

Association of Vancouver Island and Coastal  
Communities

# First Nation Relations - Cowichan Tribes

April 25, 2026

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Association of Vancouver Island and Coastal  
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## Cowichan Tribes - Decision of BCSC

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Chief-Councillor, Huu-ay-aht First Nations  
Chair, Alberni-Clayoquot Regional District

Vice-Chair, of the ICET

Director, Gathering Voices Society

Governor, for North Island College

# *Aboriginal Title and Private Property*

Presentation to AVICC, April  
25, 2026

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# Topics

1. Aboriginal title v. private property
2. Extinguishment defence
3. Appeal process in *Cowichan Tribes*
4. *DRIPA*
5. Reconciling Aboriginal and fee simple titles

# Aboriginal Title v. Fee Simple Titles

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# Aboriginal title - Source

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*Tsilhqot'in* (SCC):

[69] ... At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. **This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival.** The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an **independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.**

# Aboriginal title - Ownership rights

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*Tsilhqot'in* (SCC):

[73] Aboriginal title confers **ownership rights similar to those associated with fee simple**, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

# Aboriginal title - Not absolute

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*Tsilhqot'in* (SCC):

[120] Where legislation affects an Aboriginal right protected by s. 35 of the Constitution Act, 1982, two inquiries are required. First, does the legislation interfere with or infringe the Aboriginal right (this was referred to as *prima facie* infringement in *Sparrow*)? Second, if so, can the infringement be justified?

# Aboriginal title - Not absolute

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*Tsilhqot'in* (SCC):

[125] As discussed earlier, to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to **consult** with the right holders and **accommodate** the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a **compelling and substantial legislative objective in the public interest**; and (3) the **benefit to the public is proportionate to any adverse effect on the Aboriginal interest**. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians

# Torrens system

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- Land title registry is definitive on the state of title: no “chain of title”
- Part 3 of *Land Title Act*: registration creates indefeasible entitlement protected against actions for recovery of land
- Indefeasibility is cardinal principle or compensation if land lost by fraud or mistake by registry

# *Land Title Act, s. 23(2)*

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An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, **as against the Crown and all other persons**, that the person named in the title as registered owner is **indefeasibly entitled** to an estate in fee simple to the land described in the indefeasible title, subject to the following... [Aboriginal title not listed].

# Does s. 23(2) of the LTA defeat Aboriginal title?

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Justice Young in *Cowichan Tribes*: No.

- Indigenous nations aren't "persons" for purposes of *Land Title Act*
- Aboriginal Title not dealt with by Land Title Act (goes back to *Skeetchestn* case)
- Finding otherwise would amount to extinguishment (might be different if addressed issues like compensation, consultation, escheat)

# Extinguishment Defence

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Before 1982,  
Aboriginal  
rights and  
title could be  
extinguished

Under British colonial law,  
upon British sovereignty the  
property rights of Indigenous  
peoples continue unless  
extinguished by legislation  
or surrendered by agreement  
(Treaty)

Following entrenchment in  
1982, s. 35 rights cannot be  
extinguished unilaterally

Aboriginal  
title was not  
extinguished  
in BC

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*Delgamuukw* (1997):  
extinguishment can only be  
effected before 1982 by  
**federal** legislation with clear  
and plain intent

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Provincial legislation  
(including LTA) cannot  
extinguish Aboriginal title

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No federal legislation exists  
with clear and plain intent  
to extinguish

Impacts on  
Individual  
Landowners in  
*Cowichan*

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# No claim against individual landowners

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- Declaration of Aboriginal title over some land on which individuals hold fee simple titles
- But no claim against the landowners themselves; no relief sought against them, and none awarded
- Individual landowners not added as parties to the litigation so that (a) findings are not binding on them, and (b) the litigation is not slowed down further.

# Justice Young's comment

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[3588] The fee simple interests do not displace Cowichan Aboriginal title. Aboriginal title is a senior, constitutionally-protected interest in land. However, the Cowichan have not challenged the validity of the private fee simple interests and those interests are valid **until such a time as a court may determine otherwise** or until the conflicting interests are otherwise resolved through negotiation. As a result, ... the Cowichan's exercise of their Aboriginal title is constrained by the existing fee simple interests to the extent it is incompatible with the fee simple interests. This finding will provide some certainty for the Cowichan and the Crown with respect to the private landowners' continued fee simple interest rights. **These interests may be resolved through negotiation, challenged in subsequent litigation, purchased, or remain on the Cowichan Title Lands.** That is not a matter for this Court to address. **BC and the Cowichan should be afforded space to reconcile these competing interests. It is an issue for the Crown and not the private landowners to resolve.**

# Province Can Protect Private Landowners

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- In short term Province could immediately extend Assurance Fund type protection as a backstop
- In long term province **might** be able to extend indefeasibility to landowners in respect of Aboriginal title claims
  - Have to meet justification test (Tsilhqot'in)
  - Need to have widespread consultation
  - Need to uphold honour of the Crown
    - Compensation
    - Private v. Government landholders
    - Large, open landholdings v. small landholdings

# Appeal in *Cowichan Tribes*

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# Timelines

All parties appealed

- Schedule in BC Court of Appeal not yet set
- Delayed by request to re-open trial
- Hearing: possibly late in 2027
- Maybe 1 year for judgment: 2028-2029
- SCC leave application decision: 2029-2030
- SCC appeal hearing: 2030-2031
- SCC judgment: 2031/32
- Will be delayed further if trial re-opened

*Declaration on the  
Rights of Indigenous  
Peoples Act*

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# DRIPA of little significance in Aboriginal title litigation

- Not a source of Aboriginal title
- Barely mentioned in *Cowichan Tribes*
- *DRIPA* did lead to s. 8.1(2) of *Interpretation Act*: every statute is interpreted as upholding s. 35 rights; that was used in interpreting s. 23 of LTA

# Reconciling Aboriginal and Fee Simple Titles

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# Three needs

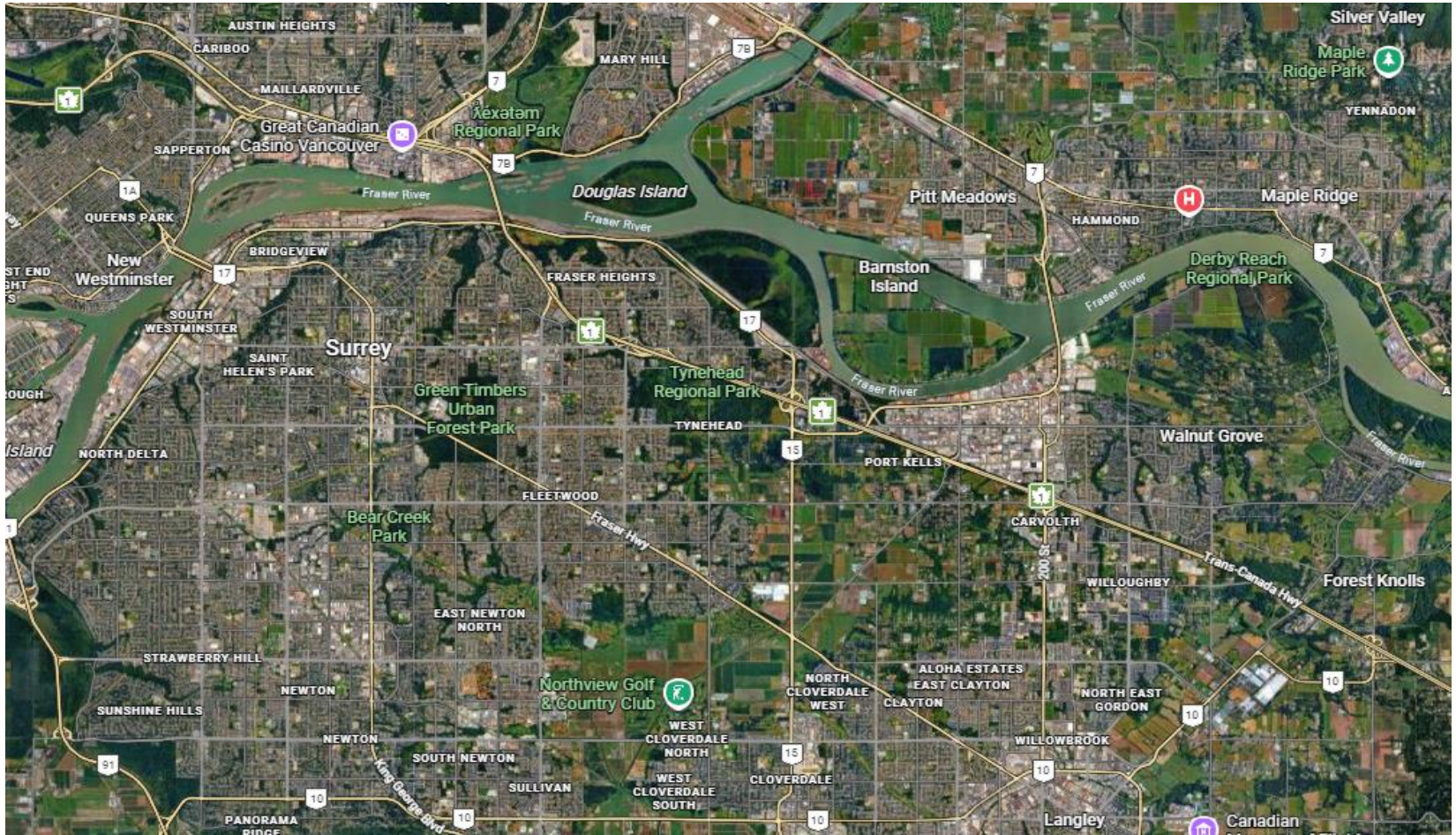
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1. Indigenous nations need justice in relation to Aboriginal title lands that have been privatized
2. Private titleholders need protection and certainty
3. Our society more broadly needs clear expectations

# 1) Justice for Indigenous nations

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- “The honour of the Crown requires that these rights be determined, recognized and respected.” (*Haida*, SCC, para 25)
- In BC the Crown chose to ignore that duty after asserting sovereignty
- A result is the collision between Aboriginal title and private property interests



## The Lower Fraser

## 2) Protection for private titleholders

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- Private titleholders are usually “equity’s darlings”: *bona fide* purchasers for value without notice
- In most cases private landholders will be protected (*Chippewas of Sarnia*)
- But not necessarily (*Saugeen Ojibway Nation - Sauble Beach* case)

# 3) Clear expectations

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- *Cowichan Tribes* has caused so much impact because of the perception of uncertainty, which investment abhors
- Province can start taking steps to address investment uncertainty (repealing or suspending DRIPA is not really one of them).

# How to meet these needs?

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- Negotiation
  - Treaties (BC Treaty Process)
  - Non-treaty agreements (the Haida agreement)
- Legislation
  - Province can legislate to protect private landowners
  - Will have to meet the justification test (compensation, consultation)
  - Process for resolving these claims effectively
- Litigation
  - Necessary as the impetus for negotiation
  - Could provide protection for private titleholders
  - But must address limitation periods to permit compensation for Indigenous nations



Questions?





Association of Vancouver Island and  
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# First Nation Relations - Cowichan Tribes

April 25, 2026

Don Lidstone, KC

# Overview

- Section 35 Constitution Act, 1982
- Royal Proclamation, 1763
- Cowichan Tribes v. Canada
- DRIPA
- Best Practices for Local Government

# Cowichan Tribes v. Canada

## 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

# Section 35: Constitution Act, 1982 - Recognition of Aboriginal and Treaty Rights

- Section 35(1): 'The existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.'
- Inherent rights include:
  - Rights to traditional territories, governance, and self-determination
  - Rights to manage lands, waters, and resources

# 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

# Cowichan Tribes

- 513 days of hearings across about 11 years
- Major Indigenous rights / land title case: Aboriginal title, fishing rights, and fee-simple overlap
- Significance: Unceded lands in BC; submerged lands included; implications for land tenure and Crown grants

# Key Facts - Historical Context

- Facts:
  - Tl'uqtinus used as a summer village by Cowichan Nation for settlement and harvest
  - 1850s: Proclaimed by Governor as Reserve land on basis of continuing historical occupation as summer village/fish camp
  - Reserve never honoured - Crown later granted in fee simple to settlers despite prior promise of Reserve

## Cowichan - Legal Issues

- Establish Aboriginal title to claim area (including submerged lands)?
- Aboriginal right to fish for food on Fraser River?
- Did Crown grants extinguish title?
- Do fee simple titles shield against Aboriginal title?

## Cowichan Decision - Main Findings

- Aboriginal title established for part of claim area (Cowichan Title Lands).
- Title includes submerged lands.
- Fee simple grants did not extinguish title.
- Crown grants defective/invalid where overlapping.
- Since promised Reserve land appropriated by Crown for Nation, a subsequent Crown grant of same land precluded by s. 13 Terms of Union.

## Cowichan Decision - Key Declarations & Orders

- Declaration of Aboriginal title to Cowichan Title Lands
- Crown's fee simple grants invalid where they infringed title
- Governments must negotiate in good faith
- Private third-party titles not invalidated

## Cowichan - Implications

- 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

# Titles of private individual landowners

- No claim against the landowners properties - no relief sought against them, and none awarded
- Individual fee simple landowners not added as parties to the litigation so court findings not binding on them
- Court ruling: Province must negotiate compensation with Cowichan (and this will not alter fee simple title)
- Note- Kwikwetlem Nation also not seeking Aboriginal title in relation to land on which individuals hold fee simple titles

# Titles of private individual landowners

*Land Title Act, s. 23(2)*

An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following... [Aboriginal title not listed].

## Titles of private landowners (continued)

- BCSC in *Cowichan Tribes*: Aboriginal title not defeated
- If Aboriginal title defeated by provincial legislation, it would be “extinguishment”
- *DRIPA* not a source of Aboriginal title
- *DRIPA* not basis for declarations in *Cowichan Tribes*

## Titles of private landowners

[3588] The fee simple interests do not displace Cowichan Aboriginal title. Aboriginal title is a senior, constitutionally-protected interest in land. However, the Cowichan have not challenged the validity of the private fee simple interests and those interests are valid until such a time as a court may determine otherwise or until the conflicting interests are otherwise resolved through negotiation. As a result, ... the Cowichan's exercise of their Aboriginal title is constrained by the existing fee simple interests to the extent it is incompatible with the fee simple interests. This finding will provide some certainty for the Cowichan and the Crown with respect to the private landowners' continued fee simple interest rights. These interests may be resolved through negotiation, challenged in subsequent litigation, purchased, or remain on the Cowichan Title Lands.

# Aboriginal title

*Tsilhqot'in* (SCC):

[69] ... This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival.

[73] Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

# Local Government Best Practices Post Cowichan

# Local Government Best Practices

- LGs should identify areas in boundaries that may be subject to aboriginal title claims - any such knowledge valuable going forward
- *Cowichan* decision is very fact-specific
- Governing test for Aboriginal title remains proof of sufficient historic (1) occupation (2) continuity (3) exclusivity
- After considering this evidence, Court recognized only 30% of Aboriginal title area claimed in Richmond, which in turn covered relatively small area of Richmond
- Court found Crown owes duty to negotiate in good faith reconciliation of fee simple interests with Cowichan Aboriginal title
- Outcome of that negotiation uncertain

# Cowichan Tribes - Local Government Best Practices

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

## Local Government Best Practices (continued)

### 6. LGs should identify areas in boundaries that may be subject to aboriginal title claims - any such knowledge valuable going forward

- *Cowichan* decision is very fact-specific
- Courts' test for Aboriginal title is proof of sufficient historic (1) occupation (2) continuity (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 of Richmond
- **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

## LG Best Practices (continued)

7. Is Municipality currently owner of land acquired by tax sale?
  - 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

# Survey Errors

## 8. Local governments may also have survey errors in boundaries

- Saugeen First Nation v. South Bruce (Town) [2024, ONCA]
- Reserve incorrectly surveyed in 1855
- SFN lost 1.4 miles of beachfront
- Therefore, part of beach held by private landowners formed part of the Reserve
- First time a court found Aboriginal interest overrides private fee simple title

## LG Best Practices (continued)

9. Participate in appeal (procedural fairness - rights of LG affected)

10. 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

## LG Best Practices (continued)

### 11. 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 - e.g. -
  - Boundary Extensions
  - Crown grants
  - Crown leases
  - Crown permits and licences (e.g., water lots)
  - Forest licences
  - Statutory approvals
  - Amendments to statutes
- As discussed: see: *Musqueam Indian Band v. British Columbia*, 2005 BCCA 128

## LG Best Practices (continued)

12. Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown

- Land granted by Crown and resulting Public or Private landowners' continued fee simple interest rights may:
  - be resolved through negotiation,
  - challenged in subsequent litigation,
  - purchased, or
  - remain on the Aboriginal Title Lands
- Issue for the Crown and not the private landowners to resolve through negotiation of reconciliation of titles

13. LGs could support Treaty Talks and proposed Claims Tribunal

Questions?