# Reconciling title: Aboriginal title and the future of fee simple tenure in British Columbia

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In a landmark decision released on Aug. 7, 2025, the Supreme Court of British Columbia found that the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe, and Halalt First Nation (collectively, the Cowichan) had established Aboriginal title to portions of the south arm of the Fraser River, and affirmed the Cowichan's constitutionally protected right to fish those waters for food.

The ruling in *Cowichan Tribes v. Canada (Attorney General),* 2025 BCSC 1490 (*Cowichan Tribes*) breaks new ground in the jurisprudence on the relationship between Aboriginal title and fee simple.

## Key takeaways

### 1. This decision creates immediate legal obligations and uncertainty

The Court's declaration that certain Crown grants were "defective and invalid" creates immediate duties for government and significant legal uncertainty for private parties. The Crown must negotiate with the Cowichan on any proposed land uses and develop transfer / sharing arrangements within 18 months, while private fee simple owners face potential validity challenges to their land titles. This results in significant legal uncertainty until appeals are resolved or negotiations concluded.

### 2. It is an important precedent for other Aboriginal title claims

The decision establishes a critical precedent that could affect existing and future Aboriginal title claims across British Columbia and elsewhere in Canada where treaties have not extinguished Indigenous land rights. The ruling demonstrates that historic Crown land dispossession of unceded territories, even when now held privately, remains subject to judicial scrutiny and constitutional remedy.

### 3. Unresolved governance and jurisdictional questions remain

The Court did not address fundamental questions about how Aboriginal title and fee simple interests will coexist, leaving critical uncertainties around land governance, regulatory authority, consultation requirements, taxation powers, and the continued validity of existing permits and licences. These unresolved issues will likely require either appellate court clarification or negotiated frameworks between Indigenous communities, governments, and private landowners.

# Background and context

The Cowichan sought declarations of Aboriginal title to its traditional permanent summer village located on the south shore of Lulu Island in Richmond, British Columbia (Tl'uqtinus) as well as an Aboriginal right to fish the south arm of the Fraser River. The Cowichan's claim was contested by Canada, British Columbia, the City of Richmond, the Vancouver Fraser Port Authority, Tsawwassen First Nation, and the Musqueam Indian Band.

The Cowichan's seasonal occupation of Tl'uqtinus was supported by extensive oral history, ethnographic, archaeological, and documentary evidence. This evidence was heard over the course of 513 trial days, following the trial's commencement in Sept. 2019. Drawing on the extensive record presented by the Cowichan, the Court ultimately found that the Cowichan sufficiently and exclusively occupied their permanent village, the surrounding lands, and the strip of submerged land in front of the village at Tl'uqtinus, before, during, and after 1846.

A key piece of historical evidence in the Cowichan's claim was Governor James Douglas' 1853 assurance that "the Queen had given him a special charge to treat them with justice and humanity, so long as they remained at peace with the settlements." The Court held that this was "a solemn promise that engaged the honour of the Crown, which is a constitutional principle that requires the Crown to act honourably in its dealings with Indigenous peoples." However, despite this promise, the Cowichan's settlement at Tl'uqtinus was never established as a reserve. Instead, between 1871 and 1914, the Crown issued grants of fee simple interest over Tl'uqtinus.

# Key findings of the Court

The Court ruled that the Cowichan succeeded in establishing Aboriginal title to a portion of Tl'uqtinus (the Cowichan Title Lands). Additionally, the Court held that Crown grants of fee simple interests over the Cowichan Title Lands (including those made to Canada and the City of Richmond) "unjustifiably infringe the Cowichan's Aboriginal title" and that, except for Canada's interests in the Vancouver Airport Fuel Delivery Project Lands, "Canada and Richmond's fee simple titles and interests in the Cowichan Title Lands are defective and invalid."

In clarifying the meaning of "defective and invalid," the Court explained that the grants of fee simple interests had been issued without statutory authority, and, in the case of post-Confederation grants, without constitutional authority. The Court further emphasized that "Aboriginal title currently lies beyond the land title system in British Columbia" and that registration under British Columbia's *Land Title Act*, R.S.B.C. 1996, c. 250is not necessarily conclusive evidence that the registered owner is indefeasibly entitled to that land against Aboriginal title holders and claimants.

In exploring the relationship between Aboriginal title and fee simple, the Court rejected the submission that the provincial Crown's grants of fee simple permanently displaced the Cowichan's Aboriginal title. Instead, it found that Aboriginal title continues to burden the lands over which the Crown grants were issued. Drawing on earlier jurisprudence, the Court concluded that because Aboriginal title and Crown title can coexist, fee simple, itself a derivative of Crown title, can also coexist with Aboriginal title.

The Court held that Aboriginal title is a prior and senior interest in land: constitutionally protected, rooted in the Cowichan's historical occupation, and not granted by the Crown. Given its status, the Court noted that the proper framework for understanding the relationship between fee simple and Aboriginal title is not to ask what remains of Aboriginal title after a grant of fee simple has been made, but rather what remains of fee simple after Aboriginal title has been recognized.

Where Aboriginal title and fee simple interests exist in the same land, the Court held that the interests must be addressed within a reconciliatory framework, an exercise that engages the Crown and must be tailored to the specific circumstances and interests at play. Both interests may be valid, and the exercise of the rights associated with each should be reconciled. The Court found that the Crown owes a duty to negotiate in good faith with the Cowichan regarding overlapping interests, including those held by third parties, in a manner consistent with the honour of the Crown.

# Defences

The defendants raised several defences, including limitation periods, laches, and bona fide purchaser for value without notice. The Court held that it would be unfair for British Columbia, as the Crown, to advance the defences of laches and bona fide purchaser for value without notice, not on its own behalf, but on behalf of private landowners who were not parties to the litigation. These defences were considered only in relation to Richmond, which was named as a defendant and had the opportunity to present its own evidence and arguments.

As a preliminary matter, the Court rejected the Cowichan's argument that the defendants should be estopped from relying on their pleaded defences due to the Cowichan's reasonable reliance on Governor Douglas' promise to protect Indian Settlements. The Court concluded that the requirements for estoppel were not met on the facts. While the promise did engage the honour of the Crown, it was not sufficiently specific to support an estoppel claim in favour of the Cowichan, and there was insufficient evidence that the Cowichan remained at peace in reliance on that promise.

## Limitation periods

The Court held that limitation periods under provincial law were ineffective to bar the Cowichan's claim for several reasons:

- Provincial limitation legislation cannot bar courts from issuing declarations on the constitutionality of the Crown's conduct.
- Courts have recognized an exception to the enforcement of statutory limitation periods when Indigenous communities seek declaratory relief against the Crown. This principle, drawn from cases such as *Manitoba Metis Federation Inc. v.*

*Canada (Attorney General),* 2013 SCC 14, reflects the constitutional nature of Aboriginal rights and the importance of addressing historical wrongs committed by the Crown. However, the Court in *Cowichan Tribes* noted that the exception may not extend to private third parties who could be directly affected by a declaration of Aboriginal title.

- Additionally, the Court likened the existence of fee simple titles over Aboriginal title lands to a continuing trespass. Because the infringement is ongoing, the cause of action is considered continuous, and limitation periods do not apply.

### Laches

The Court also rejected the defence of laches, an equitable defence based on delay. Laches may arise where a claimant acquiesces to the status quo or where a defendant reasonably relies on that acquiescence. In this case, the delay was not found to be unreasonable given the historical and constitutional nature of the rights asserted. The Court emphasized that equitable defences must be assessed in light of the honour of the Crown and the unique context of Aboriginal title claims.

### Bona fidepurchaser for value without notice

The Court considered the defence of bona fide purchaser for value without notice, commonly relied upon by private fee simple owners. While it acknowledged that this defence could, in principle, protect fee simple titles from equitable claims, the Court held that it did not apply to Richmond, which had acquired the Cowichan Title Lands through tax sales under the *Municipal Act,* R.S.B.C. 1996, c. 323, and therefore did not acquire the lands "for value."

Having rejected each of the defences raised, the Court turned to the question of remedy. Rather than awarding compensation, the Court emphasized that monetary relief would be insufficient given the constitutional nature of Aboriginal title and the ongoing infringement. The Court instead directed the parties toward reconciliation through negotiation.

## Implications

### Crown corporations and governments

The decision in *Cowichan Tribes* introduces legal uncertainty for Crown land holdings and infrastructure within the Cowichan Title Lands. Despite planned appeals (see the British Columbia Attorney General's announcement that the Province intends to appeal), the Crown has an immediate duty to negotiate with the Cowichan on any proposed uses of the fee simple parcels within the Cowichan Title Lands. The basis for consultation is likely broad, as the Court appeared to depart from the approach taken in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, and *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2022 BCSC 15, which distinguished between historic and novel adverse effects in determining whether the duty to consult is triggered.

The defendants must also negotiate a form of reconciliation with the Cowichan. Subject to any stays granted as a result of the appeal, the Province is obligated to transfer

portions of the Cowichan Title Lands within an 18-month period and will likely need to develop a framework for shared use of the remaining parcels.

More broadly, the ruling may lead to similar claims by other Indigenous communities who assert Aboriginal title across the Province and elsewhere in Canada where treaties have not extinguished or modified their Aboriginal title claims. The Crown also likely will need to revisit various policies, particularly in regard to issuing new grants of fee simple, the disposition of surplus lands, and consultation practices generally.

The *Cowichan Tribes* decision also highlights the continued relevance of the British Columbia Treaty Process as a forum for achieving comprehensive reconciliation, including clear land ownership and coordinated jurisdiction.

## Private parties

The Court's decision in *Cowichan Tribes* has significant implications for private fee simple owners within the Cowichan Title Lands. Some may be directly affected by the finding that certain Crown grants were "defective and invalid," and may consider steps to engage directly in the appeal. In parallel, owners may seek clarity from the Province and the City of Richmond on how they intend to respond, whether through negotiations with the Cowichan, policy or legislative changes, or transitional arrangements.

If upheld, the decision could pave the way for courts to issue declarations of Aboriginal title over lands held in fee simple elsewhere in British Columbia and across Canada where such lands have not been surrendered or modified through treaty.

Private parties may have better success than the government defendants in *Cowichan Tribes* in pleading defences like limitation periods, laches, and the defence of bona fide purchaser for value without notice. However, while those defences may preserve their fee simple interests from being declared invalid or defective, fee simple owners could face other complications if a court rules that Aboriginal title exists alongside fee simple interests. These include uncertainty around land use and governance, as well as the potential need for consent or coordination with the title-holding Indigenous community.

The Court declined to provide specific guidance on these uncertainties or the broader implications of the decision, leaving several critical questions unresolved. For example:

- Previous case law has linked governance to Aboriginal title. As a result, an Indigenous community may assert that it can regulate the use of Aboriginal title lands that are also subject to a fee simple interest. Could an Indigenous community require fee simple owners to obtain permits or approvals before using the land in certain ways?
- Courts have also held that Aboriginal title includes the right to benefit from economic development on the land. Might an Indigenous community impose taxes, fees, or charges on occupants of Aboriginal title lands, independent of municipal or provincial levies?
- Provincial laws have limited application on lands where Aboriginal title has been proven. Could provincial or municipal laws be similarly constrained in their application to fee simple lands subject to a declaration of Aboriginal title?
- Would statutory rights held by private parties – such as access or operational permits – continue to apply on Aboriginal title lands? Would courts uphold

licences or permits issued by Crown agencies that previously held fee simple interests?
- Even if an Indigenous community does not assert jurisdiction or challenge the authority of federal, provincial, or municipal laws, it may still assert a right to be consulted about future uses of lands where Aboriginal title has been recognized. Prior to this decision, case law generally limited consultation to new or ongoing adverse effects, however, the Court's decision in *Cowichan Tribes* appears to depart from, or at least distinguish, that framework. How might future courts approach consultation requirements in this context?

### Indigenous communities

*Cowichan Tribes* marks a significant advancement in the law, offering greater clarity on how courts may assess the validity of Crown grants over traditional territories that are not subject to treaties addressing pre-existing Indigenous land rights. By recognizing Aboriginal title over lands held in fee simple and declaring the Crown grants of those interests "defective and invalid," the Court demonstrated that historic land dispossession of unceded and unsurrendered lands that are held privately can still be subject to judicial scrutiny and constitutional remedy.

The Court's direction to Canada and British Columbia to negotiate the resolution of the competing interests in lands subject to Crown grants and Aboriginal title reflects the evolving legal standards for how governments must engage with Indigenous rights holders. Importantly, the decision also signals that resolving these claims may have significant implications for third parties, including private landowners.

## What's next?

British Columbia has confirmed its intention to appeal the decision. Given the scope of the judgement, it is likely that many stakeholders will seek to intervene in the appeal, including private landowners, utilities, and other Indigenous communities with overlapping claims. The appeal process may also prompt legislative review and policy reform, particularly around land title systems, consultation frameworks, and the reconciliation of overlapping interests. Until the appeal is resolved or negotiations are concluded, legal uncertainty will persist for parties with interests in the Cowichan Title Lands.

For more context on recent developments on Aboriginal title jurisprudence, see our Jan. 2025 Insight on recent litigation in New Brunswick, released prior to *Cowichan Tribes*, which explores the evolving legal landscape for Aboriginal title claims over lands held in fee simple: Litigation developments: Aboriginal title and fee simple title.

## Contact us

BLG regularly advises clients on matters relating to Indigenous land rights, Aboriginal title, and Aboriginal rights, including the interplay between these rights and private interests in land. If you have questions regarding the intersection of Aboriginal title and fee simple ownership in relation to your specific circumstances, please contact the authors, any of the key contacts listed below, or any lawyer from BLG's Indigenous Law Group.

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