

Potential Solutions for BC's Property Rights Crisis



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INDIGENOUS STUDIES

Constitutional Change Is the Only Solution

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A property crisis is unfolding in this country, especially in British Columbia. How to fix it? The answer is simple. It's also politically formidable, to say the least, under current circumstances. Aboriginal rights are a category error. They should not exist. See what I mean? Simple but formidable.

In early May 2026, without meaning to, Todd Stone illustrated the core problem. Stone is a former BC cabinet minister who voted for BC's now infamous *Declaration on the Rights of Indigenous Peoples Act*, or DRIPA. Stone has since become president and CEO of the Association for Mineral Exploration. Its members are now alarmed at the obstacles placed in the path of mineral development in BC (AME, 2026). In a *National Post* column, Stone wrote that DRIPA should be fixed but not scrapped. DRIPA, he insisted, should be "a pathway for all British Columbians to walk hand-in-hand down a path toward meaningful reconciliation" (Stone, 2026).

Stone believes that aboriginal people are a different category of people. He's not alone. Many Canadians agree. So do governments. So do courts. So does the Canadian Constitution. Special rights and status for aboriginal groups has long been ingrained in Canadian law and culture. Section 35 of the *Constitution Act 1982* guarantees "the existing aboriginal and treaty rights of the aboriginal peoples of Canada."

Canada pretends to be a country governed by the rule of law. Justice is supposed to be blind. The same rights and rules are supposed to apply to everyone without regard to lineage, race, origin, culture, or genes. The state is not supposed to place some citizens above others. But that's not how Canada's constitution works. Instead, it recognizes two classes of citizens.

Invasion, migration, and mixing is the history of humanity. When foreigners move into a territory, two distinct cultures confront each other. Inhabitants understandably cling to the memory that the place belongs to them. But over centuries, things change. People mix, culturally and genetically. Descendants of inhabitants and migrants marry and procreate. Their children do the same. More people from other places arrive and mix, too. Together they adapt to new technologies. A new modern culture evolves. Everyone born and raised there is native to the place. There are no "original" people.

This truth can be easier to see in countries other than your own. The Romans invaded what is now Britain in about 55 BC. They conquered it about a hundred years later, chasing various Celtic peoples into the hinterlands. By 500 AD, Saxons had established themselves as the dominant power. In 1066, led by William the Conqueror, Normans overthrew the Saxon kingdom. Should modern British law have different legal rights for Celts, Romans, Saxons and Normans? That would be silly. The people are British.

In 1973, the Supreme Court of Canada almost got it right. In a claim for aboriginal title over a portion of British Columbia, the Court split (*Calder et al. v. Attorney-General of British Columbia*). Three of seven judges ruled that the Crown had exercised sovereignty over all the lands in BC and therefore aboriginal title could not exist. Three other judges held that the common law recognized land rights of aboriginal people unless surrendered. The seventh and deciding judge rejected the claim for unrelated reasons. The claim failed. Yet only three of seven judges rejected the existence of aboriginal title.

Parliament could have legislated an end to rights that only “aboriginal people” can hold. Instead, the country’s leaders inserted section 35 into the 1982 Constitution, guaranteeing them. Since 1982, the Supreme Court of Canada has used section 35 to champion, enlarge, and reimagine those rights.

In 1997, it articulated a new vision of aboriginal title (*Delgamuukw v. British Columbia*). In 2004, it established the Crown’s “duty to consult” (*Haida Nation v. British Columbia (Minister of Forests)*). In 2014, it recognized aboriginal title over a tract of Crown land in BC (*Tsilhqot’in Nation v. British Columbia*). In 2021, it extended aboriginal rights to an American indigenous group (*R. v. Desautel*). The BC Supreme Court judge who decided the Cowichan case followed the Supreme Court of Canada’s breadcrumbs. That decision, now under appeal, is not out of step with decisions of the country’s highest court.

Politicians are no longer able to change aboriginal rights without constitutional amendment. Amendments must satisfy the “7/50” formula (*Constitution Act 1982*, Part V). Parliament along with seven of 10 provinces having at least 50 percent of the population must approve any change. Achieving that formula on a contentious matter such as eliminating the concept of aboriginal peoples would be a daunting challenge. Moreover, section 35.1 requires a constitutional convention before such changes are made, adding to the political difficulty.

But for the sake of argument, what amendments would banish this category error from the Constitution?

First, repeal section 35 (*Constitution Act, 1982*). Or better, repudiate it. New wording: “Aboriginal and treaty rights are null and void. Canada has one class of citizen.”

Second, amend section 15 of the Charter. Section 15 is the equality provision. It appears to say that the same rights and rules apply to everyone. "Every Canadian citizen is equal before and under the law," it reads, "and has the right to the equal protection and equal benefit of the law without discrimination...." Section 15(2) sets out what was supposed to be an exception to 15(1). Discrimination is permitted, it says, if its purpose is "the amelioration of conditions of disadvantaged individuals or groups...." The Supreme Court of Canada has insisted that section 15(1) does not mean what it says. Instead, it has made the exception in 15(2) into the general rule. Sections 15(1) and (2), says the Court, require substantive equality, otherwise known as equity. Equity means treating different groups differently. That's the concept upon which aboriginal law rests.

Third, repeal section 25 of the Charter. It says, believe it or not, that aboriginal rights trump Charter rights. "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada...."

Finally, repeal section 91(24) of the *Constitution Act, 1867*, which gives Parliament jurisdiction over "Indians, and Lands reserved for the Indians." The feds can't have jurisdiction over a category that does not exist. The provinces have always had jurisdiction over property and civil rights of all citizens except aboriginal peoples. Now that jurisdiction will apply to everyone.

Dealing with these four constitutional provisions would be a good start. But even that is not enough. Courts, and especially the Supreme Court of Canada, have the last say on what the Constitution means. Having championed aboriginal rights over decades, the Court might not honour the intent of the amendments. Judges with a different judicial philosophy will be needed. That will require a counter-revolution inside law schools and the legal profession. Lawyers and judges have created this problem. They're unlikely to willingly correct it.

Finally, reverse Canada's approval of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Repeal DRIPA, the BC statute that incorporates UNDRIP into provincial law. Repeal the *United Nations Declaration on the Rights of Indigenous Peoples Act*, the federal statute that incorporates UNDRIP into federal law. Repeal the federal *Indian Act*, which governs Indian reserves, bands, and status Indians. Repeal the rest of the numerous statutes that treat aboriginal people differently than other Canadians (Canada, Undated).

In Canada, special status for aboriginal peoples is regarded as the natural and proper order of things. But distinct rights for a special category of people were bound to go

wrong. “Aboriginal people” are a category error. No incremental policy solutions will work. In Canada’s laws and Constitution, aboriginal rights should not exist. Reform depends on establishing the legitimacy of that idea.

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