

Aboriginal Title Supersedes Fee Simple: Landmark Ruling in Cowichan Tribes v Canada Creates Significant Uncertainty for Private Landowners in BC

Thomas Isaac, Jared Enns, Jessica L. Lewis, Rachel Donnelly

August 12, 2025

Introduction

On August 7, 2025, the British Columbia Supreme Court (BCSC) released its much-anticipated decision in *Cowichan Tribes v Canada (Attorney General)*, [2025 BCSC 1490](#), following the completion of a 513-day trial conducted between November 2019 and November 2023. Concluding that the Cowichan Tribes (Cowichan) hold Aboriginal title to a portion of their lands – including private lands held in fee simple – the BCSC made a number of findings and issued a series of declarations that will, if left unchallenged, create significant uncertainty for fee simple title holders in the province of British Columbia (BC). These conclusions include, among others, the following:

- Aboriginal title is a senior interest to fee simple title interests;¹
- provisions of the *Land Title Act* do not shield or protect fee simple estates from Aboriginal title claims,² as “Aboriginal title lies beyond the land title system in British Columbia”;³
- historic Crown grants of fee simple had “deprived the Cowichan of their village lands, severely impeded their ability to fish ... and are an unjustified infringement of [Cowichan’s] Aboriginal title”;⁴
- fee simple title can coexist with Aboriginal title in and to the same lands, noting that the question “is not whether Aboriginal title can exist over fee simple lands, *but whether fee simple interests can exist on Aboriginal title lands*. In my view, the law has evolved, and *the answer to that question is ‘yes’*”;⁵
- the competing interests of Aboriginal title and fee simple title can coexist unless and until an Aboriginal title holder takes active steps to enforce the Aboriginal title claim against a fee simple title holder;⁶
- BC has no jurisdiction to extinguish Aboriginal title, and the historic Crown grants of fee simple did not have the legal effect of displacing or extinguishing the Cowichan’s Aboriginal title;⁷
- the limitations defences, as well as the equitable defences of *bona fide* purchaser for value without notice and laches, were not made out and the Cowichan’s claims were not time-barred by limitations statutes;⁸ and
- Cowichan sufficiently and exclusively occupied their permanent village, its surrounding lands, and the strip of submerged lands in front of the village at Tl’uqtinus (Claim Area).⁹

Having reached these conclusions, the BCSC issued six declarations, summarized as follows:

- **Aboriginal title:** the Cowichan have Aboriginal title over the lands in Cowichan's traditional village site, located in Richmond, BC, and a portion of its surrounding lands and submerged areas (the Cowichan Title Lands);
- **Unjustifiable infringement:** the Crown grants of fee simple interests in the Cowichan Title Lands, and the vesting of the soil and freehold interest in certain highway lands in the Cowichan Title Lands, unjustifiably infringe the Cowichan's Aboriginal title;
- **Invalidity of fee simple interests:** with the exception of Canada's fee simple titles and interests in certain lands, fee simple titles and interests held by Canada and the City of Richmond (Richmond) in the Cowichan Title Lands are defective and invalid;
- **Canada's duty to consult:** with respect to the Cowichan Title Lands, Canada owes a duty to the Cowichan to negotiate in good faith reconciliation of Canada's fee simple interests in the Vancouver Airport Fuel Delivery Project Lands with Cowichan Aboriginal title;
- **The province's duty to consult:** with respect to the Cowichan Title Lands, BC owes a duty to the Cowichan *to negotiate in good faith reconciliation of the Crown granted fee simple interests held by third parties* and the Crown vesting of the soil and freehold interest to Richmond *with the Cowichan's Aboriginal title*; and
- **Aboriginal right to fish:** the Cowichan have an Aboriginal right to fish the south arm of the Fraser River for food, within the meaning of section 35(1) of the *Constitution Act, 1982*.¹⁰

This decision, discussed in further detail below, has significant implications for the land titles system in BC, which is built on the concept of indefeasible title. The indefeasibility of title ensures that, once title has been duly registered in the land title office, it is final and conclusive. However, the BCSC rejected arguments that the *Land Title Act* can be relied upon to shield fee simple title from Aboriginal title claims,¹¹ and issued declarations that expressly:

- invalidated fee simple interests; and
- directed BC to reconcile, in good faith negotiations, Crown granted fee simple interests **held by third parties** (i.e., those not named as defendants in the litigation) with Cowichan's Aboriginal title.

Given the significant number of unresolved Aboriginal title claims across British Columbia, the BCSC's decision in *Cowichan* risks creating significant uncertainty for fee simple title holders across the province.

Overview of Claim and Cowichan Title Lands

The Cowichan commenced their action against Canada and BC on March 14, 2014 – with the Richmond, Musqueam Indian Band (Musqueam), Tsawwassen First Nation (TFN), and the Vancouver Fraser Port Authority (VFPA) later being added as defendants – seeking a declaration of Aboriginal title to the Claim

Area.¹² All of the defendants, including Musqueam and TFN, opposed Cowichan's claim.¹³

The trial, lasting 513 days, was the longest trial in Canadian history. As noted above, the BCSC ultimately found that Cowichan had established Aboriginal title to a portion of the Claim Area (i.e., the Cowichan Title Lands),¹⁴ consisting of:

- fee simple lands owned by Canada and Richmond;
- federal real property which, under the *Federal Real Property and Federal Immovables Act*, is effectively Crown land under the jurisdiction of Canada;¹⁵
- fee simple lands owned by private landowners who were not parties to the litigation;¹⁶ and
- submerged lands.¹⁷

The BCSC Rejected All of the Defences Raised by the Defendants

BC, Richmond, and Canada raised a number of defences to Cowichan's claim for Aboriginal title, including:

- **Extinguishment:** Richmond argued that the Crown grants of fee simple interests in Cowichan Title Lands between 1871-1914 (Crown Grants) extinguished Cowichan's title to the Cowichan Title Lands;¹⁸
- **Displacement:** BC and Richmond raised a defence that the Crown Grants displaced Cowichan's title to the Cowichan Title Lands, including through registration under the BC land titles system;¹⁹
- **Justifiable infringement:** Canada and BC argued that the Crown Grants and any subsequent dispositions of fee simple interests did not amount to an infringement of Cowichan's title.²⁰ In the alternative, Canada, BC, and VFPA took similar positions that either the justification analysis should not apply to historical Crown conduct or that the Crown Grants were justified infringements of Cowichan's title;¹⁹
- **Limitations:** BC and Richmond advanced a limitations defence that some or all of Cowichan's claims were time-barred by statutorily prescribed limitation periods;²²
- **Bona fide purchaser for value:** Richmond and BC (stating it did so on behalf of third parties) argued that fee simple title holders – including Richmond – were *bona fide* purchasers for value without notice of Cowichan's claim;²³ and
- **Laches:** BC and Richmond also raised the defence of laches, on the basis that the Cowichan had acquiesced to the Crown Grants or changed their position or unjustifiably delayed bringing their claim.²⁴

The BCSC rejected each of these arguments as follows:

- **Extinguishment:** the BCSC concluded that BC had no jurisdiction to extinguish Cowichan's Aboriginal title,²⁵ and that the federal Crown had not extinguished Cowichan's Aboriginal title to the

Cassels

Cowichan Title Lands.²⁶

- **Displacement:** the BCSC rejected the argument that the Crown Grants displaced Cowichan's title to the Cowichan Title Lands,²⁷ holding that Aboriginal title and fee simple title can co-exist "unaffected" *unless and until* Cowichan seeks remedies against the fee simple title holders.²⁸ The BCSC held that achieving reconciliation may sometimes require fee simple interests to yield to underlying Aboriginal title, and *vice versa*.²⁹
- **Indefeasibility:** the BCSC held that Aboriginal title lies beyond the land titles system in BC, and thus provisions of the *Land Title Act* pertaining to the indefeasibility of title did not – and could not – apply to protect fee simple title from the Cowichan's Aboriginal title claim.³⁰ In particular, the BCSC stated "Aboriginal title currently lies beyond the land title system in British Columbia and the [*Land Title Act*] does not apply to it. It therefore cannot be said that a registered owner's title under the [*Land Title Act*] is conclusive evidence that the registered owner is indefeasibly entitled to that land as against Aboriginal title holders and claimants."³¹ The BCSC went on to conclude that "Richmond's registered fee simple interests are not conclusive evidence as against the Cowichan *that Richmond is indefeasibly entitled to those lands, nor does registration of those fee simple interests preclude the declaration the Cowichan seek*."³²
- **Infringement not justified:** the BCSC found that the Crown Grants and the federal Crown's subsequent action to dispose of fee simple interests in the Cowichan Title Lands meaningfully diminished Cowichan's title to an extent that amounted to infringement,³³ and the infringements were not justified.³⁴ Surprisingly, given the Supreme Court of Canada's prior statements regarding justifiable infringements,³⁵ the BCSC rejected the arguments raised by BC that settlement and economic development were justifiable infringements of Cowichan's Aboriginal title.³⁶
- **Limitations:** the BCSC held that limitations legislation cannot bar courts from issuing declarations in respect of the constitutionality of Crown conduct,³⁷ concluding Cowichan's claim was not time-barred.³⁸
- **Bona Fide Purchaser for value without notice:** the BCSC determined that the application of equitable principles to Aboriginal title requires modification due to its distinct nature from other property interests.³⁹ Although the BCSC held that "Richmond did not have evidence – actual or constructive – of Cowichan's interests...before it acquired those lands,"⁴⁰ the BCSC ultimately concluded that Richmond was not a *bona fide* purchaser since it had acquired the lands "largely as a windfall through municipal tax sales";⁴¹
- **Laches:** the BCSC dismissed the laches defence, noting that Cowichan did not acquiesce its claim to the lands by not bringing its claim sooner due to colonial disruption that created barriers to Cowichan seeking relief.⁴²

Potential Impacts of Cowichan

Though we are continuing to review this decision and its implications, we note the potential for immediate and significant impacts including, among other things, uncertainty regarding the validity of fee simple

interests in BC beyond those located within the Cowichan Title Lands. In this regard, there are a significant number of unresolved Aboriginal title claims throughout the province. Accordingly, if the BCSC's decision is not varied or overturned on appeal, it risks creating significant uncertainty for any and all fee simple title holders whose lands happen to be located within Aboriginal title claim areas.

On August 9, 2025, and in an apparent recognition of the urgency and significance of these impacts, Premier Eby stated "...let me be clear: owning private property with clear title is key to borrowing for a mortgage, economic certainty, and the real estate market. We remain committed to protecting and upholding this foundation of business and personal predictability, and our provincial economy, for Indigenous and non-Indigenous people alike."⁴³ Two days later, on August 11, 2025, BC announced its intention to file an appeal and seek a stay to pause the implementation of the BCSC's decision, pending a resolution of the appeal.⁴⁴

We will continue monitoring this litigation as it develops and will provide further updates in due course.

¹ *Cowichan Tribes v Canada (Attorney General)*, [2025 BCSC 1490](#) at paras 2189, 3588 [Cowichan].

² *Cowichan* at paras 2259, 2262.

³ *Cowichan* at para 6.

⁴ *Cowichan* at para 6.

⁵ *Cowichan* at para 3589 [emphasis added].

⁶ *Cowichan* at paras 2205, 2208.

⁷ *Cowichan* at para 6.

⁸ *Cowichan* at paras 6.

⁹ *Cowichan* at para 6.

¹⁰ *Cowichan* at paras 7, 3724.

¹¹ *Cowichan* at para 2262.

¹² *Cowichan* at Executive Summary, paras 1-3.

¹³ *Cowichan* at paras 14-27.

¹⁴ *Cowichan* at paras 54, 1246, 1573, 1538, 1650, 1654-1655.

¹⁵ *Cowichan*, at para 2317.

¹⁶ *Cowichan* at paras 2315-2318. We note that in *Cowichan Tribes v Canada (Attorney General)*, [2017 BCSC 1575](#) at paras 23-24 Justice Power determined that notice to private landowners was not required in this case because Cowichan did not seek to invalidate or render defective private landowner fee simple interests.

¹⁷ *Cowichan* at para 1651.

¹⁸ *Cowichan* at para 2092. Canada initially pled extinguishment but abandoned this defence (see para 2096).

¹⁹ *Cowichan* at paras 2120, 2124, 2213-2215, 2219-2224.

²⁰ *Cowichan* at paras 2324-2328, 2452-2457.

²¹ *Cowichan* at paras 2529-2540.

²² *Cowichan* at paras 2892-2893.

²³ *Cowichan* at paras 3056-3059.

²⁴ *Cowichan* at paras 3056-3058. Canada had initially advanced this defence but later withdrew it (see para 2897).

²⁵ *Cowichan* at paras 2188-2190.

Cassels

²⁶ Cowichan at para 2188.

²⁷ Cowichan at paras 2139, 2188-2190.

²⁸ Cowichan at paras 2189, 2205-2208.

²⁹ Cowichan at paras 2195-2196, 2205.

³⁰ Cowichan at para 2259.

³¹ Cowichan at paras 2259, 2262.

³² Cowichan, at para 2262 [emphasis added].

³³ Cowichan at paras 2339, 2527.

³⁴ Cowichan at paras 3607-3608.

³⁵ *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 at para 165.

³⁶ Cowichan at paras 2625-2633.

³⁷ Cowichan at para 2902.

³⁸ Cowichan at para 2905.

³⁹ Cowichan at paras 3083-3084.

⁴⁰ Cowichan at para 3112.

⁴¹ Cowichan at para 3112.

⁴² Cowichan at paras 3140, 3151.

⁴³ “Cowichan Tribes win rights and title along Fraser River in B.C.’s Lower Mainland”, August 9, 2025, CBC News, online: <[Cowichan Tribes win rights and title along Fraser River in B.C.'s Lower Mainland | CBC News](#)>.

⁴⁴ “B.C. government to appeal historic land claim ruling for 4 First Nations”, August 11, 2025, Global News, online: <[B.C. government to appeal historic land claim ruling for 4 First Nations | Globalnews.ca](#)>.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.