

Aboriginal Title and Private Property: The Supersession Thesis Revisited

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I. Introduction

The recent trial decision of Justice Vickers of the British Columbia Supreme Court in *Tsilhqot'in Nation v. British Columbia*¹ has reawakened previously quiescent issues concerning the implications of Aboriginal title claims in Canada for privately held property within potential claim areas. Previous Canadian judicial decisions have tended to downplay any suggestion that Aboriginal title claims would affect privately held land,² preferring to consider resolutions, if it came to a judicial decision in favour of Aboriginal title, that would be made through restitution of Crown lands along with monetary compensation.³ However, as I develop further in Part II, this recent judgment has reawakened uncertainty on this point.

In this paper, I will pursue a narrow claim that we should avoid an interpretation of Aboriginal title that threatens privately held lands. In making this narrow argument, I will assume that there are valid moral justifications for the institution of private property, although my argument will operate agnostically as between different specific justifications.⁴ I will, however, engage more specifically with one particular moral account, this being Jeremy Waldron's arguments on supersession of historic injustice. In Part III, I set out Waldron's basic argument and begin to engage with some of its limits in abstract terms, posing challenges to his account. In Part IV, I consider, however, whether Waldron's argument could be used to support exactly the sort of balancing test at which Justice Vickers's judgment hints. In Part V, I challenge that claim and argue instead that Waldron's argument helps to illuminate relevant distinctions but that an awareness of these distinctions also ultimately pushes us away from the application of Aboriginal title claims directly against privately held property. In the process of making the argument on the narrow point at issue, of course, I thus implicitly (and perhaps controversially) seek to

¹ For discussion of the case, see Dwight G. Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v. British Columbia*" (2008) U.B.C. L. Rev.

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⁴ For some such justifications, see:

salvage something from Waldron's supersession thesis that may have bearing in other circumstances.

II. The Doctrine of Aboriginal Title and Its Application

The doctrine of Aboriginal title is a specific doctrine within Canadian law⁵ recognizing an Aboriginal right to land where there was exclusive occupation of particular lands by an Aboriginal community prior to the assertion of Crown sovereignty over these lands and where there is some form of ongoing, substantial relation between the Aboriginal community and those lands.⁶

Past case law has avoided suggestions that Aboriginal title would affect private land owners. Although the legal technique has not followed the simple approach of McEachern C.J. in the trial court decision in *Delgamuukw* (which the Supreme Court of Canada interpreted early in its judgment in that case as being that any fee simple grant to a third party would give rise to implied extinguishment⁷ before the Court did not mention the matter again), the case law has been almost as adamant. In *Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)*,⁸ the British Columbia Court of Appeal affirmed a decision that a certificate of pending litigation could not be registered under the *Land Title Act* with respect to upcoming Aboriginal title litigation. In *The Chippewas of Sarnia Band* case, the main conclusion of the Ontario Court of Appeal on interactions of private property and Aboriginal title claims was that it would support an exercise of discretion not to grant a title remedy in the case of land now privately owned by innocent third party purchasers.⁹ The same impulse that innocent third parties should not be affected would seem present, as well in the Supreme Court of Canada's recent determination in the duty to consult context that claims based on the duty to consult apply exclusively against the Crown and cannot be invoked against private companies.¹⁰

Given this background, one could have anticipated another reasonably clear decision that Aboriginal title does not affect private land ownership. Justice Vickers, by contrast, is

⁵ The doctrine, of course, is not unique to Canadian law, but I present the Canadian version here.

⁶ SOURCES FOR THIS STATEMENT OF THE TEST

⁷ para. 23 of Delg

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⁹ para 272 (noting the point in general terms) and para. 275 (stating that “[t]he interests of innocent third parties who have relied upon the apparent validity of the Cameron patent must prevail to the extent that the Chippewas assert a remedy that either directly or by necessary implication would set aside the Cameron patent. In so holding, we repeat here that we do not intend to preclude or limit the right of the Chippewas to proceed with their claim for damages against the Crowns.”) A delay by the Chippewas in bringing their claim also factored in the Court's analysis, although the reasoning on the rights of innocent private landholders would appear to have been determinative in any event.

¹⁰ As stated in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at para. 53, “The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests”. The Court at *ibid.*, para. 56 would implicitly have restricted private parties' duties to Aboriginal communities to traditional tort and contract actions.

anything but clear. Indeed, there are different readings on just what Justice Vickers says on this point, heightening the complex implications of the judgment. Some law firms have rushed to try to inform clients of the judgment's implications for private land ownership,¹¹ but they have come to seemingly differing interpretations of its implications. For example, Lawson Lundell pointed out that "the decision does not suggest that third parties who have received tenures from the provincial government in good faith and who have conducted themselves in accordance with those tenures are in any way liable to the Tsilhqot'in Nation, even if their activities have affected the Tsilhqot'in Nation's aboriginal rights or title."¹² Borden Ladner Gervais, by contrast, concluded that the "opinion on the application of provincial laws raises questions about the effect of underlying Aboriginal title on all third party rights derived from provincial authority, such as fee simple titles, licences and tenures."¹³ Blakes presented what would seem to be an intermediate view that "the judge did note that the creation of private interests in the Claim Area, such as by fee simple grant from the Province, has not and cannot extinguish Tsilhqot'in rights, including aboriginal title. The Court essentially left it up to the parties to reconcile the competing interests of the Tsilhqot'in, private parties and governments within the Claim Area."¹⁴

In terms of what he actually says, consistently with the Supreme Court of Canada's decision in *Delgamuukw*,¹⁵ Justice Vickers considers that only the federal government has jurisdiction within the Canadian division of powers to legislate with respect to lands affected by Aboriginal title.¹⁶ He concludes, then, that Aboriginal title has not been extinguished by provincial grants of land in fee simple or of any other interests in land.¹⁷ The implication is that there may be ongoing Aboriginal title interests in land previously thought to be held by private owners.¹⁸

Indeed, Justice Vickers is explicit in both generating a degree of uncertainty on these considerations and attempting to send some calming words about them. In a passage that raises perhaps as many questions as it answers, he writes:

What is not clear from the jurisprudence are the consequences of underlying Aboriginal rights, including Aboriginal title, on the various private interests that exist in the Claim Area. While they have not extinguished the rights of the Tsilhqot'in people, their existence may have some impact on the application or exercise of those Aboriginal rights. This conclusion is consistent with the view of the Ontario Court of Appeal in *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2001] 1 C.N.L.R. 56 (Ont.C.A). Reconciliation of competing interests will be dependant on a variety of factors, including the nature of the interests, the circumstances surrounding the transfer of the interests, the length of the tenure,

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16 para. 1039

17 para. 998

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and the existing land use. Such a task has not been assigned to this Court by the issues raised in the pleadings.¹⁹

Although the task was, in Justice Vickers's own words, "not assigned to this Court", he thus offers a sort of balancing test for assessments of the rival claims of an Aboriginal community asserting a title claim and private land owners. The decision to hint at the possibility of such a test may have arisen from a concern as to the impact on reconciliation of a simple pronouncement of possible risks to private property.

The reactions to Justice Vickers's conclusions on private property are one uncertain element as the *Tsilhqot'in Nation* case moves forward. At this stage, one other court has cited to it as raising uncertainties around conclusions to be drawn concerning relationships between Aboriginal title and private property.²⁰ What is most surprising, perhaps, is what little public reaction it has faced to date, having attracted limited media comment.²¹ In a forthcoming case comment, my co-author and I compare this muted reaction to the much more boisterous reactions experienced when similar issues arose in Australia.²²

Perhaps the reaction has been muted because it is not clear, as yet, what the case means. I say this in a strict doctrinal sense in that the judgment itself ends up declining to recognize the Aboriginal title claim at issue, or even to make an order, but instead offers what it calls an "opinion" that Justice Vickers hopes can guide further negotiations rather than have the matter go back for further trial on unresolved matters.²³ It is not clear whether that is what will happen or not. As the different sides commenced onto attempts at negotiation, they also all filed for leave to appeal the judgment, and it may work its way up the court system. Nonetheless, the mere fact that the judgment opens the prospect of Aboriginal title claims affecting private property marks a significant departure from the more reassuring tones of past jurisprudence and properly opens discussion on whether Aboriginal title should in fact have that implication. Even Kent McNeil, a prominent academic advocate of Aboriginal rights claims, has retreated from this implication to an extent, and although welcoming many dimensions of the judgment, he is quick to suggest that in fact individual private property holders should not face the effects of Aboriginal title claims but that all of society should in fact offer significant compensation to Aboriginal communities with Aboriginal title claims.²⁴ The suggestion that individual property owners should not have their titles overturned may seem intuitive in some respects, but further analyzing the issues calls for a deeper foray into relevant theory. To enter into the discussion, I turn to a prominent, although contested, argument offered by Jeremy Waldron.

¹⁹ paras. 999-1000.

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III. Waldron's Supersession Thesis

In a series of articles,²⁵ Jeremy Waldron has stated and restated a thesis that historic injustices may in some cases have become superseded by changes in factual circumstances such that it is no longer morally obligatory, and perhaps even morally impermissible, to correct them. Within the articles in which he makes this argument, he alludes as well to other arguments against reparations for historic injustice, notably an argument related to the indeterminacy of what would have happened but for an historic injustice given the complex implications of free will.²⁶ Those arguments are interesting—if problematic, for taken to the limits of the principle, it would become impossible to assess damages for any ordinary torts case, for instance, of loss of future income—but they are not my focus here. I wish specifically to draw on, engage with and challenge, but ultimately show the properly limited application of Waldron's supersession thesis.

The thesis begins from a narrow, seemingly innocuous statement: “If the requirements of justice are sensitive to circumstances such as the size of the population or the incidence of scarcity, then there is no guarantee that those requirements (and the rights that they constitute) will remain constant in relation to a given resource or piece of land as the decades and generations go by.”²⁷ Taking the point more abstractly, Waldron reasons to another conclusion that might seem similarly saccharine: “it seems possible that an act which counted as an injustice when it was committed in circumstances C1 may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the meantime from C1 to C2. When this happens, I shall say that the injustice has been *superseded*.”²⁸

Waldron then offers what he considers a specific example of such a supersession of historic injustice. He asks us to imagine a situation of plenty in which group Q seizes a waterhole from group P out of sheer greed and insists on sharing it, without sharing anything with P. Q's taking of the waterhole is a clear injustice. However, if circumstances later change, such that this waterhole becomes the only waterhole that is not dry, Q's ongoing sharing of the waterhole will cease to be unjust, the injustice having been superseded by circumstances.²⁹

And, here comes the significant conclusion. Waldron admits that this argument obviously does not mean that every unjust taking of land has had its injustice

²⁵ Jeremy Waldron, “Historic Injustice: Its Remembrance and Supersession”, in G. Oddie & R. Perrett, eds., *Justice, Ethics, and New Zealand Society* (Auckland: Oxford University Press, 1992); Jeremy Waldron, “Superseding Historic Injustice” (1992) 103 *Ethics* 4; ADD OTHER CITES

²⁶ Waldron 1992 pp 8-11; Waldron 2002 pp 144-146

²⁷ 1992 p 16

²⁸ 1992 p 24; Waldron 2002 p 155

²⁹ 1992 pp 24-25; Waldron 2002 pp 151-52

superseded.³⁰ But he also makes the explicit assertion that the argument might imply the supersession of historic injustices against indigenous peoples in North America and Australasia, arguing that since white settlement “[t]he population has increased manifold, and most of the descendants of the colonists, unlike their ancestors have nowhere else to go. We cannot be sure that these changes in circumstances supersede the injustice of their continued possession of aboriginal lands, but it would not be surprising if they did. The facts that have changed are exactly the sort of facts one would expect to make a difference to the justice of a set of entitlements over resources.”³¹

One frustrating element of Waldron’s account is that it is offered essentially, and repeatedly, as a defensive account, setting up a hurdle that advocates of reparations for historic injustices or, more specifically,³² advocates for Aboriginal land rights claims, are tasked with overcoming. Waldron, in other words, does not develop a constructive case. He does not flesh out when his argument does or does not challenge a particular claim. He sets it out only as a vague obstacle, perhaps leaving us in a genuinely frustrating position when we have begun with a vague judicial decision that might arguably now be met by vague objections.

Nonetheless, Waldron’s argument has taken on a certain degree of prominence in related debates, with many citing to it to at least some extent.³³ Indeed, some have become actually enraged by it to the point that they dismiss it immediately, without analysis, as a racist attempt to justify illegitimate dispossessions of indigenous communities. So, for instance, Dale Turner, in a generally carefully reasoned argument, ends up challenging Waldron’s supersession thesis in fairly emotive terms.³⁴ That some would react against Waldron’s argument more emotively might be understandable in some respects, but emotional reactions seldom get us far in convincing those who hold different points of view. It is important, rather, to engage carefully with Waldron’s argument, to challenge it where it needs to be challenged, and to show its limits, or one ultimately surrenders to its force amongst those who will cite it without much analysis either, thus giving it a force that it arguably does not deserve.³⁵

Waldron’s thesis makes a limited claim, that there may be some circumstances in which an injustice becomes superseded by circumstances. Waldron is ready to interpret this as giving rise to an internal limit on the property rights held by an original possessor of land or resources,³⁶ thus interpreting, for instance, the original waterhole owner’s claim as inherently limited relative to circumstances in which enforcing this claim becomes unjust.³⁷ However, his waterhole examples present dramatic circumstances of humanitarian need. That justice might permit overriding rights in certain circumstances of dramatic humanitarian need does not necessarily imply an internal limit on the rights

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31 1992 p 261; Waldron 2002 p 156

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so much as what one might equally take to be a humanitarian exception that may arise in the context of humanitarian emergencies but not as a general rights limitation.³⁸

Waldron's waterhole examples do not necessarily prove any more than this more moderate claim. And, indeed, this limited conclusion is not inconsistent with his vaguely stated supersession thesis: "an act which counted as an injustice when it was committed in circumstances C1 may be transformed, so far as its ongoing effect is concerned, into a just situation if circumstances change in the meantime from C1 to C2. When this happens, I shall say that the injustice has been *superseded*."³⁹

The question arising is whether injustices are superseded in a wider range of circumstances. Waldron asserts that they are. But his argument ultimately offers little more than a weakly-worded, probabilistic assertion about the history of North America and Australasia that "[t]he facts that have changed are exactly the sort of facts one would expect to make a difference to the justice of a set of entitlements over resources."⁴⁰

Waldron does not explain exactly how, nor does he offer any genuinely richer argument on the point, leaving much for others to discuss.

Waldron's supersession thesis does raise interesting questions, but its force is potentially limited. What we need to explore further is whether the existence of the possibility of supersession has any implications for Aboriginal title claims to privately held property.

IV. Waldron's Thesis as a Balancing Test

Waldron's argument is precisely that circumstances may affect the justice of seeking to undo a historic injustice. One natural implication of it, then, might seem to be that it is appropriate to have regard to the circumstances in determining the appropriate resolution for a particular historic injustice, including for the illegitimate taking of Aboriginal lands that might be corrected through the doctrine of Aboriginal title. On this line of argument, then, Justice Vickers's balancing test might well seem to flow naturally.

Justice Vickers, although not developing it further, states that "[r]econciliation of competing interests will be dependant on a variety of factors, including the nature of the interests, the circumstances surrounding the transfer of the interests, the length of the tenure, and the existing land use."⁴¹ The multifactorial analysis that would flow from this statement, and that we may see as a sort of balancing test, is one that seems to fit with what might matter in respect of the justice of seeking to correct a historic injustice in various situations. We can perhaps see this point most clearly by imagining the extremes within the various factors Justice Vickers suggests.

In Scenario A, we might imagine the following factors: (1) a particular Aboriginal community having a particularly strong connection to a specific site – perhaps it was used

³⁸ Cf. Patton 260.

³⁹ 1992 p 24; Waldron 2002 p 155

⁴⁰ 1992 p 261; Waldron 2002 p 156

⁴¹ paras. 999-1000.

extensively as a particularly sacred spiritual site prior to its having been taken by white settlers; (2) the private property owner having only a limited interest in the land, having for some reason given back some of the rights in the land to the Crown; (3) the historically unjust transfer having been accomplished through brutal violence and fraud in which the private property owner's predecessors were complicit – or, to put the point at its strongest, consider even a scenario where the identical private property owner (a long-standing corporation) was complicit; (4) the unjust taking of the land having been relatively recent; and (5) the land currently being scarcely used, if at all, other than by the Aboriginal community itself, which has been permitted to hunt and fish on it.

In Scenario B, we might imagine a different set of factors: (1) the Aboriginal community having made little use of the land, such that its use has only barely crossed the threshold even giving rise to an Aboriginal title claim; (2) the private property owner seeing a particularly strong connection to the land, which has been within the owner's family for generations; (3) the original transfer of the land from the Aboriginal community having been accomplished in error rather than through any deliberate taking and the land having been transferred between several *bona fide* purchasers early on, obscuring any error in its original acquisition; (4) the private property ownership having stretched back over four hundred years; and (5) the land currently being extensively used in ways particularly important to the present owner, including parts of it as sacred sites within this owner's religious traditions.

There is, of course, little doubting that Scenario A presents a stronger case than Scenario B for restoration of the land to the Aboriginal community from which it had been taken. The cumulative difference in these different factors obviously makes a difference, and these particular circumstances do matter. And, one might add, it would not be at all unreasonable to conclude that the moral force of the Aboriginal title claim in various scenarios between A and B, varying on the different factors, would be proportionate (at least metaphorically speaking) to the variation in the different factors.

In as far as Waldron's argument tracks these circumstantial differences, then, it would appear to actually have some truth to it. Indeed, considering something like Scenario B might face down one of the objections we posed to Waldron's claims in the previous section. Scenario B presents something that may not be the most common scenario in respect of private property holdings on land that would have been subject to an Aboriginal title claim but that may at least be a possible and even existing scenario. It presents a more realistic scenario than Waldron's more dramatic waterhole example. At the same time, it presents a scenario in which one can see a strong case that it would be unjust to take the land from the private property owner.

There would, of course, be theories of property that would challenge even the claim of the private property owner in Scenario B.⁴² Yet, to the extent that they do so, they run counter to significant doctrines of common law property, notably possibilities of

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acquisition through prescription, and accordingly have a strong onus to meet.⁴³ Although we cannot within one argument dismiss every possibility of such a case being mounted, it seems at least unlikely that such a case can be successfully argued.

Indeed, there are strong reasons to reject an argument that the private property owner's land should be taken in Scenario B. Specifically, each of the strongest arguments for restoring the land itself to the indigenous community even in these circumstances actually ends up becoming an argument for the land to remain with the current owner. Although these arguments obviously vary with different theories of property,⁴⁴ we can consider at least some of the better arguments to see that this is so. Consider, first, an argument that the indigenous community that seeks the land under the doctrine of Aboriginal title is morally entitled to that land because recovery of the land is important to the community's cultural identity and feeling of wholeness.⁴⁵ However, by the very factors that have varied to give rise to Scenario B, the current owner and that owner's ancestors have lives extensively enmeshed with this land, and the land is vital to their identity. Thus, an argument related to property as identity actually resists the Aboriginal title claim. Consider, second, an argument that allowing the current ownership to continue works an injustice to the Aboriginal community specifically by treating that community unequally in so far as other landowners who had possession of land at the date the land was taken were recognized as legitimate owners of that land and this community, along with other communities facing this similar discrimination, is uniquely unequally treated.⁴⁶ However, here, the fact will be that those not within the scope of an Aboriginal title doctrine do not have a claim for restoration of land four hundred years after the fact. So, the claim as to unequal treatment would have been true at the time of the taking but is no longer true. Third, let us consider an argument that the courts work an ongoing injustice against the Aboriginal community if they deny recovery of the land, for they effectively prefer the imposed Canadian legal system over the law of the Aboriginal community deprived of the land.⁴⁷ This argument might appear most troubling, but ultimately the court adjudicating an Aboriginal title claim is applying neither the Canadian legal system nor an Aboriginal legal system but an intersocietal body of law,⁴⁸ within which the bulk of opinion is that considerations of morality may properly figure.⁴⁹ If those considerations independently weigh in favour of the current owner, then to fail to overturn them is actually to apply properly the intersocietal law. Thus, the claim of the private property owner in Scenario B appears safe.

⁴³ Where certain legal frameworks, notably certain versions of the Torrens land registration system, remove acquisition by prescription, they do so in a context where there is clear evidence available to anyone who seeks it of the legally correct ownership of particular land, something notably not present in the context of a private property owner who acquires land held by an indigenous community in the distant past.

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That said, there is perhaps a further distinction that I should properly introduce that might call into question whether I have applied Waldron's framework as he would have intended. Waldron's argument, in some respects, appears to work well in respect of moral considerations that affect whether a particular private landowner must give up certain specific lands in question. However, in his pushing towards some implications of his argument, Waldron did not couch his factors in terms applicable to these scenarios. Rather, he referred to broader societal issues and whether the overall size of a population and the general options available to its members diminished the settler community's obligations to the indigenous population for historic injustices. My scenario has not been an overall societal scenario but a specific scenario related to specific persons and specific lands.

This objection does not undermine the force of my claims about the moral response to the different scenarios or the fact that circumstantial variations between Scenario A and Scenario B affect the relevant moral responsibilities arising. It says, at most, that Waldron's more abstract claims about the moral effect of circumstances contained potential not fully realized in his extremely generalized historical claims.

However, this objection might direct our attention to a further distinction and further possibility. Thus far, my examples have linked a claim of Aboriginal title to a specific remedy of the return of the land from its present owner to an Aboriginal community with a valid Aboriginal title claim. If there are but two binary options, either that of the present owner retaining the land and the Aboriginal community getting nothing or that of the present owner returning the land to the Aboriginal community and the present owner retaining nothing, then in Scenario B there is a clear case for the present owner retaining the land and in Scenario A a clear case for the Aboriginal community recovering the land. However, considering the scenarios in a societal context opens other possibilities. In Scenario B, third party wrongdoers in the past took the Aboriginal community's land. At least part of the injustice of allowing an Aboriginal title claim against the private property owner would consist in imposing on this owner all of the responsibility for something done by someone else. Separating the claim from the remedy can open different options, such as that of some broader group paying monetary compensation for the land, either to the Aboriginal community or to the present owner, the appropriate claim and appropriate remedy perhaps both to be determined by a complex set of circumstances. I now turn, in the next section, to the implications of separating the wrong and the remedy, but arguing instead that this possibility may actually lead to significant moral reasons not to interfere with current private property holdings.

V. Aboriginal Title, Private Property, and Bright-Line Rules

If the prospect of taking land from an individual property owner whose life is now enmeshed with that land⁵⁰ is what drives the moral force of a number of the circumstances that figure in Justice Vickers's test, which I argued in the last section

⁵⁰ This describes it less agnostically than one could relative to different accounts of property. Those more attracted to a different account of property are free to read this differently.

might seem to be an application in some respects of Waldron's account, then altering the possible remedies might seem to remove the moral force of those circumstances in respect of the claim and alter only what remedy properly applies. However, I want to argue now that this conclusion actually works against the possibility of restoring privately owned lands to Aboriginal communities. Although the possibility exists of paying compensation to private landowners whose lands are found subject to Aboriginal title claims, there are independent reasons to prefer the possibility of forms of compensation to the Aboriginal communities involved that do not affect the property rights of private property owners, other than in rare and exceptional circumstances.

Each of the main arguments for property rights is in fact concerned not just to establish a set of powers, immunities, claims, and so on, but a security in the arrangements around private property. Any possibility of submitting landowners' ownership to a generalized multifactorial analysis to determine whether it may continue is to disrupt this security, thus giving rise to a *prima facie* case against a remedial approach relying on removing land from private landowners. Such a remedial approach would effectively impose a burden of insecurity against every private landowner in any place where there is the possibility of an Aboriginal title claim arising (and this includes, for instance, most of the province of British Columbia). There are inherent reasons to protect the current ownership and to compensate in some other way for wrongs of the past. Whether any of these wrongs have been wholly superseded is a different question on which Waldron's argument may raise further questions, but the remedy of taking back privately held lands is in any case superseded by the relationship of present landowners to their land.

This claim fits within a broader argument of where bright-line rules are more appropriate than multifactorial tests. [...]

That said, there may be rare exceptions to this general proposition. Where a current landowner was actually actively complicit in fraud or other wrongs, there may be good reasons to contemplate the option of a remedy that removes the specific landowner's unjust enrichment. Where there is a particular reason why specific lands are especially important to an Aboriginal community, the possibility of expropriating those lands from the current landowner, with compensation, may also become appropriate, based on the normal set of moral factors applicable to expropriation. But to set up something other than a bright-line rule protecting current ownership against Aboriginal title claims is already to cause harm. It is that harm that Justice Vickers's reawakening of a prospect of new dispossessions awakens, and it is that harm that the Aboriginal title doctrine should resist.

In one sense, this puts a narrow point related to a very specific clash of Aboriginal title and private property. In another, however, it provides an illustration of a possible application of the supersession of historic injustices. In so doing, it raises the potentially controversial prospect that Waldron's account of supersession has more to be said for it than it first appears. Though Waldron's account has little to be said for it at an abstract level oriented to broad societal factors, it may have applications to more concrete problems, and it is necessary to analyze matters on a case-by-case basis in relation to this

possibility. Attempting to unravel an apparently isolated problem has thus exposed possibly broader implications for substantially different scenarios, manifesting the need for ongoing and urgent theoretical attention to related matters.