Recent developments in Aboriginal Title litigation

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"Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve … a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay."[1]

Aboriginal title claims over privately held land have generated divergent results in Canadian courts. In August 2025, in *Cowichan Tribes v Canada (Attorney General)*,[2] the Supreme Court of British Columbia declared, for the first time in Canadian legal history, Aboriginal title over privately owned fee simple lands. Three months later, the New Brunswick Court of Appeal reached the opposite conclusion in *JD Irving, Limited et al. v. Wolastoqey Nation*,[3] holding that a declaration of Aboriginal title over privately held land is not available. On May 28, 2026, the Supreme Court of Canada declined leave to appeal the New Brunswick Court of Appeal's decision, without reasons, as is customary for leave applications.

Update on Cowichan Tribes

As discussed in a previous insight article, in *Cowichan Tribes*, Justice Young of the Supreme Court of British Columbia ruled that the Cowichan succeeded in establishing Aboriginal title to a portion of Tl'uqtinus (the Cowichan Title Lands). Justice Young held that Crown grants of fee simple interests over the Cowichan Title Lands (including those made to Canada and the City of Richmond) "unjustifiably infringe the Cowichan's Aboriginal title" and that, except for Canada's interests in the Vancouver Airport Fuel Delivery Project Lands, "Canada and Richmond's fee simple titles and interests in the Cowichan Title Lands are defective and invalid."

Justice Young concluded that because Aboriginal title and Crown title can coexist, fee simple, itself a derivative of Crown title, can also coexist with Aboriginal title.

All parties, including Cowichan Tribes and the defendants, appealed the decision in *Cowichan Tribes*. The defendants seek to set aside Justice Young's decision and have Cowichan Tribes' claim dismissed. Cowichan Tribes disagrees with Justice Young's decision to only grant Aboriginal title over a portion of the Cowichan Title Lands.

However, the appeal of *Cowichan Tribes* remains at a standstill pending an application by Montrose Industries Ltd., Montrose Property Holdings Ltd., and Ecowaste Industries Ltd. (Montrose) to re-open the trial and add themselves as defendants to the action. Montrose owns certain properties within lands subject to the Court's findings of Aboriginal title in *Cowichan Tribes*. Montrose alleges that, due to the decision in *Cowichan Tribes*, it faces a number of adverse impacts, including an inability to confirm clear title to its land.

Montrose asserts that it did not receive prior notice that the decision in *Cowichan Tribes* could impact its interests. The court did consider this issue in 2017, when Canada applied to the Supreme Court of British Columbia for an order that Cowichan Tribes provide formal notice to private registered owners of fee simple lands within the Cowichan Title Lands.[4] The Court declined this request, noting that Cowichan Tribes did not seek to invalidate fee simple interests held by private landowners. However, the Court commented that nothing prevented the defendants from providing informal notice to private landowners. Montrose claims that no party provided it notice.

Cowichan Tribes opposes Montrose's application. Among other things, Cowichan Tribes argues that Montrose's delay in bringing its application until after the decision in *Cowichan Tribes* was inordinate.

The Supreme Court of British Columbia will likely issue a decision in the summer of 2026 on Montrose's application to re-open the trial in *Cowichan Tribes* and add Montrose as a defendant. If the court rejects Montrose's application, the British Columbia Court of Appeal could hear the appeal of the August 2025 decision in 2027, likely with the participation of many intervenors.

Update on Wolastoqey

Across the country, in *Wolastoqey*, the New Brunswick Court of Appeal held that Aboriginal title, which includes a right to exclusive use and occupation, is incompatible with fee simple ownership of the same land. Justice Drapeau stated that a declaration of Aboriginal title over privately owned lands would "sound the death knell of reconciliation with the interests of non-Aboriginal Canadians."[5] Although not expressly stated, Justice Drapeau's view on the nature of Aboriginal title contradicts the holding in *Cowichan Tribes* that Aboriginal title and fee simple ownership can coexist.

What remains available to the Wolastoqey Nation is a finding, rather than a declaration, of Aboriginal title over privately held land. Such a finding may support a compensation claim against the Crown for the historical grant of the land, but it does not confer on the Indigenous group rights of exclusive use and occupation.

The Supreme Court's refusal to grant leave to appeal does not signal agreement with the New Brunswick Court of Appeal's reasoning in *Wolastoqey*. It is possible that the Court is waiting for a case with a full trial record before addressing whether Aboriginal title can be declared over lands held in fee simple. The pending appeal in *Cowichan* before the British Columbia Court of Appeal, and any subsequent appeal to the Supreme Court of Canada, could provide that opportunity. For now, *Wolastoqey* remains binding in New Brunswick, and Aboriginal title claims in the province are subject to that decision. While not binding elsewhere, its reasoning may influence courts in other jurisdictions.

Implications of Cowichan Tribes and Wolastoqey

The short answer for governments, Crown entities, businesses, landowners and project proponents is that the law on Aboriginal title remains unsettled:

- In British Columbia, *Cowichan Tribes* supports the possibility that Aboriginal title and fee simple interests may coexist.
- In New Brunswick, *Wolastoqey* holds that a declaration of Aboriginal title is not available over privately held fee simple land, although a finding of Aboriginal title may still support a compensation claim against the Crown.

The Supreme Court of Canada's recent refusal to grant leave to appeal in *Wolastoqey* does not resolve the issue nationally. The result is a legal landscape marked by ongoing uncertainty rather than final resolution.

Even if an Indigenous group cannot obtain a declaration of Aboriginal title over fee simple lands, governments may still face claims for compensation for historic land grants and heightened consultation obligations when making future decisions regarding fee simple lands over which a court rules that the Indigenous group otherwise has met the test for Aboriginal title. Governments – including Crown corporations – should expect intense scrutiny of land disposition practices, project approvals, and consultation frameworks in areas where title claims remain active.

For private parties, the key takeaway is not that fee simple ownership has ceased to matter, but that it may no longer be treated as automatically insulating land from Aboriginal title-related risk, especially in British Columbia. We are seeing a marked increase in due diligence for Indigenous issues on major real estate transactions, but it is frankly difficult for private parties to properly scope the actual risk because of the limited public information on the state of aboriginal title claims but also the uncertainty in the caselaw.

The Nuchatlaht v British Columbia

Also, on April 2, 2026, The *Nuchatlaht v. British Columbia*,[6] the Court of Appeal for British Columbia granted the Nuchatlaht's claim for Aboriginal title to 201 square kilometers of Crown land on Nootka Island in British Columbia. *Nuchatlaht* illustrates the types of evidence that an Indigenous group will need to establish Aboriginal title.

The Nuchatlaht strategically framed its claim by seeking a declaration of Aboriginal title only over Crown land (not lands held in fee simple) and only over lands that were not subject to competing Indigenous claims (i.e. they excluded any land subject to overlapping or even "shared" territorial claims from other First Nations. At trial, they relied exclusively on archaeological, ethnographic, and anthropological evidence, without adducing oral history evidence. As a result of this focused approach, the trial was completed in 54 days, compared to 513-day trial in *Cowichan Tribes*.

At trial, the trial judge initially held that the Nuchatlaht had not proved its claim to the overall claim area.[7] However, the trial judge granted the Nuchatlaht leave to advance a modified claim of Aboriginal title to a portion of the area. After considering further

submissions, the trial judge found that the Nuchatlaht had established Aboriginal title over coastal areas of Nootka Island.[8]

The Court of Appeal overturned the trial judge's decision and declared Aboriginal title over the Nuchatlaht's entire claim area. The Court of Appeal held that the trial judge had erred in three respects.

- **Misapprehending Evidence**: The trial judge erred by concluding there was "almost no evidence" of the use of the interior of Nootka Island. The Court of Appeal held that the weight of evidence at trial was that the Nuchatlaht used the inland forests of Nootka Island regularly.
- **Adopting a Site-Specific Test**: The trial judge misapplied the test for occupation by requiring evidence of "specific use" of areas within the recognized boundaries of the area occupied by the Nuchatlaht. Among other things, the Court of Appeal held that the Nuchatlaht's longstanding practice of harvesting trees and bark in locations away from the coast was evidence of occupation that could support a claim for Aboriginal rights.
- **Imposing an Arbitrary Boundary**: The trial judge had imposed an arbitrary boundary to limit the Nuchatlaht's Aboriginal title. The Court of Appeal held that this boundary produced a result that did not accord with the evidence at trial and did not reflect the regular use or geography of Nootka Island.

Rather than remit the case back to the trial court, the Court of Appeal declared that the Nuchatlaht had established Aboriginal title to its entire claim area. Further, the Court of Appeal held that the provincial *Forest Act* and *Park Act* do not apply to the lands where Aboriginal title had been recognized.

As of June 1, 2026, British Columbia filed a leave to appeal *Nuchatlaht* to the Supreme Court of Canada.

Unanswered questions

These recent Aboriginal title decisions have opened up many questions that courts, governments and First Nations must address at some point, including:

- What power would municipal or provincial governments have to continue to regulate fee simple parcels that are subject to a finding or declaration of Aboriginal title, specifically in regard to zoning, development, utilities, taxation, and other permitting that fee simple owners may need?
- If a declaration of Aboriginal title is available, must affected private landowners be parties before certain types of relief can be granted?
- To what extent may an Indigenous nation holding Aboriginal title assert governance authority over fee simple lands within the declared title area?
- How does the duty to consult apply once title has been found (but not declared) over land that is also held in fee simple?

What's next?

The next significant guidance is likely to come from British Columbia. With the Supreme Court having declined to hear *Wolastoqey*, the central unresolved questions are likely to

be worked through in the *Cowichan Tribes* appeal and any related procedural motions. However, the Court of Appeal for British Columbia cannot rule on the substantive issues until private land-owners' application to re-open the trial is resolved.

Given that litigation will take years to bring certainty – and likely only on specific issues and situations – it is incumbent on provincial and federal governments, and First Nation governments, to bring clarity and actually advance reconciliation through negotiated agreements. Recent developments in the BC Treaty Process[9] are encouraging examples of how we might achieve reconciliation without litigation, but the pace of modern treaty making is not keeping pace with the expectations of the Indigenous and non-Indigenous public.

BLG's national Indigenous law group

BLG's national Indigenous law group provides experienced guidance to governments, Indigenous nations, and businesses navigating Aboriginal title, consultation and project development. We help you assess risk, strengthen relationships, and move projects forward with clarity. Contact our team to discuss how these developments may affect your operations and what steps to take next.

Footnotes

[1] *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010 at para. 186.

[2] *Cowichan Tribes v Canada (Attorney General)*, 2025 BCSC 1490 [*Cowichan Tribes*].

[3] *JD Irving, Limited et al. v. Wolastoqey Nation*, 2025 NBCA 129 [*Wolastoqey Nation*].

[4] *Cowichan Tribes v Canada (Attorney General)*, 2017 BCSC 1575.

[5] *Ibid* at para 192.

[6] *The Nuchatlaht v. British Columbia*, 2026 BCCA 137 [Nuchatlaht].

7 *The Nuchatlaht v British Columbia*, 2023 BCSC 804.

[8] *The Nuchatlaht v. British Columbia*, 2024 BCSC 628.

[9] K'ómoks Treaty passes final step in B.C. legislature, now in hands of federal government; Kitselas Treaty legislation introduced in the Legislative Assembly of British Columbia; Kitsumkalum First Nation ratifies treaty and constitution

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