



Case Comment: *Cowichan Tribes v. Canada* (Attorney General)

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This is to be my last contribution to this venerable periodical – time to hand off the torch. I thank the Appraisal Institute of Canada and the appraisal community for the opportunity over the years to ponder “out loud” legal developments that impact the appraisal community. It has been a most interesting journey.

A theme in some of my past articles is the evolving jurisprudence around Aboriginal title and rights in Canada. For this last of my contributions, the British Columbia Supreme Court (BCSC) very recently provided another compelling chapter that is certain to generate debate, further appeals, no small measure of concern among the property-owning public, and challenges for the appraisal community.

In March 2014, Cowichan Nation filed a Notice of Civil Claim in BCSC asserting Aboriginal title to approximately 1,846 acres of land on the south shore of Lulu Island in Richmond, British Columbia (the “Claimed Land”). On September 9, 2019, the trial of the action commenced. After some 513 days of trial and additional passage of time for the court’s deliberation, *Cowichan Tribes v. Canada (Attorney General)*, 2025 BCSC 1490 [*Cowichan*] was released on August 7, 2025. The court made several declarations including one that acknowledged Aboriginal title within the Claimed Lands and one that declared certain fee simple titles and interests within the Claimed Lands to be defective and invalid.

Not surprisingly, BCSC’s decision in *Cowichan* is but the first stage of litigation in this matter. One of the defendants, the Province of British Columbia, has already announced an intention to appeal the decision. Other defendants cannot be far behind. The case is being widely reported in the media raising the spectre of Aboriginal title overtaking fee simple title.

A reading of the actual *Cowichan* decision would allow one to assess the accuracy of the concerns expressed in the media publications, but it is likely that few will undertake a review of the Reasons for Judgment. *Cowichan* is a long read – 673 pages according to my printer. The court’s review of the evidence is exhaustive, the arguments presented by the parties are fully canvassed and the court’s analysis is extensive.

In the space of these paragraphs, there is no way I can do justice to all the evidence, arguments and court analysis that is set out in *Cowichan*. My purpose in bringing this case to the attention of the appraisal community is to highlight the potential impact the decision may have on appraising the fee simple interest. *Cowichan* portends a more difficult appraisal future.

The Claimed Land

The Claimed Land is depicted in Schedules A and B of the court’s Reasons for Judgment. In the Executive Summary provided in *Cowichan*, the court writes that Cowichan Nation:¹

- “... occupied several winter villages on the east coast of Vancouver Island from what is now Cowichan Bay to the south as far north as Chemainus ...” as well as winter villages in other locations. Every summer, they travelled *en masse* to their permanent village located on the south arm of the Fraser River.
- “In 1853, Governor James Douglas told the Cowichan 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. 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 ...”²
- Further, in 1859 and 1860, Douglas set apart Indian settlements from the Crown’s land disposition processes for the purpose of eventual Indian reserve creation.

- Reservations entailing the Claimed Land were never created. Instead, over the years, the lands were surveyed and there were numerous Crown grants of fee simple interest. By 2014, when the Cowichan Nation commenced their lawsuit, the Claimed Land was held by the provincial and federal Crown, the City of Richmond, and Vancouver Fraser Port Authority, all of whom were defendants in the lawsuit. There are also third-party private persons and entities that hold fee simple interests in parts of the Claimed Land but the Cowichan Nation did not sue the third parties.³

Selected points discussed in *Cowichan*

To provide context to the court's declarations in *Cowichan*, it is useful to highlight some of the more salient points relied upon by the court:

- "Aboriginal title is a *sui generis* interest [i.e., of its own kind, not explainable by reference to common law], grounded in the regular and exclusive use of land. If proved, the claimant group retains the right to use and control the land and to reap any benefits flowing from it. Incursion by the Crown can only occur with the group's consent, or if its activities are justified by a compelling and substantial public purpose and are not inconsistent with its fiduciary duty to the group ..."⁴
- Aboriginal rights and interests are enshrined in section 35 of the *Constitution Act, 1982*;⁵
- Proof of Aboriginal title requires proof of occupation at the time the Crown first asserted sovereignty.⁶ The court determined that there was the requisite sufficiency of occupation, exclusivity of occupation and duration of occupation to found the claim of Aboriginal title;⁷
- The law regarding the effect of fee simple interest on Aboriginal title land is ambiguous and unsettled; neither Aboriginal title nor fee simple title are absolute. Aboriginal title burdens land upon which fee simple estates have been granted. The exercise or application of Aboriginal title and fee simple title rights require reconciliation;⁸
- Aboriginal title and fee simple interests are not unqualified interests;⁹
- "Aboriginal title ... arises from possession before the assertion of British sovereignty, whereas estates such as fee simple are derived from Crown title and arise afterward. Aboriginal title predates colonization by the British and survives British claims of sovereignty ..."¹⁰
- "British Columbia took its underlying title in land in the province subject to Aboriginal title ... Provincial ownership of land is qualified by Aboriginal title ..."¹¹
- "Aboriginal title confers a right to the land itself."¹²
- Aboriginal title means the land cannot be alienated except to the Crown, it cannot be encumbered so as to prevent succeeding generations from use and enjoyment, nor can it be developed so as to deprive future generations of its benefit.¹³
- While the jurisprudence around section 35 of the *Constitution Act, 1982* allows for the possibility of "justifiable infringement" of Aboriginal title and rights, the test for such infringement was not made out by any of the defendants.

The declarations made by the court

Cowichan Nation sought and received from the court relief in the form of the following declarations:¹⁴

- Cowichan Nation has Aboriginal title within the Claimed Lands;
- Previous Crown grants of fee simple interest in the Claimed Lands unjustifiably infringe the Aboriginal title;
- Fee simple interest held by Canada and Richmond in the Claimed Lands is defective and invalid;
- Canada owes a duty to Cowichan Nation to negotiate in good faith;
- British Columbia owes a duty to negotiate in good faith to reconcile the Crown granted fee simple interests held by third parties and the Crown vesting of soil and freehold interest to Richmond;

There was also a declaration of an Aboriginal right to fish the south arm of the Fraser River that involved a consideration of the law around Aboriginal rights (as opposed to Aboriginal title) that is not discussed herein.

It is important to note that Cowichan Nation did not claim monetary relief. It is unclear what would have been the result had such a claim been made.

Basis for relief

Fundamental to the court's declarations was its view of the evidence that in exchange for Cowichan Nation agreeing to keep the peace with settlers, Governor Douglas, on behalf of the British Crown, promised to set aside, and effectively did set aside, land for Cowichan Nation¹⁵ and that there was nothing in the events following the Douglas commitment that evidenced a resiling from this intention although formal reservation creation did not occur. In the court's opinion, the evidence of words and conduct of government officials supported the view that land had been, or was to be, set aside for Cowichan Nation and the sequence of legislation and constitutional documents served to give expression to this intention and to solidify the claim to Aboriginal title to the Claimed Land.

Prior to British Columbia becoming a part of Canada, the legislation in place dealing with land issues was found by the court to be supportive of the view that land had been or was intended to be "appropriated" (i.e., set aside) for Cowichan Nation. There was never any express statement to countermand what Douglas had initiated.

The court found that when British Columbia became part of Canada, its jurisdiction to deal with land set aside for Indigenous peoples was transferred to the federal Crown with the result that

any provincial attempt to grant fee simple interest in the Claimed Lands was without a constitutional foundation. Further, with the entry of British Columbia into the Confederation, the federal Crown assumed the obligations British Columbia had incurred in relation to Indigenous peoples including Cowichan Nation.

The court found that Cowichan Nation's Aboriginal title burdens the land over which the Crown grants of fee simple interest were issued. Change in the fee simple ownership over the years has not displaced Aboriginal title. "... where Aboriginal title and fee simple interests exist in the same land, the respective interests must be addressed within the broader framework of reconciliation ..." Aboriginal title is a limit on private ownership; it is a prior and senior right to land.¹⁶

For the court, the correct question to pose is "what remains of fee simple title after Aboriginal title is recognized in the same lands?"¹⁷

It was argued by the City of Richmond that the Torrens system for land titles implemented in the *Land Title Act* of British Columbia (in particular sections 23 and 25) created indefeasible title for the registered owner of the fee simple interest and, therefore, the City argued, the current fee simple interests prevailed over the Cowichan Nation claims. The court made short order of this argument. It held that the Legislature did not intend that section 23 would be a bar to a claim of Aboriginal title. The court held that Aboriginal title does not derive from Crown title. It was the court's view that the *Land Title Act* is aimed at a system of registration only.

Closing: what does this mean for appraisers?

For an appraiser, there are immediate consequences flowing from *Cowichan*. Does the possibility of a claim of Aboriginal title require an appraiser to add to the list of extraordinary assumptions in an appraisal report? If a client asks an appraiser to incorporate into an opinion of value the possibility of a successful claim of Aboriginal title, how would the appraiser go about doing this?

How will an appraiser even go about identifying who might have an Aboriginal title claim, what the boundaries of the land claim might be, what form of relief might be sought (e.g., declarations of entitlement, monetary claims, etc.) and whether there are competing or overlapping claims? The land title system provides no assistance. As the court notes in *Cowichan*, "No caveats, lis pendens, or certificates of pending litigation can be registered to alert purchasers to the existence of an unproven claim to the land by Aboriginal people."¹⁸

In *Cowichan*, the court did not provide precise boundaries over which Cowichan Nation has Aboriginal title.¹⁹ Presumably, this has been left by the court in the ardent hope that the parties will negotiate the boundaries. This points to the fact that in every claim of Aboriginal title, if the claim is proven, there remains the need of a fact-finding exercise to determine boundaries that will either result from negotiation or litigation, both of which are very likely to be protracted.

We will not know for quite some time whether the *Cowichan* decision will be upheld on appeal. The process will not be quick. In the interim, there will be uncertainty. Risks associated with land purchasing, development and use have been exacerbated.

End notes

- ¹ *Cowichan*, para. 6
- ² *Cowichan*, paras. 1657-2081 for the evidence and analysis leading to this finding of the Douglas promise and appropriation including post-Douglas events
- ³ *Cowichan*, para. 44
- ⁴ *Cowichan*, para. 525
- ⁵ *Cowichan*, para. 527
- ⁶ *Cowichan*, para. 530
- ⁷ *Cowichan*, paras. 525-1656
- ⁸ *Cowichan*, para. 2141
- ⁹ *Cowichan*, paras. 2176-2181
- ¹⁰ *Cowichan*, para. 2183
- ¹¹ *Cowichan*, para. 2186
- ¹² *Cowichan*, para. 2308
- ¹³ *Cowichan*, para. 2310
- ¹⁴ *Cowichan*, paras. 7, 75, 3724
- ¹⁵ *Cowichan*, paras. 1811-1838
- ¹⁶ *Cowichan*, paras. 2188-2194
- ¹⁷ *Cowichan*, para. 2193
- ¹⁸ *Cowichan*, para. 2252
- ¹⁹ *Cowichan*, para. 31

This article is provided for the purposes of generating discussion and to make practitioners aware of certain challenges presented in the law. It is not to be taken as legal advice. Any questions relating to the applicability of cases referred to in the article in particular circumstances should be put to qualified legal and appraisal practitioners. ■