JANUARY 15, 2026 • 8 MIN READ

Can Aboriginal title be declared in respect of privately-held lands? Recent cases reach opposing conclusions

AUTHORS


T. Ryan Lax


Jacob Hinton


Natasha Williams

Two recent decisions from the courts of British Columbia and New Brunswick have addressed the relationship between Aboriginal title and private property rights. In *Cowichan Tribes v. Canada (Attorney General)*, the Supreme Court of British Columbia granted a declaration of Aboriginal title, which included lands held in fee simple by third parties[1]. In contrast, in *JD Irving Limited et al. v. Wolastoqey Nation*, the New Brunswick Court of Appeal held that such a declaration could not extend to privately-owned lands[2]. While these remedial declarations are discretionary, the apparent conflict in judicial approaches raises questions about the future approach to Aboriginal title claims in respect of private property.

What you need to know

- These two decisions reached opposite conclusions on the availability of a declaration of Aboriginal title over privately-held lands. The BC Supreme Court declared Aboriginal title over privately-held lands, leaving open the possibility that privately-held lands may be returned to the Cowichan Tribes. In contrast, the New Brunswick Court of Appeal held such a declaration would not advance reconciliation, while leaving open the potential to seek damages from government in respect of private property subject to a finding of Aboriginal title.
- In neither case were private property rights invalidated. In BC, while the Court declared that government-held lands must be returned to the Cowichan, it did not declare third party fee simple interests invalid. Instead, the Court found that the Crown owes a duty to negotiate in good faith reconciliation of the fee simple interests with the Cowichan Aboriginal title. The outcome of that negotiation is uncertain.
- The legal test to establish Aboriginal title is difficult to meet, having been established just three times in court. The implications of the *Cowichan Tribes* decision are therefore fact- and context-specific. While the governing test for Aboriginal title remains proof of sufficient historic occupation, continuity and exclusivity, the decision marks the first time that Aboriginal title has been established without relying on present occupation to prove historic occupation in a manner sufficient to establish title.
- Parties in both cases are pursuing appeals. It may be several years before the Supreme Court may resolve this apparent conflict in judicial approaches.

Background

Before *Cowichan Tribes*, just two previous decisions of Canadian courts had found that Aboriginal title was established, both in respect of Crown lands in relatively remote areas of British Columbia[3]. Both claims had excluded privately-held lands from their scope. Various modern Treaties and Land Claims Agreements have been negotiated between Indigenous communities and the Crown on a similar basis: Aboriginal title would be recognized over Crown lands, but private property rights would be respected[4]. Against this backdrop, commentators have discussed whether Aboriginal title could be recognized in respect of privately-held lands.

The decisions

Cowichan Tribes v. Canada (Attorney General)

The Cowichan claimed Aboriginal title over an 1,846-acre area of land that formed their traditional village of Tl'uqtinus, located in Richmond, British Columbia. After more than four years at trial, in August 2025 the BC Supreme Court declared that the Cowichan had established Aboriginal title to a portion of the claimed area, including government-held lands and privately-held lands.

The Court concluded that fee simple interests in the claim area were granted without statutory or constitutional authority[5]. In 1853, the colonial Governor at the time of settlement promised the Cowichan that they would be treated with "justice and humanity" in exchange for peace[6]. The Court found that this promise must be understood as requiring respect for the Cowichan's interest in the lands at issue. The Court also noted that the government planned to create a Reserve for the Cowichan at the site of Tl'uqtinus. However, the Crown subsequently sold off those lands between 1871 and 1914. This was found to breach the honour of the Crown.

When considering remedy, the Court treated government-held lands differently from lands subject to private interests. The Court declared that Canada's and Richmond's fee simple titles are defective and invalid[7]. In contrast, in respect of privately-held lands, the Court declared that Canada owes a duty to the Cowichan to negotiate the reconciliation between private property rights and the Cowichan's Aboriginal title in good faith, and in a manner consistent with the honour of the Crown. This reconciliation may take the form of expropriation and return of privately-held lands to the Cowichan, compensation, or a mix of approaches, all to be determined.

JD Irving Limited et al. v. Wolastoqey Nation

In *Wolastoqey Nation*, the New Brunswick Court of Appeal decided an appeal of a motion to strike, which held that private landowners could not be respondents to an Aboriginal title claim. In this case, the Wolastoqey Nation seeks a declaration of Aboriginal title over the western half of New Brunswick. The New Brunswick Court of Appeal adopted a different approach to Aboriginal title from the BC Supreme Court. The Court of Appeal held that the Wolastoqey may pursue its claim for a "declaration" of Aboriginal title in respect of Crown lands, but, for privately-held lands, only a "finding" of Aboriginal title is possible.

The Court concluded that a declaration is not possible in respect of privately-held lands on the basis that it would grant ownership rights and the Court was "unable to see how those rights can co-exist with the very same rights vested in fee simple owners"[8]. The Court also noted that a declaration of Aboriginal title would affect persons who are not parties to the action "without their participation in the preceding process and in violation of their right to be heard"[9].

In making these findings, the Court recognized that the Crown is ultimately responsible for reconciling Indigenous rights with other rights and interests. But the Court concluded that declaring Aboriginal title over privately-held lands would not further reconciliation as it would create an "irreconcilable" situation by recognizing two competing rights of exclusive ownership over land[10]. Instead, the Court of Appeal found that the Wolastoqey could pursue a claim for compensation and damages in respect of privately-held lands once a "finding" of Aboriginal title is made.

Key takeaways

What is required to establish Aboriginal title?

The legal test to establish Aboriginal title is difficult to meet, having been established just three times in court. The implications of the *Cowichan Tribes* decision are therefore fact- and context-specific. Relevant to lands that have not been ceded by Treaty, the test requires (1) "sufficient occupation" of the land at the time of assertion of European sovereignty; (2) where present occupation is relied on to establish "sufficient occupation", occupation must be continuous; and (3) exclusive occupation[11].

Is a declaration of Aboriginal title available in respect of privately-held lands?

The *Cowichan Tribes* and *Wolastoqey Nation* decisions diverge on whether a declaration of Aboriginal title is available in respect of privately-held lands. The New Brunswick Court of Appeal held that such a declaration of Aboriginal title would not advance reconciliation, and that claims in respect of privately-held lands should be limited to compensation and damages. The BC Supreme Court held that Aboriginal title may be established in respect of privately-held lands, and that reconciliation of interests should be subsequently negotiated. Ultimately, this issue may be taken up by the Supreme Court to clarify.

Even if Aboriginal title is declared in respect of private property, does that automatically invalidate private property rights?

Even in the current state of legal uncertainty, a declaration of Aboriginal title will not automatically invalidate private property rights. In *Cowichan Tribes*, the Court ordered that the government-held lands be returned to the Cowichan, but not privately-held lands. Instead, the Court required the Crown to negotiate in good faith reconciliation in respect of the fee simple held by third parties. The outcome of these negotiations could include compensation to the Cowichan, expropriation and return of lands, or a mix of these or other approaches. Modern treaty negotiations have typically carved out an exception for private fee simple interests, so it is possible a similar resolution is reached here.

How can companies manage the effects of this uncertainty?

In view of this uncertainty and the multiple ways it may affect a company's business, there are numerous ways that companies can prudently manage this uncertainty. While the specifics will vary from company to company based on the circumstances, three key steps that generally apply to potentially affected companies are (1) to conduct an assessment of the effects on the company; (2) to the extent warranted, to develop an appropriate plan for the company to manage these effects; and (3) to effectively implement the tailored plan for the company.

FOOTNOTES

1. *The Cowichan Tribes v. Canada (Attorney General)*, 2025 BCSC 1490 [*Cowichan Tribes*].
2. *JD Irving Limited et al. v. Wolastoqey Nation*, 2025 NBCA 129 [*Wolastoqey Nation*].
3. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 [*Tsilhqot'in*]; *The Nuchatlaht v. British Columbia*, 2024 BCSC 628.
4. See, for example, the 2025 Chiixuujin/Chaaw Kaawgaa "Big Tide (Low Water) Haida Title Lands Agreement.
5. *Cowichan Tribes*, at paras 2070, 2081.
6. *Cowichan Tribes*, at para 1730.
7. *Cowichan Tribes*, at para 3724.
8. *Wolastoqey Nation*, at para 191.

9. *Wolastoqey Nation*, at para 6.

10. *Wolastoqey Nation*, at para 200.

11. *Tsilhqot'in,* at para 50.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

For permission to republish this or any other publication, contact Bryn Turnbull.

© 2026 by Torys LLP.

All rights reserved.