Cowichan Tribes v Canada (AG) et al – Meeting for Affected Landowners

Presented to: Affected Landowners

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Purpose of the Meeting

- To inform affected landowners in the Claim Area of the Court's decision at a high level and to explain next steps that the City of Richmond is taking.
- To assure affected landowners that City Council is doing everything in its power to protect their fee simple interests.
- To encourage landowners to demand that the AG(BC) and the AG(Canada) argue extinguishment on appeal along with the City of Richmond.
- To hear from affected landowners in the Claim Area regarding the difficulties that the Court decision has created for them and to take questions regarding next steps.

The Claim

- The Plaintiff First Nations brought a claim as the descendants of the Cowichan Nation.
- Among other things, they claimed Aboriginal title over 1,846 acres (747 hectares) within the City of Richmond. See the area delineated by the bright green semi-circle.
- The Defendants were Canada, British Columbia, the City of Richmond, the Vancouver Fraser Port Authority, the Musqueam Indian Band, and the Tsawwassen First Nation.
- The Claim Area captures over 150 fee simple titles.

Key Declarations of the Court:

Justice Young delivered judgment on August 7, 2025, and granted declarations including that:

1. The plaintiffs established Aboriginal title to a portion (roughly 40 percent) of the Claimed Area, despite the fact that the Crown had, in the period from 1871 to 1914, granted the entirety of those lands in fee simple.

- This declaration applies to both government fee simple lands and private fee simple lands.
- The declaration states that Aboriginal title extends to certain submerged lands.
- See the area delineated in the aerial photograph by the thick black line.

Key Declarations of the Court:

2. The Crown's grants of fee simple did not extinguish or otherwise displace Cowichan Aboriginal title but instead constituted unjustifiable infringements of Cowichan Aboriginal title.

3. All fee simple titles and interests that the plaintiffs chose to challenge – i.e., properties held by federal Crown entities and the City of Richmond – are defective and invalid.

Key Declarations of the Court:

4. The federal Crown owes a duty to the Aboriginal title holder to negotiate in good faith towards reconciliation of Canada's fee simple interests in the area with Cowichan Aboriginal title.

5. The provincial Crown owes a duty to the Aboriginal title holder to negotiate in good faith towards reconciliation of the Crown-granted fee simple interests held by third parties in the area and of the Crown vesting of the soil and freehold interest to Richmond with Cowichan Aboriginal title.

Notice Was Not Given To Affected Private Landowners

- None of the affected private landowners in the Claim Area were given formal notice by the Plaintiffs even though the relief sought would adversely affect their fee simple interests.

- In 2017 the Court rejected the arguments of the Defendants Canada, British Columbia and the City of Richmond that the Plaintiffs must give notice of the legal proceedings to the affected landowners.

The Decision Is Unprecedented and Undermines the Land Title System In BC

- The Court's decision to undermine established fee simple ownership of the properties under the *Land Title Act* compromises the entire land title system in BC.
- The decision marks the first time that the court has ruled on a claim for Aboriginal title: (a) over urban lands; (b) over lands that had been entirely granted in fee simple; and (c) over lands that the plaintiff's ancestors had abandoned roughly 150 years in the past.
- The decision introduces enormous uncertainty into the security of any title in British Columbia and must be overturned. It cannot be negotiated away.

Appeal Proceedings

- Richmond filed a notice of appeal on September 3, 2025. In the following two days, all other parties – including the plaintiffs – filed their own appeals.
- This means that the Court of Appeal will be hearing from all sides about errors that the trial judge allegedly made.
- Specifically, because the plaintiffs have initiated their own appeal, it means that the Court of Appeal will be asked to expand the declared Aboriginal title area, so that it covers the entire Claim Area. (i.e., The plaintiffs are asking that the thick black line in the attached aerial photograph be made co-extensive with the bright green semi-circle.)

Among the Court's Findings To Be Appealed are the following:

- The Province had no jurisdiction to extinguish Aboriginal title.
- The Crown grants of fee simple interest did not displace or extinguish the Cowichan's Aboriginal title.
- Aboriginal title lies beyond the land title system in British Columbia. Sections 23 and 25 of the *Land Title Act* do not apply to Aboriginal title.

What is Aboriginal title?

- 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 to enjoyment and occupancy of the land; the right to possess the land; the right to economic benefits of the land; and the right to proactively use and manage the land.

What do Sections 23 and 25 of the Land Title Act say:

- s. 23(2) An indefeasible title, … , is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, …
- s.25(2) An action of ejectment or other action for the recovery of land for which an indefeasible title has been registered must not be commenced or maintained against the registered owner named in the indefeasible title, …
- s. 25(3) In any case…, the production of a subsisting state of title certificate must be held in all courts to be an absolute bar and estoppel to an action referred to in subsection (2) against the registered owner named in the certificate, despite a rule of law or equity to the contrary.

Aboriginal Title and Fee Simple Title Cannot Co-exist

- Aboriginal title cannot coexist with fee simple ownership.
- There cannot be two competing rights of exclusive ownership and possession of the same land.

Fee Simple Extinguishes Aboriginal Title

- Only Richmond argued extinguishment.
- The Court took notice that neither Canada nor British Columbia pled extinguishment:

> [2096] …Canada initially pled extinguishment but abandoned its reliance on this defence in its amended response to civil claim filed November 22, 2018. BC never pled extinguishment…

Fee Simple Extinguishes Aboriginal Title

- The City of Richmond was the only party at trial arguing that the Crown grants of fee simple necessarily extinguished Aboriginal title.
- The federal and province Crowns were each labouring under litigation directives that constrained their ability to argue extinguishment: see page 18 of Canada's Directive and page 15 of BC's Directive.
- Commentators have referred to these directives in asking whether the Crown parties "pulled their punches" in defending the case.

Attorney General (BC) Litigation Directive

- The Attorney General of BC's litigation directive undermines the Province's ability to adequately defend the fee simple titles at issue by stipulating that: "…The Province will not advance arguments based upon the unilateral extinguishment of Aboriginal rights…"
- The directive threatens to continue tying the hands of the Province's lawyers. There are over 2 million fee simple titles in British Columbia that are potentially susceptible to claims by other indigenous groups for declarations of aboriginal title.

Attorney General (BC) Litigation Directive

- Richmond has requested that the Province allow its lawyers to advance all legally available arguments in its defence of the Province's fee simple titles, including that the Province had constitutional authority to issue grants that extinguish aboriginal title to the lands granted.
- The Province's failure to instruct its lawyers to argue extinguishment undermines the security of fee simple title in the Province and betrays the interests of private landowners in the Province.
- The Province's argument of displacement is an alternative argument. It is not a substitute for the argument of extinguishment.

Attorney General (Canada) Litigation Directive

- The federal directive contemplates that an extinguishment defence may be advanced when there is a “principled basis” for it.
- There is a principled basis for an extinguishment defence in the Cowichan Tribes case. It was wrong for Canada to amend its pleadings and remove extinguishment as one of its arguments.
- Richmond similarly made a request to Canada that it is critical that fee simple titles in British Columbia be fully defended and Canada should advance every available argument to do so including extinguishment.

The Imperative of Landowners To Demand That Extinguishment Be Argued

- It is now open to both the Province and Canda on appeal to argue extinguishment.
- It is imperative that affected landowners demand this.

QUESTIONS FROM AFFECTED LANDOWNERS IN THE CLAIM AREA