

Navigating the Uncertainty Caused by the Cowichan Decision

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The recent decision of *Cowichan Tribes v Canada (AG)* (Decision)¹ has been subject to intense, and often polarizing, debate due to the uncertainty it has created for private property rights. This brief comment is a follow-up to our more [extensive summary](#) of the Decision, and is intended to clarify information provided by the media and other commentators.² This comment is based on a plain reading of the Decision and the extensive body of Aboriginal title jurisprudence that has been developed by the Supreme Court of Canada (SCC) since the 1980s.

The Decision

In the Decision, the Court issued declarations recognizing the Cowichan Tribes' (Cowichan) Aboriginal title to roughly 800 acres within the boundaries of the City of Richmond, BC (Cowichan Title Lands). The Cowichan Title Lands include properties held by Richmond and Canada, *and* properties belonging to unnamed third parties (Unnamed Parties).³ These lands are a portion of the roughly 1,800 acres claimed, and a small percentage of the Cowichan's asserted territory, which is largely on Vancouver Island.

The Court made a series of declarations (Declarations) recognizing Cowichan's Aboriginal title, including:

- The Cowichan have Aboriginal title over the Cowichan Title Lands;
- Cowichan title is unjustifiably infringed by grants of fee simple and other land interests;
- Title to certain lands held by Canada and Richmond overlapping the Cowichan Title Lands are defective and invalid; and
- BC owes a duty to negotiate with the Cowichan to reconcile the fee simple and other land interests with the Cowichan's Aboriginal title.⁴

The Declarations that Richmond and Canada's interests are defective and invalid were suspended for 18 months to allow the Crown to make necessary arrangements.⁵ All other declarations had immediate effect.

Lack of Notice to the Unnamed Parties

The Unnamed Parties *were not* provided with notice of Cowichan's Aboriginal title claim. In May 2017, Canada brought an application for an order that Cowichan or, alternatively, the province, deliver formal notice within 45 days following a decision on the issue. In its September 2017 reasons, the Court dismissed

Canada's application on the basis that:

- Uncertainty in the case law weighs against a court ordered notice;
- Cowichan is not, at this stage, seeking to invalidate fee simple interests held by the Unnamed Parties; and
- The Unnamed Parties would have the opportunity to make all arguments, including that they were not given formal notice, in any subsequent proceedings against them if any such proceedings are brought.⁶

We [wrote about this decision in 2017](#), noting the risks it created for the Unnamed Parties and for fee simple interests.

Though the Court may have contemplated, at that time, that the Unnamed Parties would be unaffected and have “the opportunity to make all arguments” in subsequent proceedings, the Decision undercuts many of the defences that private parties *could have advanced* in the face of an Aboriginal title claim. In particular, the Court held that:

- Crown grants of fee simple title do not have the legal effect of displacing or extinguishing Aboriginal title (para 3551), despite BCSC holding, in *Giesbrecht v British Columbia*,⁷ that these are valid defences that can be advanced by innocent third party purchasers for value;
- Crown grants of fee simple title *are not* justifiable infringements of Cowichan's Aboriginal title (para 6);
- Sections 23 and 25 – the “indefeasibility sections” – of the BC *Land Title Act*⁸ *do not apply to Aboriginal title* (para 3551); and
- Aboriginal title is a senior and prior interest, and burdens the Cowichan Title Lands upon which fee simple estates have been granted (para 2195).

Although the Court suggested that Canada or BC could provide informal notice to the Unnamed Parties, this approach is significantly different from formal notice in a judicial proceeding, which provides the parties receiving notice an opportunity to respond and participate.

If the Decision is not overturned on appeal, it is difficult to imagine what, if any, defences a private landowner *could ever advance* in the face of an Aboriginal title claim. In addition to depriving the Unnamed Parties of these defences, the Court made legal conclusions that have immediate impact on private property owners within the Claim Area: “...the exercise of Aboriginal title and fee simple interests can coexist, *but may not be exercised in their fullest form – the exercise of either will require modification or limitation.*”⁹

Frequently Asked Questions

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What is Aboriginal title?

Aboriginal title is an exclusive right in land based on occupation prior to the Crown's assertion of sovereignty, which gained constitutional protection by Section 35, *Constitution Act, 1982*.¹⁰ Aboriginal title is a *sui generis* (or unique) interest in land that is held communally and cannot be alienated from the group.¹¹ Aboriginal title lands can be used for a variety of purposes, as long as the use is not "irreconcilable with the nature of the group's attachment to that land."¹²

When can Aboriginal title be exercised?

Aboriginal title is exercisable immediately following its establishment by court declaration or agreement, unless explicitly delayed.¹³ In *Tsilhqot'in Nation v BC*, the SCC's declaration had immediate effect and was exercisable on Crown actions moving forward.¹⁴ The Decision's Aboriginal title declaration did not impose any restrictions or delays.¹⁵

What is a fee simple interest?

Fee simple interests are the right to property that is commonly understood as private ownership. A fee simple interest is the most complete form of land ownership in Canadian law, encompassing the full beneficial interest in the property, subject only to governmental restrictions (e.g., zoning, environmental laws, safety requirements). Under BC's *Land Title Act*, registration of a fee simple interest confers indefeasible title, which serves as conclusive evidence that the registered owner holds the described estate free from competing claims (s 23). Fee simple interests are protected against actions for recovery of land, except in specific circumstances, like mortgage default (s 25).

Did the Cowichan claim Aboriginal title to private property?

Yes. The approximately 1,800 acres claimed by the Cowichan overlap privately owned lands held by third parties who are not parties to the proceeding.¹⁶ While the Cowichan did not seek to invalidate existing titles, they asserted Aboriginal title over those lands. The Cowichan Title Lands recognized in the Decision *do not exclude* these private properties.¹⁷

How do fee simple interests and Aboriginal title compare?

There are similarities between these two interests in land, which both convey exclusive rights to:

- decide how the land will be used;
- enjoyment and occupancy of the land;
- possess the land;
- economic benefits of the land; and

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- pro-actively use and manage the land.¹⁸

Although they share similarities, the SCC said in *Tsilhqot'in* that Aboriginal title cannot be equated to fee simple ownership, nor can it be described referencing common law property law concepts.¹⁹ There are number of differences between the two interests which are summarized in the table below.

Aboriginal Title	Fee Simple
A <i>sui generis</i> right to land that is not determined by common law or Indigenous property law concepts	An interest in land recognized in the common law and clarified in statute
Held communally	Held individually
Inalienable, except to the Crown (including the inability to grant any material interests that may diminish entitlement to the lands)	Alienable, and can be transferred freely, subject to statutory restrictions
Use must not be irreconcilable with the nature of the group's attachment to the land	Use may be limited by government statute and regulations (e.g., zoning, environmental laws, safety requirements)
Subject to the Crown's underlying title, including the Crown's ability to justifiably infringe	Subject to the Crown's underlying title, including the Crown's ability to expropriate

Can private lands coexist with Aboriginal title?

According to the Decision, private land can coexist with Aboriginal title.²⁰ However, this statement is a source of confusion and uncertainty because both convey *exclusive* rights to land, and it is therefore unclear how they can operate concurrently. The Decision states that although these interests can coexist, “the exercise of either will require modification or limitation” (para 2195) and “the exercise of one form of title must yield to the other” so long as they coexist (para 2205). The result is that both interests cannot be enjoyed in their fullest form. This is prejudicial to both interests since the scope of each is necessarily diminished. Further, since Aboriginal title is a communal interest that is inalienable *except* to the Crown, Aboriginal title holders cannot consent to, or grant, fee simple interests without first surrendering these lands to the Crown.²¹

Although the SCC has not fully addressed whether Aboriginal title can coexist with private lands, it has provided guidance that suggests coexistence is not possible. In *Osoyoos Indian Band v Oliver*, the minority opinion held that a fee simple interest “prevents occupancy and destroys the relationship of the band with the land such that aboriginal title is extinguished.”²² In *Delgamuukw v BC*, the SCC held that the potential for two Indigenous groups to hold independent rights to Aboriginal title over the same lands was “absurd” – given the content of fee simple interests, the same considerations ought to apply.²³

Does the decision affect private landowners that overlap the Cowichan Title Lands?

Yes. While the Cowichan did not pursue remedies that would displace or dispossess third-party interests, a declaration of Aboriginal title necessarily diminishes overlapping fee simple interests. The Decision explicitly states that the Cowichan are “entitled to seek the return of their [lands]” (para 3552). Fee simple interests “will go unaffected in practice when Aboriginal title is recognized over that land, *unless or until the Aboriginal title holder successfully takes remedial action* in respect of the fee simple interests” (para 2208). In other words, the Cowichan can seek the recovery of these interests at any time.

Governments will need to reassess prior conduct over the Cowichan Title Lands moving forward.²⁴ This will influence the governance of fee simple interests, including the application of water licences, zoning regulations, and the management of utilities servicing these properties.

Does the Decision have impacts that go beyond the Cowichan Title Lands?

Yes. The Decision is concerning for private property rights generally because it considers Aboriginal title to be a senior interest, while also eliminating statutory protections for fee simple interests.²⁵ The Decision determined that the BC *Land Title Act* provisions that provide for the indefeasibility of title (s 23) and protect the owner from recovery of land (s 25) do not apply to Aboriginal title lands.²⁶ Some commentators have suggested that the Decision does not undermine private property rights, but this is expressly contradicted in the Decision.²⁷ The Court explicitly stated that this will be a “precedent that will follow from this case,” so it was intended to apply across BC moving forward (para 3551). Not only is this concerning for BC, but there are potential implications across Canada in areas that overlap unresolved Aboriginal title claims.

Did the Decision invalidate private lands held by third parties?

No, but the Decision *did* eradicate all of the material rights associated with fee simple where these interests overlap Aboriginal title, including indefeasibility and land recovery protections. The Court held that the Legislature did *not* intend the *Land Title Act* to provide “...conclusive evidence that the registered owner is indefeasibly entitled to an estate in fee simple as against Aboriginal title claimants and holders” (para 2251). In other words, landowners can no longer rely on the core protections that preserve their interest in land if Aboriginal title is established.

Does the Decision impact other Indigenous groups?

Yes. The Decision creates uncertainty for Indigenous groups whose asserted or established Aboriginal rights and title overlap those claimed by others. While announcing their appeal of the Decision, Musqueam Chief Wayne Sparrow stated that “Musqueam is deeply concerned by this judgment, particularly its potential impacts on future land claims and court declarations of Aboriginal rights to another First Nations’ core territory.”²⁸ Chief Laura Cassidy of the Tsawwassen First Nation made similar comments, stating that the Decision has already affected their Treaty-established fishing rights and that they “cannot stand by while [their] Treaty rights are undermined.”²⁹

Did Canada and BC defend the interests of private property owners?

Yes, but their defence was limited. Both BC and Canada refused to argue that Aboriginal title had been extinguished, even though this defence is available to them.³⁰

Conclusion

Tensions flowing from the Decision reflect the need to recognize that, while Indigenous groups are entitled to seek the recognition their constitutionally protected rights, there is *also* a need for fee simple owners to maintain certainty in title. This is because “[t]rue reconciliation will, *equally*, place weight” on Indigenous interests and broader Canadian society.³¹ Minimizing one interest at the expense of the other will not result in positive steps towards reconciliation.

A declaration of Aboriginal title is real and not theoretical. The impacts flowing from the Decision demonstrate the need for the Courts and government to provide clarity, as uncertainty jeopardizes positive steps towards reconciliation. The Decision underscores the need for the Crown to consider the general public (i.e., the Indigenous *and* non-Indigenous collective), as well as the claimant Indigenous group, when making decisions that affect them.

¹ [2025 BCSC 1490](#) [Decision].

² See also the commentary by Thomas Isaac and Jared Enns published in the [Vancouver Sun](#).

³ The named defendants whose land overlaps the Cowichan Title Lands include Canada, BC, the City of Richmond and the Vancouver Fraser Port Authority.

⁴ Decision at para 3724 (Note: Canada also has a duty to negotiate in good faith with the Cowichan to reconcile the YVR Fuel Project lands with the Cowichan's Aboriginal title).

⁵ Decision at para 3638.

⁶ *Cowichan Tribes v Canada (Attorney General)*, [2017 BCSC 1575](#).

⁷ [2018 BCSC 822](#) at para 6 [Giesbrecht].

⁸ [RSBC 1996, c 250](#), s 23 [Land Title Act].

⁹ Decision at para 2195.

¹⁰ [Schedule B to the Canada Act 1982 \(UK\), 1982, c 11](#).

¹¹ *Guerin v The Queen*, [1984 CanLII 25](#) at 382 (SCC); *Delgamuukw v British Columbia*, [1997 CanLII 302](#) at para 115 (SCC) [*Delgamuukw*].

¹² *Delgamuukw* at para 117.

¹³ *Tsilhqot'in Nation v British Columbia*, [2014 SCC 44](#) at para 89 [*Tsilhqot'in*].

¹⁴ See *Tsilhqot'in* at para 116, which states “Now that title has been established, however, the beneficial interest in the land vests in the Aboriginal group, not the Crown.”

¹⁵ Decision at paras 3599, 3724.

¹⁶ Decision at para 7.

¹⁷ Decision at para 3724.

¹⁸ *Tsilhqot'in* at para 73.

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¹⁹ *Tsilhqot'in* at para 72, referencing La Forest's concurring decision in *Delgamuukw* at para 190.

²⁰ Decision at para 2174.

²¹ *Delgamuukw* at paras 113, 131.

²² [2001 SCC 85](#) at para 171.

²³ *Delgamuukw* at para 155: "[...] The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to *exclusive* use and occupation of land. [...] The proof of title must, in this respect, mirror the content of the right. *Were it possible (sic) to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.*" (emphasis added).

²⁴ See *Tsilhqot'in* at para 92.

²⁵ Decision at para 2189.

²⁶ Decision at para 3551; *Land Title Act*, ss 23, 25.

²⁷ For example, an [opinion published in the Vancouver Sun](#) states: "The Cowichan decision understandably raises questions, but it neither invents new constitutional law *nor undermines private property rights.*"

²⁸ Musqueam Indian Band, News Release, "Musqueam Files Appeal in BC Supreme Court Cowichan Tribes v Canada Judgment" (5 September 2025).

²⁹ Tsawwassen First Nation, News Release, "Tsawwassen First Nation Appeals Cowichan Court Decision to Protect Treaty Right" (5 September 2025); Note: The Decision held that Cowichan has an Aboriginal right to fish the south (i.e., main) arm of the Fraser River for food purposes (at para 3724).

³⁰ Decision at para 2096 (Note: Canada initially pled extinguishment but abandoned this defence); For availability of the extinguishment defence, see *Giesbrecht*.

³¹ *R v Van der Peet*, [1996 CanLII 216](#) at para 50 (SCC) (emphasis added).

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