

Confidentiality: FOIs and AI

Regional District Chair/CAO Forum

Presented by Nick Falzon

April 21, 2026

What now?

- So of course, I asked both Grok and ChatGPT to generate this presentation for me
- My prompt:
 - I'm speaking at a municipal conference called the UBCM Regional District Chair/CAO forum. It is taking place in Victoria, B.C., and I have to present on the topic of 'Confidentiality': FOIs and AI". Can you generate me a 20 minute presentation, including slides, for this?
- Neither LLM did a very good job, so you're stuck with comments from a human
- Grok did identify several issues with AI use by public bodies, including: (1) black box decisions; (2) hallucinated outputs; (3) re-identification risk; (4) data fed into third party companies; and (5) legal liability staying with the public body, not the vendor

Common Issues

- LLM usage has become ubiquitous
 - FOI requests, as well as other communications (bylaw complaints, legal documents, building permit drawings etc.), are being produced by LLMs
 - Pros – improved access
 - Cons – administrative burden
- AI usage by public bodies comes with its own set of concerns
 - Privacy – collection and use of personal information beyond that which was previously possible
 - Opacity – how was a decision made?
 - Accuracy – did we get to the right place?

Use of AI by Public Bodies

- Getting Ahead of the Curve: Meeting the Challenges to privacy and fairness arising from the use of artificial intelligence in the public sector
 - Joint Special Report No. 2, June 2021 (OIPC)
- This report, having come out 5 years ago, is no longer ahead of the curve
- However, the principles are still useful

Some Highlights

- Administrative Fairness and AI
 - Rule of law requires open, accountable, equitable, and fair decision-making
 - Opacity is a key problem with predictive AI systems
 - Public bodies must be able to determine the *how* and the *why* of decision-making
 - Concern for Ombudsperson and Court system

Questions/Discussion

The Cowichan Tribes Case

Regional District Chair/CAO Forum

Presented by Reece Harding

April 21, 2026

CT Introduction

- *Cowichan Tribes v. Canada* is a remarkable and important case re process and outcome
- 513-day trial – longest in Canadian history
- 86 lawyers of record – cost??!!
- 800 plus page judgement
- Tremendous amount of interest, opinion and disagreement
- Goal today is for fair and accurate dialogue with respectful discussion

CT Introduction

- Case involves complex issues of Aboriginal title and fee simple title over the same lands
 - In general, Aboriginal title has these aspects:
 - Right to exclusive use and occupation
 - Right to determine uses
 - Right to enjoy economic fruits
 - Held collectively
 - Fee simple ownership also exclusive use and occupation – held as indefeasible title under *Land Title Act*
 - How do these co-exist?
- *Constitution Act, 1982, section 35*

CT Facts

- **The Plaintiffs (aka, the Cowichan Tribes)**
 - Four bands under the *Indian Act*:
 - Cowichan Tribes
 - Stz'uminus First Nation
 - Penelakut Tribe
 - Halalt First Nation
 - Chiefs of each nation also individually named
 - Claim Area was 1846 acres of fee simple land in Richmond
 - Traditional village site and fishing grounds

CT Facts

The Defendants

- **Canada**
 - Owned land within Claim Area
- **British Columbia**
 - Provincial government historically responsible for granting lots to settlers within Claim Area
- **Vancouver Fraser Port Authority**
 - Agent for federal government, owned lands within Claim Area
- **City of Richmond**
 - Claim Area within City boundaries, City owned several lots obtained via municipal tax sale between 1920s and 1940s, also had interest in roadways
- **Tsawwassen First Nation**
 - Treaty lands near the Claim Area and unsettled rights
- **Musqueam Indian Band**
 - Reserve land nearby, unsettled title and rights claim over the Claim Area

CT Court Orders*

■ #1 - Declaration of Title

- Aboriginal title declared over a 740-acre *portion* of the Claim Area – approximately 40% of total area sought
- Title area includes flood protection and prevention infrastructure, roads, foreshore, submerged lands, residences, agricultural lands, industrial and commercial property, and a golf course

■ #2 - Infringement on Title

- Court ordered that original Crown grants of fee simple title unjustifiably infringe upon Cowichan Aboriginal title
- Infringement is a complex issue in Aboriginal rights and title cases, but can be justified in some circumstances
 - Court found not justified in this case

* We will not review the court order dealing with fishing rights

CT Court Orders

■ #3 - Invalidated Fee Simple Title

- Fee simple title was invalidated, but limited to lands held by federal government and Richmond
 - This order suspended for 18-month period to facilitate “necessary arrangements”
- All other lands over which title was established now have co-existing Aboriginal title and fee simple interests
 - Unprecedented legal outcome
 - No suspension of order

■ #4/5 Duty to Negotiate

- Canada-owned a YVR fuel project within the Title area
 - Court found Canada owes a duty to negotiate in good faith in relation to this project
- BC owes duty to negotiate in good faith
 - Ordered in relation to reconciliation of Crown-granted fee simple title to third-parties, and soil and freehold interests held by Richmond

Analysis: the Court's Reasoning

- **Lack of Statutory Authority**
 - 1859-1860 Douglas appropriations of Indian settlements
 - Crown grants made between 1871-1914
 - Court found provincial Crown grants for some fee simple titles were made in violation of the applicable provincial land disposition statutes at the time of granting
- **Terms of Union: Article 13**
 - Terms of Union were the constitutional instrument by which BC joined Dominion of Canada
 - Article 13 establishes:
 - trustee and management of Indian lands would be assumed by Dominion government
 - Court infers prohibition against BC issuing Crown grants of Indian settlements

CT Analysis

■ The Division of Powers

- Given the division of powers set out within the *Constitution Act, 1867*, even if Crown grants were made validly, BC does not have the authority to extinguish title
 - This finding applies to all Aboriginal title lands anywhere in the Province

■ Section 35

- Fee simple title and other interests on land subject to Aboriginal title constitutes an ongoing infringement of Aboriginal title – irrelevant if fee simple granted prior to *Constitution Act, 1982*

CT Analysis

■ Indefeasibility of title under the *Land Title Act*

- LTA provides that registered fee simple owner has indefeasible title to the registered land, and is protected from claims for recovery of that land – subject to certain limited exceptions
- Even though Aboriginal title is not a listed exception, court found that these protections would effectively “extinguish” Aboriginal title, contrary to findings re the constitutional division of powers

■ Co-Titled Lands

- Certain lands within the Claim Area now have fee simple interests co-existing with underlying Aboriginal title
- Unprecedented in Canadian legal history – how can two rights to exclusive use and occupation of land, held by different parties, co-exist?
- These lands may be subject to further litigation – court implied fee simple interests may simply be effective until action is taken to have them invalidated

Appeals and Other Considerations

- All seven parties have appealed
 - Including all three First Nations
- Will take years to work through BC Court of Appeal and Supreme Court of Canada
- Several private landowners looking to appeal land value to PAAB
- Class action lawsuit commenced
- At least one private owner will be seeking to re-open trial judgment – May 2026
 - No notice given to private owners
- Province considering the seeking of a stay
- UBCM intervening
- December 2025 *Gitxaala v. BC* decision, DRIPA and UNDRIP implications

Implications - Proprietary

- [3551] “... A precedent that will follow from this case is that provincial Crown grants of fee simple interest do not extinguish nor permanently displace Aboriginal title, and ss. 23 and 25 of the *LTA* do not apply to Aboriginal title.”
- Loss of public lands and infrastructure
- Loss of charges over private lands
- Loss of tax base
- Land acquisition and disposition

Implications - Jurisdiction

- BCSC held that certain lands are subject to both fee simple ownership and Aboriginal title (“co-title”)
- BCSC said:

“I find that Aboriginal title and fee simple titles can coexist, and where they do, the exercise of one form of title must yield to the other so long as they are both present on the same parcel of land.”

Para. 2205
- Regulatory jurisdiction of local governments – and ability to perform their mandate – is called into question by co-title finding

Implications - Jurisdiction

- Numerous regulatory implications for local government
 - LG jurisdiction is entirely predicated on fee simple ownership
 - Zoning, taxation, servicing, building and business regulation, liability are all unclear under the co-title framework

Implications - Reconciliation

- Reconciliation could be set back:

...Dispossessing the current beneficiaries of government land grants would not be just, especially when the land has passed through numerous innocent hands. Instead, compensation should be paid to the Indigenous nations concerned.

[202] I endorse this commonsensical and reconciliation-friendly conclusion. In my view, remedial justice favours compensation from the Crown over dispossession of private fee simple owners in all cases although, admittedly, that is especially the case “when the land has passed through numerous innocent hands”.

JD Irving, Limited et al. v. Wolastoqey Nation, 2025 NBCA 129

Implications - Reconciliation

"But uncertainty over title now festers and causes problems for investment and for financing that is bound to grow in the years it may take to get to legal clarity. The situation is also tragically undermining efforts at reconciliation. There are some people feeling desperate, and there are some very harsh exchanges taking place - I do not want to predict where some of this could all lead [...]"

- Professor Dwight Newman Canada Research Chair in Rights, Communities, and Constitutional Law

Implications - Reconciliation

"We know that people's ability to buy, sell and mortgage private property is key in our legal system and our rights of ownership in this province and across this country. We are hard at work, working not only with the city of Richmond and their council, with the federal government on grounds of appeal at the Court of Appeal level....

We know that upholding private property rights is very key and critical work along with the work of reconciliation. "

AG Nicki Sharma

Questions/Discussion