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BULLETIN

ABORIGINAL TITLE DECLARED OVER FEE SIMPLE LANDS IN LANDMARK DECISION

In a landmark decision, already the subject of an appeal by the Province, the British Columbia Supreme Court has granted the Cowichan Tribes Aboriginal title over a large swathe of land in the southeastern portion of the City of Richmond. *Cowichan Tribes v. Canada (Attorney General),* 2025 BCSC 1490 is not only important because it represents a rare instance of a successful claim for Aboriginal title, but also because it is the first time that a Canadian court has granted remedies that include the invalidation of certain fee simple titles within the claim area. Of particular relevance and concern to local governments in British Columbia, the Court invalidated the title of certain lands held by the City of Richmond in fee simple. Notably, the claim area also included lands held by other fee simple owners. While the Court did not invalidate those titles, as the Cowichan Tribes did not seek such a remedy, it did declare that Cowichan Tribes has Aboriginal title over those lands.

Fee simple title is, in general terms, as close to absolute ownership as exists in the Canadian system of property law. As homeowners know, fee simple title carries with it a right of exclusive use and occupation. While fee simple titles are subject to regulation by the government, and the exercise of rights on fee simple titles is also limited by common law principles like the law of nuisance, fee simple title has always been reliable, secure, and constant.

Aboriginal title is a concept that courts have found to be recognized by section 35 of the *Constitution Act*, which states that "the existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed". Aboriginal title, like fee simple title, is a form of land ownership that carries with it an exclusive right of use and occupation. However, unlike fee simple, which is registered in a land title system created provincially, Aboriginal title has been called by Canadian courts a *sui generis* interest. This means that Aboriginal title is "of its own kind, or "unique". Canadian courts have said that Aboriginal title is a collective form of title that attaches to a particular indigenous body. It carries with it three things: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put; and (3) the right to enjoy the economic fruits of the land.

Until the *Cowichan Tribes* decision, no court had ever directly grappled with a circumstance in which fee simple title was challenged as being invalid on the basis of a claim for Aboriginal title. That was exactly what was put to the Court in this case. Among other findings, the Court found that the Province of British Columbia has no jurisdiction to extinguish Aboriginal title through the granting of fee simple interests.

While the decision is very lengthy and complex, and is being appealed, its implications could be far-reaching if upheld. If indigenous bodies can prove Aboriginal title to a fee simple parcel in British Columbia, then a Court may invalidate that title. The Court also appears to contemplate certain circumstances in which Aboriginal title and fee simple title might co-exist, with Aboriginal title as a "burden" on fee simple estates that were granted by the Province. How such titles could co-exist is not a question that the Court answers, as the specific remedy granted in relation to Richmond's title allowed the Cowichan Tribes' title to overcome and displace that of Richmond.

We will continue to report on this landmark case as we come to understand other implications that affect BC local governments.

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