IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cowichan Tribes v. Canada (Attorney General),* 2026 BCSC 1213

Date: 20260629
Docket: 14-1027
Registry: Victoria

Between:

Cowichan Tribes,
Squtxulenuhw, also known as William C. Seymour Sr.,
Stz'uminus First Nation, Thỏlmen, also known as John Elliott,
Penelakut Tribe, Kwaliimtunaat, also known as Joan Brown,
Halalt First Nation, and Sulsimutstun, also known as James Thomas,
on their own behalf, and on behalf of all other descendants
of the Cowichan Nation

Plaintiffs

And:

The Attorney General of Canada,
His Majesty the King in right of the Province of British Columbia,
the City of Richmond, the Vancouver Fraser Port Authority,
the Musqueam Indian Band and the Tsawwassen First Nation

Defendants

Before: The Honourable Justice Young

Reasons for Judgment

Counsel for the Applicant:	J. M. Young and D. G. Burchart
Counsel for the Plaintiffs:	D.M. Rosenberg, K.C. D. M. Robbins I. A. Kennedy
Counsel for the Defendant Attorney General of Canada:	S.-L. Vigneau B. C. Marleau
Counsel for the Defendant His Majesty the King in right of the Province of British Columbia:	M.-S Poulin
Counsel for the Defendant City of Richmond:	B. B. Olthuis, K.C. B. Risk
Counsel for the Defendant Vancouver Fraser Port Authority	E.A.B. Gilbride
Counsel for the Defendant Musqueam Indian Band:	R. W. Millen
Place and Dates of Hearing:	Victoria, B.C. May 25 - 26 2026
Place and Date of Judgment:	Victoria, B.C. June 29, 2026

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Introduction

[1] Montrose Industries Ltd., Montrose Property Holdings Ltd. and Ecowaste Industries Ltd. (collectively, “Montrose”) apply to be added as defendants to this action prior to the entry of final order after trial and seek related amendments to the style of cause. Montrose also applies to reopen the trial to permit Montrose to file submissions and affidavit evidence in respect of specific issues. In the alternative to joinder, Montrose seeks leave to intervene or otherwise participate for the limited purpose of filing written submissions and affidavit evidence on those issues, as an intervenor.

Background

[2] Below, I set out a brief history of these proceedings.

[3] The plaintiffs commenced this representative action on March 14, 2014, seeking declarations relating to Aboriginal title to certain land on the south arm of the lower Fraser River, and relating to an Aboriginal right to fish the south arm of the Fraser River. The plaintiffs initially filed the action as against the Attorney General of Canada (“Canada”) and Her Majesty the Queen in right of the Province of British Columbia (“BC”). In November 2014, the plaintiffs added the City of Richmond (“Richmond”) as a defendant. In January 2016, the plaintiffs consented to adding the Vancouver Fraser Port Authority (“VFPA”) and the Musqueam Indian Band (“Musqueam”) as defendants. In April 2016, Tsawwassen First Nation (“TFN”) applied to the court to be added as a defendant, and in September 2016, the Court granted the application.

[4] In 2017, Canada applied for an order that the plaintiffs, or alternatively, BC, deliver formal notice of the action to private registered owners of fee simple lands within and outside of the claim area. In reasons indexed at 2017 BCSC 1575 [*Cowichan Tribes 2017*], Justice Power dismissed Canada’s application, declining to require the plaintiffs or BC to provide formal notice to private landowners, noting that the Court’s ruling did not prevent any of the defendants from providing informal notice: paras. 25–27.

[5] The trial required 513 days to complete, beginning in September 2019 and concluding in November 2023. On August 7, 2025, the Court released final reasons for judgment, indexed at 2025 BCSC 1490 (“Final Reasons”). I found that the plaintiffs had established Aboriginal title to a portion of the land that they claimed, as well as an Aboriginal right to fish the south arm of the Fraser River for food. The lands over which the plaintiffs established Aboriginal title are described in the Final Reasons (defined as the “Cowichan Title Lands”), summarized at paras. 1573–1576 and 1655 and depicted at Schedule “A” to the Final Reasons.

[6] I granted six declarations, which are reviewed at para. 3724 of the Final Reasons, reproduced below:

> [3724] In summary, I make the following declarations:
>
> - The descendants of the Cowichan Nation, including the Cowichan Tribes, Stz’uminus, Penelakut and Halalt, have Aboriginal title to a portion of the Lands of Tl’uqtinus, the Cowichan Title Lands, within the meaning of s. 35(1) of the *Constitution Act, 1982*.
> - The Crown grants of fee simple interest in the Cowichan Title Lands, and the Crown vesting of the soil and freehold interest in the Richmond Tl’uqtinus Lands (Highways) in the Cowichan Title Lands, unjustifiably infringe the Cowichan Nation Aboriginal title to these lands.
> - Canada’s fee simple titles and interests in Lot 1 in Sections 27 and 22 (except those in the YVR Fuel Project lands), Lot 2 in Section 23, and Lot 9 in Sections 23 and 26, and Richmond’s fee simple titles and interests in Lot E in Sections 23 and 26 and Lot K in Section 27, are defective and invalid.
> - With respect to the Cowichan Title Lands, Canada owes a duty to the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz’uminus, Penelakut, and Halalt, to negotiate in good faith reconciliation of Canada’s fee simple interests in the YVR Fuel Project lands with Cowichan Aboriginal title, in a manner consistent with the honour of the Crown.
> - With respect to the Cowichan Title Lands, British Columbia owes a duty to the descendants of the Cowichan Nation, including the Cowichan Tribes, Stz’uminus, Penelakut, and Halalt, to negotiate in good faith reconciliation of the Crown granted fee simple interests held by third parties and the Crown vesting of the soil and freehold interest to Richmond with Cowichan Aboriginal title, in a manner consistent with the honour of the Crown.

- The descendants of the Cowichan Nation, including the Cowichan Tribes, Stz'uminus, Penelakut and Halalt, have an Aboriginal right to fish the south (i.e., main) arm of the Fraser River for food purposes within the meaning of s. 35(1) of the *Constitution Act, 1982*.

[7] Following the release of the Final Reasons, all parties filed notices of appeal. The final order has not yet been entered.

[8] On December 4, 2025, Montrose served this application on the parties, and on January 23, 2026, filed its application with the court. Montrose Industries Ltd. ("Montrose Industries") is a private landowner who has fee simple interests in the Cowichan Title Lands.

[9] On February 6, 2026, the plaintiffs applied for document production from Montrose and BC related to the extent of notice that Montrose had about these proceedings while they were ongoing. Following a hearing of that application, I ordered that BC and Montrose produce some documents to the plaintiffs. I set timelines for production of those documents and for the plaintiffs to respond to Montrose's application: 2026 BCSC 324 at paras. 48–50.

[10] Montrose's application was heard on May 25–26, 2026.

Montrose's interests in land and business operations

[11] Ken Low is the CEO and President of Montrose Property Holdings Ltd. ("Montrose Holdings"). Montrose relies on two affidavits of Mr. Low in support of its application, which describe the nature of Montrose's business, reviewed below.

[12] Montrose Industries, Montrose Holdings and Ecowaste Industries Ltd. ("Ecowaste") are companies which carry out business operations in BC, including industrial development and sustainable waste solutions.

[13] Montrose Industries is a wholly owned subsidiary of Montrose Holdings. Ecowaste is a wholly owned subsidiary of Montrose Industries.

[14] Montrose Industries is the registered fee simple owner of certain properties in Richmond. Ecowaste operates a landfill in Richmond and is a long-term lessee of the lands comprising the Richmond landfill.

[15] Mr. Low deposed that Montrose's real estate business involves development and construction of industrial warehouses on reclaimed landfill lands, leased to tenants under long-term lease agreements of up to 20 years. He described parcels of land that Montrose Industries owns in Richmond with a total area of about 193.4 ha. which includes three parcels of land in the Agricultural Land Reserve (ALR) and a road allowance (collectively, the "Montrose Lands", described with reference to the property address, parcel identifier, and Area-Jurisdiction-Roll):

1. 6871 No. 7 Road, 003-560-261, 11-320-R-019-440-503
2. 8060 No. 6 Road, 003-845-231, 11-320-R-026-779-000
3. 7011 No. 7 Road, 024-397-407, 11-320-R-022-907-001
4. No Address, 024-397-423, 11-320-R-022-907-002
5. No Address, 003-574-229, 11-320-R-029-101-340
6. 8011 Zylmans Way, 031-099-467, 11-320-R-027-000-420
7. 8031 Zylmans Way, 031-099-475, 11-320-R-027-000-430
8. 8020 Zylmans Way, 031-099-483, 11-320-R-027-000-440
9. 8040 Zylmans Way, 031-650-350, 11-320-R-027-000-450
10. 8060 Zylmans Way, 031-650-368, 11-320-R-027-000-460
11. 8080 Zylmans Way, 031-650-376, 11-320-R-027-000-470
12. 8040 Zylmans Way, 031-099-157, 11-320-R-027-000-410
13. 15111 Williams Road, 003-475-727, 11-320-R-028-500-654
14. Road Allowance 936, 11-320-R-021-748-002

[16] Mr. Low deposed that the portion of land north of Blundell Road, excluding any land in the ALR (approximately 59.7 ha. excluding road allowances) consists primarily of Ecowaste's landfill and recycling facility (the "Northern Montrose Lands"). The portion of land south of Blundell Road, excluding any land in the ALR (approximately 65.4 ha., excluding road allowances) (the "Southern Montrose Lands") has several large industrial warehouses leased to third parties which serve as storage and distribution centres. The warehouses are constructed on land

formerly used as a landfill. There is also industrial development land and land which supports permanent landfill operations infrastructure, as well as about 12 ha. of industrial lands that were never operated as a landfill and are leased to tenants and used in other industrial operations.

[17] Mr. Low deposed that he understands that the Cowichan's Aboriginal title encompasses all of the Southern Montrose Lands and portions of the ALR land parcels, but not the Northern Montrose Lands. Mr. Low deposed that the Cowichan Title Lands also appear to include Blundell Road which bisects the Southern Montrose Lands and the Northern Montrose Lands. The portion of Blundell Road which bisects the Montrose Lands was constructed by Montrose and donated to the City of Richmond.

[18] Mr. Low deposed that Montrose has spent in excess of $30 million managing environmental issues on the Northern Montrose Lands and the Southern Montrose Lands. He deposed that Montrose has spent in excess of $300 million developing the buildings on the Southern Montrose Lands and that Montrose owes approximately $200 million in mortgages in relation to those buildings.

[19] The Montrose Lands, other than the ALR parcels, are regulated as a single landfill, and the subject of a single landfill operation certificate issued under the *Environmental Management Act*, S.B.C. 2003, s. 53. The *Environmental Management Act* and operation certificate required Montrose to develop a design, operation and closure plan ("DOCP") that must be updated every 5 years. While the Montrose Lands are regulated as a single landfill, the Southern Montrose Lands are inactive (having been reclaimed as industrial lands) while the Northern Montrose Lands are active. The DOCP addresses, among other things, the landfill design and implementation plan, leachate and stormwater management requirements and design, design and operation of the landfill gas collection system, and water monitoring and reporting requirements.

[20] Mr. Low deposed that the leachate collection, management and discharge systems are integrated amongst both the Northern Montrose Lands and the

Southern Montrose Lands. This includes infrastructure below Blundell Road connecting the systems on both sides. The leachate from the Southern Montrose Lands is conveyed through a pipe network on the Northern Montrose Lands to a municipal pipe along Blundell Road. Leachate and groundwater monitoring access points are located throughout the Montrose Lands. Similarly, the landfill gas collection system collects gas from both the Southern Montrose Lands and Northern Montrose Lands, with the two halves being fully integrated.

[21] Mr. Low deposed that portions of the Southern Montrose Lands are registered contaminated sites that are regulated, in part, by certificates of compliance issued under s. 53 of the *Environmental Management Act*. These certificates apply to portions of the Southern Montrose Lands where the warehouses have been constructed and contain a range of requirements regarding engineering controls, vapour management, performance verification planning and reporting. The certificates of compliance are technical and integrally connected with the leachate and gas management system that operates in an integrated manner over the Southern Montrose Lands and the Northern Montrose Lands. The certificates also cross-reference the DOCP and the landfill operations certificate.

Positions of the Applicants and the Parties

Montrose's position

[22] The Montrose entities apply to be added as defendants under Rule 6-2(7)(b) or alternatively under Rule 6-2(7)(c) of the *Supreme Court Civil Rules*. Rule 6-2(7) permits joinder "at any stage of the proceedings". Montrose submits that although final judgment has been issued, and some authorities have questioned joinder after judgment, the Court retains broad authority to reopen the trial and make procedural directions prior to entry of the final order. Montrose concedes that a post-trial application to be added as a party is unusual, but notes that this is the first case where Aboriginal title has been found to exist over private property, which weighs in favour of the Court exercising its discretion generously.

[23] Rule 6-2(7)(b) allows the court to add a person as a party where they ought to have been added, or where their participation is necessary to ensure all matters in the proceeding are effectually adjudicated.

[24] Montrose says it ought to have been added as a party because it has a direct interest in the outcome of the action. Montrose also seeks clarity about whether the declaration of Aboriginal title is a judgment *in rem* or *in personam*. Montrose says its fee simple land interests are directly affected by a declaration of Aboriginal title. The New Brunswick Court of Appeal in *J.D. Irving, Limited et al. v. Wolastoqey Nation*, 2025 NBCA 129 [*Wolastoqey*], leave to appeal to SCC ref'd 42204 (28 May 2026), which was issued after the Final Reasons, concluded that the trial court had no jurisdiction to make a declaration of Aboriginal title against the Crown over privately owned lands once the private landowners were removed as parties to the action. Montrose relies on *Wolastoqey* in support of its position that private landowners were excluded from this case by virtue of *Cowichan Tribes 2017*, and therefore this Court lacked jurisdiction to make a declaration of Aboriginal title over privately held lands.

[25] Montrose says a finding of Aboriginal title directly affects it, including in matters related to co-ownership; restrictions on use; imposition of new requirements; the applicability of provincial laws; indefeasibility of title; impacts on ability to sell its land; use of land as security; provincial, federal and local government permitting and authorizations; and economic benefits from the land. The fact that the plaintiffs do not seek a declaration that Montrose Industries' fee simple titles are defective and invalid is irrelevant and distracts from the issue of how a finding of Aboriginal title affects Montrose.

[26] Montrose submits that even if this Court follows the reasoning in *Cowichan Tribes 2017* and determines that a finding of Aboriginal title, without a declaration that the private fee simple interests are defective and invalid, does not directly affect Montrose, the Court must also consider whether that analysis changes in light of the plaintiffs' pleading amendment in 2023 seeking a declaration of unjustified

infringement of Aboriginal title. Montrose says a finding of unjustified infringement impacts its interests because it is fundamental to the question of whether Aboriginal title would have been overridden by Montrose's fee simple title.

[27] If Montrose does not meet the test for joinder under Rule 6-2(7)(b), the Court should exercise its discretion to add Montrose as a defendant under R. 6-2(7)(c), which is broader in scope. Under Rule 6-2(7)(c), the court may add a party where there is a question or issue between an existing party and the applicant related to or connected with the claimed relief or subject matter of the proceeding and the court is of the view that it would be just and convenient to join them. Montrose submits the threshold for the first condition is low and only determines whether the question or issue is real and not frivolous. Regarding whether joinder is just and convenient, Montrose submits that there would be no prejudice to any party in allowing Montrose to adduce tailored evidence and make limited submissions on specific issues. This case has been ongoing for 11 years in connection with historical events that occurred around 150 years ago. Any incremental time associated with Montrose's participation will be modest. Montrose says it has not delayed bringing this application; it only became aware of significant impacts of the proceeding on its interests when the Final Reasons were released.

[28] Montrose seeks an order re-opening the trial to permit it to provide affidavit evidence and submissions with respect to five issues:

a) the question of whether it would be appropriate for the court to make findings and/or declarations of Aboriginal title over Montrose Lands in circumstances where Montrose was not a party during the 513 days of trial;

b) the question of what provincial laws would apply to the Montrose Lands if Aboriginal title exists over it;

c) the finding that the exercise of Aboriginal title and fee simple interests can coexist, but may not be exercised in their fullest form, and that the exercise of either will require modification or limitation;

d) the finding that any infringement of Aboriginal title that occurred through the issuance of fee simple titles in respect of the Montrose Lands is unjustified; and

e) the finding that Aboriginal title was not extinguished through the issuance of fee simple title and related legislation.

[29] In respect of item (b) above, Montrose says that the applicability of the below 38 statutes are among the laws that must be considered in the course of these proceedings if Aboriginal title is found: *Agricultural Land Commission Act*, S.B.C. 2002, c. 36; *Assessment Act*, R.S.B.C. 1996, c. 20; *Building Act*, S.B.C. 2015, c. 2; *Builders Lien Act*, S.B.C. 1997, c. 45; *Commercial Liens Act*, S.B.C. 2022, c. 9; *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57; *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78; *Community Charter*, S.B.C. 2003, c. 26; *Dike Maintenance Act*, R.S.B.C. 1996, c. 95; *Drainage, Ditch and Dike Act*, R.S.B.C. 1996, c. 102; *Drinking Water Protection Act*, S.B.C. 2001, c. 9; *Employment Standards Act*, R.S.B.C. 1996, c. 13; *Enforcement of Canadian Judgments and Decrees Act*, S.B.C. 2003, c. 29; *Environmental Management Act*, S.B.C. 2003, c. 53; *Escheat Act*, R.S.B.C. 1996, c. 120; *Expropriation Act*, R.S.B.C. 1996, c. 125; *Fire Safety Act*, S.B.C. 2016, c. 19; *Heritage Conservation Act*, R.S.B.C. 1996, c. 187; *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212; *Labour Relations Code*, R.S.B.C. 1996, c. 244; *Land Owner Transparency Act*, S.B.C. 2019, c. 23; *Land Survey Act*, R.S.B.C. 1996, c. 247; *Land Title Act*, R.S.B.C. 1996, c. 250; *Land Title Inquiry Act*, R.S.B.C. 1996, c. 251; *Land Transfer Form Act*, R.S.B.C. 1996, c. 252; *Law and Equity Act*, R.S.B.C. 1996, c. 253; *Local Government Act*, R.S.B.C. 2015, c. 1; *Motor Vehicle Act*, R.S.B.C. 1996 c. 318; *Occupiers Liability Act*, R.S.B.C. 1996, c. 337; *Property Law Act*, R.S.B.C. 1996 c. 377; *Provincial Sales Tax Act*, S.B.C. 2012, c. 35; *Public Health Act*, S.B.C. 2008, c. 28; *Safety Standards Act*, S.B.C. 2003,

c. 39; *Sale of Goods Act*, R.S.B.C. 1996, c. 410; *Strata Property Act*, S.B.C. 1998, c. 43; *Transportation Act*, S.B.C. 2004, c. 44; *Trespass Act*, R.S.B.C. 2018, c. 3; *Workers Compensation Act*, R.S.B.C. 2019, c. 1.

[30] Montrose submits that the Court has broad discretion to reopen the trial to hear new evidence or otherwise reconsider the original judgment prior to entry of the formal order. The discretion is properly exercised where the Court is satisfied that it is in the interests of justice to reopen the trial, particularly where the Court is of the view that not doing so would probably result in a miscarriage of justice and the reception of new evidence would probably change the result: *Mong v. Giang*, 2024 BCCA 136 at para. 28; *Brown v. Douglas*, 2011 BCCA 521; *B.W.H v. T.B.H*, 2024 BCSC 1623 at para. 46; *Zhu v. Li*, 2007 BCSC 1467 at para. 20; *Moradkhan v. Mofidi*, 2013 BCCA 132 at para. 31. Montrose says it does not seek to recall witnesses that testified at trial or to make submissions about whether the plaintiffs met the evidentiary burden of establishing Aboriginal title, although it does seek to make submissions about whether Aboriginal title was extinguished.

[31] Montrose says there is a real risk of a miscarriage of justice if the Court does not consider Montrose's ownership interests, its investments related to the land and the integrated nature of its operations. Montrose submits that evidence about these matters could affect the trial outcome, including the Court's determination about whether to making findings of Aboriginal title in respect of lands owned in fee simple and whether to declare Aboriginal title. Montrose says the Court may wish to provide further analysis about the applicability of certain provincial laws to Aboriginal title lands and the relationship between fee simple and Aboriginal title. Montrose was not a party at trial and had no opportunity to adduce evidence or make submissions; Montrose says this is an important consideration for the Court in determining whether a miscarriage of justice would probably occur if the trial were not reopened.

[32] Regarding the plaintiffs' submission that relitigation of these issues would be an abuse of process, Montrose says the doctrine of abuse of process has no application because it had no opportunity to litigate. Montrose has a unique

perspective which is different from that of the other defendants. Regarding delay, Montrose says it did not delay bringing its application and any delay does not give rise to an abuse of process. While Montrose had general knowledge of the litigation, knowledge is not notice. With respect to the plaintiffs' submission that the Court of Appeal is the proper forum, if Montrose is not a party to this proceeding, it will have no standing at the Court of Appeal unless it obtains leave to intervene.

Defendants' positions

[33] Canada consents to Montrose's application. Canada acknowledges the time and effort involved in closing the trial of this case, the importance of finality, and that it is generally in the interests of justice to consider a trial complete when all sides have closed their case. However, it is equally important for parties to have an opportunity to be heard when directly affected by a decision. Consenting to Montrose's application is consistent with Canada's application in 2017 to have the plaintiffs, or alternatively, BC, provide formal notice of the proceedings to private landowners within the claim area. Montrose should be added as a party and the trial reopened to allow Montrose to put their submissions and evidence before the Court about the impact of the decision on their financial and legal interests.

[34] BC consents to Montrose's application. BC says Montrose should be able to speak to the consequences the declaration of Aboriginal title has had on its fee simple titles and business activities. BC says the Court should consider the direct perspective of private landowners affected by a declaration of Aboriginal title, and that this is consistent with its position throughout the proceedings, including supporting Canada's application for the plaintiffs to provide notice to private landowners and in its final argument at the end of the trial. BC adopts Montrose's submissions regarding the test to add a party and to reopen a trial.

[35] Richmond consents to Montrose's application, except that it takes no position regarding reopening the trial for purpose of addressing which provincial laws would apply to the lands that Montrose owns that are Aboriginal title lands. Richmond otherwise endorses the submissions of Montrose, Canada and BC. Should the Court

dismiss the application, Richmond cautions the Court against providing any analysis or commentary related to the issues adjudicated at trial. Where an appeal has been filed, a trial court must avoid issuing supplemental reasons that address matters under appeal and which could constitute or could appear to constitute additional justification for the original conclusions: *R. v. Tesky*, 25 SCC 2007 at para. 18.

[36] The VFPA also consents to Montrose's application. The VFPA says it is consistent with the jurisprudence and principles of fundamental justice to allow Montrose's application, as the action has the potential to prejudice their interests. The VFPA says Montrose's application raises questions about the scope of the declaration of Aboriginal title, including whether it is *in rem*, *in personam*, or *sui generis*. If it is *in rem*, such that it is binding as against the world, and is intended to bind the fee simple title holders, fairness requires that those impacted by a discretionary declaration have the ability to make submissions on how it affects them: *Wolastoqey* at para. 196.

[37] Musqueam takes no position on the application. Musqueam says that it has a strong interest — given Musqueam's understanding of its territory, its stewardship responsibilities, its Aboriginal fishing right, and the use of the claim area as a landfill site — in ensuring that the regulatory scheme which applies adequately mitigates against the risk of environmental harm. Although Musqueam takes no position in relation to the relief Montrose seeks, it agrees that the applicability of provincial and federal laws within the Cowichan Title Lands is an important issue. Regulatory conflict, uncertainty or a regulatory vacuum could result in environment impacts that would jeopardize the interests of all who rely on the health of the Fraser River. Accordingly, the applicable regulatory regime is a matter that must be resolved, regardless of whether the resolution comes from the resolution of this application. Further, Musqueam also says on this application the Court must take care to address only Montrose's application, and not the plaintiffs' underlying claim or jurisprudence which was decided after the Final Reasons were issued.

[38] TFN also takes no position on the application.

Plaintiffs' position

[39] The plaintiffs raise four preliminary objections to Montrose's application: 1) Montrose lacks standing to bring the application; 2) the application is an abuse of process because it attempts to relitigate issues the Court has already decided; 3) the application is an abuse of process because of undue delay; and 4) s. 17 of the *Court of Appeal Act*, S.B.C. 2021 c. 6, requires that the issues be addressed by the Court of Appeal and not the trial court.

[40] Alternatively, the plaintiffs submit that the application fails on the merits because Montrose has not satisfied the test for joinder or for reopening the trial.

[41] With respect to standing, the plaintiffs say Montrose lacks standing to bring the application and has no mechanism to obtain standing. Rule 6-2(7) is unavailable to the applicants because it ceases to apply after reasons for judgment have been issued.

[42] Regarding relitigation, the plaintiffs say that Montrose seeks to relitigate issues that were fully litigated and decided in the Final Reasons, as well as issues decided in *Cowichan Tribes 2017* with respect to notice. The plaintiffs say if Montrose's application is granted, third parties would have an incentive to wait to join litigation, depending on the outcome after trial, rather than applying for joinder in a timely way and participating in the litigation.

[43] The plaintiffs say Montrose has delayed bringing its application, and that delay is inordinate and prejudicial, amounting to an abuse of process. Montrose was aware of the litigation and could have applied to become a party earlier. Montrose acknowledges its awareness of the litigation but has not advised the Court of when and how they became aware of the action and why they did not bring this application earlier, beyond Mr. Low's assertion that Montrose did not think its interests as a private landowner could be affected. The plaintiffs say the Court should draw an adverse inference that Montrose was aware of the litigation at an early stage and has no justification for failing to apply to be added as a party at that time.

[44] The plaintiffs say Montrose essentially seeks to undo the trial decision, which would take the action back to the pleadings stage. Montrose characterizes its application as simple, but the addition of a party normally carries with it the full suite of rights and obligations under the *Supreme Court Civil Rules*, including exchange of pleadings, document discovery, examinations for discovery, etc. If Montrose was joined as a party, the plaintiffs would have to consider whether to amend the relief they seek. Other private landowners would likely apply to join the action, creating an unmanageable litigation process. Years of work and judicial resources would be lost. Moreover, the plaintiffs say the Quw'utsun Nation has relied on the decision in conducting its affairs and allowing the application would be highly prejudicial.

[45] The plaintiffs also rely on s. 17 of the *Court of Appeal Act* which requires that all matters pertaining to an appeal be determined by the Court of Appeal. Most of the issues that Montrose seeks to raise if the trial is reopened were decided at trial and the Court's decision is now before the Court of Appeal. That is the proper forum. The plaintiffs echo Musqueam and Richmond's submissions that on this application, the Court must avoid explaining or supplementing the Final Reasons.

[46] Finally, the plaintiffs say that Montrose's application fails on its merits.

[47] Subrule 6-2(7)(b)(i) is intended to remedy defects in the proceeding, where a person has a direct interest in the outcome of the proceeding and ought to have been added. The plaintiffs say there is no such defect. Montrose Industries, the only Montrose entity with fee simple interests in the Cowichan Title Lands, has no legal relationship with the plaintiffs and the plaintiffs sought no relief against them. The plaintiffs say the decision in *Wolastoqey* does not assist Montrose, as the Court in that case upheld the motions judge's determination that there was no direct legal relationship or interests between the Aboriginal title claimant and the private landowners.

[48] The plaintiffs say that Montrose cannot succeed under subrule 6-2(7)(b)(ii). The proceeding has already been effectively adjudicated and their participation is

not necessary because they propose to make arguments already advanced at trial and to raise questions that are not in issue.

[49] The plaintiffs submit the application also fails under Rule 6-2(7)(c) which requires a question or issue between an existing party and the applicant related to the claimed relief or subject matter of the proceeding. Where a private party has legal rights within an Aboriginal title claim area, and the title claimant does not seek to invalidate or alter those rights, there is no question or issue between the Aboriginal title claimant and the private party. That is the case here. The plaintiffs also say that the Cowichan's claim as it relates to the privately held fee simple titles only raises questions or issues engaging the Crown. Montrose Industries' fee simple interests constrain the underlying Cowichan Aboriginal title and are not undermined. The plaintiffs argue that if there has been a change in Montrose's land value or access to credit, which is not proven, their remedies are against the Crown, not through joining a litigation process which is complete.

[50] The plaintiffs submit that the Court must find adding a party under Rule 6-2(7)(b) or (c) is just and convenient. At this stage, the plaintiffs say considerations of delay and prejudice to the plaintiffs weigh against granting the application. In other cases, adding private parties to an Aboriginal title claim has been found contrary to the objectives of proportionality, access to justice, and reconciliation for failure to minimize costs and complexity, and threatened to render Aboriginal title claims unmanageable: *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311 at paras. 36, 174-176; *The Council of the Haida Nation v. British Columbia*, 2017 BCSC 1665 at para. 51; *William v. Riverside Forest Products Ltd.*, 2002 BCSC 1199 at paras. 8, 15, citing *Calder et al. v. Attorney General of British Columbia* (1969), 8 D.L.R. (3d) 59 (B.C.S.C.) at p. 62.

[51] Regarding the application to reopen the trial, the plaintiffs say this discretion should be exercised sparingly and only when it is probable that a miscarriage of justice would occur unless the trial was reopened: *1104318 B.C. Ltd. v. Dr. Paul Wittenberg, Inc.*, 2025 BCCA 68 at para. 34. The plaintiffs say it is in the interests of

justice to consider the trial complete with the release of the Final Reasons. There is no substantial injustice to be remedied, and Montrose would necessarily seek to lead substantial new evidence, which is prohibited. Further, Montrose has pointed to no evidence which could change the result of the trial. Every argument that Montrose wants to advance that could properly be advanced has already been argued by one or more defendants in this case. Allowing the application would be an injustice.

Evidence about Montrose's recent development activities

[52] As set out above, some of Montrose Industries' fee simple interests are in the Cowichan Title Lands. Of the three Montrose entities, Montrose Industries is the only applicant that has fee simple interests in the Cowichan Title Lands. Ecowaste leases land from Montrose Industries, some of which is in the Cowichan Title Lands, while Montrose Holdings has shares in Montrose Industries. Accordingly, their interests are different: Montrose Industries as a landowner, Ecowaste as a long-term lessee, and Montrose Holdings as a shareholder.

[53] Mr. Low deposed that for the past several years, Montrose has been pursuing the development of an additional warehouse in the Southern Montrose Lands. Prior to the release of the Final Reasons, Montrose had secured all key approvals and agreements related to zoning, development permit, approved stormwater and sediment control plan and a water and services agreement with the City of Richmond. Mr. Low deposed that Montrose has spent about $7.5 million to date advancing the project, and anticipated borrowing about $35 million to complete it.

[54] Mr. Low deposed that Montrose had been in advanced discussions with both a lender and a prospective tenant with respect to the development of the additional warehouse. Mr. Low deposed that the lender advised Montrose that it will no longer lend money in respect of the additional warehouse because of issues raised in the Final Reasons. He said negotiations with the prospective tenant have ceased because of uncertainty and risk allocation issues raised by the Final Reasons. There

is no evidence before the Court from either the lender or the prospective tenant, nor any evidence about their identities.

[55] Mr. Low deposed that following the issuance of the Final Reasons, Montrose can no longer confirm clear title to its land as required by lenders. Mr. Low also said that in the last six years, Montrose has been in discussions with Fortis and Enbridge and their partner companies about the prospect of installing a facility to take captured landfill gas and create compressed renewable natural gas for future use, rather than flaring it to the environment as currently occurs. This would require constructing a new facility on the Southern Montrose Lands near Blundell Road. Mr. Low said those discussions have been impaired following the issuance of the Final Reasons.

[56] Regarding what Montrose knew about this case, Mr. Low deposed that the Montrose entities were aware of the case and had general familiarity with it. Mr. Low deposed that no party provided formal notice to Montrose. He said that at no point did the Montrose entities consider that their interests as private landowners could be affected by the final reasons for judgment.

[57] In Montrose's document disclosure, it produced a 2016 Archaeological Overview Assessment prepared by Arrowstone Archaeological Research and Consulting Ltd. for landfill operations at 15111 Williams Road, which is within the Cowichan Title Lands. That assessment repeatedly mentions the connection of the Cowichan and the Hul'qumi'num Treaty Group to the site, observed that the site is within the claim area of the Hul'qumi'num Treaty Group, and referenced "the large 'Cowichan' summer fishing villages on the South Arm". Montrose also produced a 2019 Archaeological Overview Assessment prepared by Wood Environment and Infrastructure Solutions for Omicron Canada Ltd. on behalf of Ecowaste, again in respect of 15111 Williams Road. That assessment identifies that the property overlaps with the archaeological site DgRs-17, the traditional seasonal village known as Tl'uqtinus that was used by the Cowichan. I find that Montrose had knowledge of

the Cowichan's asserted claim prior to the commencement of the trial, at least by 2016.

[58] In a responding affidavit filed by the plaintiffs, K. McKerracher attached an article from the Canadian Press reporting that Premier David Eby made public representations that the Province plans to offer private owners in the Cowichan Aboriginal title area more than $150 million in loan guarantees, including as much as $100 million in guaranteed financing for Montrose. The Canadian Press reported that Premier Eby said that the actual amount the Province guarantees could be zero because the banks have informed the government they have not changed lending policies. Montrose filed a further affidavit from Mr. Low but did not address this evidence or whether Montrose has been offered a loan guarantee from the Province.

[59] For the purpose of determining this application, without deciding the matter, I will proceed on the basis that following the release of the Final Reasons, Montrose has experienced the impacts described in Mr. Low's affidavit as outlined above.

Evidence about the Cowichan's reliance on the Final Reasons

[60] The Chief of the Cowichan Tribes, Sulsulxumaat, also known as Chief Cindy Daniels, deposed that the Final Reasons are of historic importance to the Quw'utsun Nation as a historic validation from the Court of the Quw'utsun Nation's identity, laws, history, culture, oppression, title and rights. She said the Quw'utsun Nation has dedicated extensive resources to internal planning and external negotiations in reliance upon the Final Reasons. They have attended dozens of meetings and engaged in innumerable communications with members and internal committees, as well as with the Province (including the Premier, the Minister of Indigenous Relations and Reconciliation and, separately, the Special Counsel to the Premier on Reconciliation), BC government agencies, Transport Canada, Fisheries and Oceans Canada, other defendants and private fee simple titleholders. Chief Daniels deposed that the Quw'utsun Nation has engaged professional services, including to further develop a working national governance structure to guide decision-making over the Quw'utsun Nation title lands and fishery on the south arm of the Fraser River.

[61] Chief Daniels said the Quw'utsun Nation sought unsuccessfully for almost 150 years to resolve its claim to its land at Tl'uqtinus, and that those efforts were blocked at every turn. To revisit the determination of Aboriginal title constitutes another effort to displace the Cowichan from their homeland. Chief Daniels deposed that as Chief, she oversees Quw'utsun negotiations with the Province regarding reconciliation of privately held fee simple titles on the Cowichan Title Lands with Quw'utsun Nation Aboriginal title. Reopening the trial would threaten this work and introduce delay and uncertainty into the appeal process.

Preliminary Objections

[62] Below, I address the plaintiffs' preliminary objections.

Lack of Standing

[63] Montrose applies to be added as a party under Rule 6-2(7)(b) and (c) of the *Supreme Court Civil Rules*.

[64] Rule 6-2(7) provides:

> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> (a) order that a person cease to be party if that person is not, or has ceased to be, a proper or necessary party,
>
> (b) order that a person be added or substituted as a party if
>
> (i) that person ought to have been joined as a party, or
>
> (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
>
> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding
>
> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[65] The plaintiffs say that Montrose lacks standing to bring this application because Rule 6-2(7) ceases to apply after reasons for judgment have issued.

Neither Montrose nor any party has cited any authority where a party was added after final reasons for judgment were issued. The plaintiffs say it will never be just and convenient to add a party to litigation that has resulted in judgment after trial. It will always be too late, and too prejudicial to the parties, the administration of justice, and the principle of finality. Whatever legal questions the late applicant seeks to raise will always be better addressed through some fresh legal mechanism, such as a new action or an appeal.

[66] In support of their position that Rule 6-2(7) is unavailable to Montrose, the plaintiffs rely on McLachlin & Taylor, *British Columbia Practice*, 3rd ed. (2023 looseleaf) at p. 6–46 which provides: “Like the other provisions of Rule 6-2, subrule (7) does not apply after judgment”, citing *Canadian Imperial Bank of Commerce v. Garneau*, (1986) 1 B.C.L.R. (2d) 53, [1986] B.C.J. No 2362 (S.C.) [*Garneau*], amongst other cases.

[67] In *Garneau*, Justice Southin heard an application from CIBC to add tenants of the mortgaged premise to foreclosure proceedings, as the tenants became tenants after the order *nisi* was issued. The bank was concerned that if the tenants were not added as parties, it would not be able to enforce the judgment against them. Justice Southin found at para. 9 that it is a well established principle that, “generally, parties cannot be added after judgment” citing *Attorney General v. Corporation of Birmingham* (1880), 15 Ch. D. 423 (C.A.) [*Birmingham*]. That case was decided under Order XVI, Rule 13 of the original post Judicature Act English Rules, which was comparable to Rule 15(5) of the former *Supreme Court Rules* (the predecessor to Rule 6-2(7) of the *Supreme Court Civil Rules*) as it provided for the addition of parties “at any stage of the proceedings”. There, Bacon V.C. found that the words “any stage of the proceedings” permitted the addition of parties after decree, but the Court of Appeal disagreed. In concluding that generally, parties cannot be added after judgment, Justice Southin held that the difference in wording between the original English rule and Rule 15(5) did not create a difference in meaning or effect: para. 9. Justice Southin went on to observe that parties can be added after decree in

a foreclosure action if the judgment has not been entered: para. 9, citing *Keith v. Butcher* (1884), 25 Ch. D. 750.

[68] Subsequently, in *Farina v. O'Neil*, [1994] B.C.W.L.D. 2167, 1993 CanLII 1808 (S.C.), Justice Lamperson noted that he "knew of no case in which parties were added long after a trial". Justice Lamperson relied on *Cassidy v. Lee*, 4 A.C.W.S. (3d) 302, 1987 CarswellBC 2466 (B.C. Co. Ct.) [*Cassidy*], which states: "Rule 15 which provides for adding or substituting parties has no application after judgment has been entered" and cites *Birmingham*.

[69] In *Cassidy*, the plaintiff applied under Rule 15 of the *Supreme Court Rules* to have the correct corporate entity, Eight One Nine Holdings Ltd., doing business as The Restaurant at Eight One Nine Pacific, substituted for the defendant, The Restaurant at Eight One Nine Pacific, which did not exist. The application was made after the plaintiff had taken default judgment and the order had been entered. The court held that Rule 15 has no application after judgment has been entered: paras. 10–12.

[70] Montrose relies on *Berthin v. British Columbia (Victoria, Registrar of Land Titles)*, 2015 BCSC 2527 [*Berthin*] as authority for the proposition that a matter remains a 'proceeding' until the order after trial is entered: paras. 30, 39. That case dealt with an application for an interlocutory injunction compelling the Registrar of Land Titles to register a certificate of pending litigation ("CPL") pending the outcome of an appeal. Justice Gaul considered whether the applicant was a "party to a proceeding" as defined in s. 215(6) of the *Land Title Act* such that he was entitled to register a CPL. Justice Gaul concluded the proceeding was spent after the trial order was entered such that the applicant was not a party to a proceeding in the sense that the term is used in s. 215(6) of the *Land Title Act*: paras. 30 and 39.

[71] *Berthin* is of little assistance in the circumstances of this application as it does not deal with Rule 6-2(7) or joinder.

[72] I have found no case where a person has been added as a party to a proceeding after final reasons for judgment have been issued. In my view, the authorities are determinative that the court's ability to add a party to a proceeding is generally spent once the final order is entered: see *Garneau* and *Cassidy*. However, I find that Rule 6-2(7), allowing as it does for a person to be added as a party "at any stage of a proceeding" does not preclude adding a party after judgment and before the final order is entered. The fact that there are apparently no published decisions where the court has exercised its discretion to add a party after final reasons for judgment have been issued in my view reflects that such an order will rarely be appropriate. Accordingly, the plaintiffs' objection as to standing is not made out.

Abuse of Process – Relitigation

[73] The plaintiffs say the application should be summarily dismissed as an abuse of process because it attempts to relitigate issues the Court has already decided in the Final Reasons as well as in *Cowichan Tribes 2017*. The plaintiffs say it is an abuse of process for Montrose to ask the Court, after it has decided issues at trial, to reopen the trial and revisit those issues and decide them differently. The plaintiffs say Montrose's application is an attack on the finality of the Court's decision and the integrity of the Court.

[74] Montrose says the plaintiffs' submission that Montrose is seeking to relitigate issues that have already been determined cannot be sustained because Montrose had no opportunity to litigate these issues at trial. Further, Montrose is not asking to relitigate issues determined in the Final Reasons but rather asking the Court to consider Montrose's unique position and interests in the Aboriginal title claim area and how the declarations may affect its land. Montrose submits that evidence of its ownership interests and investments could affect the trial outcome, including the Court's determination about whether to make findings of Aboriginal title in respect of lands owned in fee simple and whether to declare Aboriginal title.

Law

[75] Judges have an inherent and residual discretion to prevent abuse of the court's process: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [*Toronto (City)*] at para. 35.

[76] The general principles regarding the abuse of process doctrine were recently outlined by the Supreme Court of Canada in *Saskatchewan (Environment) v. Métis Nation – Saskatchewan*, 2025 SCC 4 [*Métis Nation*] as follows:

> [33] The doctrine of abuse of process is concerned with the administration of justice and fairness (*Behn*, at para. 41). The doctrine engages the inherent power of the court to prevent misuse of its proceedings in a way that would be manifestly unfair to a party or would in some way bring the administration of justice into disrepute (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37; *Behn*, at para. 39; *Abrametz*, at para. 33).

[77] The doctrine of abuse of process is flexible, and unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements: *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 [*Behn*] at para. 40. Abuse of process is broad and can be applied in various contexts, depending on the facts before the court: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at para. 34 [*Abrametz*], citing *Toronto (City)* at para. 36 and *Behn* at para. 39. At the heart of the doctrine is upholding the administration of justice and the principle of fairness to the parties: *Behn* at para. 41.

[78] Abuse of process may arise where a matter is being re-litigated or there is inordinate delay: see *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44; *Behn* at para. 40; *Métis Nation* at para. 35. A claim may be dismissed as an abuse of process for relitigation where allowing it to proceed would violate principles including judicial economy, finality, consistency and the integrity of the administration of justice: *Toronto (City)* at paras. 35-37; *Métis Nation* at paras. 33–35, *Behn* at paras. 39–40; *Abrametz* at paras. 33–36.

[79] In *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 [*Figliola*], the majority summarized the underlying principles regarding abuse of process for relitigation:

> [34] At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland* [*v. Consumers' Gas Co.*, 2004 SCC 25], at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:
>
> - It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher* [*v. Stelco Inc.*, 2005 SCC 64], at para. 35).
> - Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
> - The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
> - Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision ([*Canada (Attorney General) v.*] *TeleZone* [*Inc.*, 2010 SCC 62], at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
> - Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).

[80] In *Toronto (City)* at paras. 51-52, the majority noted that the doctrine of abuse of process as it relates to relitigation is focused on the integrity of the adjudicative process. Relitigation can diminish the authority of the judicial process, while proper review by way of appeal increases confidence in the ultimate result. The cautions with respect to relitigation in *Toronto (City)* at paras. 51-52 bear repeating:

> [51] ... First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will

> undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
>
> [52] In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context.

[81] The decision to apply the abuse of process doctrine is discretionary, and the court may decline to apply it where to do so would create unfairness. The majority in *Toronto (City)* affirmed the discretionary factors that prevent issue estoppel from operating unjustly are equally available with respect to abuse of process:

> [53] ... There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *Franco*, *supra*, at para. 55).

Analysis

[82] In my view, the central issue that underpins Montrose's application was decided at trial. That question is whether the Court could determine the issues and make the declarations that it did in the absence of the private landowners.

[83] I agree with the plaintiffs that this application seeks to relitigate both the Court's determination in *Cowichan Tribes 2017* that formal notice to private landowners was not required, as well as the Court's determination in the Final Reasons that it has jurisdiction to make a declaration of Aboriginal title in the absence of private landowners.

[84] The premise underlying Montrose's application is a challenge to the correctness of issues determined in the Final Reasons. On this application, Montrose submits that it was not open to the Court to make a declaration of Aboriginal title in Montrose's absence, and that fairness dictates that Montrose have an opportunity to participate in the proceedings. At trial, BC also argued that the Court should not and could not make a declaration of Aboriginal title over privately owned land in the absence of the private landowners: Final Reasons, paras. 3564 and 3567. The Court determined that it could grant the declaration of Aboriginal title in the absence of the private landowners: Final Reasons at paras. 3565 and 3567.

[85] Four of the five issues that Montrose seeks to address if the trial was reopened were fully argued and litigated by the parties at trial, and the subject of discussion and determination in the Final Reasons. Those issues are: whether it was appropriate to make findings of Aboriginal title and a declaration of Aboriginal title in the absence of private landowners with fee simple titles in the claim area; the finding that Aboriginal title and fee simple titles can coexist; the finding that Crown grants of fee simple interest unjustifiably infringe Aboriginal title; and the finding that the issuance of fee simple titles and related legislation did not extinguish Aboriginal title.

[86] BC argued extensively in its final submissions that the Court should decline to make a declaration of Aboriginal title, and that if it did make such a declaration, it should be limited to lands owned by parties to this proceeding: Final Reasons, para. 3565. Richmond and BC argued that Aboriginal title and fee simple title cannot coexist: Final Reasons, paras. 2120 and 3564. BC argued that any infringement arising from the Crown grants of fee simple interests is justified: Final Reasons, para. 2540. Richmond argued that Crown grants of fee simple interest extinguished Aboriginal title (Final Reasons, para. 2092) and BC argued that grants of fee simple interests suspended Aboriginal interests in land: Final Reasons, para. 2139.

[87] While Montrose did not participate in the trial, the fact is these issues have been fully canvassed over the course of a lengthy trial by well-resourced parties. All these issues were addressed and decided in the Final Reasons. For example, see

paras. 3584–3587 regarding the appropriateness of declaring Aboriginal title over private land; see paras. 2139–2208, 3541–3545 and 3588 regarding the finding that fee simple titles and Aboriginal title can coexist; see paras. 2527–2661 regarding the finding that the Crown grants of fee simple interest unjustifiably infringe Aboriginal title; and see paras. 2091–2118 regarding the finding that Cowichan Aboriginal title was not extinguished through the issuance of fee simple titles and related legislation.

[88] The remaining issue, the applicability of provincial laws, including 38 statutes, is not an appropriate issue for the Court to determine in these proceedings as the issue does not arise on the pleadings and there is an absence of any live controversy or dispute: *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539 at para. 18. There is no plea of infringement in relation to any of these laws nor any *lis* between the parties in respect of them. The issue, requiring, as it would, serious expense and complication in respect of a matter that is concluded, strikes at the principles of judicial economy and finality which animate the abuse of process doctrine.

[89] In addition to challenging the correctness of issues determined in the Final Reasons, Montrose's application also seeks to relitigate issues decided in *Cowichan Tribes 2017*.

[90] In *Cowichan Tribes 2017* the Court determined that formal notice to private landowners was not required in the circumstances of this case. That decision was discretionary, and followed the approach in *Calder v. British Columbia (Attorney General)* (1969), 8 D.L.R. (3d) 59, 1969 CanLII 1697 (B.C.S.C.), *William v. Riverside Forest Products Ltd.*, 2002 BCSC 1199, *Ahousaht Indian Band v. Canada (Attorney General)*, 2006 BCSC 646 and, in part, in *Willson v. British Columbia (Attorney General)*, 2007 BCSC 1324: see *Cowichan Tribes 2017* at paras. 18–21. Justice Power concluded at paras. 23–27:

> [23] ... the plaintiffs in the case at bar do not seek to invalidate or render defective the fee simple interests of private landowners. Rather, as stated above, they seek a declaration of aboriginal title to land held by private landowners -- title which is *sui generis* in nature, and the consequences of which, in relation to private interests, remain unclear (see *Delgamuukw v.*

> *British Columbia*, [1997] 3 S.C.R. 1010; *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700; and *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44).
>
> [24] In this regard, one of Canada's central arguments is that the uncertainty in the case law in and of itself should cause the court to order notice. I have determined that the counter argument is more persuasive -- uncertainty in the case law weighs against court ordered notice. As the plaintiffs do not seek, at this stage, to invalidate fee simple interests held by private landowners, I conclude that the defendant Canada's application should be dismissed. Private landowners will have an opportunity to make all arguments, including that they were not given formal notice, in any subsequent proceedings against them if any such proceedings are brought.
>
> [25] While I am not persuaded by the plaintiffs that the authorities definitively decide the issue before me, I have concluded that in the context of these circumstances I should exercise my discretion by dismissing Canada's application.
>
> [26] As a result, I further decline to comment on the issue, raised by Canada, concerning whether it is more appropriate for the plaintiffs, as initiators of this litigation, or British Columbia, from whom private landowners derive their fee simple titles from, to be the party to provide formal notice.
>
> [27] In these particular circumstances, I decline to exercise the court's discretion to require the plaintiffs to serve formal notice on private landowners. However, as I have already outlined above, my decision does not prevent any of the defendants from providing informal notice to private landowners if they wish to do so.

[91] Both Canada and BC reiterate arguments on this application that they advanced before Justice Power in 2017. Canada observed that its submission on this application that Montrose should be heard is consistent with the position it advanced in *Cowichan Tribes 2017* regarding notice to the private landowners. BC cites, on this application, Canada's submission in 2017 that the private landowners have a substantial relationship to the claim area and are entitled to be heard. BC also cites Canada's submission in 2017 that uncertainty regarding the relationship between fee simple title and Aboriginal title over the same land militates in favour of providing notice to the private landowners. These submissions, made before me now, and which were considered and rejected in *Cowichan Tribes 2017*, illustrate one way in which this application constitutes relitigation.

[92] Relitigation of *Cowichan Tribes 2017*, at this stage of the proceeding, and in the context of seeking to reopen the trial to litigate issues already decided, seeks to

undo the basis on which the trial proceeded, and is not in keeping with principles of finality and judicial economy.

[93] Montrose emphasizes that in 2023, well after *Cowichan Tribes 2017* was decided, the plaintiffs' fifth notice of civil claim was amended to seek a declaration of unjustified infringement of Aboriginal title. Montrose says this amendment materially changed the stakes for private landowners like Montrose. I do not agree with that submission. The defence of justification was pleaded by both BC and Canada in 2015 and was a live issue when *Cowichan Tribes 2017* was decided. The plaintiffs' pleading amendment in 2023 did not substantively alter the issues before the Court and was consented to by all parties. In my view, that amendment does not support a determination that fairness considerations arise such that the abuse of process doctrine should not preclude relitigation of *Cowichan Tribes 2017*.

[94] In determining whether relitigation amounts to an abuse of process, the task of the court is to focus on the integrity of the adjudicative process, not the motives or interests of the party seeking to relitigate the issue: *Toronto (City)* at paras. 43 and 51. Rather, the court will consider whether allowing the litigation to proceed would violate the principles of judicial economy, consistency, finality or the integrity of the administration of justice: *Métis Nation* at para. 35, citing *Toronto (City)* at para. 37; *Behn* at para. 41. In considering the impact of relitigation on the adjudicative process, finality is not to come at the expense of fairness.

[95] In the circumstances of this case, the integrity of the administration of justice would not be enhanced by this Court revisiting its own determinations. This is not a case where the trial was tainted by fraud or dishonesty, or where fresh new evidence, previously unavailable, impeaches the original result. Nor does there exist a new context within which Montrose's application is brought. This action has always been a claim for infringement of Aboriginal title in respect of lands encumbered by fee simple interests, and (once Canada and BC filed their responses to civil claim in 2015) whether any infringements of Aboriginal title were justified.

[96] In the particular circumstances of this case, the fact that Montrose did not participate in the trial does not bar a determination that its application both constitutes and attempts relitigation of issues the Court has already decided, nor bar a determination that the application is an abuse of process. Allowing a new party to reargue these issues, before this Court, nearly two years after the conclusion of a 513-day trial, improperly interferes with the principle of finality. It is in the interests of the public and the parties that the decision at trial is final. Adding a new party and relitigating issues that have been fully argued and determined also violates the principle of judicial economy and consistency, would be neither efficient nor timely, and would circumvent the appropriate method for challenging the correctness of the determinations in the Final Reasons: an appeal to the Court of Appeal.

[97] Given the stage of this proceeding, the determinations that have already been made, the importance of the finality of this proceeding, and in light of the pending appeals, this is not a case where fairness would be achieved by declining to give effect to abuse of process. Rather, I find that relitigation of *Cowichan Tribes 2017* and issues determined in the Final Reasons, at this stage in the proceeding, offends all the principles outlined at para. 34 in *Figliola*.

[98] To be clear, the harm to the justice system does not arise from challenging the correctness of the Final Reasons; it comes from circumventing the proper forum for doing so, which is through an appeal: *Figliola* at para. 30, citing *Toronto (City)* at para. 46. Following that method for reviewing the Final Reasons will promote the integrity of the administration of justice. It is open to Montrose to seek to participate in the Court of Appeal proceedings. Additionally, to the extent that Montrose has been or may be impacted by recognition of the Cowichan's Aboriginal title, there are other, fresh legal mechanisms available to it.

[99] I agree with the plaintiffs that allowing this application could open the floodgates for numerous other private landowners and persons with commercial or other interests in the Cowichan Title Lands to seek to join the litigation. This sort of sprawling process, long after trial has concluded, would be inefficient, disruptive for

the parties, and would not enhance the integrity of the administration of justice. Allowing this application could incentivize third parties to take a wait-and-see approach to joining litigation until after reasons for judgment are released. That would mean if reasons for judgment are met with disapproval, a person might apply to be added as a party after they are issued and seek to have the matter reopened, rather than applying for joinder in a timely way and assuming the cost and efforts associated with participating in litigation.

[100] This application exemplifies that approach. Although Montrose did not have formal notice of the proceeding, it had knowledge of the proceedings, and chose not to apply to be added as party until long after the conclusion of the trial.

[101] Montrose's application is dismissed as an abuse of process for relitigation. It is not necessary to address the plaintiffs' other preliminary objections to the application, nor is it necessary to determine the merits of Montrose's application to be added as a party, to reopen the trial, or alternatively, to participate as an intervenor.

"B. M. Young, J."
The Honourable Justice Young