Cowichan Tribes Case Commentary – A Focused Dialogue for Local Government

November 27, 2025

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What will we discuss today?

- Introductory comments
- Factual overview – Pause for Q & A
- Description of the Court Orders
- Court's Analysis (in brief)
- Appeals and Other Matters
- Challenges for local government
- More Q & A

Introduction

- *Cowichan Tribes v. Canada (AG)* 2025 BCSC 1490
- Remarkable and important case re process and outcome
- 513-day trial – longest in Canadian history
- 86 lawyers of record – cost??!!
- 800 plus page judgement
- Tremendous amount of interest, opinion and disagreement
- Goal today is for fair and accurate dialogue with respectful discussion

Introduction

- Case involves complex issues of Aboriginal title and fee simple title over same lands
  - In general, Aboriginal title has these aspects:
    - Right to exclusive use and occupation
    - Right to determine uses
    - Right to enjoy economic fruits
    - Held collectively
  - Fee simple ownership also exclusive use and occupation – held as indefeasible title under *Land Title Act*
  - How do these co-exist together?

- Aboriginal title has grounding in the *Constitution Act, 1982*, section 35:

  "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Facts

- The Plaintiffs (aka, the Cowichan Tribes)
  - Four bands under the *Indian Act*:
    - Cowichan Tribes
    - Stz'uminus First Nation
    - Penelakut Tribe
    - Halalt First Nation
- Chiefs of each nation also individually named

Facts

The Defendants

- **Attorney General of Canada**
  - Canada owned land within Claim Area
- **Attorney General of British Columbia**
  - BC provincial government historically responsible for granting lots to settlers within Claim Area
- **Vancouver Fraser Port Authority (VFPA)**
  - Agent for federal government, owned lands within Claim Area
- **City of Richmond**
  - Claim Area within City boundaries, City owned several lots obtained via municipal tax sale between 1920s and 1940s, also had interest in roadways
- **Tsawwassen First Nation (TFN)**
  - Treaty lands near the Claim Area and unsettled rights
- **Musqueam Indian Band (Musqueam)**
  - Reserve land nearby, unsettled title and rights claim over the Claim Area

- **Note**: numerous third-party fee simple title owners within Claim Area <u>were not</u> given notice of, or named as defendants in, this action

Facts

- **The Claim Area**
  - Approx. 1846 acres
  - Argued to be the site of a traditional village and fishing ground for historical Cowichan Nation
- **Nature of Interests**
  - Fee simple lots owned by Canada, VFPA, Richmond, and numerous private parties
  - Richmond also owned soil and freehold interest in roadways
  - BC defending legality of historical Crown grants made to settlers
  - TFN opposing title claim as they have treaty lands in the area and fishing rights
  - Musqueam opposing title claim over lands they claim title and rights over

Facts

- Proving Aboriginal title is very difficult
  - *Delgamuukw* sets out three-part test for proving title:
    1) "sufficient occupation" of land at time of assertion of European sovereignty
    2) "continuity of occupation" where present occupation is relied on as proof of occupation at time of assertion of European sovereignty
    3) "exclusive historic occupation"
  - Cowichan Tribes required to prove sufficient occupation and exclusive historic occupation of Claim Area to establish title

Facts

Sufficient Occupation

- Cowichan Tribes relied upon:
  - oral histories,
  - eyewitness testimony,
  - linguistic evidence,
  - written accounts from colonial expeditions,
  - settler accounts,
  - archaeological evidence,
  - expert opinions,
  - historical maps, and
  - evidence regarding the ecology, topography, and resources within the Claim Area historically
- established existence of historic Cowichan Nation village site and customary cultivation and use of surrounding lands

Exclusive Historic Occupation

- Cowichan Tribes had to prove not only that they used the land, but they had the exclusive historical right to do so
- Evidence:
  - historical conflicts with other Indigenous groups,
  - competing TFN and Musqueam claims to occupation and use of land, and
  - nature and extent of Cowichan Nation use and occupation of land
- Cowichan Tribes satisfy court that the Cowichan Nation used the historical village site "*en masse*" during the summer and occupied the lands periodically through the remainder of the year

The Result: Six Court Orders

- The Law of Declaratory Relief
  - Declarations are granted on a discretionary basis – even if plaintiff is "correct," court may still decline relief sought
  - Fundamental question: will the declarations have "practical value" between the parties
    - Relevant re historical dealings between Crown and Cowichan Tribes, and Crown's constitutional duties to Aboriginal peoples
  - Nature of relief sought
    - Cowichan Tribes applied to invalidate fee simple title held by Canada, VFPA, and Richmond
    - Cowichan Tribes did not apply for declaration invalidating fee simple title held by private third-party owners

Court Orders

- **#1 - Declaration of Title**
  - Aboriginal title declared over a 740-acre *portion* of the Claim Area – approximately 40% of total area sought
  - Title area includes flood protection and prevention infrastructure, roads, foreshore, submerged lands, residences, agricultural lands, industrial and commercial property, and a golf course
- **#2 - Infringement on Title**
  - Court ordered that original Crown grants of fee simple title unjustifiably infringe upon Cowichan Aboriginal title
  - Infringement is a complex issue in Aboriginal rights and title cases, but can be justified in some circumstances
    - Court found not justified in this case

Court Orders

- **#3 - Invalidated Fee Simple Title**
  - Fee Simple title was invalidated, but limited for lands held by federal government and Richmond
    - This order suspended for 18-month period to facilitate “necessary arrangements”
  - All other lands over which title was established now have co-existing Aboriginal title and fee simple interests
    - Unprecedented legal outcome
    - No suspension of order
- **#4/5 Duty to Negotiate**
  - Canada-owned a YVR fuel project within the Title area
    - Court found Canada owes a duty to negotiate in good faith in relation to this project
  - BC owes duty to negotiate in good faith
    - Ordered in relation to reconciliation of Crown-granted fee simple title to third-parties, and soil and freehold interests held by Richmond

Court Orders

- **#6 - Aboriginal Right to Fish**
  - Certain Aboriginal rights are distinct from title
  - Cowichan Tribes sought right to fish portion of the Fraser River
  - Granted despite TFN rights and Musqueam claim

Court Orders

- Court acknowledged the significance of these orders:

  "Most of the Cowichan's Aboriginal title lands… were granted away over 150 years ago… much remains to be resolved through negotiation and reconciliation between the Crown and the Cowichan."

  "Additionally, the determinations in this case will impact the historic relationships between the Cowichan, Musqueam and TFN relations moving forward. The fact is all the parties have continued interests, rights and obligations…"

Analysis: the Court's Reasoning

- **Lack of Statutory Authority**
  - 1859-1860 Douglas appropriations of Indian settlements
  - Crown grants made between 1871-1914
  - Court found provincial Crown grants for some fee simple titles were made in violation of the applicable provincial land disposition statutes at the time of granting

- **Terms of Union: Article 13**
  - Terms of Union were the constitutional instrument by which BC joined Dominion of Canada
  - Article 13 establishes:
    - trustee and management of Indian lands would be assumed by Dominion government
    - Lands appropriated for Indians shall be conveyed to Dominion for that purpose
  - Court infers prohibition against BC issuing Crown grants of Indian settlements

Analysis

- **The Division of Powers**
  - Given the division of powers set out within the *Constitution Act, 1867*, even if Crown grants were made validly, BC does not have the authority to extinguish title
    - This finding applies to all Aboriginal title lands anywhere in the Province

- **Section 35**
  - Fee simple title and other interests on land subject to Aboriginal title constitutes an ongoing infringement of Aboriginal title – irrelevant if fee simple granted prior to *Constitution Act, 1982*

Analysis

- **Indefeasibility of title under the *Land Title Act***
  - LTA provides that registered fee simple owner has indefeasible title to the registered land, and is protected from claims for recovery of that land – subject to certain limited exceptions
  - Even though Aboriginal title is not a listed exception, court found that these protections would effectively "extinguish" Aboriginal title, contrary to findings re the constitutional division of powers
- **Co-Titled Lands**
  - Certain lands within the Aboriginal Title area now have fee simple interests co-existing with underlying Aboriginal title
  - Unprecedented in Canadian legal history – how can two rights to exclusive use and occupation of land, held by different parties, co-exist?
  - These lands may be subject to further litigation – court implied fee simple interests may simply be defective until action is taken to have them invalidated

Appeals and Other Considerations

- All seven parties have appealed
  - Including Cowichan, who appeal size of title area
- Will take years to work its way through BC Court of Appeal
- Several private landowners looking to appeal land value to PAAB
- At least one private owner will be trying to re-open trial judgment
  - No notice given
- Province seeking a stay
- Very likely that Supreme Court of Canada takes the case eventually

Challenges for Local Governments

- *Proprietary*
  - Loss of public lands
  - Loss of charges over private lands
  - Loss of tax base
- *Regulatory*
  - 'Co-title' situation creates lack of clarity in land use permitting decision-making, taxation, service delivery, and liability
  - Time will be needed for these complex issues to settle out

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Huy tseep q'u

Thank you

Merci

YOUNG ANDERSON
BARRISTERS & SOLICITORS

AVICC
association of vancouver island and coastal communities