Cowichan Tribes v Canada: Uncharted Land in Indigenous Rights Claims

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published 01/13/2026

The August 2024 **British Columbia Supreme Court** judgment in *Cowichan Tribes v Canada (Attorney General)* has been described by some as the most consequential Aboriginal law decision since *Tsilhqot'in*.

The Cowichan Tribes brought an action seeking a declaration that they hold Aboriginal title and fishing rights at the location of their ancestral village, Tl'uqtinus – situated on the south arm of the Fraser River in present-day Richmond, British Columbia. The Cowichan relied on commitments made in 1853 by the then Governor of Vancouver Island, James Douglas. Between 1871 and 1914, Crown grants were issued over the whole of the lands. Much of it was granted to settlers without the knowledge or agreement of the Cowichan.

Recognition of Aboriginal title over developed and subdivided lands

The Court declared that the Cowichan have Aboriginal title to a portion of Tl'uqtinus, including surrounding upland and submerged lands. The Court emphasized that Aboriginal title 'lies beyond the land title system'. It held that Crown grants do not extinguish Aboriginal title. Richmond's claim that its registered fee simple interests created indefeasible title under the **Land Title Act** was rejected.

Why this matters for industry

The decision confirms that Aboriginal title can exist beneath existing third-party tenures, even in urbanized land. For **natural resource developers**, this raises the possibility that historical Crown grants of project lands (including forestry tenures, mineral claims, rights-of-

way and waterlots) may be subject to un-surrendered, underlying Aboriginal title. This highlights the importance of TDS' **Aboriginal Law Services** in advising these risks. The Court's analysis suggests that future claims for title in other parts of British Columbia and other provinces and territories where un-surrendered Aboriginal title is claimed may overlap with private lands, fee simple interests or long-established industrial sites.

Crown grants found to be unconstitutional and unjustified infringements

The Court held that historic Crown grants over the Cowichan lands, many made after Confederation, were issued without statutory or constitutional authority. It found that the Crown knew the area constituted an 'Indian settlement,' and Article 13 of the BC Terms of Union constitutionally protected Indian settlements from transfer without proper process. Later municipal tax sales and vesting of highway lands were also held to unjustifiably infringe title.

Although the Court did not grant remedies against 'innocent' third-party landholders, it declared that their fee simple titles are defective and invalid as against the Aboriginal title holders. If this stands, it is a profound legal development. It signals that developers cannot depend on the validity of underlying Crown dispositions if those dispositions infringed Aboriginal title and cannot be subsequently justified.

This invites **legal uncertainty** for any project located on or near historically occupied Indigenous lands – especially where lands were granted during the colonial and early-Confederation eras.

Crown has a constitutional duty to negotiate in good faith

The Court declared that Canada and British Columbia each owe a constitutional duty to negotiate in good faith with the Cowichan to reconcile existing fee simple interests with Cowichan title. This duty flows from the honour of the Crown and persists even after land has been granted to third parties.

Resource companies must anticipate that Crown decision-making in areas of potential Aboriginal title will become more cautious, more time-consuming and more focused on co-management or shared-decision frameworks.

Broader application of the honour of the Crown

The Court emphasized that the 1853 assurance made by Governor James Douglas to treat the Cowichan with ‘justice and humanity’ constituted a solemn promise engaging the honour of the Crown. This 170-year-old promise imposed ongoing constitutional obligations influencing land management decisions now.

Aboriginal fishing right recognized without temporal or species limitation

The Court found that the Cowichan have an Aboriginal right to fish the south arm of the Fraser River for food, without any seasonal or species limits and without needing permission.

Where to now? Stay tuned

The decision is under appeal by the Province of British Columbia, the **City of Richmond** and the **Musqueam Indian Band**, with parties arguing over property rights and jurisdiction, while the Musqueam Band clarified it is not targeting private owners but addressing the Crown’s actions. Notice of Cowichan’s action was not provided to the private landowners also affected by the decision; there is a move by some to have the whole case re-opened to allow submissions on their behalf. There is plenty to stay tuned for.

In the meantime, BC has announced $150 million in loan guarantees to support private landowners in the area whose lenders may have cold feet in light of this decision and the pall it casts over provincially recognized title.

Cowichan Tribes v Canada arguably (and for better or worse) reshapes the legal landscape. By recognizing Aboriginal title in an urban, industrialized area and declaring certain Crown grants invalid as against that title, the Court may have signalled a new era in evaluating the relationship between **Indigenous land rights,** historical land dispositions and contemporary resource development. It also risks upsetting the whole fabric of title to land and interests in land and the societal and economic reliance on those certainties. Natural resource developers must now evaluate the possibility of unceded Aboriginal title and plan proactively, integrating enhanced Indigenous engagement, legal risk assessment and long-term land strategy into all phases of project development. Reliance on the Crown’s guaranteed title might not stand.

As Yogi Berra said, ‘The future ain’t what it used to be.’

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