.

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