THE COEXISTENCE & RECONCILIATION OF ABORIGINAL & FEE SIMPLE TITLE IN BRITISH COLUMBIA – THOUGHTS ON WHERE THE COURTS WENT WRONG IN NEW BRUNSWICK

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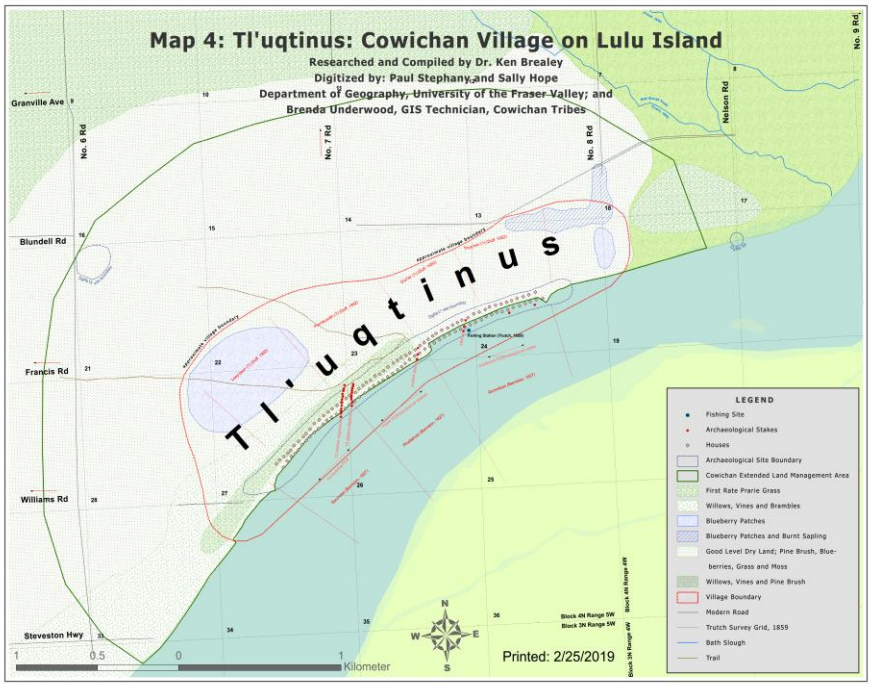
INTRODUCTION

The established Aboriginal title case law in British Columbia, including the 2025 Cowichan (Quw'utsun) Nation trial judgment, arguably reveals error in both the nascent Aboriginal title decisions from New Brunswick made pre-trial in the Wolastoqey Nation's claim.

COWICHAN TRIBES ET AL. V. CANADA (ATTORNEY GENERAL) ET AL., 2025 BCSC 1490

In *Cowichan Tribes v. Canada (Attorney General),* 2025 BCSC 1490, the Cowichan Nation plaintiffs brought an action in 2014 seeking declaratory relief from the court. The court declarations sought included that the Cowichan Nation has Aboriginal title to their settlement lands at Tl'uqtinus on the south arm of the Fraser River in British Columbia, comprising some 1846 acres, or a portion thereof, and that the Crown grants of fee simple interests in the Cowichan Nation Aboriginal title lands are an unjustified infringement.[ii]

SCHEDULE A



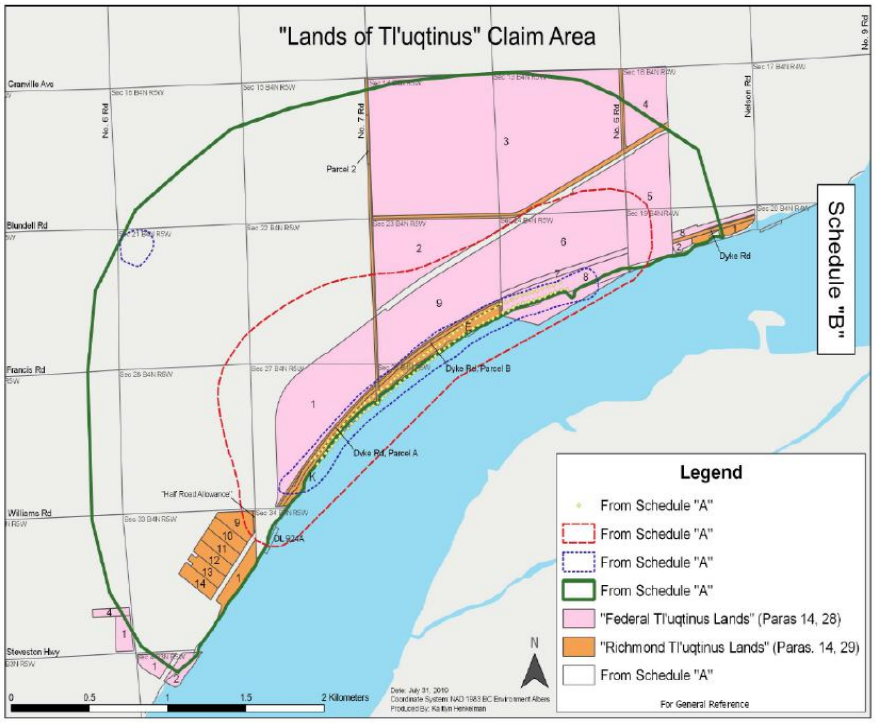
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The Cowichan Nation plaintiffs also sought a declaration that the publicly held fee simple titles in their Aboriginal title lands are defective and invalid. In this regard they sought a declaration that the fee simple titles and interests in the Cowichan Aboriginal title lands held by Canada, the Vancouver Fraser Port Authority as a federal Crown agent, and the City of Richmond are defective and invalid. The Cowichan Nation plaintiffs respectfully did not seek any declaration of defectiveness or invalidity regarding privately held fee simple titles. Instead, they sought a declaration that British Columbia has a duty to negotiate with the Cowichan Nation in good faith reconciliation of the Crown granted fee simple interests held by third parties with the Cowichan Aboriginal title.[iii]



It is important to understand how the relief sought informed which parties were defendants to the Cowichan Nation litigation and why others were not. The Cowichan Nation plaintiffs proceeded to trial against three Crown defendants as having unjustifiably infringed Cowichan Nation Aboriginal title to their national settlement lands by way of unlawful colonizing conduct:

- British Columbia was a proper defendant in part because as of Confederation in 1871 it held the Crown's underlying title to the pre-existing Cowichan Nation Aboriginal title, and the plaintiffs impugned the lawfulness of the Province's conduct historically granting fee simple titles in these Cowichan settlement lands.[iv]

- Canada was a proper party to the action in part because, having acquired some of the provincially granted fee simple titles, the Cowichan Nation plaintiffs challenged the lawfulness of Canada's conduct assigning that fee simple title to its agent the Vancouver Fraser Port Authority for port purposes and requiring it to undertake port related land use planning.[v]

- In turn, the Vancouver Fraser Port Authority was properly a defendant in part because, as a federal Crown agent, the Cowichan Nation plaintiffs impugned its conduct managing and leasing out the lands for port purposes.[vi]

The Cowichan Nation plaintiffs also proceeded to trial against three defendants as public holders of unlawfully granted registered fee simple titles in the Cowichan Aboriginal title lands, namely, Canada, the Vancouver Fraser Port Authority, and the City of Richmond. The plaintiffs sought a declaration of defectiveness and invalidity in relation to these publicly held fee simple titles only.[vii] The defendant City of Richmond opposed this relief sought regarding its fee simple titles by pleading a series of private law defences, namely, statutory defences of indefeasible title under British Columbia's *Land Title Act* and limitation periods pursuant to the Province's *Limitations Act*, as well as equitable defences of *bona fide* purchaser for value without notice and *laches*.[viii]

As the Cowichan Nation plaintiffs respectfully did not seek a declaration of defectiveness or invalidity in relation to any privately held fee simple titles they did not need to proceed against any private fee simple titleholders, who did not need an opportunity to be heard.[ix] The court expressly preserved the right of these private fee simple holders to raise potential defences of *bona fide* purchaser for value without notice and *laches* in subsequent proceedings. It did so by preventing the defendant British Columbia from invoking the defences on their behalf.[x] In this regard, British Columbia was also a party because the Cowichan Nation plaintiffs sought a declaration of its duty, as holder of the Crown's underlying title, to negotiate in good faith with the Cowichan Nation reconciliation of the Crown granted fee simple interests held by third parties with the Cowichan Aboriginal title.[xi]

After over 500 days of trial (the longest trial in British Columbia history) the court recognized the plaintiffs' claim to Cowichan Nation Aboriginal title and the Crown's unlawful infringement thereof, and generally rejected the defendant-claimed defences. The court then declared that:

- the Cowichan Nation has Aboriginal title to the Cowichan Title Lands, comprising about 800 acres of Cowichan settlement lands (see the map below as a visual aid, where the court's thick black line depicts the boundaries and parameters of the Cowichan Title Lands), and

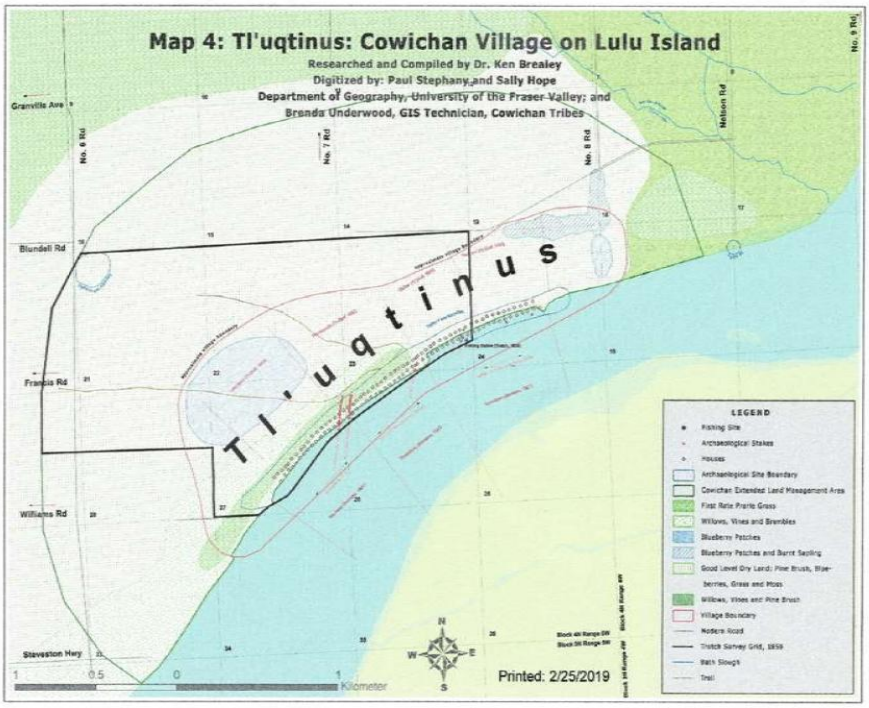
- British Columbia's grants of fee simple interests in the Cowichan Title Lands unjustifiably infringe the Cowichan Nation Aboriginal title.

The trial judge also declared that:

- publicly held fee simple titles and interests in the Cowichan Title Lands, as held by Canada and Richmond, were defective and invalid., and

- British Columbia owes a duty to the Cowichan Nation to negotiate in good faith reconciliation of the Crown granted fee simple interests held by third parties with the Cowichan Aboriginal title, in a manner consistent with the honour of the Crown.[xii]

SCHEDULE "A"



***WOLASTOQEY NATIONS V. NEW BRUNSWICK AND CANADA, ET AL*, 2024 NBKB 203**

In *Wolastoqey Nations v. New Brunswick and Canada, et al,* 2024 NBKB 203, the Wolastoqey Nation plaintiffs filed pleadings in 2021 seeking a declaration of Aboriginal title "over a large swath of land amounting to more than 50% of the land in the province (283,204 separate parcels of land)", including fee simple title land owned by timber companies identified as the Industrial Defendants.[xiii] They also sought relief arising from the sought declaration of title, that being, an order cancelling the original Crown grants to the lands now owned by the Industrial Defendants, and in the alternative, an order returning possession of those lands to the plaintiffs.[xiv] The defendants identified were New Brunswick, Canada, and New Brunswick Power, as well as seven Industrial Defendants.[xv]

Prior to filing any statements of defence, three Industrial Defendants brought motions to strike the Wolastoqey Nation plaintiffs' claim as it related to them.[xvi] They argued "that the sought declaration and relief has no reasonable prospect of success directly against them, and that such declaration and relief can only come through the Crown."[xvii] In other words, their ultimate argument was "that they should not be required to defend against the litigation as there is no direct link between them and the plaintiffs sufficient to ground a declaration and relief against them. They repeat the phrase … 'All roads lead to the Crown.'"[xviii]

The chambers judge generally agreed, concluding the Industrial Defendants had no legal relationship with the Wolastoqey Nation plaintiffs with respect to the Aboriginal title declaration sought and no direct interest in opposing it. The legal relationship at issue in the claim for a declaration is that between the Crown and the plaintiffs, not between the Industrial Defendants and the plaintiffs.[xix]

Gregory J. also found that the private, property law-based relief sought directly against the Industrial Defendants was a distraction and detraction from the constitutional nature of the action, and the pleadings untenably drew private party litigants into a constitutional challenge.[xx] The court thus struck parts of the Wolastoqey Nation plaintiffs' claim as requested by the moving Industrial Defendants. The court allowed the action to proceed for a declaration of Aboriginal title against the Crown, including the lands owned privately in fee simple by the Industrial Defendants.[xxi]

With respect, granting the motions and striking the pleadings as it related to the Industrial Defendants seems unwarranted. While the direct legal relationship at issue in the claim for a declaration of Aboriginal title is that between the Crown and the Wolastoqey Nation plaintiffs, which the Court of Appeal confirmed,[xxii] the plaintiffs also sought an order cancelling the original Crown grants to the lands now owned by the Industrial Defendants, and in the alternative, an order returning possession of those lands to the plaintiffs.[xxiii] This relief would give effect to the Wolastoqey Nation Aboriginal title as an essential part of the constitutional case, one about property in land rather than civil rights. It was not a distraction or detraction.

Further, it is not tenable to draw private parties into an Aboriginal title case to contest the declaration of constitutionally protected Aboriginal title. In British Columbia, the case law establishes this is properly the role of the relevant Crown defendant.[xxiv] However, it appears tenable to have had the Industrial Defendants heard as parties in relation the additional relief sought and any private law defences they may have eventually pled. The subsequent Cowichan Nation decision may be suggestive of this, insofar as the City of Richmond was included as a defendant holding Crown granted fee simple title which the plaintiffs successfully sought to have declared defective and invalid (based on the Crown's unlawful infringement of the Cowichan Nation Aboriginal title).[xxv] In other words, Gregory J. seemingly could have proceeded to trial of the Wolastoqey Nation plaintiffs' Aboriginal title case with the Industrial Defendants as parties having a circumscribed role in the litigation.

J.D. IRVING LIMITED ET AL. V. WOLASTOQEY NATION, 2025 NBCA 129

On appeal by Industrial Defendants, in *J.D. Irving Limited et al. v. Wolastoqey Nation,* 2025 NBCA 129, the New Brunswick Court of Appeal reversed the lower court's decision to let stand the Wolastoqey Nation plaintiffs' claim against the Crown: (1) for a declaration of Aboriginal title over lands the appellants held in fee simple title, and (2) all relief consequential to any such declaration. In the result, the court rendered the lands subject to the appellants' fee simple title as ineligible for a declaration of Aboriginal title and any Aboriginal title was only amenable to monetary remedy.[xxvi]

The Court of Appeal professed to being "unable to see" how declared Aboriginal title can co-exist with fee simple title. It reasoned that because an Aboriginal title declaration confers a beneficial interest in the land to the Aboriginal titleholder relative to a private fee simple titleholder, the Industrial Defendants have an interest in opposing the declaration of Aboriginal title such that they must be heard as a matter of procedural fairness. It regarded the two rights as "irreconcilable".[xxvii]

This is apparent error. As one can see in the 2025 Cowichan Nation and Haida Nation cases from British Columbia, which the New Brunswick Court of Appeal did not consider, court-declared Aboriginal title can and does co-exist with fee simple title, and the two rights are reconcilable. In both the Cowichan Nation and Haida Nation cases privately held fee simple title to land continued as a beneficial interest in land constraining the newly declared but pre-existing Aboriginal title.

In the Haida Nation case, the privately held fee simple titles continued as a constraint on Haida Nation Aboriginal title by virtue of Haida Nation consent. British Columbia obtained this consent through a negotiated reconciliation agreement with the Haida Nation that recognized its Aboriginal title.[xxviii] The reconciliation agreement also allowed for Haida Nation purchase and deregistration of the fee simple titles in future, which would leave Haida Nation Aboriginal title unconstrained by the interest – i.e., disencumbered.[xxix]

In the Cowichan Nation case, the privately held fee simple titles continued as a constraint on Cowichan Nation Aboriginal title by virtue of the Cowichan Nation's respectful remedial restraint. While the Cowichan Nation plaintiffs sought and received a declaration of Aboriginal title, they did not seek relief declaring the interests of third-party private fee simple titleholders defective and invalid. Instead, the Cowichan Nation plaintiffs successfully sought a declaration of the Province's duty to negotiate reconciliation with the Cowichan Nation of such privately held fee simple with their Aboriginal title, in accordance with the honour of the Crown.[xxx] British Columbia had refused to do so historically, and in modern times.[xxxi] The court also noted that upon Cowichan complaint historically, federal-provincial Reserve Commissioner Gilbert Sproat had advised British Columbia that it may have to buy out the fee simple interests it had granted. It later pointed to purchase of the fee simple titles in the Cowichan Title Lands as a means of Crown-Cowichan reconciliation.[xxxii]

Thus, both the Cowichan Nation and Haida Nation cases from the British Columbia Supreme Court illustrate that court-declared Aboriginal title and Crown granted fee simple title to land can and do co-exist. Both also support negotiated Crown-Aboriginal reconciliation of these two rights to land. By contrast, the New Brunswick Court of Appeal's decision in Wolastoqey Nation precludes any possibility of this.

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[i] While I am lead counsel for the Cowichan (Quw'utsun) Nation in *Cowichan Tribes v Canada (Attorney General),* 2025 BCSC 1490, and was counsel for the Tsilhqot'in Nation in *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44, and 2007 BCSC 1700, the views expressed herein are entirely my own. I am grateful to counsel David M. Rosenberg, K.C., Jessica Proudfoot, and Ian Kennedy for their review and comments during development of this paper.

[ii] Paras 1-2, 7, 75(a)-(b), Schedule A.
[iii] Paras 32-33, 35, 37-38, 44, 75(c), 75(g), 2952-2953, 3543, Schedule B.
[iv] Paras 16, 75(b).
[v] Paras 15, 32-33, 2437-2438, 2454-2456, 2469-2470, 2484.
[vi] Paras 17, 2490-2493, 2497.
[vii] Paras 32-33, 35, 37-38, 44, 75(c), 2210, Schedule B.
[viii] Paras 18, 2213, 2892-2893, 3065.
[ix] Paras 43-44, 3584-3587; *Cowichan Tribes v. Canada (Attorney General) et al,* 2017 BCSC 1575, paras 23-24. See also *Calder v British Columbia (Attorney General)* (1969), 8 DLR (3d) 59, p 62; *William v Riverside Forest Products Ltd,* 2002 BCSC 1199, paras. 8-16; *The Council of the Haida Nation v British Columbia,* 2017 BCSC 1665, para 34.
[x] Paras 3064, 3586.
[xi] Para 75(g).
[xii] Paras 3724 with Schedule A, 1971.
[xiii] Paras 8-13.
[xiv] Paras 11, 60.
[xv] Paras 8-9.
[xvi] Paras 7, 14, 17, 19, 51.
[xvii] Para 46.
[xviii] Para 97.
[xix] Paras 102, 104, 109, 112, 120, 125, 198-202.
[xx] Paras 126-127.
[xxi] Paras 198-203.
[xxii] *JD Irving Limited et al v Wolastoqey Nation,* 2025 NBCA 129, paras 187, 189. See also *Cowichan Tribes v Canada,* 2025 BCSC 1490, paras 2584-2586, 3543.
[xxiii] Paras 11, 60.
[xxiv] *Calder v British Columbia (Attorney General)* (1969), 8 DLR (3d) 59, p 62; *William v Riverside Forest Products Ltd,* 2002 BCSC 1199, paras. 8-16; *Cowichan Tribes v. Canada (Attorney General),* 2017 BCSC 1575; *The Council of the Haida Nation v British Columbia,* 2017 BCSC 1665, para 34.
[xxv] *Cowichan Tribes v Canada (Attorney General) et al,* 2025 BCSC 1490, paras 28-31, 37-41, 3611, 3625-3636, 3724(3), Schedules A & B.
[xxvi] Paras 1, 203.
[xxvii] Paras 190-192, 196, 200.
[xxviii] *Haida Nation v British Columba,* 2025 BCSC 1806; *Haida Nation Recognition Act,* SBC 2023, c 24, ss 4.1-4.3.
[xxix] GAAYHLLXID • GÍIHLAGALAGANG "RISING TIDE" – *Haida Title Lands Agreement,* ss. 4.8-4.10.
[xxx] *Cowichan Tribes et al v Canada (Attorney General) et al,* 2025 BCSC 1490, paras 43-44, 75(g), 3543, 3588, 3724(5).
[xxxi] Paras 3119-3122, 3128, 3550.
[xxxii] Paras 1216, 2597, 3588.