

Third Time's the Charm? The Nuchatlaht Granted Aboriginal Title Over 201km² of Nootka Island

Thomas Isaac, Jared Enns, Devon Campbell, Lilly Callender

April 10, 2026

On April 2, 2026, the British Columbia Court of Appeal (BCCA) issued a declaration of Aboriginal title over 201 km² of Nootka Island to the Nuchatlaht, a Nuuchahnulth First Nation on the west coast of Vancouver Island.¹ The claim did not include any private lands, reserves, or overlapping claims of other First Nations.²

The decision was rendered on appeal from two interrelated BC Supreme Court (BCSC) decisions that resulted in the recognition of Aboriginal title over a limited portion of the Nuchatlaht's claimed lands.³ These decisions were summarized in a [previous commentary](#).

The central issue in the appeal was whether the Nuchatlaht's historic occupation of these lands was sufficient to meet the test for Aboriginal title set out in *Delgamuukw v BC*,⁴ and affirmed in *Tsilhqot'in v BC*.⁵

Trial History

During the 54-day trial,⁶ the Nuchatlaht argued that Aboriginal title does not require evidence of intensive use of specific tracts of land.⁷ This follows *Tsilhqot'in*, in which the Supreme Court of Canada (SCC) held "[c]ultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are *not essential* to establish occupation."⁸ While the trial judge acknowledged that there was evidence of sufficient occupation in certain areas, he noted that the type of use and control identified by the SCC in *Tsilhqot'in* "is absent for most of the Claim Area."⁹

In a subsequent proceeding, the trial judge found that the Nuchatlaht hold Aboriginal title over 11.33 km² of the claimed area, where the evidence of intensive use was strongest.¹⁰ The trial judge largely restricted Aboriginal title to lands below 100 metres in elevation, drawing a rough distinction between coastal and interior areas.¹¹ The trial judge did *not* make a formal declaration of Aboriginal title, but instead encouraged a negotiated agreement between the parties.¹²

The Appeal

The Nuchatlaht appealed, seeking a declaration of Aboriginal title to their entire claim area. The BCCA allowed the appeal and granted the relief sought. In its reasons, the BCCA ruled that the trial judge erred in

three respects:

1. **Misapprehension or disregard for material evidence:** The BCCA held that the trial judge erred by relying on evidence suggesting that some Nuu-chah-nulth peoples did not claim “remote inland areas” to characterize interior portions of the claim as unoccupied by the Nuchatlaht.¹³ The BCCA rejected this characterization, finding that the interior of the claim did not constitute a remote inland area, particularly in light of extensive evidence of trees modified for cultural purposes during the relevant timeframe.
2. **Improper application of the legal test for sufficient occupation:** The BCCA held that the trial judge applied an unduly narrow, site-specific approach to assessing occupation, akin to the “postage-stamp” approach rejected in *Tsilhqot’in*.¹⁴ Rather than assessing whether the evidence demonstrated possession and control of the claim area, the BCSC imposed an “inappropriately narrow site-specific approach.”¹⁵
3. **Arbitrary boundary drawn in the modified title claim:** The BCCA found that the 100-metre elevation boundary adopted by the trial judge was unsupported by the evidence, did not consider the Aboriginal perspective, and excluded areas with evidence supporting the Nuchatlaht’s occupation.¹⁶ The BCCA concluded that the evidence demonstrated that the Nuchatlaht sufficiently occupied the entire claim area.¹⁷

Additionally, the BCCA held that the *Forest Act* and *Park Act* no longer apply to the recognized Aboriginal title lands, which indicates that existing forest licences and an overlapping provincial park cease to exist.¹⁸ Notably, the Province accepted that the *Park Act* does not apply over Aboriginal title lands, rather than attempting to defend this legislation as a justified infringement to the Nuchatlaht’s title.¹⁹

While the BCCA noted significant errors in the treatment of evidence, limited deference was given to the trial judge’s *overall* interpretation of the evidence. The Court did not send the decision back to the BCSC for reconsideration, but instead substituted the trial judge’s limited recognition of Aboriginal title with an order declaring Aboriginal title over the entire claim area.²⁰

Implications

The BCCA judgment reinforces the existing test for Aboriginal title, while recognizing the need for courts to remain sensitive to the territorial and cultural realities of claims. The BCCA’s rejection of the overly-site specific approach re-affirms and applies the more flexible principles articulated in *Tsilhqot’in*, emphasizing that Aboriginal title can be established in areas without explicit evidence of intensive use or occupation.

While the BCCA’s decision relies on settled SCC jurisprudence regarding the test and evidentiary requirements to establish Aboriginal title, significant uncertainties remain with respect to the affected lands. These include questions as to whether:

Cassels

- existing forest harvest licences and other potentially infringing Crown conduct can be justified as infringements to the Nuchatlaht's Aboriginal title;
- the Province or forest licensees are responsible for any outstanding liabilities associated with former Crown lands if such infringements cannot be justified; and
- public access to the Nuchatlaht title lands may continue, particularly within the Nuchatlitz Provincial Park, which largely overlaps with the Nuchatlaht's title lands.

These uncertainties may be resolved either through negotiation between the Crown and the Nuchatlaht or through further litigation. Considering recent declarations of Aboriginal title in BC, the Province will need to determine a predictable approach to respond to competing interests. The SCC has accepted that the range of legislative objectives which may justify an infringement to Aboriginal title is "fairly broad," permitting the Province to infringe such title where the applicable legal requirements are satisfied.²¹

This is the first decision in which the *Park Act* was found to be inapplicable over Aboriginal title lands. Given that the *Park Act* authorizes the designation of parks over provincial Crown land, it is unclear whether portions of Nuchatlitz Provincial Park overlapping the Nuchatlaht title area continue to exist. The Province advised that it is "reviewing the decision to understand the ruling and its implications for parks, protected areas, and recreation sites."²²

In addition to the uncertainty surrounding the lands at issue, the BCCA's findings raise broader questions about the future establishment of Aboriginal title, including whether:

- the duration of the claimant group's presence prior to the Crown's assertion of sovereignty is relevant to establishing Aboriginal title (in this case, the Nuchatlaht moved to the area roughly 70 years prior);²³ and
- appellate courts can significantly expand the scope of recognized title without remitting the matter to the trial court, given the deference owed to the trier of fact.²⁴

The Province has indicated that it is evaluating the BCCA's decision before it determines whether to appeal to the SCC.²⁵

¹ *The Nuchatlaht v British Columbia*, [2026 BCCA 137](#) [Nuchatlaht BCCA].

² Nuchatlaht BCCA, para [14](#).

³ *The Nuchatlaht v British Columbia*, [2023 BCSC 804](#) [Nuchatlaht BCSC 2023]; *The Nuchatlaht v British Columbia*, [2024 BCSC 628](#) [Nuchatlaht BCSC 2024].

⁴ [1991 CanLII 2372](#) [Delgamuukw].

⁵ [2008 BCSC 600](#) [Tsilhqot'in].

⁶ The "condensed trial" was a marked departure from previous Aboriginal title trials *Delgamuukw* and *Tsilhqot'in* both in the excess of 300 days.

⁷ Nuchatlaht BCSC 2024, para [5](#).

Cassels

⁸ *Tsilhqot'in* at para 38 (emphasis added).

⁹ *Nuchatlaht* BCSC 2023, para [482](#).

¹⁰ *Nuchatlaht* BCSC 2024, para [11](#).

¹¹ *Nuchatlaht* BCSC 2024, para [34](#).

¹² *Nuchatlaht* BCSC 2024, para [37](#).

¹³ *Nuchatlaht* BCCA, para [97](#).

¹⁴ *Nuchatlaht* BCCA, para [127](#).

¹⁵ *Nuchatlaht* BCCA, para [127](#).

¹⁶ *Nuchatlaht* BCCA, para [116](#).

¹⁷ *Nuchatlaht* BCCA, para [203](#).

¹⁸ *Nuchatlaht* BCCA, para [206](#); *Park Act*, [RSBC 1996, c 344](#); *Forest Act*, [RSBC 1996, c 157](#).

¹⁹ *Nuchatlaht* BCCA, para [206](#): "In *Tsilhqot'in*, the Court accepted the *Forest Act* does not apply to areas of Aboriginal title as it is limited to areas of "Crown land": at paras. 107–116. The Province accepted this reasoning applied to the *Park Act*. We agree. Accordingly, to the areas where Aboriginal title has been recognized, the *Forest Act* and the *Park Act* do not apply."

²⁰ *Nuchatlaht* BCCA, para [205](#).

²¹ The SCC provided a list of examples in which infringement to Aboriginal title may be justified, including "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims": *Tsilhqot'in*, para [83](#), citing *Delgamuukw*, para [165](#).

²² British Columbia, "Nuchatlitz Park" (2 April 2026), online: <<https://bcparks.ca/nuchatlitz-park/>>.

²³ *Nuchatlaht* BCCA, para [108](#) (The Court accepted that the *Nuchatlaht* moved to the area in the 1780s and the Crown's assertion of sovereignty occurred in BC in 1846).

²⁴ But see *Nuchatlaht* BCCA, para [189](#), where the Court stated that it has jurisdiction to make its determination "upon finding palpable and overriding error or a holding that findings of fact were unsupported by the evidence, appellate courts are endowed with the powers of the trial court in considering what the evidence proves and what inferences may be drawn" (referencing *HL v Canada (Attorney General)*), [2005 SCC 25](#), paras 88-89.

²⁵ See Stefan Labbé, *BIV*, "We got it all": *Nuchatlaht* First Nation wins title over entire 210 sq. km claim" (2 April 2026), online: <<https://www.biv.com/news/economy-law-politics/we-got-it-all-nuchatlaht-first-nation-wins-title-over-entire-210-sq-km-claim-12095975>>.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.