

# Aboriginal Title and the Provinces after Tsilhqot'in Nation

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# Aboriginal Title and the Provinces after *Tsilhqot'in Nation*

Kent McNeil\*

## I. INTRODUCTION

In its groundbreaking decision in *Tsilhqot'in Nation v. British Columbia*,<sup>1</sup> the Supreme Court for the first time issued a declaration of Aboriginal title. The Court's unanimous judgment, written by McLachlin C.J.C., clarified the test for exclusive occupation that has to be met for an Aboriginal group to establish Aboriginal title at the time of Crown assertion of sovereignty.<sup>2</sup> The Court rejected the site-specific approach applied by the British Columbia Court of Appeal, opting instead for a territorial approach that takes account of the patterns of land use and control by semi-nomadic Aboriginal peoples such as the Tsilhqot'in. The Court also affirmed Lamer C.J.C.'s description of Aboriginal title in *Delgamuukw v. British Columbia*<sup>3</sup> as a *sui generis* interest in land, entitling the titleholders to exclusive occupation and use. In *Tsilhqot'in Nation*, McLachlin C.J.C. put it this way:

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.<sup>4</sup>

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\* Osgoode Hall Law School, Toronto. I am grateful to John Borrows, Kathy Simo, Kerry Wilkins, and an anonymous reviewer for reading a draft of this article and providing me with very helpful comments.

<sup>1</sup> [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257 (S.C.C.) [hereinafter "*Tsilhqot'in Nation*"].

<sup>2</sup> See Kent McNeil, "Exclusive Occupation and Joint Aboriginal Title", forthcoming (2015) 48:3 U.B.C. L. Rev.

<sup>3</sup> [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.) [hereinafter "*Delgamuukw*"].

<sup>4</sup> *Tsilhqot'in Nation*, *supra*, note 1, at para. 73.

But unlike fee simple, Aboriginal title is inalienable other than by surrender to the Crown,<sup>5</sup> and is subject to an inherent limit, namely that the land cannot be used in ways that would deprive future generations of the benefit of the land.<sup>6</sup> However, in *Tsilhqot'in Nation* the inherent limit underwent a significant modification: instead of preserving the land for the traditional uses relied upon to establish title, which is the way it was expressed in *Delgamuukw*, in *Tsilhqot'in Nation* McLachlin C.J.C.'s emphasis was on sustainability and respect for Aboriginal peoples' authority to make their own decisions about the best uses of their land. "[L]ike other landowners," she said, "Aboriginal title holders of modern times can use their land in modern ways, if that is their choice", as long as the land is not "developed or misused in a way that would substantially deprive future generations of the benefit of the land".<sup>7</sup> Moreover, the inherent limit applies to governments as well that try to justify infringements of Aboriginal title:

[T]he Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. *This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.*<sup>8</sup>

The reformulation of the inherent limit and extension of it to non-Aboriginal governments in *Tsilhqot'in Nation* are significant developments in the law relating to Aboriginal title.<sup>9</sup>

Another major change in the law resulting from *Tsilhqot'in Nation* relates to the constitutional division of powers and provincial jurisdiction over Aboriginal title lands. This article discusses the nature and effect of

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<sup>5</sup> *Delgamuukw*, *supra*, note 3, at para. 113; *Tsilhqot'in Nation*, *id.*, at paras. 15, 74. See Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 McGill L.J. 473.

<sup>6</sup> *Delgamuukw*, *supra*, note 3, at paras. 125-132; *Tsilhqot'in Nation*, *id.*, at paras. 15, 74-75, 121.

<sup>7</sup> *Tsilhqot'in Nation*, *supra*, note 1, at paras. 75, 74. At para. 121, McLachlin C.J.C. said the limit prevents uses that would "destroy the ability of the land to *sustain* future generations of Aboriginal peoples" (emphasis added).

<sup>8</sup> *Id.*, at para. 86 (emphasis added).

<sup>9</sup> For critical discussion of the inherent limit prior to *Tsilhqot'in Nation*, *id.*, see Kent McNeil, "The Post-*Delgamuukw* Nature and Content of Aboriginal Title", in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) [hereinafter "McNeil, *Emerging Justice?*"], 102 at 116-22.

this change in two distinct time periods: provincial authority and obligations *prior* to proof of Aboriginal title, and the application of provincial laws to Aboriginal title lands *after* Aboriginal title has been established.

## II. PROVINCIAL AUTHORITY AND OBLIGATIONS PRIOR TO PROOF OF ABORIGINAL TITLE

Aboriginal title claims over most of British Columbia have not yet been resolved by historical treaties, modern land claims agreements, or court decisions. Privately owned lands apart,<sup>10</sup> most lands in the province are subject to conflicting claims by Aboriginal peoples and the Crown in right of the province. So what is the status of these lands and what is the extent of provincial authority over them prior to proof of Aboriginal title?

According to Canadian law, the onus of proving Aboriginal title is on the Aboriginal claimants.<sup>11</sup> As a result, lands that are subject to unproven Aboriginal title claims are presumed to be Crown lands.<sup>12</sup> This presumption of Crown title, like most legal presumptions, is rebuttable, in this context by sufficient evidence of the Aboriginal title. In the meantime, the Crown cannot simply act as though it owns the land outright. In *Haida Nation*,<sup>13</sup> the Supreme Court held that the Crown is honour-bound to take account of unproven Aboriginal claims of which it has actual or constructive notice, and to consult with the Aboriginal

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<sup>10</sup> In *Tsilhqot'in Nation*, privately owned lands were excluded from the claim area: see *Tsilhqot'in Nation*, *id.*, at para. 9; David M. Rosenberg, "10 Reasons Why the Tsilhqot'in Succeeded" (paper delivered at the Affinity Institute Conference, The SCC *Tsilhqot'in* Decision: Significance, Implications, and Practical Impact, Vancouver B.C., September 26, 2014), at 7. For discussion in relation to the trial decision, see Kent McNeil, "Reconciliation and Third Party Interests: *Tsilhqot'in Nation v. British Columbia*" (2010) 8 *Indigenous L.J.* 7. See also Gordon Christie, "Aboriginal Title and Private Property" in Maria Morellato, ed., *Aboriginal Law Since Delgamuukw* (Aurora, ON: Canada Law Book, 2009), 177, and John Borrows, "Aboriginal Title and Private Property" (in this volume).

<sup>11</sup> *Delgamuukw*, *supra*, note 3, at paras. 143-144; *Tsilhqot'in Nation*, *supra*, note 1, at paras. 25-26, 50. For criticism, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall L.J.* 537; Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37 *Osgoode Hall L.J.* 775, republished in McNeil, *Emerging Justice?*, *supra*, note 9, at 136.

<sup>12</sup> This appears to be taken for granted in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.) [hereinafter "*Haida Nation*"].

<sup>13</sup> *Id.*

claimants and accommodate their unproven interests in situations where the Crown contemplates action that may adversely affect those interests. Speaking for the whole Court in *Haida Nation*, McLachlin C.J.C. summed up the situation in forceful language:

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.<sup>14</sup>

In *Tsilhqot'in Nation*, the Supreme Court affirmed and applied its decision in *Haida Nation*,<sup>15</sup> holding that British Columbia had breached its duty to consult. Chief Justice McLachlin stated:

The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.<sup>16</sup>

However, given that this all occurred before Aboriginal title had been proven, the Court did not regard these actions as infringements of Aboriginal title. Chief Justice McLachlin distinguished between the procedural duties of consultation and accommodation that the Crown owes prior to proof of title, and the obligation to justify infringements of proven title:

Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government

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<sup>14</sup> *Id.*, at para. 27.

<sup>15</sup> *Tsilhqot'in Nation*, *supra*, note 1, at paras. 17, 78-80, 95-96.

<sup>16</sup> *Id.*, at para. 96.

action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.<sup>17</sup>

These guidelines were then applied by the Court to a specific provincial statute, namely the *Forest Act*.<sup>18</sup> Chief Justice McLachlin appears to have regarded the application of this statute to Tsilhqot'in lands before title had been established as mainly a matter of statutory interpretation. As long as Aboriginal title is unproven and remains uncertain, she observed, "Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land's use: *Haida*. At this stage, the Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims."<sup>19</sup> In her opinion, the British Columbia legislature must have intended that lands subject to Aboriginal title claims would be "Crown land" within the meaning of the *Forest Act*,<sup>20</sup> "at least until Aboriginal title is recognized by a court or an agreement", as to "proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands of hectares and represent a resource of enormous value".<sup>21</sup> After Aboriginal title has been established, the *Forest Act* would not apply because the lands would no longer be vested in the Crown and so would no longer be "Crown land".<sup>22</sup>

With all due respect, I am puzzled by McLachlin C.J.C.'s conclusion that lands can somehow be vested in the provincial Crown up to the time

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<sup>17</sup> *Id.*, at para. 80. See also paras. 89-94. Section 35 of the *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982* (U.K.), c. 11, provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

<sup>18</sup> R.S.B.C. 1996, c. 157. Chief Justice McLachlin indicated that, since the Court had determined that the province had breached its duty to consult and accommodate, it was not necessary to deal with the application of the *Forest Act*, but she went on to address this matter anyway because the parties had made extensive submissions on its application and this issue had been "dealt with by the courts below and is of pressing importance to the Tsilhqot'in people and other Aboriginal groups in British Columbia and elsewhere": *Tsilhqot'in Nation, id.*, at para. 99.

<sup>19</sup> *Tsilhqot'in Nation, id.*, at para. 113.

<sup>20</sup> "Crown land" is defined in the *Forest Act*, s. 1, as having "the same meaning as in the *Land Act*, but does not include land owned by an agent of the government". In the *Land Act*, R.S.B.C. 1996, c. 245, s. 1, "Crown land" is defined as "land, whether or not it is covered by water, or an interest in land, vested in the government." See *Tsilhqot'in Nation, id.*, at para. 109.

<sup>21</sup> *Tsilhqot'in Nation, id.*, at para. 114. Importantly, as McLachlin C.J.C. based this conclusion on interpretation of a specific statute, the same conclusion would not necessarily apply to other provincial statutes.

<sup>22</sup> *Id.*, at paras. 111-112, 115-116.

title is established, and thereafter be vested in the Aboriginal people whose title has been proven. I also wonder how the vesting of Aboriginal title can seemingly depend on the intention of a provincial legislature, given that Aboriginal title lands are within Parliament's exclusive jurisdiction over "Lands reserved for the Indians".<sup>23</sup>

In *Delgamuukw*, Lamer C.J.C. held that the exclusive occupation of land upon which Aboriginal title depends has to be proven at the time of Crown sovereignty because "aboriginal title crystallized at the time sovereignty was asserted".<sup>24</sup> In *Tsilhqot'in Nation*, the Court applied the requirement of exclusive occupation at the time of Crown assertion of sovereignty.<sup>25</sup> Relying on the judgment of Dickson J. (as he then was) in *Guerin v. Canada*,<sup>26</sup> McLachlin C.J.C. observed:

At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation (1763)*, R.S.C. 1985, App. II, No. 1. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.<sup>27</sup>

So when the Court issued a declaration of Aboriginal title for the Tsilhqot'in, it was not *creating* a title, but rather *acknowledging* the existence of a title that pre-dated European colonization and that had crystallized at common law in 1846, the year the Court accepted as the time of assertion of Crown sovereignty.<sup>28</sup>

Given that Aboriginal title is a pre-existing legal right to land that crystallized at the moment of Crown assertion of sovereignty and

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<sup>23</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24). See *Delgamuukw*, *supra*, note 3, at paras. 173-176.

<sup>24</sup> *Delgamuukw*, *supra*, note 3, at para. 145.

<sup>25</sup> *Tsilhqot'in Nation*, *supra*, note 1, at paras. 25-66.

<sup>26</sup> [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335 (S.C.C.).

<sup>27</sup> *Tsilhqot'in Nation*, *supra*, note 1, at para. 69.

<sup>28</sup> Obviously, the role of the courts is not to create rights, but rather to declare and define them on the basis of the application of the common law, statutes, *etc.*, to the facts in a given case. In a case like *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), where the House of Lords undoubtedly found a new right to exist, their Lordships changed the common law and then declared the right to exist on the basis of the changed law. The existence of the right related back to the time liability arose on the facts, rather than from the time of the decision forward. See Rupert Cross & J.W. Harris, *Precedent in English Law*, 4th ed. (Oxford: Clarendon Press, 1991), 31-33.

continued as a burden on the Crown's underlying title thereafter, how is it possible for that land to be vested in the Crown prior to proof of Aboriginal title? In *Tsilhqot'in Nation*, McLachlin C.J.C. held that the "content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it".<sup>29</sup> As Aboriginal titleholders have the right to all the benefits flowing from the land,<sup>30</sup> she concluded that the Crown's underlying title does not amount to a beneficial interest. Instead, it is limited to "a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*".<sup>31</sup> The pre-existing nature of Aboriginal title is also confirmed by the same section, which recognizes and affirms the "existing aboriginal rights" of the Aboriginal peoples. As held in *R. v. Sparrow*,<sup>32</sup> "existing" here means rights that were in existence and had not been extinguished prior to the enactment of section 35.<sup>33</sup> How, one might ask, can a crystallized, beneficial title to land be in existence and yet unvested?

Chief Justice McLachlin seems to have agreed that the Crown's underlying title could not give it a vested interest in Aboriginal title land.<sup>34</sup> However, her concern was that the large areas of land in British Columbia that are subject to Aboriginal title claims could "be immune

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<sup>29</sup> *Tsilhqot'in Nation*, *supra*, note 1, at para. 70.

<sup>30</sup> See quotation at note 4, *supra*.

<sup>31</sup> *Tsilhqot'in Nation*, *supra*, note 1, at para. 71. See also paras. 111-112. Although the matter cannot be pursued here, in my respectful opinion the power to justifiably infringe Aboriginal title is not derived from the Crown's underlying title, which is a property right provided by s. 109 of the *Constitution Act, 1867*. Instead, this power is legislative in nature and flows from s. 92 of that Act, especially s. 92(13) which empowers provincial legislatures to enact laws in relation to "Property and Civil Rights in the Province". See *Tsilhqot'in Nation*, *id.*, at paras. 102-103.

<sup>32</sup> [1990] S.C.J. No. 49, at para. 23, [1990] 1 S.C.R. 1075 (S.C.C.) [hereinafter "*Sparrow*"].

<sup>33</sup> In *Haida Nation*, *supra*, note 12, at para. 34, McLachlin C.J.C. observed: "The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow* [*id.*], *Nikal* [*R. v. Nikal*, [1996] S.C.J. No. 47, [1996] 1 S.C.R. 1013 (S.C.C.)], and *Gladstone* [*R. v. Gladstone*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723 (S.C.C.)], where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour *before* determination of the right" (emphasis in original). If Aboriginal fishing rights exist and can be infringed before determination by a court, surely Aboriginal title must as well. See also *R. v. Van der Peet*, [1996] S.C.J. No. 77, at para. 28, [1996] 2 S.C.R. 507 (S.C.C.) [hereinafter "*Van der Peet*"]: "In identifying the basis for the recognition and affirmation of aboriginal rights it must be remembered that s. 35(1) did not create the legal doctrine of aboriginal rights; aboriginal rights existed and were recognized under the common law: *Calder v. Attorney-General of British Columbia*, [1973] S.C.J. No. 56, [1973] S.C.R. 313" [hereinafter "*Calder*"].

<sup>34</sup> *Tsilhqot'in Nation*, *supra*, note 1, at paras. 111-112.



from forestry regulation” until land claims are resolved if the *Forest Act* does not apply to these lands in the meantime.<sup>35</sup> While this is a legitimate concern, with all due respect I think that the Chief Justice’s manner of resolving it is problematic. As mentioned above, she thought that the provincial legislature must have intended the Act to apply to lands where Aboriginal title was claimed but unproven because “[t]o hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based.”<sup>36</sup> One has to wonder whether the legislature had any such intent, keeping in mind that legislative intent does not depend on what was actually in the minds of the legislators, but rather on a court’s assessment of the intent as derived from the words of the statute and the historical context.<sup>37</sup> Instead, given the historical denial of the existence of Aboriginal title by the government of British Columbia<sup>38</sup> and the absence of any reference to Aboriginal title in the *Forest Act*, it is more likely that the legislature simply and mistakenly assumed that any lands in the province that were not privately owned were Crown lands.<sup>39</sup> But surely such an important issue as the application of provincial laws to lands under Aboriginal title claim should not depend on presumed legislative intent, especially if based on a fundamental mistake of law.<sup>40</sup>

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<sup>35</sup> *Id.*, at para. 113.

<sup>36</sup> *Id.*, at para. 115.

<sup>37</sup> See P. St. J. Langan, *Maxwell on the Interpretation of Statutes*, 12th ed. (London: Sweet and Maxwell, 1969), at 1; Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed. (Toronto: Carswell, 2011), at 5-6, 13-14, 315-24; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, ON: LexisNexis Canada, 2014), at 269.

<sup>38</sup> Although this denial was called into question by the Supreme Court in *Calder*, *supra*, note 33, it was not definitively put to rest until the Court’s 1997 decision in *Delgamuukw*, *supra*, note 3, which came after enactment of the *Forest Act*.

<sup>39</sup> Perhaps this is what McLachlin C.J.C. had in mind when she stated in *Tsilhqot’in Nation*, *supra*, note 1, at para. 114, that “[i]t seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain ‘Crown land’ under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement.”

<sup>40</sup> As recently as 2004 in *Haida Nation*, *supra*, note 12, at para. 58, the province was still arguing that s. 109 of the *Constitution Act, 1867*, “gives it exclusive right to the land at issue” (*i.e.*, the land subject to the Haida Nation’s strong Aboriginal title claim that had been included in tree farm licences granted by the Crown). The Court rejected this argument at para. 59 because it had been wrong as a matter of law ever since *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.) laid down that the provincial Crown’s s. 109 title is subject to Aboriginal title.

If Aboriginal title vested at common law at the time of Crown assertion of sovereignty,<sup>41</sup> that legal reality could not have been altered by the British Columbia legislature when it enacted the *Forest Act*.<sup>42</sup> The Supreme Court has repeatedly held that, while provincial laws of general application can apply to Aboriginal people and their lands, the provinces cannot legislate directly in relation to “Indians, and Lands reserved for the Indians”<sup>43</sup> by singling them out for special treatment in a way that impairs their status or rights.<sup>44</sup> If the provinces cannot explicitly single Indians and Indian lands out for special treatment, they cannot do so implicitly.<sup>45</sup> And yet that is what McLachlin C.J.C. seems to have concluded the legislature did when it enacted the *Forest Act*. As she held, private lands are excluded from the Act,<sup>46</sup> so Aboriginal title lands are the only lands not owned by the Crown that would be implicitly included in the Act’s definition of “Crown lands”. As the effect of this interpretation would be to bring Aboriginal title lands, and no other lands that are not owned by the Crown, within the scope of the Act, this intent could cause the definition to cross the line into exclusive federal jurisdiction and render it *ultra vires* the province.<sup>47</sup>

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<sup>41</sup> See text at notes 24-27, *supra*.

<sup>42</sup> Perhaps McLachlin C.J.C. was suggesting that Aboriginal title could be vested for some purposes from the time of Crown assertion of sovereignty, but not for others such as application of the *Forest Act*. If so, the result would seem to be that the Aboriginal title interest in forests in British Columbia was vested *until* it became unvested by enactment of that statute. If so, I think this aspect of the *Forest Act* would have to be *ultra vires* for the reasons outlined in the text following this note.

<sup>43</sup> *Constitution Act, 1867*, s. 91(24).

<sup>44</sup> See *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1979] S.C.J. No. 138, [1980] 1 S.C.R. 1031 (S.C.C.); *R. v. Sutherland*, [1980] S.C.J. No. 85, [1980] 2 S.C.R. 451 (S.C.C.); *R. v. Dick*, [1985] S.C.J. No. 62, [1985] 2 S.C.R. 309 (S.C.C.) [hereinafter “*Dick*”]; *Delgamuukw*, *supra*, note 3, at para. 179; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, at para. 67, [2002] 2 S.C.R. 146 (S.C.C.); *R. v. Morris*, [2006] S.C.J. No. 59, at para. 41, [2006] 2 S.C.R. 915 (S.C.C.) [hereinafter “*Morris*”]. Note that invalidity due to singling out is distinct from reading down due to the doctrine of interjurisdictional immunity: see Peter Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented (Toronto: Carswell, 2007), at §§ 15.5(b), 15.7-8, 28.2(b)-(c). The latter doctrine will be discussed in Part III of this article.

<sup>45</sup> See *Dick*, *id.*, at para. 30, where Beetz J., relying on *R. v. Kruger*, [1977] S.C.J. No. 43, [1978] 1 S.C.R. 104 (S.C.C.) [hereinafter “*Kruger*”], held unanimously that singling out can be either overt or colourable. On the application of the doctrine of colourability in other division-of-powers contexts, see *Ladore v. Bennett*, [1939] A.C. 468, at 482; *Amax Potash Corp. v. Saskatchewan*, [1976] S.C.J. No. 86, [1977] 2 S.C.R. 576, at 590-91 (S.C.C.) [hereinafter “*Amax Potash Corp.*”]; *Reference re Upper Churchill Water Rights Reversion Act 1980 (Newfoundland)*, [1984] S.C.J. No. 16, [1984] 1 S.C.R. 297, at 332 (S.C.C.).

<sup>46</sup> *Tsilhqot’in Nation*, *supra*, note 1, at para. 109.

<sup>47</sup> See cases cited in note 44, *supra*, holding that singling out renders provincial laws unconstitutional and invalid, whereas provincial laws of general application that are otherwise valid

But is McLachlin C.J.C.'s concern that a legal vacuum might result if lands subject to unestablished Aboriginal title claims are not within the definition of "Crown lands" in the *Forest Act* justified? In my opinion, the issue here is not so much one of legal vacuum as of legal liability. The problem is that prior to the establishment of Aboriginal title we just don't know whether these lands are owned by the Crown or by the Aboriginal claimants. The Court's way of addressing this uncertainty in *Haida Nation* was to implicitly *presume* that the lands are Crown lands and that the *Forest Act* applies,<sup>48</sup> but to impose a duty on the Crown to consult the Aboriginal claimants and accommodate their interests in appropriate circumstances. But once title is established, any prior action in relation to the land taken or authorized by the Crown without the consent of the Aboriginal claimants could amount to an unjustifiable infringement of Aboriginal title.<sup>49</sup> I think the Court was striving to avoid this result in *Tsilhqot'in Nation* by interpreting the *Forest Act* so that Aboriginal title in relation to forests would only vest when proven, thereby potentially protecting the province from liability for prior unjustifiable infringements.

Given that the Court seems to have taken for granted in *Haida Nation* that Crown title and jurisdiction are presumed prior to proof of Aboriginal title, there is no legal vacuum in this context. If the province grants timber harvesting rights to a corporation without Aboriginal consent and Aboriginal title is subsequently proven, the presumptions of Crown title and jurisdiction would then be rebutted. As a result, the grant of harvesting rights should be invalid. In *Tsilhqot'in Nation*, McLachlin C.J.C. envisaged just this kind of scenario:

Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For

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are not *ultra vires*, but might have to be read down so as not to impair Indian status or capacity: see Hogg, *supra*, note 44, at § 28.2(b)-(c).

<sup>48</sup> This interpretation could perhaps be supported by the presumption of constitutionality of legislation in the context of division of powers: see *Kruger, supra*, note 45, at 112; *Reference re Firearms Act (Canada)*, [2000] S.C.J. No. 31, at para. 25, [2000] 1 S.C.R. 783 (S.C.C.); *Siemens v. Manitoba (Attorney General)*, [2002] S.C.J. No. 69, at para. 33, [2003] 1 S.C.R. 6 (S.C.C.). See Joseph Eliot Magnet, "The Presumption of Constitutionality" (1980) 18 Osgoode Hall L.J. 87; Hogg, *supra*, note 44, at § 15.5(i).

<sup>49</sup> See Kent McNeil, "Aboriginal Rights, Resource Development, and the Source of the Provincial Duty to Consult in *Haida Nation* and *Taku River*" (2005) 29 S.C.L.R. (2d) 447, at 460. See also note 33, *supra*. In *R. v. Sappier; R. v. Gray*, [2006] S.C.J. No. 54, [2006] 2 S.C.R. 686 (S.C.C.), the Court declared an Aboriginal right to harvest wood for domestic purposes to exist, and accepted at para. 54 that it had been infringed by provincial legislation before the case went to trial.

example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable *going forward* to the extent that it unjustifiably infringes Aboriginal title.<sup>50</sup>

So McLachlin C.J.C. contemplated situations where the provincial legislation could be rendered inapplicable after proof of title, but by including the words “going forward” she evidently meant to preserve the legality of what had been done previously. But what difference does it make whether legislation governing the grant of a forestry licence, for instance, is rendered inapplicable from the time Aboriginal title is proven or beforehand? What happens to that licence at the time Aboriginal title is declared? If the legislation authorizing the grant of the licence and its operation is inapplicable going forward because it unjustifiably infringes the title, surely the grant would be invalid from that time forward as well.

The Court’s main concern obviously relates to the period prior to proof of title.<sup>51</sup> As suggested above, the issue here is really liability, as there would be no legal vacuum as long as provincial title and jurisdiction are presumed. If provincial laws that infringe Aboriginal title are rendered inapplicable only after Aboriginal title is proven, then actions taken under authority of those laws prior to that time apparently could have been legal even if they unjustifiably infringed Aboriginal title.<sup>52</sup> If this is correct, the province and the recipients of Crown grants

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<sup>50</sup> *Tsilhqot’in Nation*, *supra*, note 1, at para. 92 (emphasis added).

<sup>51</sup> *Id.*, especially paras. 113-115.

<sup>52</sup> See, however, *British Columbia Power Corp. v. British Columbia Electric Co.*, [1962] S.C.J. No. 48, [1962] S.C.R. 642 (S.C.C.), and *Amax Potash Corp.*, *supra*, note 45. In those cases, the Supreme Court decided that a province cannot escape liability for actions taken pursuant to legislation subsequently held to be unconstitutional. In the former case, Kerwin C.J.C. stated at 644: “In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid.” *British Columbia Power Corp.* was followed by Maclean J.A. in his concurring judgment in *Canex Placer Ltd. v. British Columbia (Attorney General)*, [1975] B.C.J. No. 1155, 58 D.L.R. (3d) 241 (B.C.C.A.). See also *Law Society of British Columbia v. Canada (Attorney General)*, [1978] B.C.J. No. 359, 92 D.L.R. (3d) 53 (B.C.S.C.), *affid* [1980] B.C.J. No. 1949, 108 D.L.R. (3d) 753 (B.C.C.A.), *affid* [1982] S.C.J. No. 70, [1982] 2 S.C.R. 307 (S.C.C.). Compare *Guimond v. Quebec (Attorney General)*, [1996] S.C.J. No. 91, [1996] 3 S.C.R. 347 (S.C.C.); *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, [2002] 1 S.C.J. No. 13, [2002] 1 S.C.R. 405 (S.C.C.), neither of which involved assertion of a property right by the Crown.

of resources on Aboriginal title lands might not be liable for removal of resources from Aboriginal title lands prior to proof of title. This can't be right. Taking the *Forest Act* as an example, consider a parallel situation where a private landowner and the Crown are in dispute over title to a particular parcel of land. The Crown proceeds on the assumption that it owns the land and grants harvesting rights to a forestry company, and the company proceeds to harvest timber. The individual claiming title goes to court and obtains a declaration of title in her favour. As a result, the *Forest Act* would not have applied to the land at the time of the grant to the forestry company,<sup>53</sup> and so the grant would have been invalid from the outset and the province and the company would probably both be liable to the landowner for infringement of her property rights.<sup>54</sup> Why should the result be any different when the titleholder is an Aboriginal group rather than a private individual? Moreover, how can the result be different as a result of judicial attribution of intention to a provincial legislature when the result would be colourable singling out of Aboriginal people and their lands for discriminatory treatment?

In the Conclusion to this article we will return to this issue and suggest an approach that also takes account of our discussion in Part III of the application of provincial laws to Aboriginal title lands *after* title has been established.

### III. APPLICATION OF PROVINCIAL LAWS AFTER ABORIGINAL TITLE HAS BEEN ESTABLISHED

As McLachlin C.J.C. acknowledged, the Supreme Court had previously sent mixed messages regarding provincial authority to infringe Aboriginal rights, including title.<sup>55</sup> In *Delgamuukw*, for example, Lamer C.J.C. stated that the provinces can infringe Aboriginal title as long as the infringement can be justified using the test laid down by the

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<sup>53</sup> *Tsilhqot'in Nation*, *supra*, note 1, at para. 109.

<sup>54</sup> As the Crown cannot grant what it does not have, the grant to the forestry company would have been void and any entry and harvesting of timber would have been trespass: see *Case of Alton Woods* (1600), 1 Co. R. 40b, at 44a (K.B.); *Sir Oliver Butler's Case* (1681), 2 Ventr. 344 at 344 (Ch.), *affd* (1685), 3 Lev. 220 (H.L.); *Alcock v. Cooke* (1829), 5 Bing. 340, at 348 (C.P.); *Bristow v. Cormican* (1878), 3 App. Cas. 641 (H.L.); *Attorney-General for the Isle of Man v. Mylchreest* (1879), 4 App. Cas. 294 (P.C.); *City of Vancouver v. Vancouver Lumber Co.*, [1911] A.C. 711, at 721 (P.C.).

<sup>55</sup> *Tsilhqot'in Nation*, *supra*, note 1, at paras. 35-38.

Court in *Sparrow*.<sup>56</sup> However, elsewhere in *Delgamuukw* he said that Aboriginal title is within the core of Parliament's exclusive jurisdiction over "Indians, and Lands reserved for the Indians",<sup>57</sup> and so has been protected since Confederation against *extinguishment* by provincial laws by the doctrine of interjurisdictional immunity.<sup>58</sup> Then in *Morris*,<sup>59</sup> the Supreme Court held (unanimously on this point) that non-commercial treaty rights to hunt are within the core of federal jurisdiction over "Indians" and thus are protected from *infringing* provincial laws by interjurisdictional immunity. As Justice Vickers held at trial in *Tsilhqot'in Nation*,<sup>60</sup> if treaty rights are so protected, Aboriginal title must have equivalent protection. But in a striking reversal, the Supreme Court held in *Tsilhqot'in Nation* that the doctrine of interjurisdictional immunity no longer applies to Aboriginal rights, including title. "To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights," McLachlin C.J.C. stated, "it should no longer be followed".<sup>61</sup> In the modern era, she continued, Aboriginal rights are adequately protected by constitutional recognition and affirmation of these rights in section 35 of the *Constitution Act, 1982*,<sup>62</sup> "which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups".<sup>63</sup>

In my opinion, the Court's rejection of the application of division-of-powers protection through the doctrine of interjurisdictional immunity needs to be qualified.<sup>64</sup> In discussing this matter, McLachlin C.J.C.

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<sup>56</sup> *Supra*, note 32. See *Delgamuukw*, *supra*, note 3, at para. 160. For critical commentary, see Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431, republished in Kent McNeil, *Emerging Justice?*, *supra*, note 9, at 249; Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dalhousie L.J. 185.

<sup>57</sup> *Constitution Act, 1867*, s. 91(24).

<sup>58</sup> *Delgamuukw*, *supra*, note 3, at paras. 177-178, 181.

<sup>59</sup> *Supra*, note 44.

<sup>60</sup> *Tsilhqot'in Nation v. British Columbia*, [2007] B.C.J. No. 2465, at paras. 1021-1032, [2008] 1 C.N.L.R. 112 (B.C.S.C.). See *Tsilhqot'in Nation*, *supra*, note 1, at paras. 132-133.

<sup>61</sup> *Tsilhqot'in Nation*, *supra*, note 1, at para. 150. Two weeks later, in *Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014] S.C.J. No. 48, [2014] 2 S.C.R. 447 (S.C.C.), the Court applied this aspect of *Tsilhqot'in Nation* and held at para. 53 that "the doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights", effectively overruling this aspect of *Morris*, *supra*, note 44.

<sup>62</sup> *Supra*, note 17.

<sup>63</sup> *Tsilhqot'in Nation*, *supra*, note 1, at paras. 138-152, quotation at para. 152.

<sup>64</sup> In addition to the analysis in the text, it should be emphasized that the Court's rejection of the application of the doctrine of interjurisdictional immunity cannot have been intended to be

consistently referred to “regulation” of these rights by provincial laws. For example, she stated:

Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that *preserves the Aboriginal right while permitting effective regulation of forests by the province*, as required by s. 35 of the *Constitution Act, 1982*.<sup>65</sup>

So provincial forestry laws could apply to govern harvesting of timber on Aboriginal title lands *by the Aboriginal titleholders themselves*, either because these laws would not infringe the titleholders’ rights or because the infringement could be justified.<sup>66</sup> However, the Aboriginal titleholders’ rights to the timber on their lands would not be preserved if the province had the authority to grant licences to private individuals or corporations to harvest timber there, even if this could somehow be justified under the *Sparrow* test.<sup>67</sup> The distinction between governmental regulation and taking is well established in expropriation law,<sup>68</sup> and was acknowledged by McLachlin C.J.C. in *Tsilhqot’in Nation*:

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retroactive. In her discussion of this issue, McLachlin C.J.C. made it very clear that the reason why the doctrine is no longer applicable to Aboriginal and treaty rights is because those rights are now adequately protected by s. 35 of the *Constitution Act, 1982*, and the justifiable infringement test. As those protections were not in place prior to the enactment of s. 35, the protection afforded by the division of powers and interjurisdictional immunity should still have impeded provincial authority to infringe prior to 1982. See *Dick*, *supra*, note 44, a case involving Aboriginal hunting rights that arose before the enactment of s. 35, where the Court expressed the view that, if on the facts the hunting was within the “core of Indianness” of the Aboriginal people in question, provincial game laws could not apply because they would impinge on the federal jurisdiction over “Indians” provided by s. 91(24) of the *Constitution Act, 1867*. In *Tsilhqot’in Nation*, *id.*, at para. 152, McLachlin C.J.C., referring to situations outside of the context of s. 35 (which would include the *Dick* case) said that “conflict between the federal and provincial levels of government [can be] appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports this.” It can also be argued that, right up to the Court’s decision in *Tsilhqot’in Nation*, interjurisdictional immunity continued to apply to Aboriginal and treaty rights, as that was the state of the law laid down in *Morris*, *supra*, note 44, in relation to treaty rights — and by extension to Aboriginal rights — before that aspect of *Morris* was overruled by *Tsilhqot’in Nation*.

<sup>65</sup> *Tsilhqot’in Nation*, *id.*, at para. 151 (emphasis added).

<sup>66</sup> *Id.*, at paras. 105, 118-127.

<sup>67</sup> Even if justifiable, it is important to realize that the cost to the province might be prohibitive. The *Sparrow* test requires governments to pay compensation for infringements that have an economic impact on Aboriginal title: *Delgamuukw*, *supra*, note 3, at para. 169. In the current context, the cost to the province of compensating the Aboriginal titleholders for timber removed from their lands would probably exceed the benefits, leaving taxpayers on the hook.

<sup>68</sup> See *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, [1999] N.S.J. No. 283, 177 D.L.R. (4th) 696 (N.S.C.A.); *Canadian Pacific Railway Co. v. Vancouver (City)*, [2006] S.C.J.

“General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties.”<sup>69</sup> She nonetheless regarded such transfers of property rights as potentially justifiable: “The issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group’s ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.”<sup>70</sup>

Standing timber is part of the land, as are minerals that have not been severed by mining — both belong to Aboriginal titleholders as incidents of their title.<sup>71</sup> When a private landowner has mineral rights, a taking of those rights by the Crown amounts to expropriation, which requires statutory authority and payment of full compensation.<sup>72</sup> Similarly, a grant by the Crown of a timber cutting licence on privately owned land would require statutory authority and would amount to expropriation of the timber.<sup>73</sup> However, this situation does not currently arise in British Columbia because the provincial *Forest Act* does not apply to private land; it only applies to “Crown land” and “Crown timber”.<sup>74</sup> Likewise, in *Tsilhqot’in Nation* the Court held that, as a matter of statutory interpretation, the *Forest Act* does not apply to Aboriginal title land and the timber thereon once title is established because they are not “Crown land” and “Crown timber”.<sup>75</sup> Nonetheless, McLachlin C.J.C. said it was

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No. 5, [2006] 1 S.C.R. 277 (S.C.C.). More generally, see Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed. (Toronto: Carswell, 1992).

<sup>69</sup> *Tsilhqot’in Nation*, *supra*, note 1, at para. 124.

<sup>70</sup> *Id.* See also para. 127. Compare the dissenting judgment of McLachlin J. (as she then was) in *Van der Peet*, *supra*, note 33, at paras. 314-316, where she characterized such transfers as “unconstitutional”. For discussion, see Kent McNeil, “Aboriginal Title as a Constitutionally Protected Property Right” in Owen Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000), 55, republished in McNeil, *Emerging Justice?*, *supra*, note 9, at 292 [hereinafter “McNeil, ‘Constitutionally Protected Property Right’”].

<sup>71</sup> See *Tsilhqot’in Nation*, *supra*, note 1, at para. 116; *Delgamuukw*, *supra*, note 3, at paras. 119-124.

<sup>72</sup> See *British Columbia v. Tener*, [1985] S.C.J. No. 25, [1985] 1 S.C.R. 533 (S.C.C.).

<sup>73</sup> Any taking of private property by the Crown requires clear and plain statutory authority: see *Attorney-General v. De Keyser’s Royal Hotel*, [1920] A.C. 508 (H.L.); *Burmah Oil Co. v. Lord Advocate*, [1965] A.C. 75 (H.L.); *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.J. No. 54, [1933] S.C.R. 629, at 638 (S.C.C.); *Attorney-General for Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427, especially at 450 (P.C.); *R. v. Colet*, [1981] S.C.J. No. 2, [1981] 1 S.C.R. 2, at 10 (S.C.C.).

<sup>74</sup> *Tsilhqot’in Nation*, *supra*, note 1, at para. 109. See note 20, *supra*.

<sup>75</sup> *Id.*, at para. 116.



obvious that “it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.”<sup>76</sup>

So what are these constitutional restraints? First, of course, there is section 35 of the *Constitution Act, 1982*.<sup>77</sup> As McLachlin C.J.C. outlined in her judgment, any infringement of Aboriginal title by the application of an amended *Forest Act*, especially the granting of cutting licences to private companies, would have to be justified.<sup>78</sup> Second, there is division of powers and the impact of section 91(24) of the *Constitution Act, 1867*.<sup>79</sup> As we have seen, McLachlin C.J.C. ruled that the doctrine of interjurisdictional immunity no longer applies in the context of provincial *infringement* of section 35 Aboriginal and treaty rights. However, in *Delgamuukw* Lamer C.J.C. held that the federal government’s exclusive section 91(24) jurisdiction over “Indians, and Lands reserved for the Indians” means that, even before section 35 was enacted in 1982, the provinces did not have the authority to *extinguish* Aboriginal title.<sup>80</sup> He gave two reasons. Taking his second reason first, he said that the doctrine of interjurisdictional immunity protects Aboriginal title from extinguishment by provincial laws of general application because Aboriginal title is within the core of exclusive federal jurisdiction.<sup>81</sup> As McLachlin C.J.C. in *Tsilhqot’in Nation* only envisaged infringement, not extinguishment, of Aboriginal title by provincial laws, she does not appear to have overruled this aspect of Lamer C.J.C.’s decision.<sup>82</sup>

Chief Justice Lamer’s second reason why provincial laws could never extinguish Aboriginal title was that extinguishment requires “clear and plain” legislative intent, and any provincial law with sufficient intent to extinguish would cross the line into federal jurisdiction. This reason does not depend on interjurisdictional immunity. It arises instead from the constitutional rule discussed in Part II of this article that provincial laws that single out “Indians” or “Lands reserved for the Indians” for

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<sup>76</sup> *Id.*

<sup>77</sup> *Supra*, note 17.

<sup>78</sup> *Tsilhqot’in Nation*, *supra*, note 1, at paras. 117-127.

<sup>79</sup> *Supra*, note 23.

<sup>80</sup> *Delgamuukw*, *supra*, note 3, at paras. 172-181.

<sup>81</sup> *Id.*, at para. 181.

<sup>82</sup> She could not have envisaged extinguishment because, since the enactment of s. 35 in 1982, neither the provincial legislatures nor Parliament can unilaterally extinguish Aboriginal rights: *Van der Peet*, *supra*, note 33, at para. 28; *Mitchell v. Canada (Minister of National Revenue – M.N.R.)*, [2001] S.C.J. No. 33, at para. 11, [2001] 1 S.C.R. 911 (S.C.C.).

special treatment are not laws of general application — they are laws in relation to those subject matters and so are *ultra vires* and invalid.<sup>83</sup> Chief Justice Lamer put it this way:

My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.<sup>84</sup>

The issue of invalidity of provincial laws for singling out Aboriginal title lands was not addressed at all by McLachlin C.J.C. in *Tsilhqot'in Nation*. However, one has to wonder how the provincial legislature could amend the *Forest Act* so that it would apply to Aboriginal title lands without singling those lands out for special treatment, which established case law has indicated would be *ultra vires* the province.<sup>85</sup> In theory it might be possible for the province to amend the Act so that it applies more broadly, making the amendment a law of general application by extending the definitions of “lands” and “timber” to all lands and timber in the province, but one can imagine the political outcry from private landowners if that were done, especially if it gave the province the authority to grant timber harvesting licences on private land to forestry companies, which is one sort of infringement that McLachlin C.J.C. envisaged. Private landowners do have to accept regulation of their land rights by zoning laws, building codes, environmental protection laws, and so on.<sup>86</sup> In some situations, legislation also permits expropriation of private lands for public purposes, such as construction of roads and airports.<sup>87</sup> However, expropriation of natural resources from private lands for the benefit of private corporations, some of which may be foreign owned, is an entirely different matter that British Columbians, and Canadians generally, would be unlikely to tolerate. So amending the *Forest Act* in the way McLachlin C.J.C. seems to have envisaged may not be a simple matter.

There is, however, a more fundamental issue here: why should Aboriginal titleholders be subject to governmental expropriation of the resources from their lands for the benefit of privately owned corporations

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<sup>83</sup> See text accompanying notes 43-47, *supra*.

<sup>84</sup> *Delgamuukw*, *supra*, note 3, at para. 180.

<sup>85</sup> See cases cited in note 44, *supra*.

<sup>86</sup> See cases cited in note 68, *supra*.

<sup>87</sup> See Todd, *supra*, note 68.

when private landowners are not? This is all the more troubling when one takes into account the fact that Aboriginal land rights are constitutionally protected by section 35 of the *Constitution Act, 1982*, whereas the land rights of other Canadians are not.<sup>88</sup> In my respectful opinion, the Supreme Court went too far in *Tsilhqot'in Nation* if it meant to suggest that British Columbia could amend the *Forest Act* to permit the province to grant timber harvesting rights on Aboriginal title lands to privately owned corporations. I think a preferable approach would involve a compromise position that would permit provincial regulatory laws to infringe Aboriginal title rights for purposes such as environmental protection and control of pests like the pine beetle, but would not allow the expropriation of the resources from Aboriginal title lands, either for the benefit of the province or of private parties. One way to do this would be to apply the distinction in expropriation law between regulation and taking. As we have seen, regulation of private land rights involves zoning laws, building codes, and the like. Expropriation involves government taking of private land or of the resources from the land, thereby extinguishing the property rights to those lands or resources. In *Delgamuukw*, Lamer C.J.C. made clear that, ever since Confederation, the provinces have not been able to extinguish Aboriginal title, not just because of the doctrine of interjurisdictional immunity, but also because that would be *ultra vires* the provinces. So by regarding the taking of resources from Aboriginal title lands as extinguishment rather than infringement of the rights to those resources, one can accord the provinces authority to regulate Aboriginal lands while denying them the authority to expropriate the resources from them.

Provincial authority to regulate Aboriginal lands and resources cannot, however, be taken for granted. If the regulation infringes Aboriginal title rights, it has to be justified under the test that the Court apparently made even more stringent in *Tsilhqot'in Nation*.<sup>89</sup> Chief Justice McLachlin did observe that “[g]eneral regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it will be reasonable, not impose undue hardship, and not deny the holders

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<sup>88</sup> Before the *Constitution Act, 1982* was enacted, this matter was debated and a conscious political decision was made not to include protection of private property rights in the *Canadian Charter of Rights and Freedoms*: see Jean McBean, “The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights” (1988) 26 *Alta. L. Rev.* 548. See also McNeil, “Constitutionally Protected Property Right”, *supra*, note 70.

<sup>89</sup> *Supra*, note 1, at paras. 77-88, 118-127.

of the right their preferred means of exercising it. In such cases, no infringement will result.”<sup>90</sup> However, she did not take account of the impact of Aboriginal law and self-government in this context.<sup>91</sup> In situations where Aboriginal peoples have their own laws governing the management of resources such as forests on their lands, there would be no reason for provincial laws to apply unless the Aboriginal laws were determined on the facts to be inadequate to meet the valid legislative objectives behind the provincial laws.<sup>92</sup> In my opinion, the onus of proving that Aboriginal title lands are not adequately managed by Aboriginal laws would be on the province because the right to use Aboriginal law can also be regarded as a constitutionally protected Aboriginal right,<sup>93</sup> any infringement of which by imposition of provincial law would require justification.<sup>94</sup>

#### IV. CONCLUSION

The application of provincial laws to Aboriginal title lands has been a matter of considerable uncertainty and controversy ever since the Supreme Court ruled definitively in *Delgamuukw* that these lands are under exclusive federal jurisdiction as section 91(24) “Lands reserved for the Indians”. In *Tsilhqot’in Nation*, the Court addressed this matter head on in order to provide badly needed clarity to the

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<sup>90</sup> *Id.*, at para. 123.

<sup>91</sup> See A. Boisselle, “To Dignity Through the Back Door: *Tsilhqot’in* and the Aboriginal Title Test” (in this volume); British Columbia Treaty Commission Annual Report 2014, online: <[http://www.bctreaty.net/files/pdf\\_documents/BCTC-Annual-Report-2014.pdf](http://www.bctreaty.net/files/pdf_documents/BCTC-Annual-Report-2014.pdf)>, at 26.

<sup>92</sup> The first part of the test for valid infringement of Aboriginal rights laid down by the Supreme Court in *Sparrow*, *supra*, note 32, requires the Crown to prove a valid legislative objective. See Kent McNeil, “Envisaging Constitutional Space for Aboriginal Governments” (1993) 19 Queen’s L.J. 95 at 133-36, republished in McNeil, *Emerging Justice?*, *supra*, note 9, 184 at 211-13.

<sup>93</sup> See *Casimel v. Insurance Corp. of British Columbia*, [1993] B.C.J. No. 1834, [1994] 2 C.N.L.R. 22 (B.C.C.A.), where the British Columbia Court of Appeal held that the Carrier People have a constitutional right to rely on their own customary adoption laws. See also *Manychief v. Poffenroth*, [1994] A.J. No. 907, [1995] 2 C.N.L.R. 67 (Alta. Q.B.). In *Campbell v. British Columbia (Attorney General)*, [2000] B.C.J. No. 1524, [2000] 4 C.N.L.R. 1 (B.C.S.C.), Williamson J. held that Aboriginal titleholders’ decision-making authority over their lands is inherent and governmental. This decision was followed in *House of Sga’nisim v. Canada (Attorney General)*, [2011] B.C.J. No. 1940, [2012] 2 C.N.L.R. 82 (B.C.S.C.), but in that case Smith J. held as well that the governmental authority in the Nisga’a Final Agreement, 1998, the validity of which was challenged in both these cases, could also be valid as delegated authority. Justice Smith’s decision was upheld on the latter basis, without deciding the inherent right issue: [2013] B.C.J. No. 179, [2013] 2 C.N.L.R. 226 (B.C.C.A.), leave to appeal refused [2013] S.C.C.A. No. 144 (S.C.C.).

<sup>94</sup> The onus of proving that infringement of an Aboriginal right is justified is on the Crown: *Sparrow*, *supra*, note 32.

law. In doing so, however, I respectfully think the Court overlooked some important considerations.

In regard to the application of provincial laws prior to proof of Aboriginal title in court or acknowledgment thereof in a land claims agreement, the Court assumed there would be a legal vacuum if the British Columbia *Forest Act* in particular were not interpreted so that the term “Crown lands” in the Act includes lands subject to unestablished Aboriginal title claims. In my opinion, this interpretation involves a strained attempt to attribute a non-existent intention to the provincial legislature. But if the intention was to include these lands in the definition of “Crown lands”, this would be *ultra vires* the province because it would be a colourable attempt to single these lands out for unfavourable, discriminatory treatment. Not only that, but as this attribution of intention relates only to a *specific* provincial statute, the Court’s approach does not tell us whether *other* provincial statutes apply to these lands. Each statute that might apply would have to be assessed separately on the basis of the legislative intention behind it, with uncertain results. This is not a workable solution to the legal vacuum the Court was striving to avoid.

In my view, the Court’s fear of a legal vacuum is unjustified. Given that Crown title and provincial jurisdiction are presumed, all relevant provincial laws would presumptively apply prior to establishment of Aboriginal title.<sup>95</sup> In situations where Aboriginal title is subsequently acknowledged in a land claims agreement, problems arising from the application of provincial laws prior thereto could be dealt with in the negotiations. Where Aboriginal title is declared by a court, as in *Tsilhqot’in Nation*, the presumption of Crown title and jurisdiction would be rebutted. As would be the case regarding any land which the Crown mistakenly thought it owned, the Crown and its grantees should be liable to the Aboriginal titleholders for any actions that infringed their rights prior to the declaration of title.

A concern might be raised that fear of liability would impede resource development in British Columbia, and elsewhere in Canada such as the Maritime Provinces where Aboriginal title claims are unresolved, if the Crown and resource companies could be held liable for actions taken prior to declarations of Aboriginal title. I think this concern is largely unfounded. The reality is that most Aboriginal title claims will

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<sup>95</sup> Of course, the application of these laws would be subject to the Crown’s duty to consult and accommodate in appropriate circumstances: see text at notes 13-17, *supra*.

be resolved through agreements, not through litigation,<sup>96</sup> so any compensation for past incursions on settlement lands can be dealt with in the negotiations. Where negotiations do not take place or fail, the Crown can assess the risk on the basis of the strength of the Aboriginal title claims,<sup>97</sup> and companies can seek indemnity guarantees from the province or take out insurance. In areas where claims are weak, the risk may be small. Where claims are strong, the province should either obtain the consent of the Aboriginal claimants before proceeding or abstain from actions that could give rise to claims for compensation.<sup>98</sup> We know from *Haida Nation* that Aboriginal consent is not necessary where Aboriginal title claims are unproven,<sup>99</sup> but this should not allow the Crown to escape liability for incursions on Aboriginal title lands any more than it would if the lands were privately owned.<sup>100</sup>

After a declaration of Aboriginal title, the province must either get the consent of the Aboriginal titleholders for any incursions on their land or be able to justify infringement of their rights.<sup>101</sup> In *Tsilhqot'in Nation*, McLachlin C.J.C. suggested that provincial regulatory laws to prevent forest fires or control pests such as pine beetles would probably apply without infringing Aboriginal title, but of course this would depend on the laws in question and the factual circumstances. However, the Chief Justice does not seem to have taken into account the relevance of Aboriginal laws in this context. Where Aboriginal titleholders have adequate laws of their own governing such matters,<sup>102</sup> application of

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<sup>96</sup> See British Columbia Treaty Commission Annual Report 2014, *supra*, note 91, at 26. After all, it took 40 years from the time the Supreme Court in *Calder*, *supra*, note 33, first acknowledged that Aboriginal title is a legal right for the first declaration of title to be issued in *Tsilhqot'in Nation*, *supra*, note 1.

<sup>97</sup> Assessment of legal risk is an essential element of a lawyer's job, and Crown lawyers should be as capable of doing so as any lawyers.

<sup>98</sup> From an economic perspective, the cost to the province of defending against and paying compensation for strong claims would, in most cases, be greater than the benefit it would receive from resource development.

<sup>99</sup> *Haida Nation*, *supra*, note 12, at para. 48.

<sup>100</sup> In assessing compensation, a court might take into account accommodation measures taken by the Crown in fulfilling its pre-proof duty to consult and accommodate.

<sup>101</sup> *Tsilhqot'in Nation*, *supra*, note 1, especially at paras. 76, 90.

<sup>102</sup> On March 19, 2015, the Tsilhqot'in enacted their own law governing their Aboriginal title lands, affirming the Nemiah Declaration of August 23, 1989: see Tsilhqot'in National Government Press Release, "Tsilhqot'in Nation affirms law for title land", March 20, 2015, online: <[http://www.tsilhqotin.ca/PDFs/Press%20Releases/2015%2003%2020\\_XeniDeclaration.pdf](http://www.tsilhqotin.ca/PDFs/Press%20Releases/2015%2003%2020_XeniDeclaration.pdf)>. The Nemiah Declaration can be found online: <[http://www.tsilhqotin.ca/PDFs/Nemiah\\_Declaration.pdf](http://www.tsilhqotin.ca/PDFs/Nemiah_Declaration.pdf)>.

provincial laws relating thereto should be excluded.<sup>103</sup> Ideally, as McLachlin C.J.C. expressed, “it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both.”<sup>104</sup> This will require respect by the province for the governance authority of Aboriginal peoples that has been sadly lacking in the past. But failing the kind of cooperation the Chief Justice hopes for, one can anticipate litigation to determine which laws are paramount where Aboriginal laws and provincial laws governing Aboriginal title lands come into conflict.

As McLachlin C.J.C. noted in *Tsilhqot’in Nation*, laws regulating land use are one thing, and laws authorizing transfer of the natural resources on Aboriginal title lands to private individuals or corporations are quite another. In my opinion, such transfers should never be justifiable, but I would go further. Even if the provincial legislature could amend existing statutes so as to authorize transfers of resources on Aboriginal title lands without singling those lands out for special discriminatory treatment (which I think is extremely doubtful), such transfers would extinguish the titleholders’ rights to those resources. As Lamer C.J.C. held in *Delgamuukw* and McLachlin C.J.C. did not question in *Tsilhqot’in Nation*, since Confederation the provinces have lacked the authority to extinguish Aboriginal rights for division-of-powers reasons. Any provincial attempt to authorize such transfers should therefore be *ultra vires*.

In *Tsilhqot’in Nation*, McLachlin C.J.C. admitted that the Court did not need to deal with the issue of the application of provincial laws to Aboriginal title lands, as it found on the facts that the Crown had breached its duty to consult with the Tsilhqot’in and accommodate their interests.<sup>105</sup> Strictly speaking, the Court’s analysis of this issue is therefore *obiter*. While lower courts might still be expected to follow this aspect of the judgment,<sup>106</sup> the fact that the Chief Justice explicitly stated that her treatment of this issue was not necessary to the decision may have been intended to provide the Supreme Court with flexibility. As we

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<sup>103</sup> See Kent McNeil, “The Jurisdiction of Inherent Right Aboriginal Governments” (West Vancouver: National Centre for First Nations Governance, 2007), online: <[http://fngovernance.org/ncfng\\_research/kent\\_mcneil.pdf](http://fngovernance.org/ncfng_research/kent_mcneil.pdf)>, at 25-31.

<sup>104</sup> *Tsilhqot’in Nation*, *supra*, note 1, at para. 105.

<sup>105</sup> *Id.*, at paras. 95, 98-99. See note 18, *supra*.

<sup>106</sup> See *R. v. Sellars*, [1980] S.C.J. No. 9, [1980] 1 S.C.R. 527 (S.C.C.). Compare *R. v. Henry*, [2005] S.C.J. No. 76, at paras. 52-59, [2005] 3 S.C.R. 609 (S.C.C.); *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, at paras. 38-46, [2013] 3 S.C.R. 1101 (S.C.C.) [hereinafter “*Bedford*”].

have seen, in this area of the law the Court has been willing to change direction quite dramatically, as it did when it decided in *Tsilhqot'in Nation* that its unanimous ruling just eight years earlier in *Morris* on the application of the doctrine of interjurisdictional immunity should no longer be followed in the context of section 35 rights.<sup>107</sup> One can therefore be optimistic that in future cases the Court will reconsider problematic aspects of its decision in *Tsilhqot'in Nation* on the application of provincial laws to Aboriginal title lands.

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<sup>107</sup> Recently, the Court has also been willing to change direction where prostitution and assisted suicide are concerned: see *Bedford, id.*; *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, [2015] 1 S.C.R. 331 (S.C.C.).



