

CASE COMMENT

The Cowichan Decision Explained

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THE DECISION OF THE British Columbia Supreme Court in *Cowichan Tribes v. Canada* is a carefully reasoned legal analysis covering over 513 days of evidence and argument presented by eighty-six lawyers.¹ At 863 pages long, it is a daunting read requiring days of focused attention. Even the most engaged citizens will not have the time required to fully appreciate and understand the decision.

The public dialogue has instead been filled with reactions and hot takes from politicians and pundits. Premier David Eby was quick to declare that “the judge made some very serious errors.”² Attorney General Niki Sharma said the case could have “significant unintended consequences.”³ Lawyers, professors, and think tanks have used the decision as an opportunity to platform their own ideological perspectives.⁴ More balanced views have been drowned out by the clamour.⁵ The result is growing anxiety about government policy on reconciliation with

¹ *Cowichan Tribes v. Canada (Attorney General)*, 2025 BCSC 1490.

² Vaughn Palmer, “David Eby Says Court Wrong on Aboriginal Title, Insists Private Landowners Will Be Protected,” *Vancouver Sun*, 5 November 2025, <https://vancouver.sun.com/opinion/columnists/bc-premier-david-eby-says-court-wrong-aboriginal-title-private-landowners-protected-cowichan-richmond>.

³ Attorney General, “Minister’s Statement on Cowichan Tribes Court Decision,” *BC Gov News*, 11 August 2025, <https://news.gov.bc.ca/releases/2025AG0041-000758>.

⁴ Bruce Pardy, “Aboriginal Title Has Become a Constitutional Threat in Canada,” *Fraser Institute*, 5 February 2025, <https://www.fraserinstitute.org/commentary/aboriginal-title-has-become-constitutional-threat-canada>; Barry Kirkham, “All of B.C. Now Subject to ‘Aboriginal Title’ Claims,” *Fraser Institute*, 27 August 2025, <https://www.fraserinstitute.org/commentary/all-bc-now-subject-aboriginal-title-claims>; “The Cowichan Tribes Decision – Aboriginal Title and Private Land in British Columbia,” interview by Christine Van Geyn, posted 27 October 2025 by *Canadian Justice*, YouTube, 22 min., <https://www.youtube.com/watch?v=FFpFTM5XKm4>; Radha Curpen and David Spivak, “Cowichan Decision Fails the Constitutional Stress Test,” *Business in Vancouver*, 17 December 2025, <https://www.biv.com/news/commentary/opinion-cowichan-decision-fails-the-constitutional-stress-test-11638017>.

⁵ Andrew Coyne, “To Recognize Aboriginal Title Is Not to Abolish Property Rights, but to Uphold Them,” *Globe and Mail*, 15 August 2025, <https://www.theglobeandmail.com/opinion/article-cowichan-aboriginal-first-nation-indigenous-property-rights/>.

Indigenous people.⁶

It is both troubling and telling, however, that none of the pundits critical of the *Cowichan* decision have acknowledged the key facts or the legal principles at work in the case. The public has not been informed that the *Cowichan* case arose because corrupt government officials conspired to illegally claim the lands at issue for themselves. There has been no discussion of the difference between statutory and constitutional rights or the history and role of Aboriginal title in Canadian constitutionalism. If the public knew of the legal-historical context and understood the *Cowichan* case from a fact-based perspective, the justice of the decision might shine through the criticisms.

This case comment offers a counterpoint to those criticisms, and to the online sound bites and click-bait that have tended to distort the decision and exaggerate its significance.⁷ Put briefly, the *Cowichan* decision is narrowly limited to the particular historical facts in the case. It is *not* the “tip of the iceberg.”⁸ It does *not* put private property rights at risk across British Columbia. Instead, the *Cowichan* decision confirms that our existing constitutional framework provides an opportunity for the Crown to remedy a longstanding fraud by negotiating win-win solutions with Cowichan Tribes.⁹

To explain why that is so, it is helpful to begin by briefly discussing the origins of British Columbia and the concept of Aboriginal title.

⁶ Amy Judd, “BC Conservatives Want David Eby to Reconvene Legislature, Repeal DRIPA,” *Global News*, 8 December 2025, <https://globalnews.ca/news/11568633/bc-conservatives-david-eby-reconvene-legislature-repeal-dripa/>; Wolfgang Depner, “Eby Rejects Recall of Legislature, Will Amend, Not Repeal UN Indigenous Act,” *Business in Vancouver*, 8 December 2025, <https://www.biv.com/news/eby-rejects-a-recall-of-the-legislature-will-amend-not-repeal-un-indigenous-act-11595399>.

⁷ “Private Property Now Indigenous Land? B.C. Conservative Leader John Rustad Responds,” posted 13 August 2025 by *Juno News*, YouTube, 28 min., 51 sec., https://www.youtube.com/watch?v=-_wFleiU_ZU; “Richmond, B.C. Landowner Blasts Liberal, NDP Gov’ts for Cowichan Tribes Land Grab,” posted 22 October 2025 by *Rebel News*, YouTube, 16 min., 26 sec., <https://www.youtube.com/watch?v=yNDbQAPIPl0>; “Indigenous Land Claims Could Rip Canada Apart,” *Inside Politics*, posted 9 November 2025 by Kevin Kline, YouTube, 33 min., 20 sec., <https://www.youtube.com/watch?v=-ub8FtSE0mI>; “Land Claims Shocker: Court Says Aboriginal Title Trumps Your Rights,” *Leaders on the Frontier* (podcast), hosted by David Leis, posted on 26 December 2025 by Merit TV Canada, YouTube, 11 min., 18 sec., <https://www.youtube.com/watch?v=g9-KTtmCRl0>.

⁸ Vaughn Palmer, “Just How Big Is B.C.’s Aboriginal Title Iceberg, Anyway?,” *Vancouver Sun*, 6 November 2025, <https://vancouversun.com/opinion/columnists/how-big-aboriginal-title-iceberg-huge>.

⁹ The plaintiffs in the *Cowichan* case are Indigenous Peoples known as the Quw’utsun Mustimuhw, who are sometimes referred to collectively as Cowichan Tribes or Cowichan Nation, and individually as Stz’uminus First Nation, Penelakut Tribe, Halalt First Nation, Lyackson First Nation, and Hwlitsum First Nation.

WHY "BRITISH" COLUMBIA?

The Columbia River is the largest river in the Pacific Northwest region of North America. Its headwaters begin high in the Canadian Rocky Mountains. It then flows south for 2,000 kilometres until it empties into the Pacific Ocean near Astoria, Oregon. The river received its English name in 1792 from the captain of the *Columbia Rediviva* – the first ship to sail upriver in an effort to advance the maritime fur trade. Thereafter the Columbia River became an important transportation route for the Hudson's Bay Company (HBC), the American Fur Company, and other fur traders.¹⁰

At the same time, several European states were competing with each other and the fledgling United States for territory and commercial interests in the Pacific Northwest. This competition was largely resolved in the early nineteenth century by a series of international treaties between Great Britain, the United States, Spain, and Russia.¹¹ It was agreed that Russia and Spain would withdraw their claims and the region would remain in the British and American spheres of influence. There was no urgency for Great Britain and the United States to establish a border west of the Rocky Mountains so in 1818 those two powers agreed to defer the matter and declared the Columbia River basin to be "free and open" for joint occupation by British and American traders.¹²

That arrangement was continued indefinitely by a further agreement in 1827,¹³ but by the 1840s the United States began voicing new expansionist aspirations over the Pacific Northwest. The Americans wanted control over all the lands west of the Rockies and north to Alaska. The British preferred to use the Columbia River as the international

¹⁰ William Denison Lyman, *The Columbia River* (Knickerbocker Press, 1909).

¹¹ A Treaty of Peace and Amity, Great Britain and the United States, 24 December 1814, *US Statutes at Large*, ed. Richard Peters, vol. 8 (Little and Brown, 1848), 218–23; Treaty of Amity, Settlement, and Limits, United States and Spain, 22 February 1819, *US Statutes at Large*, ed. Richard Peters, vol. 8 (Little and Brown, 1848), 252–73; Convention Between the United States of America and Russia, 5 April 1824, *US Statutes at Large*, ed. Richard Peters, vol. 8 (Little and Brown, 1848), 302–5; Convention Concerning the Limits of Their Respective Possessions on the Northwest Coast of America and the Navigation of the Pacific Ocean, Great Britain and Russia, 28 February 1825, *British and Foreign State Papers*, vol. 12 (J. Harrison, 1826), 38–43.

¹² Convention of Commerce Relative to Fisheries, Boundary and the Restoration of Slaves, Great Britain and the United States, 20 October 1818, *US Statutes at Large*, ed. Richard Peters, vol. 8 (Little and Brown, 1848), 248–51.

¹³ Convention, Relative to the Territory on the North-west Coast of America, Great Britain and the United States, 6 August 1827, *US Statutes at Large*, ed. Richard Peters, vol. 8 (Little and Brown, 1848), 360–61.

boundary.¹⁴ A compromise was reached in June 1846, when Great Britain and the United States signed the Treaty of Oregon, which extended the international border west along the forty-ninth parallel from the Rockies to the Pacific Ocean, thereby cutting the Columbia River basin in two.¹⁵

Later, Queen Victoria chose the name “British Columbia” to distinguish the lands north of the border from the “American Columbia” to the south.¹⁶ In this way, by 1846 the sorting of commercial and territorial interests in the Pacific Northwest was mostly resolved as between the United States, Great Britain, and other European states.

A PRIMER ON ABORIGINAL TITLE

Long before the arrival of Europeans, the lands west of the Rockies and north of the forty-ninth parallel were owned and occupied by organized societies of Indigenous Peoples with their own legal systems that governed rights to lands and resources. Today, those Indigenous societies are known as First Nations, a literal and figurative distinction from the European states that came later.

And yet, with a few rare exceptions, the British did not make treaties with the First Nations west of the Rocky Mountains. Consequently, when in 1846 the British asserted legal jurisdiction over those lands vis-à-vis the United States through the Treaty of Oregon, important questions were left unanswered about the relationship between the British and Indigenous legal systems north of the forty-ninth parallel. Are those legal systems layered, or merged? Did one displace the other? Do they coexist? How can we organize our laws today to achieve our shared goals and values? What does justice require?

These important questions invite deeper inquiry into legal pluralism and Indigenous law that are beyond the scope of this case comment. Here, the focus is on the common law tradition and the continued existence of legally enforceable Indigenous rights to lands – a concept long established and accepted in British law, in Colonial law and policy, in international law, and in Canadian law. Four sources are particularly relevant.

¹⁴ Joseph Schafer, “The British Attitude Toward the Oregon Question, 1815–1846,” *American Historical Review* 16, no. 2 (1911): 273–99; Edwin A. Miles, “Fifty-Four Forty or Fight – An American Political Legend,” *Journal of American History* 44, no. 2 (1957): 291–309, <https://doi.org/10.2307/1887191>.

¹⁵ Treaty in Regard to Limits Westward of the Rocky Mountains, Great Britain and United States, 15 June 1846, *US Statutes at Large*, ed. George Minot, vol. 9 (Little and Brown, 1851), 869–70.

¹⁶ Ged Martin, “The Naming of British Columbia,” *Albion* 10, no. 3 (1978): 257–63, <https://doi.org/10.2307/4048132>.

The Royal Proclamation of 1763

On 10 February 1763, France ceded its colonies in Canada to Great Britain through Article IV of the Treaty of Paris.¹⁷ Eight months later, on 7 October 1763, King George III issued a *Royal Proclamation* with three main purposes. First, to establish governments in the colonial territories newly acquired from France. Second, to declare it “just and reasonable” to reserve “all Lands and Territories” west of those colonies “for the use of the Indians.” Third, to acknowledge that “great Frauds and Abuses have been committed in the purchasing Lands of the Indians” and to “strictly forbid” British subjects from “taking Possession of any of the Lands above reserved,” unless those lands were first “ceded to, or purchased by” the Crown through formal agreements with “the said Indians.”¹⁸

Thus, the King and his government recognized and affirmed that the First Nations occupying the lands west of the colonies then established in British North America were the rightful owners of those lands. The affirmation of Indigenous rights to lands and the rules governing the relationship between First Nations and the Crown with respect to those lands were implemented throughout the late eighteenth and nineteenth centuries, including with respect to land in what would later become the westernmost colonies of Vancouver Island and British Columbia.¹⁹

Colonial Law and Policy

Around 1839, James Douglas was appointed chief factor of the HBC stationed at Fort Vancouver at the mouth of the Columbia River. After the Treaty of Oregon, the HBC shifted its main operations north to Fort Victoria on Vancouver Island, which became the HBC’s main Pacific depot from which furs were shipped.²⁰ In 1849, Vancouver Island was

¹⁷ The Definitive Treaty of Peace and Friendship, Between His Britannick Majesty, the Most Christian King, and the King of Spain: Concluded at Paris, the 10th day of February, 1763 (E. Owen and T. Harrison, 1763).

¹⁸ Clarence S. Brigham, ed., *British Royal Proclamations Relating to America*, vol. 12, *Transactions and Collections of the American Antiquarian Society* (American Antiquarian Society, 1911), 212–18.

¹⁹ See, for example, Hamar Foster and Benjamin L. Berger, “From Humble Prayers to Legal Demands: The Cowichan Petition of 1909 and the British Columbia Indian Land Question,” in *The Grand Experiment: Law and Legal Culture in British Settler Societies*, ed. Hamar Foster, Benjamin L. Berger, and A.R. Buck (UBC Press, 2008), 240–67; Hamar Foster, “The Royal Proclamation of 1763 in British Columbia: An Indigenous Magna Carta’s Chequered Canadian Career,” in *Challenges to Authority and the Recognition of Rights: From Magna Carta to Modernity*, ed. Catharine MacMillan and Charlotte Smith (Cambridge University Press, 2018), 269–95.

²⁰ W.N. Sage, *Sir James Douglas and British Columbia* (University of Toronto Press, 1930).

declared a Crown colony and was leased to the HBC for ten years. Douglas requested and received instructions “to consider the natives as the rightful possessors” of the lands that they occupied (in particular settlements and enclosed fields) and that such lands “should be reserved for their benefit and fully secured to them by law.”²¹

Douglas was then appointed governor in 1851. The protection of Indigenous rights to the lands they occupied was expressly continued by Queen Victoria through Royal Instructions²² and by Douglas and his successors in their capacity as colonial governors in the 1850s and ’60s.²³ Those protections were also included in the *Terms of Union* by which the colony of British Columbia became a province of the Dominion of Canada in 1871.²⁴ Moreover, the *Land Act, 1874* – the first provincial *Land Act* – also reflected the protection of Aboriginal title by expressly prohibiting settlers from claiming lands that were “an Indian settlement.”²⁵ That statutory prohibition was continued in subsequent versions of the *Land Act*, including during the time the Cowichan settlement lands were unlawfully sold to speculators (discussed in the section below titled *Cowichan: Two Key Facts*).²⁶

International Law

The same approach to Indigenous rights to lands set out in the *Royal Proclamation of 1763* has also been recognized through international law processes. For example, in 1974, the United Nations General Assembly requested an advisory opinion on Aboriginal title from the International Court of Justice in the *Western Sahara* case. The Court found that, as a matter of state practice and customary international law, the “territories inhabited by tribes or peoples having social and political organization were not regarded as *terrae nullius*.”²⁷ Moreover, the Court found that the acquisition of colonial sovereignty by European states was not

²¹ *Cowichan* at paras. 1690–1692, 1734. See also Hamar Foster, “The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title,” *UBC Law Review* 23 (1989): 629–50.

²² *Cowichan* at paras. 1892–1893, 1900–1901, 1903.

²³ *Cowichan* at paras. 1740–1742, 1750, 1757–1758, 1766–1767, 1775–1778, 1787–1788, 1790–1795, 1823, 1838. See also *Land Ordinance, 1865*, reprinted in RSBC 1871, App. No. 23; *Indian Reserves Ordinance, 1869*, reprinted in RSBC 1871, No. 125; *Land Ordinance, 1870*, reprinted in RSBC 1871, No. 144.

²⁴ *Cowichan* at paras. 1912–1915. On deficiencies in the implementation of the *Terms of Union*, see *Cowichan* at paras. 1949–1963. On the application of the Royal Proclamation to British Columbia, see Foster, “The Royal Proclamation,” n. 19 at p. 274.

²⁵ *An Act to Amend and Consolidate the Laws Affecting Crown Lands in British Columbia*, SBC 1874, No. 2, s. 3 (the “Land Act, 1874”).

²⁶ *Cowichan* at paras. 1929–1947.

²⁷ *Western Sahara*, Advisory Opinion, *ICJ Reports* 1975, at p. 39.

effected unilaterally but rather by agreement with the leadership of local tribes, and that the Aboriginal title held by those local Peoples was the root onto which that colonial sovereignty was grafted.²⁸ Thus, the *Western Sahara* decision confirms two of the core precepts in the *Royal Proclamation*: that the law recognizes Aboriginal title based on prior occupation of lands by Indigenous Peoples, and that Aboriginal title can only be modified or extinguished by agreement with those Peoples.

The Supreme Court of Canada

Moreover, beginning with the *Calder* case in 1973, the Supreme Court of Canada has considered the application of the principles set out in the *Royal Proclamation* in British Columbia. In *Calder*, the Court left open the idea that Aboriginal title continues until lawfully extinguished,²⁹ and that Governor Douglas was not empowered to extinguish Aboriginal title in British Columbia except by treaty.³⁰ Then, in *Sparrow*, the court made clear that for extinguishment to be effective it must be by “clear and plain” legislative intent.³¹ And, in *Delgamuukw*, the Court confirmed that a First Nation can establish Aboriginal title to lands by proving that it had “exclusive use and occupation” of those lands prior to the British assertion of sovereignty via the Treaty of Oregon in 1846. In addition, the Court also confirmed that the provincial legislature had no previous authority to extinguish Aboriginal title because the matter falls with federal jurisdiction under section 91(24) of the *Constitution Act, 1867* and is now further constrained because Aboriginal title is recognized and affirmed as a constitutional right pursuant to section 35 of the *Constitution Act, 1982*.³²

For these reasons, the concept of Aboriginal title to lands occupied by First Nations in 1846 has always and will continue to be part of the law of the land in British Columbia. Which brings us to the *Cowichan* case.

²⁸ *Western Sahara*, at p. 39.

²⁹ *Calder et al. v. Attorney-General of British Columbia*, [1973] SCR313, at pp. 328 (per Judson J.), pp. 376 and 401 (per Hall J.).

³⁰ *Calder* at pp. 406–414 (per Hall J.).

³¹ *R. v. Sparrow*, [1990] 1 SCR 1075, at pp. 1098–1099.

³² *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010. See discussion in *Cowichan* at paras. 2112–2118.

COWICHAN: TWO KEY FACTS

In every case brought before the courts, it is the trial judge's task and responsibility to sift through the evidence and determine the facts. In *Cowichan*, the evidence included many historical documents, expert reports, and many days of witness testimony. The judge carefully considered all of the evidence and made two findings of fact that are key to understanding the *Cowichan* decision.

First, the trial judge noted that in ancient times, six species of salmon returned to the Fraser River each year³³ in numbers so great and runs so dense that it was said you could almost walk across the river on their backs.³⁴ The Cowichan people participated in the harvest of these salmon, an activity that was and remains central to their economy and their culture.³⁵ This explains why, long before the arrival of Europeans, the Cowichan built and occupied a large and permanent settlement of 108 multi-apartment, post-and-beam longhouses on the South Arm of the Fraser River.³⁶

We can be confident there was a permanent Cowichan settlement in that location at the relevant time because – in addition to oral history and archaeological evidence – the settlement is repeatedly mentioned in the earliest reports of European explorers, fur traders, and colonial and provincial officials.³⁷ Indeed, the Court found that there was overwhelming evidence that the Cowichan were the largest Indigenous group in the Gulf of Georgia and the lower Fraser River, that Cowichan controlled and were the only Indigenous Peoples to occupy the lands at issue, and that the Crown's expert agreed in cross-examination that she had made an error in that regard.³⁸ Thus the Cowichan met the legal test for Aboriginal title to the site of their settlement on the South Arm of the Fraser River.

Second, the trial judge reviewed the administrative records of the first land transfers to colonists and found that a high-ranking provincial official named Richard Moody, then the Chief Commissioner of Lands and Works, covertly and illegally claimed lands at the mouth of the Fraser River for himself, including lands at the site of the Cowichan settlement. Moody knew about the Cowichan settlement on the South Arm as he was responsible for a survey of the area in 1859 that included

³³ *Cowichan* at para. 1110.

³⁴ *Cowichan* at para. 663.

³⁵ *Cowichan* at paras. 3233–3287.

³⁶ *Cowichan* at paras. 478, 994, 1081, 1212, 1245, 1535.

³⁷ *Cowichan* at paras. 756–922, 3254–3261, 3268, 3285, 3292, 3293.

³⁸ *Cowichan* at paras. 1332, 1340, 1377.

map notations identifying the location of the Cowichan settlement.³⁹ But instead of reserving the site for the Cowichan as Governor Douglas had instructed him to do, Moody surreptitiously used a land agent and a subordinate official to complete the paperwork and disguise his role as the purchaser of two sections of land at the site of the settlement.⁴⁰ Later, other “well-placed men” and high-ranking government officials (including a former attorney general, a justice of the peace, and Moody’s private secretary) continued to acquire parcels of land in the same area by similarly unlawful means.⁴¹

These two key historical facts – the location of a permanent Cowichan settlement on the South Arm and the corrupt and unlawful transfer of those lands to government officials – form the basis of the Court’s decision that the Cowichan continue to have Aboriginal title to the site of their settlement. Fast-forward to today and, as a direct result of these corrupt land speculation schemes, there are now eight sections of land (around 300 hectares) that are wholly or partially within the protected location of the Cowichan settlement. These lands, originally acquired through illegal means, are divided into 150 separate lots, the fee simple title to which is registered in the provincial Land Title Office or otherwise held in the names of the federal Crown, the Port Authority, the City of Richmond, and several individuals and businesses.

TWO CONCEPTS OF “TITLE” AND THE HIERARCHY OF NORMS

Hence, the Cowichan case brings into focus two different concepts of legal “title” to land. These two concepts do overlap in some significant ways. For example, at first glance a First Nation holding Aboriginal title and an individual holding fee simple title both have the exclusive right to decide how the land is used. On that basis these two concepts of title appear to be incompatible because they both purport to exclusively occupy the same physical and legal space. But the two concepts are not the same; they are different in important ways that have come to the fore now because of the peculiar facts and circumstances of the *Cowichan* case.

In particular, the two concepts of title are different because they originate from different sources and consequently have a different and contrasting legal status. The right to exclusive use that comes with fee simple title is statutory; it is derived from and protected by the land

³⁹ *Cowichan* at paras. 1847–1850.

⁴⁰ *Cowichan* at paras. 1791, 1839–1843, 1847–1853, 1856.

⁴¹ *Cowichan* at paras. 1861, 1986, 2051–2056, 2070.

title registration system established by the *Land Title Act* (a provincial statute). For example, section 23(2) provides that registered fee simple titles are indefeasible and section 25(2) provides that no court proceedings for recovery of land can be maintained against a registered owner:

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 ...

25(2) An action of ejectment or other action for the recovery of land for which an indefeasible title has been registered must not be commenced or maintained against the registered owner named in the indefeasible title ...

In contrast, the right to exclusive use that comes with Aboriginal title is constitutional; it is derived from the prior occupation of the land by organized societies of Indigenous Peoples, affirmed by the *Royal Proclamation of 1763*, protected by subsequent law and policy (discussed above), falling within exclusive federal jurisdiction pursuant to section 91(24) of the *Constitution Act, 1867*, and now also protected by section 35 of the *Constitution Act, 1982*. Indeed, section 35(1) states:

35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The distinction between statutory and constitutional rights is critically important to our system of government. Canada is a constitutional democracy in which the legislative and executive powers of government are constrained by higher order constitutional norms. Those constitutional norms serve to prevent unlawful and arbitrary actions by governments (and are a bulwark against authoritarianism).

The law on that point could not be more clear. Section 52 of the *Constitution Act, 1982* confirms:

52. The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

In other words, provincial statutes can only be applied in ways that are consistent with the rights guaranteed by the *Constitution*. It follows that a fee simple title created by a provincial statute such as the *Land*

Title Act cannot defeat or replace Aboriginal title that was upstream of the powers of the province prior to 1982 and has since been protected by section 35 of the *Constitution Act, 1982*.

A CONSTITUTIONAL RIGHT TO PRIVATE PROPERTY?

It could be argued – at least as a matter of legal and political philosophy – that private property rights to land are so important to the political economy that those rights should also have constitutional protections. For example, section 8 of the *Charter of Rights and Freedoms* might seem to provide an opening for such an argument. It says:

8. Everyone has the right to be secure against unreasonable search or seizure.

Section 8 is typically applied in limited circumstances to protect privacy and prevent police from misusing criminal law enforcement powers against citizens.⁴² But an argument that section 8 should be interpreted more broadly to include a constitutional guarantee of private property rights to land could be raised in an attempt to balance the two concepts of title in our constitutional framework and better shield private property from Aboriginal title claims.

That argument, however, is a nonstarter and must fail. This is because section 25 of the *Constitution Act, 1982* adds a further and supervening layer of protection for the rights of Aboriginal Peoples. Section 25 states:

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

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Therefore, even if section 8 of the *Charter* were to be interpreted as including a right against “unreasonable seizure” of privately held lands, such a right cannot be used to defeat the more senior right of Aboriginal

⁴² See, for example, *R. v. Duarte*, [1990] 1 SCR 30; *R. v. Wiggins*, [1990] 1 SCR 62. See also Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Thomson Carswell, 2007), section 48:4.

title.⁴³ Indeed, section 25 is also remarkable for the way it confirms the primary role and ongoing relevance of the *Royal Proclamation of 1763* in Canadian constitutionalism.

It follows that it is both a legal-political error and a strategic mistake for politicians and pundits to try to frame the issue in the *Cowichan* case as a zero-sum contest between fee simple title and Aboriginal title.

COWICHAN AND THE HONOUR OF THE CROWN

The Court in *Cowichan* took a different, more thoughtful, and more principled approach to solving the problem. In particular, the Court noted that whether Aboriginal title or fee simple title should take priority is the wrong question.⁴⁴ Neither form of property right is absolute, and one does not necessarily defeat the other.⁴⁵ Both interests may be valid, and the law provides for a principled reconciliation of interests through negotiation between the Nation and the Crown.⁴⁶ Indeed, the Court in *Cowichan* carefully considered many previous decisions of other courts on this subject⁴⁷ and found that “the trend in the jurisprudence” suggests that Aboriginal title and fee simple title can coexist, and that “the governing approach is reconciliation of those rights through engagement between the Aboriginal rights-holder and the Crown.”⁴⁸

The above approach is founded in part on the Court’s analysis of the facts and law concerning the “honour of the Crown.” This principle requires colonial and government administrators to conduct themselves with honour and integrity when acting on behalf of the sovereign, including by diligently fulfilling promises and duties owed to First Nations, with a view to the reconciliation of preexisting Aboriginal societies with the Crown’s assertion of sovereignty.⁴⁹ In this regard, the Court found that Governor Douglas assured the Cowichan that the Queen had given him a special direction to treat them with justice and humanity in exchange for peace.⁵⁰ This, together with the colonial policy requiring the protection of Indigenous settlements from incursions by settlers, engages the honour of the Crown.⁵¹

⁴³ Note also that a right to “property” was intentionally omitted from section 7 of the *Constitution Act, 1982*. See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.

⁴⁴ *Cowichan* at para. 2182.

⁴⁵ *Cowichan* at paras. 2176, 2190.

⁴⁶ *Cowichan* at para. 2194.

⁴⁷ *Cowichan* at paras. 2142–2174.

⁴⁸ *Cowichan* at para. 2174.

⁴⁹ *Cowichan* at paras. 1709–1715.

⁵⁰ *Cowichan* at paras. 1697–1701.

⁵¹ *Cowichan* at paras. 1729–1730.

Indeed, the Court noted that Douglas had directed Moody to reserve lands at the sites of Indian settlements, but that Moody did not fulfill his responsibilities and instead purchased some of Cowichan's lands for himself and adjacent lands were sold to other "high-placed officials." This conduct was dishonourable.⁵² It follows that the Crown grants of fee simple interests to the Cowichan lands were and continue to be an unjustified infringement of Cowichan's Aboriginal title and the Crown now has a duty to make amends.⁵³ Moreover, the Court found that the Crown cannot breach its duties to Cowichan Tribes and then rely on the passage of time to avoid fulfilling those duties.⁵⁴

After careful consideration of the facts and the law, the Court ordered the federal and provincial governments to negotiate in good faith and reconcile their interests with Cowichan Tribes in a manner that accords with the honour of the Crown.⁵⁵ This is not a new or extraordinary remedy. It is a remedy that has been applied many times in British Columbia and across the country.

The practical effect of the Court's order is to guide the federal and provincial governments to the opportunity to (i) repair the damage done by what has been shown to be, to quote the *Royal Proclamation of 1763*, one of the "great Frauds and Abuses [that] have been committed in the purchasing Lands of the Indians," and (ii) restore balance to the relationship between the Crown and Cowichan Tribes and place the parties back on the path to reconciliation.⁵⁶

NEGATIVE REACTIONS IN THEIR POLITICAL AND ECONOMIC CONTEXT

Rather than accept the Court's findings and direction, Premier Eby characterized the Court's decision as "dramatic, overreaching and unhelpful" and said "the uncertainty this case creates is toxic."⁵⁷ He went on to assert in a speech to business leaders that the province will "go to

⁵² *Cowichan* at paras. 1853–1854, 2261, 2602–2604.

⁵³ *Cowichan* at paras. 2581.

⁵⁴ *Cowichan* at paras. 2902–2905, 3150–3151.

⁵⁵ *Cowichan* at paras. 2658–2661, 3724.

⁵⁶ For a recent decision on the honour of the Crown and the relationship between the Crown and First Nations, see *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*, 2024 SCC 39, at paras. 210–11.

⁵⁷ Justine Hunter and Frances Bula, "Eby Accuses Courts of Jeopardizing B.C. Economy, Resource Projects," *Globe and Mail*, 10 December 2025, <https://www.theglobeandmail.com/canada/article-eby-accuses-courts-of-jeopardizing-bc-economy-resource-projects/>.

the wall in defence of private property.”⁵⁸ Likewise, Attorney General Niki Sharma declared that the province would appeal the decision to “make clear that fee-simple title has a superior title to everything else.”⁵⁹ Meanwhile, opposition parties have used the *Cowichan* decision to blame the Eby government for misguided policies and a lack of leadership on reconciliation.⁶⁰ In an ironic twist, Premier Eby responded by calling for amendments to the provincial statutes that uphold the rights of Indigenous Peoples – statutes that he himself had championed when he was attorney general.⁶¹

These highly critical reactions to the Court’s decision in *Cowichan* are best understood in the prevailing political and economic contexts. Generally speaking, British Columbia remains a frontier jurisdiction with a political economy that depends on industrial scale natural resource extraction activities. Its provincial politics are often characterized by a mix of insularity, partisanship, and general anxiety about the need to attract new investment to fuel the economy.⁶² Mood swings between unbridled optimism about “generational opportunities” for prosperity⁶³

⁵⁸ Bricanna Charlebois, “Eby Promises Business Leaders to ‘Go to the Wall’ to Protect Private Property,” *Business in Vancouver*, 10 December 2025, <https://www.biv.com/news/real-estate/eby-promises-business-leaders-to-go-to-the-wall-to-protect-private-property-11609042>.

⁵⁹ Vaughn Palmer, “What Happened to the Promise That Private Property in B.C. Would Be Untouched?,” *Vancouver Sun*, 21 October 2025, <https://vancouver.sun.com/news/vaughn-palmer-bc-private-property-cowichan-richmond-ndp-promise>.

⁶⁰ Trevor Halford, “David Eby Has No Path Forward on the Most Consequential File Shaping B.C.’s Future,” *Vancouver Sun*, 27 December 2025, <https://vancouver.sun.com/opinion/op-ed/opinion-eby-no-path-reconciliation-business-land-title>.

⁶¹ Andrew Kurjata, “Eby Says B.C. May Revise DRIPA Legislation, Worries Court Is ‘In Driver’s Seat,’” *CBC News*, 5 December 2025, <https://www.cbc.ca/news/canada/british-columbia/eby-dripa-gitxaala-ruling-9.7005087>; Rob Shaw, “The Unintended Consequences of DRIPA Land at BC NDP’s Doorstep,” *Business in Vancouver*, 8 December 2025, <https://www.biv.com/news/commentary/rob-shaw-the-unintended-consequences-of-dripa-land-at-bc-ndps-doorstep-11593569>.

⁶² For example, see James Hickling, “The Importance of Narrative in the Negotiation of Host Government Agreements for LNG Projects: The Case of British Columbia and Petronas,” *Journal of World Energy Law & Business* 10, no. 4 (2017): 293–325, <https://doi.org/10.1093/jwelb/jwx012>.

⁶³ The Canadian Press, “Christy Clark Calls LNG an ‘Incredible Opportunity,’ Recalls President Kennedy in Throne Speech,” *National Post*, 12 February 2014, <https://nationalpost.com/news/politics/christy-clark-calls-lng-an-incredible-opportunity-recalls-president-kennedy-in-throne-speech>; Ministry of Natural Gas Development, “Province Opens Doors to Asian Investment in LNG,” *BC Gov News*, 7 October 2013, <https://news.gov.bc.ca/releases/2013MNGD0016-001517>; Office of the Premier, “B.C. Passes Liquefied Natural Gas Project Agreements Act,” *BC Gov News*, 21 July 2015, <https://news.gov.bc.ca/releases/2015PREM0051-001144>; Office of the Premier, “Premier Unveils Plan to Secure Billions in Mining Investments, Build Prosperity Through Partnership, Conservation,” *BC Gov News*, 26 May 2025, <https://news.gov.bc.ca/releases/2025PREM0059-000496>; Ministry of Jobs and Economic Growth, “Premier Goes to New York to Promote B.C.’s Clean Energy, Critical Minerals,” *BC Gov News*, 22 September 2025, <https://news.gov.bc.ca/releases/2025JEG0039-000916>.

and paralyzing fears of debt and affordability crises⁶⁴ are not uncommon.

In this regard, the *Cowichan* decision arrived at a particularly sensitive time. Previously reliable trade relationships are in flux⁶⁵ and industries that have been economic engines for the province are in retreat.⁶⁶ The premier has taken controversial steps to roll back climate policies and fast-track permits for new natural resource extraction projects, in spite of opposition from First Nations and civil society organizations.⁶⁷ Meanwhile, the Eby government is nursing a one-seat majority in the

⁶⁴ David Williams, "B.C.'s Bleak Economic Performance and Outlook," *Business Council of British Columbia*, 21 July 2025, <https://www.bcbc.com/insight/v1b8jn1xl6oedpamn0mmdgdc721wft>; Vaughn Palmer, "B.C. Debt Skyrockets in First Two Years of David Eby's Government," *Vancouver Sun*, 7 August 2025, <https://vancouversun.com/opinion/columnists/vaughn-palmer-bc-debt-skyrockets-two-years-eby-government>; Tegan Hill and Milagros Palacios, "B.C. Government's Finances Fall Off Cliff with Disastrous Fiscal Update," *Fraser Institute*, 15 September 2025, <https://www.fraserinstitute.org/commentary/bc-governments-finances-fall-cliff-disastrous-fiscal-update>.

⁶⁵ Office of the Premier, "Premier Announces New Measures to Defend B.C. from Trump Tariffs," *BC Gov News*, 6 March 2025, <https://news.gov.bc.ca/releases/2025PREM0011-000174>; Rob Shaw, "Eby's Tariff Task Force Ends in a Shrug," *Business in Vancouver*, 5 November 2025, <https://www.biv.com/news/commentary/rob-shaw-ebys-tariff-task-force-ends-in-a-shrug-11446633>.

⁶⁶ Nono Shen, "B.C. Forest Sector in 'Crisis' Triggering Change in BC Timber Sales," *Business in Vancouver*, 23 September 2025, <https://www.biv.com/news/bc-forestry-sector-in-crisis-triggering-change-in-bc-timber-sales-11254082>; Jim Pine, "B.C.'s Forest Industry Needs Massive Overhaul," *Times Colonist*, 12 December 2025, <https://www.timescolonist.com/opinion/comment-bcs-forest-industry-needs-massive-overhaul-11609073>; Bryan Yu, "B.C. Housing Market Loses Momentum as Affordability Strains Persist," *Business in Vancouver*, 29 October 2025, <https://www.biv.com/news/commentary/bryan-yu-bc-housing-market-loses-momentum-as-affordability-strains-persist-11384979>; Dean Recksiedler and Mike Lloyd, "November Report Shows B.C. Real Estate Prices, Sales Continuing Downward," *City News*, 15 December 2025, <https://vancouver.citynews.ca/2025/12/15/november-report-shows-bc-real-estate-prices-sales-continuing-downward/>.

⁶⁷ Chad Pawson, "Bill Passes to Fast-Track Transmission Line in Northern B.C.," *CBC News*, 20 November 2025, <https://www.cbc.ca/news/canada/british-columbia/north-coast-transmission-line-bill-passes-9.6986020>; Justine Hunter, "B.C. Fast-Tracks Power Line to Feed Resource Projects in the Province's North," *Globe and Mail*, 16 January 2025, <https://www.theglobeandmail.com/canada/article-bc-fast-tracks-power-line-to-feed-resource-projects-in-the-provinces/>; Rosemary Collard and Jessica Dempsey, "B.C.'s Resources Extraction Lifeboat Is Full of Holes," *Business in Vancouver*, 7 February 2025, <https://www.biv.com/news/commentary/opinion-bcs-resource-extraction-lifeboat-is-full-of-holes-10201976>; Rob Shaw, "Carbon Tax Is Dead, but B.C.'s Budget Mess Is Just Beginning," *Business in Vancouver*, 17 March 2025, <https://www.biv.com/news/commentary/rob-shaw-carbon-tax-is-dead-but-bcs-budget-mess-is-just-beginning-10384923>; Ministry of Finance, "B.C. Eliminates Carbon Tax," *BC Gov News*, 31 March 2025, <https://news.gov.bc.ca/releases/2025FIN0014-000280>; Stefan Labbé, "B.C. Weakens Net-Zero Emissions Policy for New LNG Terminals," *Business in Vancouver*, 4 April 2025, <https://www.biv.com/news/bc-weakens-net-zero-emissions-policy-for-new-lng-terminals-10475477>; Graeme Wood, "B.C. First Nations, Cities Unite to Oppose Infrastructure Bill," *Business in Vancouver*, 22 May 2025, <https://www.biv.com/news/economy-law-politics/bc-first-nations-cities-unite-to-oppose-infrastructure-bill-10698070>; Meghan McDermott and Veronica Martisius, "BCCLA Urges BC Government to Withdraw Bill 15: Infrastructure Projects Act," *BC Civil Liberties Association*,

legislature⁶⁸ and recently forecast a series of unprecedented budget deficits that will significantly increase the provincial debt and costs of debt service.⁶⁹

In that light, it may be that the Eby government is particularly concerned about the additional political cost to be paid if a settlement with Cowichan Tribes requires spending and borrowing at a time when the government is already vulnerable to the argument that it has mismanaged public finances. Indeed, some pundits have reacted to the *Cowichan* decision and policies on reconciliation as if they present an existential threat to the provincial economy.⁷⁰

PRACTICAL LIMITS ON ABORIGINAL TITLE

The better view is that there are several practical ways to mitigate the effects of the *Cowichan* decision, and to limit the scope of the Crown's future liability on a case-by-case basis. For example, Aboriginal title is subject to geographic limits. First Nations claimants must meet the strict legal test of "exclusive use and occupation" of lands prior to 1846. In *Cowichan*, the Court found that to be limited to a relatively small area shown to have been the site of a Cowichan settlement at the relevant

27 May 2025, <https://bccla.org/policy-submission/bccla-urges-bc-government-to-withdraw-bill-15-infrastructure-projects-act/>; Wolfgang Depner, "Chorus of Critics Grows for B.C. Fast-Track Bill as Minister Fails to Soothe Concerns," *Business in Vancouver*, 27 May 2025, <https://www.biv.com/news/chorus-of-critics-grows-for-bc-fast-track-bill-as-minister-fails-to-soothe-concerns-10720353>; Rob Shaw, "BC NDP Playing Divide and Conquer with Indigenous, Municipal Allies," *Business in Vancouver*, 27 May 2025, <https://www.biv.com/news/commentary/rob-shaw-bc-ndp-playing-divide-and-conquer-with-indigenous-municipal-allies-10718403>; Katie DeRosa, "B.C. NDP Government Narrowly Passes Controversial Bills to Fast-Track Projects," *CBC News*, 28 May 2025, <https://www.cbc.ca/news/canada/british-columbia/bc-ndp-bill-15-1.7546636>; Justine Hunter, "Critics Question Whether Eby's Transmission Line Plan Will Fix B.C.'s Massive Deficit," *Globe and Mail*, 25 October 2025, <https://www.theglobeandmail.com/canada/british-columbia/article-david-ebby-debt-economic-engine-us-trade/>.

⁶⁸ Wolfgang Depner, "A Shaky Coalition and 'Near-Death' Election Put Eby Under Scrutiny at NDP Convention," *CBC News*, 14 November 2025, <https://www.cbc.ca/news/canada/british-columbia/2025-ndp-convention-david-ebby-leadership-review-9.6978847>.

⁶⁹ Rob Shaw, "B.C. Braces for Worsening Budget Deficit amid Economic Warning Signs," *Business in Vancouver*, 23 July 2025, <https://www.biv.com/news/commentary/rob-shaw-bc-braces-for-worsening-budget-deficit-amid-economic-warning-signs-10980642>; Alex Lazenby, "From a \$5.7 Billion Surplus to an \$11.6 Billion Deficit: How Did B.C.'s Finances Go Astray?," *Vancouver Sun*, 16 September 2025, <https://vancouversun.com/news/from-surplus-deficit-how-did-bc-finances-go-astray>.

⁷⁰ Bruce Pardy, "Eby Bringing B.C. to Its Knees with Aboriginal Land Deals: The Premier Is Mounting an Existential Threat to the Future of His Own Province," *National Post*, 28 October 2025, <https://nationalpost.com/opinion/ebby-bringing-b-c-to-its-knees-with-aboriginal-land-deals>; David Frum, "Good Intentions Gone Bad," *The Atlantic*, 27 December 2025, <https://www.theatlantic.com/international/2025/12/canada-indigenous-land-court/685463/>.

time. Indeed, the Court rejected the Cowichan claim to a broader area around the site of the settlement on the South Arm of the Fraser River.⁷¹

Moreover, proving “exclusive use and occupation” in 1846 is a long and difficult process. Assembling the necessary evidence requires years of careful research by archivists and expert historians, as well as corroborating oral history evidence. Even then it is open to the government to challenge the meaning, purpose, and validity of every document and witness statement. This means governments have the ability (acting honourably) to defer, sequence and limit costs, and to stage the resolution of claims in ways that are manageable and responsive to the prevailing economic and political circumstances.

In addition, the province can get ahead of future claims and protect fee simple interests by negotiating treaties and other agreements with First Nations. For example, the Court in *Cowichan* noted that the “Rising Tide Agreement” between the province and the Haida Nation provides for the provincial recognition of Haida Aboriginal title and the Haida recognition of existing fee simple titles.⁷² Similarly, the province has concluded negotiations and is currently in the process of ratifying and implementing three new treaties with the K’ómoks, Kitselas, and Kitsumkalum First Nations.⁷³

It also bears emphasizing that Cowichan and other First Nations have not sought to invalidate fee simple title to privately held lands and have tailored the remedies they seek to minimize their effects on third parties.⁷⁴ In this way, First Nations have demonstrated themselves to be thoughtful, pragmatic, and solution-oriented. Moreover, whether or not individual First Nations continue the policy of not directly challenging fee simple titles, the courts will almost certainly continue to respond to valid Aboriginal title claims by placing obligations solely on the Crown

⁷¹ *Cowichan* at paras. 36, 1568, 1571–1574, 1654–1656, 1859, 1909, 2324, 2448, 2730, 2733. Note also that while the Court has held that Aboriginal title may extend to “tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources,” in *Tsilhqot’in* that amounted to only 5 percent of the area the Tsilhqot’in regard as their traditional territory. *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44; *The Nuchatlaht v. British Columbia*, 2023 BCSC 804 and 2024 BCSC 628.

⁷² *Cowichan* at para. 2138.

⁷³ Celeste Haldane, “Modern Treaties Should Be a Priority for All British Columbians,” *Times Colonist*, 29 November 2024, <https://www.timescolonist.com/opinion/comment-modern-treaties-should-be-a-priority-for-all-british-columbians-11556167>.

⁷⁴ See, for example, *Cowichan* at para. 1682; *Tsilhqot’in* at para. 9. See also the discussion of the pending Kwikwetlem claim in, Gordon Hoekstra, “Will First Nations Seek Aboriginal Title to More Privately Held Lands in B.C.?” *Vancouver Sun*, 8 December 2025, <https://vancouver.sun.com/news/will-first-nations-seek-aboriginal-title-to-more-privately-held-lands-in-bc>. See also sections 4.1 and 4.3 of the *Haida Nation Recognition Amendment Act*, 2024, SBC 2024, c. 23.

(not private land owners) as the party responsible for reconciliation.⁷⁵ For all of these reasons, fee simple titles held by private landowners remain safe and secure from Aboriginal title claims.

POTENTIAL NEXT STEPS: A RECENT EXAMPLE

With respect to the *Cowichan* decision, the quickest, most efficient, least expensive, and most honourable way for the Crown to proceed from here would be to de-escalate the rhetoric against First Nations and the Courts, acknowledge the need to remedy the unlawful actions of corrupt officials, and comply with the rule of law by negotiating a good faith resolution with Cowichan Tribes. Based on past experience, those negotiations could be completed within a year and include some win-win solutions for everyone.

A previous example may help. Twenty-five years ago, the BC Supreme Court issued a decision in a case called *Canada v. Canadian Pacific Ltd.* (the Kits Point case).⁷⁶ The lands in question were the site of a Squamish First Nation settlement on False Creek but were taken by the federal Crown in the nineteenth century for railway development. The trial judge began her reasons by asking the question: “Who owns the land at the south end of the Burrard Street Bridge in Vancouver?” She then noted that this simple question was multi-layered and that the answer “is found in the early history of Vancouver, old statutes and early jurisprudence, as well as more recent authority and present circumstances.” In these respects, the *Cowichan* case is an echo of the earlier case concerning lands at Kits Point.

In her decision, the trial judge in the Kits Point case found that, based on the particular facts and circumstances in that case, title to the lands no longer needed for railway purposes reverted to Canada and Canada held the lands in trust for the use and benefit of the Squamish First Nation.⁷⁷ And the sky did not fall. The Burrard Street Bridge did not collapse. Vancouver did not sink into the sea. Instead, the Kits Point decision provided a framework within which the Squamish First Nation, British Columbia, Canada, and the City of Vancouver could collaborate on forward-thinking, win-win solutions.

Today, the Squamish Nation is helping to solve the housing crisis in Vancouver by constructing around 6,000 new and affordable rental

⁷⁵ *J.D. Irving, Limited et al. v. Wolastoqey Nation*, 2025 NBCA 129.

⁷⁶ *Canada (A.G.) v. Canadian Pacific Ltd.*, 2000 BCSC 933, aff’d 2002 BCCA 478 and 2003 BCCA 283.

⁷⁷ *Canada (A.G.)* at para. 260.

units on the Kits Point lands.⁷⁸ And this is just one example; the same kinds of collaborative solutions between Indigenous and non-Indigenous governments are being implemented in other parts of Vancouver through similar legal-political reconciliation processes aimed at resolving wrongdoings by past governments.⁷⁹ The *Cowichan* decision provides for similar collaborative solutions.

CONCLUSIONS

Aboriginal title has always been an important part of the deep structure of our laws and legal systems. It is a pre-existing right to land based on prior occupation that was recognized and affirmed by the Crown at the time of the founding of Canada and British Columbia. The concept of Aboriginal title has long been accepted in British law, Colonial law, international law, and the law of Canada. It has since been embedded in our Constitution by democratic processes. It has not been extinguished or replaced. It is part of our history and our future.

In that regard, Aboriginal title was not “created” by the courts. In fact, the courts have imposed strict tests and limits on Aboriginal title, including practical, procedural, and other legal limits. It is incorrect and dangerous for politicians to try to undermine the judicial branch of government for implementing the rule of law.

Canada is a constitutional democracy in which the legislative and executive functions of government are constrained by higher order constitutional norms. This legal framework is critical to the functioning of our system of government and to the maintenance of our free and democratic society. There is no escaping the hierarchy of norms, and every citizen has an interest in defending it.

The *Cowichan* decision is narrowly limited to the peculiar historical facts in that case. It does *not* put private property rights at risk in Richmond or across British Columbia. It puts the responsibility for

⁷⁸ Squamish Nation, “Sen’ák̓w,” <https://www.squamish.net/partnerships-entities/partnerships/senakw/>.

⁷⁹ See, for example, the resolutions of disputes between British Columbia and Musqueam Nation leading to settlement models that include new market housing developments for UBC and Vancouver. *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128; *Musqueam Indian Band et al. v. City of Richmond et al.*, 2005 BCSC 1069; *Musqueam Reconciliation, Settlement and Benefits Agreement Implementation Act*, SBC 2008 c. 6; “Musqueam Approve Land and Cash Deal Worth up to \$250M,” *CBC News*, 11 March 2008, <https://www.cbc.ca/news/canada/british-columbia/musqueam-approve-land-and-cash-deal-worth-up-to-250m-1.718335>; Musqueam Capital Corporation. “welcome to leləm,” <https://lelemliving.com/>; City of Vancouver. “Jericho Lands Planning Program,” *Shape Your City*, <https://www.shapeyourcity.ca/jericho-lands>.

reconciliation on the Crown, where it belongs. Indeed, the case arose in part because of the unlawful actions of past government officials and in that regard, it is a helpful reminder that some aspects of the history of British Columbia are unpleasant. Parts of our history are rooted in white nationalism and illegal land grabs by corrupt officials. But the future of British Columbia does not have to be tainted by past wrongs. The future can be based on justice and the rule of law, and reconciliation through negotiation is a necessary part of that future.

British Columbia and Canada could learn from recent examples and take the opportunity to negotiate positive and cost-effective outcomes with Cowichan Tribes (and other First Nations).⁸⁰ Further litigation, whether by a reference case to the Supreme Court of Canada⁸¹ or by an appeal to the BC Court of Appeal,⁸² all but guarantees that the issues will continue to simmer in the courts without resolution for at least another three or four years. And since the trial judge's decision was based on strong evidence and well-established principles of law, it is likely that, as in the Kits Point case, her decision will be upheld by the appeal courts. If that happens, then a reference or an appeal will only have deferred the inevitable and increased the cost of a negotiated settlement with Cowichan.

The sooner the federal and provincial governments begin negotiations with Cowichan Tribes, and renew their commitment to reconciliation with First Nations in "British" Columbia, the better for everyone.

⁸⁰ Nono Shen, "Musqueam Chief Says Talks May Be Way Out of Cowichan Aboriginal Title Dispute," *Business in Vancouver*, 18 December 2025, <https://www.biv.com/news/musqueam-chief-says-talks-may-be-way-out-of-cowichan-aboriginal-title-dispute-11643241>.

⁸¹ Dwight Newman, "Aboriginal Title's Conflict with Private Property Must Be Resolved," *National Post*, 24 August 2025, <https://nationalpost.com/opinion/dwight-newman-aboriginal-titles-conflict-with-private-property-must-be-resolved>; Andrew Petter, "Protecting Private Property While Recognizing Aboriginal Title," *Vancouver Sun*, 28 October 2025, <https://vancouversun.com/opinion/protecting-private-property-while-recognizing-aboriginal-title>.

⁸² Valerie Leung, "Richmond Appeals B.C. Supreme Court's Cowichan Tribes Title Decision," *Richmond News*, 4 September, 2025, <https://www.richmond-news.com/local-news/richmond-bc-appeals-bc-supreme-courts-cowichan-title-decision-11165516>; Les Leyne, "Premier Defends Cowichan Title Appeal Before Chiefs," *Times Colonist*, 5 November 2025, <https://www.timescolonist.com/opinion/les-leyne-premier-defends-cowichan-title-appeal-before-chiefs-11442840>.