REAL PROPERTY

Reconciliation Act: no land-use veto to First Nations

JOHN GAILUS

The B.C. government recently put forward a proposal for a *Recognition and Reconciliation Act* that recognizes that aboriginal rights and title exist in B.C. without proof of claim.

Members of the business community raised the concern that the implementation of such legislation would effectively provide First Nations with a veto over any land-use and resource decisions in the province. Subsequently, some First Nations and officials in the federal Department of Indian Affairs also raised significant concerns regarding the content of the proposed Act. Notwithstanding these concerns, the government has stated that it intends to proceed with this legislative package.

Since the Supreme Court of Canada's decision in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, the province has been repeatedly chastised by the courts for its failure to adequately consult with First Nations before making decisions that may impact on their aboriginal rights and title. The Act is an attempt to address the duty of consultation and accommodation in a structured manner. It is also intended to provide certainty for government, First Nations, and industry.

The Act will apply to all ministries and provincial agencies, in particular those that have any direct or indirect role in the management of lands and resources in the province, and will take priority over all other provincial statutes dealing with these matters.

The outstanding question for industry and the general public is "How will this impact my tenure or title?" The Act does not affect the status of existing provincial Crown-granted interests or tenures in land, including fee simple title.

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However, the Act may have a significant impact upon any future tenures as well as the development of fee simple land.

The Crown will continue to have a constitutional duty to consult with First Nations when it has knowledge of the potential existence of aboriginal right or title and when it contemplates conduct that might adversely affect it. B.C. courts have recognized that the duty of consultation may apply on private land as well (*Hupacasath First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 2653).

The province faces significant jurisdictional hurdles to implement this legislation given that the federal government is constitutionally responsible for Indians and lands reserved for Indians under s. 91(24) of the *Constitution Act, 1867*. Any legislation touching on the "core of Indianness" would be ultra vires the province.

The Supreme Court of Canada, in *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, held that aboriginal title would fit within this core of Indianness. Although the province may recognize that aboriginal title exists, if B.C. were to try to regulate or legislate regarding aboriginal title, it would almost certainly be ultra vires. Thus, the province has very little room in which to manoeuvre to enact the legislation.

To date, no draft legislation has been circulated. However, the province and the First Nations Leadership Council, a group representing the diverse First Nations organizations in B.C., have produced a discussion paper (available on the B.C. government website at www.gov.bc.ca/arr/index.html).

The discussion paper sets out the following purposes: 1) to provide recognition that aboriginal rights and title exist in B.C. without proof of claim; 2) to establish mechanisms for shared decision-making in land-use decisions; and 3) to enable revenue sharing arrangements.

The discussion paper does not contemplate a veto for First Nations. Both the province and the leadership council agree that it is not the intent of the Act to provide First Nations with a veto over land-use decisions. At best, First Nations may be involved in the collaborative management of resources. The only way to obtain comprehensive shared decision-making and revenue sharing is through a reconstitution into 23 defined "indigenous nations." Given the reality that there are over 200 *Indian Act* bands in B.C., claiming overlapping territories, the likelihood of many groups reconstituting as indigenous nations is unlikely. The most likely scenario is that First Nations may obtain deeper structured consultation than they currently obtain in their discussions with government.

It is questionable whether such legislation is even necessary. Without any overarching legislation, the province is already involved in myriad negotiations and agreements involving shared decision-making and revenue sharing. Examples abound, including forest and range agreements, incremental treaty agreements, economic benefits agreements and collaborative management agreements. However, one benefit of the legislation is that rather than engaging in these negotiations on an ad hoc basis, a legislative framework would provide some certainty to all the parties.

Given the jurisdictional hurdles and the concerns expressed by industry and First Nations, it is unlikely that the legislation will be enacted any time soon. While the stated goal of the legislation is certainty, the likely result is a significantly watered-down *Recognition and Reconciliation Act* that will not change the status quo. ■

John Gailus is a partner in the law firm of Devlin Gailus in Victoria. He practises aboriginal law, representing First Nations and First Nations organizations in B.C. and Alberta.