Cassels

Uncertainty in Dealing with Private Property Rights and Aboriginal Title

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The Council of the Haida Nation v. British Columbia (BCSC) and Cowichan Tribes v. Canada (A.G.) (BCSC)

The Supreme Court of British Columbia released two decisions in September 2017, *Haida Nation v. British Columbia*[1] and *Cowichan Tribes v. Canada (A.G.)*[2], which dismissed applications for the provision of notice to private landowners potentially impacted by claims of Aboriginal title.

In both decisions, the Court focused on the judiciability of potentially joining hundreds of private landowners with disparate interests as defendants to claims for Aboriginal title. The Court recognized that the result of a finding of Aboriginal title on lands issued in fee simple were uncertain, but suggested that private landowners would not be immediately impacted by a declaration of Aboriginal title. Since both the Cowichan and Haida Nation had not sought explicitly to invalidate fee simple interests, the Courts surprisingly suggested that the fee simple would remain following a declaration of Aboriginal title and that landowners could defend their interests from future specific claims.

Aboriginal title, as currently set out by the Supreme Court of Canada (SCC), is inherently at odds with fee simple interests. Recent claims for Aboriginal title risk putting growing numbers of Canadians into conflict, and could impede reconciliation. Rather than identify the challenges with the law as currently described by the SCC, the Court in both decisions appears to have re-construed the nature of Aboriginal title. Unless this approach is clarified by an appellate court, or affirmed by the SCC, *Haida Nation and Cowichan Tribes* are likely to cause further confusion and impede efforts for reconciliation.

Before *Haida Nation* and *Cowichan Tribes*

Aboriginal title and fee simple are, on their face, incompatible. As the SCC has stated: “Aboriginal title encompasses an *exclusive* right to the use and occupation of land, i.e., to the *exclusion* of both non-aboriginals and members of other aboriginal nations [emphasis in original].”[3] The SCC has also stated “Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.”[4]

Aboriginal title is “held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.”[5] Fee simple interests, in comparison, are held individually, and decisions affecting fee simple land are made by the individual owners.

The very nature of Aboriginal title means that “[l]ands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, [it] is inalienable to third parties.”[6] Fee simple is an estate in land issued by the Crown, and is by necessity, a derivative of the Crown’s interest in the land.

Justification for Non-Aboriginal Title

Following the *Tsilhqot’in* decision in 2014, there appear to be three primary means by which the Crown has title to lands.[7]

First, the Crown has title where Aboriginal peoples are unable to demonstrate the “intention and capacity to retain exclusive control over lands”.[8] These lands are subject to Crown title only as a result of conflicting claims. Given that these lands have historical connections to multiple Aboriginal groups, it is unclear why such lands would not become Aboriginal title lands if the conflicting claims were resolved.

Second, the Courts have long stated that Aboriginal title could have been extinguished prior to 1982. To extinguish any Aboriginal rights, including Aboriginal title, “the Sovereign's intention must be clear and plain.”[9] At present the SCC has never found an occurrence of extinguishment.

Finally, the Court in *Tsilhqot’in* and *Delgamuukw* found that the Crown can infringe Aboriginal title for compelling and substantial public purposes such as agriculture, forestry, mining, and the settlement of foreign populations (otherwise known as homesteading).[10] To date, the SCC has offered no indication of whether the granting of fee simple title can justify the infringement of any Aboriginal title.

The Dilemma for Fee Simple Title

The increase in claims for Aboriginal title following *Tsilhqot’in*, the incompatible nature of fee simple and Aboriginal title, and the lack of guidance generally from the courts regarding fee simple interests and Aboriginal title, all suggest that courts should be thoughtful and prudent in balancing the rights of private property land owners with those asserting Aboriginal title. Much is at stake.

The importance of this issue was identified in *Haida Nation* where the Court noted that “requiring the plaintiffs to give the notice sought would... create unnecessary fear in the non-aboriginal community in Haida Gwaii... [and] would have a negative effect on the objective of reconciliation.”[11]

It was into this legal reality, and with a focus on reconciliation, that the Courts in Hai*da Nation* and *Cowichan Tribes* sought to re-construe Aboriginal title in a manner consistent with the objective of reconciliation.

Cowichan Tribes v Canada (Attorney General)

The application brought in *Cowichan Tribes* related to the Cowichan Nation's claim for Aboriginal title over certain lands within the City of Richmond.[12] The area claimed covered both publicly-held lands and the fee simple properties of more than 200 private landholders.

Canada sought an order requiring the Cowichan Nation to give formal notice to the potentially affected private landowners. Without this notice, the applicant argued that the private landowners could be disadvantaged, since a declaration of Aboriginal title may have adversely affected private landowners' fee simple title.[13]

Administration of Justice - Logistics

A key factor in determining whether to provide notice, according to the jurisprudence examined in *Cowichan Tribes*, was whether requiring notice would make the action non-judiciable due to the number of parties and the conflicting interests present. In its application, Canada had suggested that the private landowners could be effectively managed by way of a representative proceeding, or a defendant class proceeding.[14] While the Court's analysis focused significantly on judiciability, the Court did not explicitly conclude on whether providing notice would make the action non-judiciable and did not give explicit consideration to Canada's suggestion for a representative proceeding or defendant class proceeding.

Administration of Justice - Remedy

The Applicant had argued that notice would ensure that private landowners were aware that their interests were at risk. A declaration of Aboriginal title, it was argued, would be a judgement *in rem*, exercisable conclusively against non-parties, including private landowners.
The Court disagreed with the applicant, inferring that there would be no risk to the private land owners since the Cowichan Nation were not seeking to invalidate or render defective fee simple interests at that stage of the proceedings.[15] The Court acknowledged that it is unclear what happens if there is a declaration of Aboriginal title to land held by private landowners but stated that the private landowners would have an opportunity to defend their interests at a later time if the Cowichan Nation, after receiving a declaration of Aboriginal title, sought to invalidate the fee simple titles.[16]

The Court's assertions reflect its examination of both *Ahousaht Indian Band v. Canada (A.G.)*[17] and *Willson v. British Columbia (A.G.)*[18], however both of those cases addressed conflicting Aboriginal rights, and not fee simple rights which derive their power from a Crown grant.
Additionally, the Court's assertion that private landowners would have a future opportunity to defend

their *fee simple* interest seemed to conflict with the Court's quote of *William v. Riverside Forest Products Ltd.*:

> *"Any tenure holder's interest derives from the interest of British Columbia. If the plaintiff's aboriginal rights and title affect the title and interest of British Columbia, then the interests of tenure holders are also affected. If they have something less than what they bargained for, their remedy does not lie in joining this action to attack the interests of the plaintiff."*[19]

The Court did not make clear how private landowners could "defend their interests" at a later date, if, as suggested by *Williams*, the finding of Aboriginal title by necessity impairs their interests.

The decision in *Cowichan Tribes* relies on the assumption that the Cowichan Nation can determine the content of Aboriginal title; the SCC has been clear that Aboriginal title is the exclusive right to use and occupy land.

The Council of the Haida Nation v British Columbia

The September 20, 2017 decision in *Haida Nation* addressed and dismissed applications from British Columbia and Canada seeking that third parties be provided notice or be joined to the claim for Aboriginal title proceedings.[20] The Court based its decision on jurisprudence suggesting that a declaration of Aboriginal title would not affect the rights of non-parties to the proceedings. The Court concluded that with 3,285 private property folios valued at $458,500,480, requiring notice to or the joining of third parties would be both unwieldy, and would require the participation of defendants whose interests may never be subject to a challenge.

Prior to the decision at hand, Haida Nation had amended their claim for Aboriginal title. Initially, in addition to their claim for Aboriginal title, they also asked for orders quashing tenures, permits and licences in the claim area and orders for ejectment of tenures issued by the Province subsequent to the filing of the action. By subsequently amending their claim by removing the requested quashing and ejectment orders, and by suggesting to the Court that "aboriginal title can co-exist with fee simple title,"[21] Haida Nation encouraged the Court to consider how such interests could co-exist.

The Court's suggestion that fee simple interests *may* remain unchanged, or be defensible, following a determination of Aboriginal title, suggested the possibility of the interests co-existing. The Court stated that jurisprudence supported "the proposition that [a declaration for Aboriginal title] would only be binding on non-parties with an interest in the lands affected if they had received formal notice of the claim".[22] "If a

declaration of aboriginal title is equivalent to a declaration of ownership as against the named defendants only, as suggested by the plaintiffs, it would follow that its scope would be limited."[23]

When finding that the Haida could be awarded title, rights, and compensation, the Court reiterated Haida's claim, that "they will be precluded from pursuing any third parties who hold tenures in respect of which compensation from the Crown has been paid," further suggesting that fee simple could continue to exist on established Aboriginal title lands.

The approach taken in *Haida Nation* appears to contradict the current guidance of the SCC on the incidents of Aboriginal title. There is no protection for fee simple interests on lands subject to Aboriginal title, except for justifiable infringement (assuming such Aboriginal title was not earlier extinguished by the granting of a fee simple interest or otherwise).

Reconciling Aboriginal Title and Fee Simple

Instead of highlighting the challenges with Aboriginal title as it is currently described by the SCC, the Court's approach to fee simple and Aboriginal title in *Cowichan Tribes* and *Haida Nation* sought to craft a new way of understanding Aboriginal title, resulting in further uncertainty and flies in the face of existing SCC jurisprudence on this matter.

Uncertain Support for Haida Nation in Tsilhqot'in

A key element supporting the decision in *Haida Nation* was a quote from *Tsilhqot'in* which says "[t]he usual remedies that lie for breach of interests in land are available, *adapted as may be necessary* to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title [emphasis added]." The quote was applied by the Court to suggest that there is flexibility in applying Aboriginal title. The type of flexibility available was unclear, but the Court raised the possibility that the finding of Aboriginal title may have value beyond exclusive possession by quoting Haida Nation's claim that the *sui generis* nature of Aboriginal title confers additional rights beyond the rights of exclusive use and occupation, such as "the ability to regulate land use or the ability to tax."[24]

While the need for flexibility within the SCC's framework for Aboriginal title seems apparent, it is not clear that the *Tsilhqot'in* quote provides the inferred flexibility. Instead, the quote from *Tsilhqot'in* appears intended as a source of protection for Aboriginal title against infringement, not as justification for the derogation of Aboriginal title.

Understanding the Court's Approach in Haida Nation and Cowichan Tribes

The Court's approach to Aboriginal title, as set out in *Haida Nation*, appears to include a hierarchy of interests simultaneously existing over land: (1) at the highest level, a Crown interest capable of general

regulation, taxation, and justified interference; (2) an Aboriginal title interest, capable of specific regulation, taxation, and possibly justified interference or infringement; and (3) a fee simple interest with the right to exclusive occupation. This approach is compatible with the less explicitly defined approach taken in *Cowichan Tribes*. To be clear, this approach is not supported by existing SCC jurisprudence and is in conflict with the SCC's findings that Aboriginal title is a right to exclusively possess and use the land held under it.

Even if the Court's hierarchical approach to interests is adopted by the SCC, the hierarchy, as proposed, creates challenges that need to be resolved, both internally, and within the larger context of Aboriginal title jurisprudence. For instance, is the Crown capable of holding, in fee simple, interests subject to an Aboriginal title interest? How can the uses of Aboriginal title "be consistent with the group nature of the interest and the enjoyment of the land by future generations" (*Tsilhoqt'in*)[25] if no right is held for occupation by current and future generations? How can fee simple title on Aboriginal title lands be reconciled with the general principle that fee simple in Aboriginal title lands may only be surrendered to the Crown?

Necessary Next Steps

The Courts in both *Haida Nation* and *Cowichan Tribes* appear to have identified the current challenge with Aboriginal title as described by the SCC: without an evolution of the law, Aboriginal title, where claimed, will threaten the fee simple interests of individual Canadians and pose a significant threat to reconciliation.

As superior courts, following the direction of the SCC, both decisions missed an opportunity to identify the conflict and associated risks inherent in Aboriginal title, and attempted instead to modify the law. This divergence, rather than creating clarity and promoting reconciliation, only adds risk and uncertainty for all parties.

The development and evolution of the law affecting Aboriginal rights in Canada depends on clarity of thought and complete analysis. While courts must be diligent in following the law as it is currently stated, governments must also engage fully with the Courts, ***advancing all available arguments***. This approach advances reconciliation because it is focused on a full, complete and thoughtful analysis about where Canadian law and reconciliation are headed. Omitting or ignoring arguments for extinguishment or justifiable infringement unduly constrains government, puts fee simple holders at risk, and is a disservice to justice and the broader goal of reconciliation generally.

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[1] *Haida Nation v British Columbia* 2017 BCSC 1665 [*Haida Nation*]
[2] *Cowichan Tribes v. Canada (Attorney General)*, 2017 BCSC 1575 [*Cowichan Tribes*]
[3] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*] at185.
[4] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in*] at para 73.
[5] *Delgamuukw, supra* at para 115
[6] *Delgamuukw, supra* at para 117
[7] The test for Aboriginal title set out in *Delgamuukw* requires that (1) ancestors of the group claiming the right occupied the claimed lands prior to the British assertion of sovereignty; (2) if current occupation of lands was used as evidence of pre-sovereignty occupation, the occupation must have been continuous since

sovereignty; and (3) occupation by the Aboriginal group must have been exclusive. [*Delgamuukw* at paras 140-159].
[8] *Tsilhqot'in, supra* at 47
[9] *R v Sparrow*, [1990] 1 SCR 1075.
[10] *Tsilhqot'in, supra* at paras 83, 84
[11] *Haida Nation, supra* at para 51.
[12] *Cowichan Tribes, supra* at para 3
[13] *Cowichan Tribes, supra* at para 2
[14] *Cowichan Tribes, supra* at para 12
[15] *Cowichan Tribes, supra* at para 23.
[16] *Cowichan Tribes, supra* at para 24.
[17] *Ahousaht Indian Band v. Canada (Attorney General)*, 2006 BCSC 646.
[18] *Willson v. British Columbia (Attorney General)*, 2007 BCSC 1324.
[19] *William v. Riverside Forest Products Ltd.*, 2002 BCSC 1199.
[20] *Haida Nation* also included an action to have Haida Nation unequivocally elect not to disturb the interests of third parties, which was dismissed. The Court stressed that the application for Aboriginal title was still at an early stage and it was inappropriate to require the plaintiff to make an unequivocal election, because it remained open to them to seek to further amend their pleadings if circumstances changed.
[21] *Haida Nation, supra* at para 7
[22] *Ibid*, at para 29
[23] *Haida Nation, supra* at para 29.
[24] *Ibid*, at para 32
[25] *Tsilhqot'in, supra* at para 88.

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