Reconciling Aboriginal Title and Private Property: Lessons from the Cowichan Tribes Decision

The recent BC Supreme Court decision recognizing the Cowichan Tribes' Aboriginal title to lands along the Fraser River has reignited debate over property rights in British Columbia. While politicians have voiced strong concerns about the security of fee simple titles held by private individuals, there has been far less attention paid to the Cowichan Tribes themselves—whose ancient village site was at the heart of the case, and who endured the longest trial in Canadian history to have their property rights recognized.

Importantly, the Cowichan Tribes did not seek to invalidate private land titles or repossess privately held lands. Their legal remedies targeted lands held by governments. Despite this, the City of Richmond has warned individual titleholders that the court's judgment could "negatively affect the title to your property," fueling public anxiety.

This issue, often referred to as the "Land Question," is not new. It dates back to the earliest days of European settlement and is rooted in three interconnected facts:

1. Indigenous peoples occupied, governed, and owned their lands long before settlers arrived.

2. British colonial law recognized these property rights, which continue under Canadian law as Aboriginal title, now protected by the Constitution.

3. Governments historically failed to secure treaties in most of BC, instead granting land rights to settlers as if Indigenous rights did not exist.

The resulting conflict is a direct consequence of government policy and inaction. Resolving it falls primarily to the provincial government, which must engage in meaningful negotiations with Indigenous nations.

On appeal, it is unlikely that the courts will rule that Aboriginal title cannot extend to lands subject to fee simple title. Arguments advanced by the Province and Richmond—that granting land titles extinguished or "displaced" Aboriginal title—have been rejected. The Supreme Court of Canada's 1997 Delgammukw decision clarified that only federal legislation with clear intent could extinguish Aboriginal title, and no such legislation exists for these land grants.

The trial judge found that granting land titles does not extinguish or displace Aboriginal title; it infringes upon it. While infringements can sometimes be justified, this is a nuanced process requiring careful balancing of interests. Blanket protection for fee simple titles is not guaranteed, and depriving Indigenous peoples of future use of their land is difficult to justify. In the Cowichan case, the court did not find justification for the fee simple titles.

Ultimately, reconciling Aboriginal title with private property interests requires hard work at the negotiation table—between governments and Indigenous nations. Treaties and agreements that recognize Aboriginal rights and provide certainty for all British Columbians are essential. The Cowichan Tribes judgment is a powerful reminder that the Land Question remains unresolved, and it is time for governments to recommit to the work of reconciliation.

JFK Law has substantial experience with advancing Aboriginal title and rights claims on behalf of its clients through litigation and negotiation. If you would like further information about the *Cowichan Tribes* decisions and its implications for Aboriginal title and rights, we encourage you to contact us.