A Better Path

Indigenous Reconciliation, Property Rights, and the Future of British Columbia

ICBA's Policy Recommendations

Independent Contractors and Businesses Association

Executive Summary

British Columbia is at a crossroads. Two landmark court decisions have destabilized property rights, frozen investment in some parts of the province's economy, and created profound uncertainty about who owns and governs the province's land base.

The Cowichan Tribes decision – a Section 35 Aboriginal title case under the *Constitution Act, 1982* – declared Aboriginal title over private land in Richmond, without the property owners ever being notified or given a chance to defend their interests. The court ruled that Aboriginal title co-exists with, and is a prior and senior right to fee-simple ownership, when the former is found by a court to apply to private land. This exposed a critical gap in Canadian law and B.C. jurisprudence: there is neither statutory nor constitutional protection for private property against Aboriginal title declarations.

The Gitxaala decision – driven by DRIPA and Section 8.1 of the *Interpretation Act* – confirmed that every B.C. law must be read through the lens of the UN Declaration on the Rights of Indigenous Peoples, a broad political statement that was never intended to be enshrined into law. This damaged B.C.'s mineral tenure system and gave courts an open-ended mandate to rewrite provincial laws. Even Premier Eby conceded the courts went further than the legislature ever intended.

These two decisions arise from different legal mechanisms but point to the same conclusion: B.C.'s reconciliation framework is broken. The province needs a complete reconciliation reset – one rooted in **clarity, certainty, and finality** through the constitutional treaty process, not through DRIPA's untested experiment of subjugating provincial law to a UN declaration, and not through a system that allows courts to strip away private property rights without due process.

ICBA recommends six core actions to fix the mess created by the NDP Government and courts: repeal DRIPA; repeal Section 8.1 of the *Interpretation Act*; reinvigorate the treaty process; legislate protections for private property; commit to transparency in all land-use negotiations; and press Ottawa to repeal the federal UNDRIPA.

These are not anti-Indigenous reconciliation positions. This is a pro-reconciliation framework that recognizes the proven success of modern treaties, the constitutional duty to consult and accommodate, and the fundamental importance of legal clarity and certainty to the prosperity of all British Columbians – Aboriginal and non-Aboriginal alike.

Our Commitment to Reconciliation

Reconciliation is not optional – it is how we realize British Columbia's potential and bring healing to Aboriginal communities. At ICBA, we are committed to listening, learning, and supporting public policies that are grounded in fairness and opportunity to create outcomes that will lift everyone up and help all British Columbians move forward together.

That commitment is reflected in our actions. ICBA's team works to connect Aboriginal apprentices to job and career opportunities with our member companies. We provide bursaries to Aboriginal apprentices to support their journey to becoming ticketed Red Seal designated professionals. We believe economic reconciliation – creating shared prosperity through partnership – is the most powerful and durable form of reconciliation available.

British Columbia has many examples of what reconciliation looks like when it works. LNG Canada and the Coastal GasLink pipeline involved extensive partnership with Indigenous communities along the route. Cedar LNG and the expansion of the Trans Mountain pipeline demonstrated that nation-building projects can move forward with Indigenous participation and benefit. The MST Development Corporation's project at Jericho, Squamish Nation's Sen̓áḵw Phase I, and countless other projects show Aboriginal and non-Aboriginal partners working side-by-side to build communities.

The Squamish Nation's independent approval of the $10-billion Woodfibre LNG project is particularly instructive. The Nation issued its own environmental certificate in 2015 and found a way to get to "yes" on a Canadian nation-building project – while the District of Squamish, after a decade, continues to obstruct it.

Modern treaties provide the strongest evidence of all. The Nisga'a Final Agreement and the Tsawwassen Treaty demonstrate that negotiated outcomes can deliver legal certainty, economic opportunity, and self-governance for Aboriginal communities while protecting the rights of all British Columbians. These are the models we should be building on – not discarding or leaving insufficiently supported.

The Current Crisis

Understanding the current legal context is essential. Two court decisions in 2025, arising from different legal mechanisms, have together produced a crisis of confidence in British Columbia's legal and economic framework.

The Cowichan Tribes Decision: Aboriginal Title Over Private Land

In August 2025, Justice Young of the BC Supreme Court issued what Thomas Isaac, KC, has called the most significant decision in Aboriginal law in the past 35 years. In Cowichan Tribes v. Canada, the court declared Aboriginal title in favour of the Cowichan Tribes over approximately 800 acres of land in Richmond.

This was a **Section 35 Aboriginal title case** under the *Constitution Act, 1982* – not a DRIPA case. The court applied the established test for Aboriginal title as set by the Supreme Court of Canada in its Tsilhqot'in decision (2014), requiring proof of sufficient and exclusive occupation prior to the assertion of Crown sovereignty. But the Cowichan decision broke controversial new legal ground in its treatment of private property.

The court ruled that Aboriginal title and fee-simple title can co-exist on the same land, but that neither party can exercise their title "in its fullest form." It found that provincial *Land Title Act* protections for indefeasible title do not apply when Aboriginal title is found to exist over private land. And it effectively held that Aboriginal title is a "prior and senior right" over the right to private property. B.C. is now the only western economy where you cannot take indefeasible title to the bank – because it is now, in practice, defeasible when Aboriginal title is declared.

The real-world impact was immediate. Montrose Properties, which has owned and operated 193 hectares in Richmond for more than 40 years with $300 million invested, was never a party to the case and received no notice during a trial that involved 98 lawyers and lasted 11 years. According to Montrose's court filings, their lender pulled a $35-million construction loan. A prospective tenant withdrew. A proposed renewable natural gas project evaporated. Montrose's assessed property value is estimated by one senior local appraiser to have dropped from $1.5 billion to $300 million – an 80% loss. We fear that the uncertainty flowing from this far-reaching court decision will weigh on property values and depress investment in an increasing number of B.C. communities in the coming years.

Only after the court decision was rendered was the City of Richmond able to send letters to roughly 150 local landowners warning them their titles might be compromised. The Cowichan's own lawyer publicly stated that any future private land sales in the Aboriginal title area would require the consent of the Cowichan Nation.

Premier Eby has said his government will appeal the Cowichan decision and "go to the wall" to protect private property rights. But four months after the decision, the government has not filed a stay of proceedings, let alone introduced legal protections for private landowners, who have been left to twist in the wind.

It is worth noting that in December 2025, the New Brunswick Court of Appeal set aside an Aboriginal title declaration over private lands, holding that courts lack jurisdiction to make such a declaration without private owners as parties. That court emphasized that owners must be heard before their rights are altered and found compensation to be the appropriate remedy - not the dispossession of private owners.

The Gitxaala Decision: DRIPA Becomes a Wrecking Ball

In December 2025, the BC Court of Appeal delivered its decision in Gitxaala v. British Columbia (Chief Gold Commissioner). Unlike the Cowichan case, this decision was **driven directly by DRIPA**. The court ruled that DRIPA combined with Section 8.1 of the *Interpretation Act* – which requires every B.C. law and regulation to be construed consistently with the UN Declaration on the Rights of Indigenous Peoples – is legally enforceable, not merely aspirational. The court found B.C.'s mineral tenure system

inconsistent with UNDRIP Article 32, effectively dismantling the online mineral staking regime and freezing the province's mining and exploration sector. It is logical to conclude that many other provincial laws and regulatory frameworks governing access to Crown land and resources are now in similar legal jeopardy.

The significance of this decision cannot be overstated. DRIPA's proponents – including now Premier Eby and other ministers in the NDP government of the day – repeatedly assured British Columbians that the legislation was symbolic – a political commitment, not a legal tool for courts to use to rewrite provincial law. The Gitxaala decision demolished that assurance. As the Public Land Use Society's executive director Warren Mirko has stated: "British Columbians were repeatedly told DRIPA would not override existing laws, would not affect third-party rights, and would not shift decision-making power to the courts. All three claims have now collapsed."

Premier Eby himself responded to the Gitxaala ruling by stating the court had "over-reached" and that it was never the intention of DRIPA to result in changes to every law in B.C. He announced plans to amend DRIPA. But when the law's champion and architect admits the courts have used it in ways he never contemplated (or at least acknowledges), the appropriate response is not to tinker at the margins or suspend certain sections. The law must be repealed.

Two Mechanisms, One Crisis

The Cowichan and Gitxaala decisions arise from different legal mechanisms – Section 35 constitutional law and DRIPA respectively – but together they reveal the scale of the crisis now unfolding in B.C. The Cowichan decision shows that under existing Section 35 case law, courts can declare Aboriginal title over private land without notice to the owners and thereby undo statutory protection for fee-simple property . The Gitxaala decision shows that DRIPA gives courts an additional, open-ended tool to rewrite any provincial law they find inconsistent with UNDRIP. Together, they leave every landowner, business, and investor in the province wondering whether the rules they have relied on still apply.

The Haida Gwaii Precedent

The provincial government's 2024 agreement with the Haida Nation sets a troubling precedent. Through two agreements, provincial legislation, and a court consent order, the government effectively recognized Aboriginal title over the entirety of the Haida Gwaii archipelago – including over private lands – without any public consultation and with no input from private landowners. Premier Eby called this arrangement a "template" for the rest of the province. We find that statement deeply troubling.

One of the most significant effects of the Haida agreements was to eradicate provincial Crown land from Haida Gwaii, except for some infrastructure lands. If the eradication of Crown land throughout the province is part of the government's reconciliation strategy, then all British Columbians and every B.C. business should be alarmed. The Haida agreements created no certainty for non-Aboriginal residents – a stark contrast to the detailed certainty guarantees found in modern treaties.

The NDP's Secret Land-Use Agreements

The pattern summarized above extends well beyond the courtroom. As ICBA detailed in Northern Beat, the Tahltan–B.C. Planning Project could hand effective control over an area larger than Portugal – covering roughly 11% of B.C.'s land mass – to a single Indigenous group. The process has proceeded largely in secret, with industry partners like Brixton Metals (which invested more than $70 million over 15 years in a critical minerals project in the affected area) invited only at the eleventh hour, long after material decisions appear to have been made.

The Shíshálh Nation land-use agreement on the Sunshine Coast prompted the Pender Harbour Area Residents Association (PHARA) to file the first constitutional challenge to DRIPA in BC Supreme Court. PHARA argues that DRIPA conflicts with Section 35 of the Constitution by failing to balance third-party rights with Indigenous rights – a fundamental requirement of Canadian law.

These are not isolated incidents. They represent a systematic pattern of negotiating Aboriginal title and land-use control behind closed doors, ignoring the public interest, bypassing the treaty process, sidelining affected communities, and presenting outcomes as fait accompli. This is expropriation by stealth, dressed up as reconciliation.

The Economic Toll

The cumulative effect of legal uncertainty on B.C.'s economy is growing. When no one knows who owns the land, who has the right to decide how it is used, or which laws still apply, investment dries up. Construction loans are pulled. Exploration declines. Projects are shelved. Workers lose their jobs.

An ICBA-commissioned poll conducted by One Persuasion in February 2026 confirmed that public concern is deep and crosses every demographic and political line. Among the findings:

- **78%** of British Columbians say the Cowichan decision will hurt B.C.'s economy by undermining property rights certainty.
- **80%** believe that governments must protect private property.
- **75%** believe it is not fair for courts to change the rules around property ownership.
- **78%** do not believe First Nations should be given a veto over development projects in their traditional territories – including 69% of NDP core voters and 82% of swing voters.
- **73%** believe private property ownership in B.C. is now uncertain, including 58% of NDP core voters.
- **59%** believe B.C. has gone too far in giving power and rights to Indigenous groups, while only 14% believe more should be given.

These numbers tell a clear story: this is not a partisan issue. There is strong consensus, across every region, age group, and political party, that the current approach is failing.

Why DRIPA Failed: The Legal Framework

The Cowichan decision demonstrated that even under existing constitutional law, private property is vulnerable. But DRIPA added an entirely new layer of risk by giving courts an untested and unlimited interpretive tool. To understand why, it is necessary to examine the legal framework DRIPA attempted to override.

Section 35: A Balanced Constitutional Framework

Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. It provides a balanced, judicially developed framework for reconciliation that has been shaped over decades by the Supreme Court of Canada.

In Haida Nation v. British Columbia (Minister of Forests) (2004), the Supreme Court stated that treaties serve to "reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35." The court was clear: the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims. But the Crown is not rendered impotent – it may continue to manage resources pending claims resolution, subject to the duty to consult and accommodate.

In Tsilhqot'in Nation v. British Columbia (2014) – the first judicial declaration of Aboriginal title in Canada – the court confirmed that Aboriginal title is a beneficial interest in land, but set out a framework for how provincial legislative authority can still apply to Aboriginal title lands, provided government action is consistent with Section 35. This framework includes requirements of justification and proportionality that balance Aboriginal and non-Aboriginal interests.

This constitutional framework is not perfect – as the Cowichan decision starkly illustrated, it can be interpreted in a manner that does not adequately protect private property owners. But generally speaking, it is balanced. It protects Aboriginal rights while preserving the Crown's ability to govern and providing a mechanism for third-party interests to be weighed. DRIPA replaced this imperfect but workable balancing with something far more radical.

UNDRIP and DRIPA: A Radical Departure

The *United Nations Declaration on the Rights of Indigenous Peoples* was adopted by the UN General Assembly in 2007 as a non-binding resolution. It was never intended to be directly legislated into domestic law, and no other jurisdiction besides Canada has chosen to subordinate its entire legal system to it. Yet that is precisely what DRIPA does in the B.C. context.

DRIPA commits the B.C. government to bring all provincial laws into alignment with UNDRIP. Section 8.1 of the *Interpretation Act*, enacted as part of this framework, requires every law and regulation to be construed consistently with the Declaration. This gave courts an entirely new interpretive tool with no defined limits and no democratic accountability.

Several provisions of UNDRIP go significantly beyond what Section 35 of the Constitution provides. Article 26 states that Indigenous peoples have the right to lands they have "traditionally owned, occupied or otherwise used or acquired." This stands in sharp contrast to the geographic limitations on Aboriginal title developed by the Supreme Court under Section 35, which requires proof of regular occupation of defined tracts of land. Further, article 32(2) requires the "free, prior and informed consent" of Indigenous peoples before any project affecting their lands is approved – effectively a veto that goes well beyond the duty to consult and accommodate.

The adoption of UNDRIP as the overarching framework for reconciliation in B.C. sidelined the balanced approach of Section 35 and replaced it with a scheme that is, in practical effect, one-sided. The opposition BC Conservatives, with all leadership candidates calling for repeal, agree that DRIPA has "created uncertainty, empowered litigation, and shaken public confidence."

14 Minutes of Debate

Section 8.1 of the *Interpretation Act* was passed in 2021 with a grand total of 14 minutes of democratic debate about what it would actually do. As for DRIPA itself, British Columbians were told by NDP Ministers that it was symbolic. They were assured it would not override existing provincial laws, would not affect third-party rights, and would not shift decision-making to the courts. Every one of those assurances has proven completely false. The question is not whether to fix the law. It is whether one bad law, buttressed by another that was passed with virtually no scrutiny, should continue to be relied upon to remake B.C.'s entire governance framework case by case in the courts, and more problematically, to form the basis for one-off government negotiations with Aboriginal communities.

The Solution: A Reinvigorated Treaty Process

The Supreme Court of Canada has been clear: treaties are the preferred mechanism for reconciling pre-existing Aboriginal sovereignty with Crown sovereignty. Modern treaties deliver what no "reconciliation agreement" or UNDRIP-based framework can: clarity, certainty, and finality.

What Treaties Deliver

Clarity. Treaty final agreements are detailed, comprehensive documents that spell out the rights, obligations, and legal authority of all three parties – the Aboriginal community, Canada, and British Columbia. They address land ownership, governance, resource management, fiscal arrangements, and the relationship between treaty rights and other laws. Nothing in a "reconciliation agreement" provides anything close to this level of clarity.

Certainty. Modern treaties include carefully negotiated certainty provisions – developed over decades beginning with the Nisga'a Final Agreement – that ensure Aboriginal rights and title are defined and contained within the treaty framework. Whether through "modification" or "non-assertion" models, treaties guarantee that rights not specifically set out in the treaty cannot be asserted or litigated. This creates the legal certainty that investors, lenders, businesses, and homeowners depend on.

Finality. While modern treaties now incorporate provisions for orderly processes to address newly recognized rights and periodic review, the core elements – land, governance, and certainty guarantees – are not subject to those processes. Treaties are constitutionally protected under Section 35(3) as "land claims agreements." No "reconciliation agreement" has equivalent constitutional standing.

Protection of private property. Every modern treaty in B.C. makes clear that private lands are not affected by the treaty and cannot be acquired by the treaty community except on a willing seller/willing buyer basis. This fundamental protection is entirely absent from "reconciliation agreements" like the Haida Gwaii deal being promoted by the Eby government. Had the Cowichan land question in Richmond been resolved through treaty, private property owners in the area affected would never have been put in the position they have been.

Why 'Reconciliation Agreements' Are Not the Answer

The previous NDP government under Premier Horgan, along with the Trudeau administration in Ottawa, systematically chose to de-emphasize the treaty process and substitute "reconciliation agreements" negotiated through the lens of UNDRIP. These agreements bypass the important balancing of Aboriginal treaty rights with the rights of other British Columbians that is inherent in the treaty process. They also establish incentives for secretive negotiations that leave the public, elected officials, and other stakeholders on the sidelines.

These agreements create no certainty for non-Aboriginal British Columbians. The Haida agreements are the prime example: they presumed Aboriginal title over lands to which it may well never have been proven in court, eradicated provincial Crown land from Haida Gwaii, and put private property rights squarely in the crosshairs – none of which the treaty process would ever do. These agreements also

create a massive disincentive for Aboriginal communities to pursue actual treaties, since they can obtain recognition of title without the balancing requirements that treaties demand.

The BC Treaty Commission itself has acknowledged changes to the treaty process that incorporate UNDRIP principles, expanding the concept of “tripartite reconciliation” beyond the original treaty mandate. These changes must be reversed and the treaty process returned to its core Section 35 purpose.

The Path Forward

ICBA recommends the following steps to reset Crown-Indigenous relations in British Columbia on a foundation that delivers reconciliation grounded in clarity, certainty, and finality:

1. Repeal DRIPA

Section 35 of the Constitution already protects Aboriginal rights and title. The duty to consult and accommodate is well-established law, developed over decades by the Supreme Court of Canada. B.C. does not need a provincial statute pointing courts at a non-binding UN General Assembly resolution with no guardrails.

Amendments to DRIPA – or merely suspending certain sections of that legislation – will not solve the fundamental problem. The Public Land Use Society, the Pender Harbour Area Residents Association, the BC Conservatives, and a growing coalition of business, property, and community organizations agree. Any amendment short of full repeal would leave UNDRIP as the preferred reconciliation framework and leave the door open for further court-driven expansion of its interpretation – likely well beyond the parameters of section 35.

2. Repeal Section 8.1 of the Interpretation Act

Section 8.1 provides that "every Act and regulation must be construed as being consistent with the Declaration." This provision fuels uncertainty by allowing courts to read UNDRIP into every statute and regulation. It turned the Gitxaala case into a wrecking ball for the mineral tenure system and gives courts an open-ended mandate to remake any area of provincial law. It must be repealed immediately.

3. Reinvigorate the Treaty Process

The Supreme Court of Canada has stated in Haida Nation (2004) that treaties serve to "reconcile pre-existing Aboriginal sovereignty with the legal reality of Crown sovereignty." The province must recommit to the BC Treaty Process as the primary mechanism for reconciliation, with the following specific actions:

- **Remove UNDRIP-based expansions from treaty negotiation mandates.** Recent mandates have incorporated UNDRIP principles that introduce new uncertainty into agreements meant to deliver certainty. Treaty mandates must be returned to their original Section 35 foundation.
- **Make the process faster, more efficient, and more accessible.** The treaty process has languished due to government disinterest and capitulation to opposition from communities that reject treaty-making. Serious political will and adequate resources are needed.
- **Create incentives for treaty participation and disincentives for alternatives.** Communities that wish to establish Aboriginal title outside the treaty process should be required to pursue that claim in court, and provincial litigators must be free to present every

available legal and factual argument to defend the Crown's interests. The province should stop rewarding refusal to engage in the treaty process with one-sided "reconciliation agreements" or other "arrangements".

- **Terminate the expanded "tripartite reconciliation" mandates** that have diluted the treaty process and created a parallel track for UNDRIP-based negotiations.

4. Legislate Protections for Private Property

The Cowichan decision exposed a critical gap in B.C.'s legal framework: there is no statutory protection for private property against Aboriginal title declarations. This gap exists independently of DRIPA and must be filled by legislation. The province should:

- **Require notice.** Enact legislation requiring that private landowners receive notice of any Aboriginal title or rights proceeding that could affect their property, and that they have standing to participate as parties.
- **Protect against extinguishment.** Explore legislative options to provide that fee-simple private property cannot be extinguished or materially diminished by a declaration of Aboriginal title without due process and fair compensation.
- **Restore indefeasibility.** Seek to determine if the Land Title Act's protections for indefeasible title can be made to apply to private lands burdened by declared Aboriginal title, and re-affirm that registered owners can rely on their title for purposes of lending, investment, and sale.

5. Commit to Transparency and Public Engagement

The provincial government's pattern of negotiating land-use agreements and planning agreements behind closed doors – and presenting outcomes as fait accompli – must end. Specifically:

- **Make all agreements public.** All framework agreements, reconciliation agreements, land-use plans, and internal mandates affecting Crown and private land must be made public.
- **Fulsome debate in the legislature.** The legislature must fully and openly debate any and all changes to B.C.'s reconciliation framework. Section 8.1 of the *Interpretation Act* was passed with just 14 minutes of debate. The decisions flowing from it combined with DRIPA will reshape the province for generations. British Columbians deserve better.
- **Consult meaningfully.** Affected communities, businesses, landowners, and local governments must be meaningfully consulted – not managed, not informed after the fact, and not simply "consulted" through a single workshop dominated by conservation groups as a box-ticking exercise.
- **End conflicted processes.** Government must abandon "co-development" processes where one party is both negotiator and beneficiary without impartial provincial oversight.

6. Press Ottawa to Repeal the Federal UNDRIPA

The federal *United Nations Declaration on the Rights of Indigenous Peoples Act* suffers from the same structural problems as its provincial counterpart. It creates a parallel legal framework that competes with and confuses the constitutional framework of Section 35. British Columbia should formally call on Ottawa to repeal UNDRIPA and refocus federal resources on accelerating the BC treaty process, providing adequate funding for treaty negotiations, and fulfilling Canada's role as an honourable treaty partner.

Conclusion

The challenge facing all British Columbians can be stated simply: who owns the land, and who has the right to make decisions about how it is used? Getting this answer right is the key to our long-term prosperity. Getting it wrong – as the current approach has demonstrably done – creates confusion, division, and economic harm for everyone, including the Aboriginal communities that reconciliation is supposed to lift up.

ICBA is not asking the government to shut the door on Aboriginal peoples. Just the opposite: we are asking the government to open the door to a process that actually works – the treaty process – and to end an experiment that has failed. Section 35 provides a constitutional framework for balanced reconciliation. Modern treaties have proven that negotiated outcomes can deliver clarity, certainty, and finality for all parties. DRIPA and its UNDRIP framework have delivered confusion, uncertainty, and open-ended litigation. And the Cowichan decision has shown that even the existing constitutional framework has a critical gap when it comes to protecting private property – a gap that ultimately the Supreme Court of Canada will need to fill.

The strength of our democracy is respectful and robust debate on a wide range of issues that results in policies that are fair and strike the right balance. That debate has not happened. DRIPA was passed on the basis of assertions about what it would and would not do that have proven to have been incorrect. Land-use agreements have been negotiated in secret. Affected communities have been shut out.

We are calling on Premier Eby and his government to engage all British Columbians in an open and transparent discussion on how we can work together to build shared prosperity through an alternative approach to reconciliation that is transparent and incorporates clarity, certainty, and finality through a reinvigorated treaty negotiation process.

Finding consensus on these very complex issues – both within and between Aboriginal communities and among the broader public – is not easy and takes a lot of work. Our organization is not perfect, and we make mistakes. But we are focused on continually striving to do better and on being part of the solution, working to bridge divides where they exist and to increase our shared understanding.

In that spirit, we welcome the opportunity to work with government, Aboriginal communities, and all British Columbians to get this right. The stakes are too high to keep getting it wrong.