



Local Government Best Practices After *Cowichan Tribes*

The Association of Kootenay and Boundary
Local Governments

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Lindsay Parcels and Chris Grove
Lidstone & Company

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Overview of Presentation

- Brief History of the Aboriginal Law
- Honour of the Crown and the Duty to Consult
- UNDRIP & DRIPA
- The *Cowichan Tribes* Decision
- Local Government Best Practices
- Future of Land Use & Governance in BC
- Q & A

Brief Aboriginal Law History of BC

- 14,000 years indigenous occupation - Organized societies, economies, cultures
- 19th Century European settlement - BC distinct situation from Canada
 - Vancouver Island Colony – 1849
 - British Columbia Colony – 1858
 - United British Columbia Colony – 1866
 - BC becomes part of Canada - 1871
- Limited treaties (“Douglas Treaties” and Treaty 8)
- *Laws: Royal Proclamation (1763); Law & Equity Act, Indian Act 1876*
- Court Decisions since 1876 defining aboriginal rights
- Today: Uncertainty, negotiation, litigation, & agreements

Royal Proclamation 1763

- Aboriginal title has existed and continues to exist
- All land considered Aboriginal land until ceded by treaty
- Settlers forbidden from claiming land from Aboriginal occupants unless first bought by Crown and then sold to settlers
- Only Crown can buy land from First Nations
- Consistent with international law

Sections 25 & 35 of the Canadian Constitution

- 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
 - any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
 - any rights or freedoms that now exist by way of land claim agreements or may be so acquired.
- Section 35(1): 'The existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.'

Section 35: *Constitution Act*, 1982 - Recognition of Aboriginal and Treaty Rights (Continued)

- Key case law:
 - *Calder* (1973): Recognized existence of Aboriginal title
 - *Sparrow* (1990): Established justification test for infringement of rights
 - *Delgamuukw* (1997): Defined Aboriginal title as right to land itself
 - *Tsilhqot'in* (2014): Confirmed Aboriginal title and consent requirements for land use

Today's Legal Landscape: Land, rights and governance

- Crown Lands
- Fee Simple Lands
- Reserve Lands
- Statutory Lands
- Treaty Lands
- Aboriginal Title
- *Land Act*
- *Land Title Act*
- *Indian Act*
- Statute
- Treaty Terms
- Inherent Self-Government

Honour of the Crown and Local Governments

Honour of the Crown Does Not Apply to Municipalities

- 'Honour of the Crown' arises from the relationship between the Crown (federal/provincial governments) and Indigenous peoples
- Municipalities are 'creatures of the province' and not considered the Crown
- Therefore, they do not carry the legal duty to consult or uphold the Honour of the Crown directly

Honour of the Crown in Various Circumstances

- Treaty-Making and Implementation
- Duty to Consult and Accommodate
- Control Over Aboriginal Interests
- Reconciliatory Contracts
- Land Use and Resource Management
- Legislative and Statutory Interpretation

Elements of Honour of the Crown & Remedies for Breach

- Elements:
 - Duty of Diligence
 - Good Faith Negotiation
 - Interpretation of Agreements
 - Rectifying Past Wrongs
- Remedies for Breach:
 - Declaratory Relief
 - Damages
 - Quashing Decisions
 - Mandatory Orders

Duty to Consult and Accommodate

- Duty to consult if Crown has knowledge of potential rights or title and if Crown decision may impact these
- Nature of duty varies with circumstances, is proportional to strength of claim
- Consultation must be meaningful, in good faith
- If infringement despite consultation, accommodation applies
- Third parties do not have duty to consult and accommodate, cannot be liable for failing to discharge Crown duty
- Crown cannot delegate its honour

Local Government Obligations

Statutory Consultation

- Official Community Plans: *LGA s. 475*
- Regional Growth Strategies: *LGA s. 434*
- *Gaming Control Act*

B.C. Court of Appeal: 2012

- September, 2012: *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379
- November, 2012: *Halalt First Nation v. British Columbia*, 2012 BCCA 472

Honour of Crown and Local Government

- However, municipalities play a key role in reconciliation by:
 - Partnering with First Nations on land use planning
 - Integrating Indigenous values and knowledge in decision-making
 - Supporting collaborative governance frameworks

Local Government Obligations: Summary

- Local Governments do not have Constitutional duty to consult
- Statutory duties in some instances

UN Declaration of Rights of Indigenous Peoples ("UNDRIP")

- international instrument intended as global benchmark Indigenous rights
- adopted by the UN General Assembly 2007
- 2016 Canada announced full endorsement of UNDRIP without conditions, but "in accordance with Constitution"
- adopted "with application" to law, but not as new law

DECLARATION ON RIGHTS OF INDIGENOUS PEOPLES ACT

- adopted November 2019 – unanimous vote of BC Legislature
- requires BC government to take all measures necessary to make all BC laws consistent with UNDRIP
- requires BC to make action plan to achieve UNDRIP objectives
 - e.g., free, prior, informed consent in UNDRIP redefined in DRIPA as early, deep, meaningful involvement
 - confuses consultation under existing law with “consent”
 - e.g., right to lands, territories, resources traditionally owned, occupied, acquired
 - change case law on aboriginal title (*Tsilhqot’in* case)?

Cowichan Tribes Decision

Cowichan Tribes - Background

- Longest trial in Canada's history
- Sought declaration of Aboriginal title to historical village and surrounding areas ("Claim Area") and Aboriginal right to fish
- Claim Area subsequently transferred by sales and Crown grants - fee simple title issued
- Parties include descendants of the Cowichan Nation, Canada, BC, and Richmond, but not private landowners

Cowichan Tribes - Legal Issues

- Establish Aboriginal title to Claim Area (incl. submerged lands)?
- Aboriginal right to fish for food on Fraser River?
- Did Crown grants extinguish title?
- Do fee simple titles shield against Aboriginal title?
- Did the Crown grants unjustifiably infringe on Aboriginal title?
- Are limitation/laches defences applicable?
- What remedies are appropriate?

Cowichan Tribes - Main Findings

- Aboriginal title established for part of Claim Area including submerged lands (the "Cowichan Title Lands")
- Crown's grants did not extinguish title
- Province had no jurisdiction to extinguish Aboriginal title by granting fee simple interests
- Crown grants unjustifiably infringed on Cowichan's title
- Limitations and other defenses inapplicable
- Discretionary determination of Crown's and Richmond's defective and invalid fee simple titles warranted
- Canada and BC owe duties re: Cowichan Title Lands

Cowichan Tribes - Key Declarations & Orders

- Declaration of Aboriginal title to Cowichan Title Lands
- Crown grants unjustifiably infringed on Cowichan's Aboriginal Title
- Except for certain airport lands, Canada's and Richmond's fee simple titles in the Cowichan Title Lands are defective and invalid (subject to 18-month suspension)
- Canada and BC owe the Cowichan duties to negotiate in good faith reconciliation in a manner consistent with the honour of the Crown
- Private titles not defective or invalid

Cowichan Tribes - Implications Generally

- Precedent for Aboriginal title (including submerged lands)
- Questions certainty of BC land-title system in unceded territories
- Aboriginal and fee simple title can coexist but need reconciliation
- *Land Title Act* cannot bar Aboriginal title claims

Cowichan Tribes - Implications for Private Owners

- No relief sought against privately owned properties - and none awarded
- Private landowners not added as parties to the litigation so that:
 - findings are not binding on them; and
 - the litigation was not slowed down further
- Province must negotiate reconciliation with the Cowichan (and this will not alter fee simple title)
- Note - Kwikwetlem Nation also not seeking relief in relation to land on which private parties hold fee simple titles

Local Government Best Practices

Local Government Best Practices (continued)

1. Establish healthy relationship with local First Nations including effective communications on solid foundation
2. Work with Canada and BC to address reconciliation, including unceded lands and Crown compensation/treaties
3. Join BC and Canada at treaty table for talks on treaty and interim arrangements
4. Partnerships for coexistence - negotiate FN policies re: no claims against private landowners

Local Government Best Practices (continued)

5. Identify areas in boundaries that may be subject to Aboriginal title claims - any such knowledge valuable going forward
 - *Cowichan Tribes* decision is very fact-specific
 - Courts' test for Aboriginal title is proof of sufficient historic: (1) occupation; (2) continuity (if applicable); and (3) exclusivity (very difficult hurdles)
 - After considering this evidence, Court recognized only a portion of Aboriginal title area claimed in Richmond, which in turn covered relatively small area
 - Court found Crown (not LGs) owes duty to negotiate in good faith reconciliation of fee simple interests with Cowichan Aboriginal title
 - Outcome of that negotiation uncertain

Local Government Best Practices (continued)

6. Identify local government land that was not purchased for value (e.g., tax sale properties)

- Is a municipality a bona fide purchaser for value?
- To succeed, municipality must establish it purchased the land:
 - In good faith
 - For value
 - Without notice of existing interests
- Willful blindness is deemed to be actual knowledge of existence of an interest

Local Government Best Practices (continued)

7. Participate in appeal (procedural fairness - rights of LG affected)
8. Take position that parties affected by land title issues can seek damages from government in respect of private property subject to a finding of Aboriginal title:
 - *Irving Limited et al. v. Wolastoqey Nation* (2025, NBCA)
 - NBCA held that declaration re: private lands being returned would not advance reconciliation, while leaving open potential to seek damages from government in respect of private property subject to a finding of Aboriginal title
 - Note: in Irving, NBCA said the private owners' lands not impacted since did not have opportunity to be heard

Local Government Best Practices (continued)

9. Hold Province's feet to the fire

- Interface between Crown decisions and local government aspirations...ensure Province consults and accommodates where required or carry out “third party” consultation with consent - for example
 - Boundary Extensions
 - Crown grants, leases, permits and licenses (e.g., water lots)
 - Forest licenses
 - Statutory approvals
 - Amendments to statutes
- As discussed, see: *Musqueam Indian Band v. British Columbia*, 2005 BCCA 128

10. LGs could support treaty talks and proposed Claims Tribunal

Questions?

Lindsay Parcels
Chris Grove

parcells@lidstone.ca
grove@lidstone.ca