Public Law

"The SCC will be required to resolve the courts' diverging approaches to the question of whether a court can make a declaration of Aboriginal title over fee simple lands."

What was the most interesting development of 2025, and why?

In 2025, courts in British Columbia and New Brunswick reached opposite conclusions in cases about the legal relationship between private property, Aboriginal title, and the Crown's duty to negotiate in good faith to reconcile those interests.

In August, the British Columbia Supreme Court released a 863-page decision in *Cowichan Tribes v Canada (Attorney General)*. After a 513-day trial, the trial judge declared that descendants of the Cowichan Nation have Aboriginal title over a portion of land in what is now Richmond, British Columbia. This includes land the government holds in fee simple and parcels that private properties own.

The trial judge made several other declarations and findings, including, but not limited to, the following:

- With one exception, Canada's and the City of Richmond's fee simple titles and interests in the lands over which Aboriginal title was declared are defective and invalid.
- Crown grants of fee simple interest in lands did not displace or extinguish the Cowichan's Aboriginal title.
- British Columbia owes a duty to negotiate with the Cowichan to reconcile the Crown-granted fee simple interests held by third parties and private landowners (who were not defendants to the claim) with the Cowichan's Aboriginal title. The Aboriginal title over these lands is the senior and constitutionally protected interest in the land.
- Reconciling the Aboriginal title with private property interests is an issue for the Crown and not the private landowners to resolve. The Cowichan did not challenge the validity of private fee simple interests, and the Court confirmed those interests remained valid for now.

A few months later, in December, the New Brunswick Court of Appeal released its decision in *JD Irving, Limited v Wolastoqey Nation*. In that case, the Court of Appeal overturned the lower court's decision on a pleadings motion and held that it was plain and obvious that the claim for a declaration of Aboriginal title over the appellants' privately held lands had no chance of success at trial.

The Court of Appeal held that the Wolastoqey Nation could pursue their title case against the Crown, including by seeking a finding that they have Aboriginal title over the privately held lands and seeking an award of damages and compensation flowing from that finding.

However, a finding that there is Aboriginal title does not amount to an actual declaration of Aboriginal title. The distinction is important. As acknowledged by the Court of Appeal, "Such a finding, without a confirmatory judicial declaration, would not burden the [private landowners'] title to the lands in question."

What developments do you anticipate in the year(s) ahead?

Over the last few decades, the Supreme Court of Canada has issued several decisions clarifying the legal test for Aboriginal title, including in the context of section 35 of the *Constitution* which "recognized and affirmed" existing Aboriginal and treaty rights. The Supreme Court has not, however, decided a case where Aboriginal title is being claimed over lands held in fee simple. The courts and parties need clear guidance on the relationship between Aboriginal title, fee simple ownership, and the Crown's role in negotiating resolutions where Aboriginal title and fee simple land ownership both exist. The Supreme Court will be required to resolve the courts' diverging approaches to the question of whether a court can make a declaration of Aboriginal title over fee simple lands.

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