



The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 71 (2015)

Article 5

Aboriginal Title and Private Property

John Borrows

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/sclr>



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Citation Information

Borrows, John. "Aboriginal Title and Private Property." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71. (2015).

<http://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/5>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.

Aboriginal Title and Private Property

John Borrows*

Q: What did Indigenous Peoples call this land before Europeans arrived?

A: “OURS.”¹

I. INTRODUCTION

In the ground-breaking case of *Tsilhqot'in Nation v. British Columbia*² the Supreme Court of Canada recognized and affirmed Aboriginal title under section 35(1) of the *Constitution Act, 1982*.³ It held that the Tsilhqot'in Nation possess constitutionally protected rights to certain lands in central British Columbia.⁴ In drawing this conclusion the Tsilhqot'in secured a declaration of “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”.⁵ These are wide-ranging rights. Furthermore, a broad array of remedies exists to enforce these rights.⁶ Such recognition should

* John Borrows, Canada Research Chair in Indigenous Law, University of Victoria Law School and Nexen Chair in Indigenous Leadership, Banff Centre. I would like to thank the following friends for their helpful feedback on earlier drafts of this article: Hannah Askew, Ryan Beaton, Kirsty Gover, Kent McNeil, Aaron Mills, Jeremy Sapers, Jim Tully and Kerry Wilkins.

¹ Will Falk, “Aboriginal Title in Tsilhqot'in: A Radical Reading” (Vancouver Island Community Forest Action Network), online: <<http://forestation.wikidot.com/court>>.

² [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257 (S.C.C.) [hereinafter “*Tsilhqot'in Nation*”].

³ Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Tsilhqot'in Nation, supra*, note 2.

⁴ Tsilhqot'in narratives concerning their homelands are found in David W. Dinwoodie, *Reserve Memories: The Power of the Past in a Chilcotin Community* (Lincoln, NE: University of Nebraska Press, 2002).

⁵ *Tsilhqot'in Nation, supra*, note 2, at para. 73.

⁶ *Tsilhqot'in Nation, supra*, note 2, at paras. 89 and 90. The Tsilhqot'in can claim all the usual remedies for breaches of interest to land as long as they are adapted to their special relationship to land. These remedies include “injunctions, damages, and orders for the Crown to engage in proper consultation and accommodation of Aboriginal title”.

significantly enhance Tsilhqot'in stewardship and control over their traditional territories.⁷ When Aboriginal title is proven it erases the Crown's assumed beneficial interest in relation to Aboriginal lands.

At the same time the Supreme Court was careful to note that the declaration of Aboriginal title did not apply to "privately owned or underwater lands".⁸ In fact, title over such lands was not asserted. Canadians' sense of entitlement to these types of land likely prompted a narrower framing of issues.⁹ The stakes would have been much greater had Aboriginal title affected private ownership and submerged lands.¹⁰

Nevertheless, the implications of the case are very significant. Tsilhqot'in title supplanted the Crown's wrongfully asserted "beneficial interest" within the claim area.¹¹ In the process this declaration changed non-Aboriginal peoples' relationship with Aboriginal title lands.¹² The Crown can no longer derive direct economic benefits from Aboriginal title lands. The Crown's beneficial interest is vacated. This changes property law in Canada.¹³ One can only imagine the public's response if Aboriginal title ousted private ownership within the claim area.

If one thing seems sacrosanct in the common law it is so-called "private" property.¹⁴ Thus, the decision to leave private property aside in

⁷ A description of this process is found in Jonaki Bhattacharyya, Marilyn Baptiste, David Setah & Roger Williams, "It's Who We Are Locating Cultural Strength in Relationship with the Land" in John R. Parkins, Maureen G. Reed, eds., *Social Transformation in Rural Canada: Community, Cultures, and Collective Action* (Vancouver: UBC Press, 2012), at 211.

⁸ *Tsilhqot'in Nation*, *supra*, note 2, at para. 9.

⁹ A decision to frame rights narrowly and not claim third party interests was also made in *Calder v. British Columbia (Attorney-General)*, [1973] S.C.J. No. 56, [1973] S.C.R. 313, at 354 (S.C.C.) [hereinafter "*Calder*"]: "... the grants made so far in respect of Nishga lands are so relatively insignificant the appellants have elected to ignore them while maintaining that they were ultra vires".

¹⁰ Public reaction and political implications of Aboriginal Rights cases are discussed in Michael Plaxton, "The Formalist Conception of the Rule of Law and the Marshall Backlash" (2003) 8 *Review of Constitutional Studies* 66.

¹¹ For a discussion of the Crown's contradictory nature for Indigenous peoples in Canada see Mariana Valverde, "The Crown in a Multicultural Age: The Changing Epistemology of (Post) colonial Sovereignty" (2012) 21(1) *Social & Legal Studies* 3.

¹² *Tsilhqot'in Nation*, *supra*, note 2, at para. 70.

¹³ Tom Flanagan, "Clarity and confusion? The New Jurisprudence of Aboriginal Title", April 9, 2015, online: <<http://www.fraserinstitute.org/research-news/display.aspx?id=22435>>.

¹⁴ For a discussion of the cultural nature of private property and its relationship to Aboriginal land rights see Nicholas Blomley, "Making Space for Property" (2014) 104(6) *Annals of the Association for American Geographers* 1291; Nicholas Blomley, "The Ties that Bind: Making Fee Simple in the British Columbia Treaty Process" (2015) 40(2) *Transactions of the Institute of British Geographers* 168. I have italicized the word private when describing ownership to highlight the cultural assumptions made concerning this characterization. At other times I have added the prefatory words "so-called" to property when describing this type of interest. For an excellent

seeking a declaration of title was politically astute.¹⁵ While property rights are not protected under Canada's Constitution,¹⁶ land ownership is a primary source of wealth for most Canadians. It is also a source of individual pride and identity.¹⁷

An important question which the *Tsilhqot'in* decision raises is whether "private" and Aboriginal land titles will conflict under the Supreme Court's new framework.¹⁸ Will Aboriginal title oust privately held beneficial interests in land, or will privately owned land prevent declarations of Aboriginal title over such lands?

This article's answer to the foregoing question is: *it depends*. Neither private property nor Aboriginal title is absolute in Canadian law. Both deserve the utmost respect and protection — though either interest can be attenuated in appropriate circumstances. This article explores the Constitution's potential for both protecting and attenuating so-called private interests in land in the face of a declaration of Aboriginal title.

I believe the *Tsilhqot'in* decision contains a nascent framework for carefully calibrating a healthier relationship between Aboriginal title and private ownership. Of course, these issues will necessarily be tested in light of real-life (on-the-ground) facts. We also require further guidance from the Court to more effectively address the complexities of this

discussion of property from this perspective see Andries Johannes van der Walt, *Property in the Margins* (Oxford: Hart Publishing, 2009).

¹⁵ The Supreme Court had not granted a declaration of Aboriginal title in the previous three cases: *Calder*, *supra*, note 9; *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.) [hereinafter "*Delgamuukw*"]; and *R. v. Marshall; R. v. Bernard*, [2005] S.C.J. No. 44, [2005] 2 S.C.R. 220 (S.C.C.) [hereinafter "*Marshall*"]. The Supreme Court seemed to prefer a political solution to recognizing title. For contextual discussion of this issue see, generally, Hamar Foster, Heather Raven & Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) and Ardith Walkem & Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton, B.C.: Theytus Books, 2003).

¹⁶ Property rights were deliberately excluded from the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "*Charter*"], see Richard Bauman, "Property Rights in the Canadian Constitutional Context" (1992) 8 *South African Journal on Human Rights* 344. For commentary see Philip Augustine, "Protection of the Right to Property under the Canadian Charter of Rights and Freedoms" (1986) 18 *Ottawa L. Rev.* 55 at 67-68; John D. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983) 13 *Manitoba L.J.* 455.

¹⁷ Land is also a source of Indigenous pride and identity. It has long nurtured Indigenous livelihoods, identities and worldviews. For a discussion to protect these sites see Michael Lee Ross, *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2006).

¹⁸ This article will not address the question of Aboriginal title in submerged lands. For a discussion of this issue prior to the *Tsilhqot'in* decision see C. Rebecca Brown and James I. Reynolds, "Aboriginal Title to Sea Spaces: A Comparative Study" (2004) 37 *U.B.C. L. Rev.* 449. This issue has been addressed in the Australian context, see *The Commonwealth of Australia v. Yarmirr and Others* (2001), 208 C.L.R. 1.

question. Nevertheless I believe the future contours for Aboriginal title's interface with "privately" owned lands will find inspiration within the judgment's broader approach. This article explores ways that Aboriginal title might be reconciled with fee simple interests which are currently held under Crown grants in British Columbia.

This article proceeds in the following way. First, I show how Aboriginal title and private property might conflict by providing an example from a post-*Tsilhqot'in* confrontation in Canada's Salish Sea. Second, I explain how both the common law and Indigenous peoples' law contain mutually obligatory practices which facilitate syncretic and synergistic relationships to land. Third, I discuss how federalism and Aboriginal rights protections can build relationships on mutually transformative terms under section 35(1) of the *Constitution Act, 1982*. Fourth, I evaluate the concept of whether so-called "innocent third party purchasers of Aboriginal lands" can prevail in the context of Aboriginal title claims. Finally, I examine four obstacles which might exist in reconciling Aboriginal title with private ownership, and point to how they might be overcome.

1. Private Ownership and Aboriginal Title: Setting the Context

Private property's relationship to Aboriginal title is a pressing issue. In the fall of 2014, a few brief months after the *Tsilhqot'in* decision was released, the relationship between Aboriginal title and private ownership came into public view. The site of the conflict was Shmukw'elu or Grace Islet.¹⁹ This is a very small island in Ganges Harbour off the shores of Salt Spring Island in south-western British Columbia.²⁰ Shmukw'elu is part of the Gulf Islands in the Canadian waters of the Salish Sea.²¹ In 1990, Barry Slawsky, an Edmonton entrepreneur, purchased fee simple title to the Islet and registered his interest in the land titles office.

¹⁹ A discussion of the broader oral histories of the Indigenous peoples in this area is found in Daniel P. Marshall, *Those Who Fell From the Sky: A History of the Cowichan Peoples* (Duncan, B.C.: Cowichan Tribes, 1999).

²⁰ For a broader Indigenous history of the region see Chris Arnett, ed., *Two Houses Half Buried in Sand: Oral Traditions of the Hul'q'umi'num Coast Salish of Kuper Island and Vancouver Island* by Beryl Mildred Cryer (Vancouver: Talonbooks, 2008); Chris Arnett, *The Terror of the Coast: Land Alienation and Colonial War on Vancouver Island and the Gulf Islands, 1849-1863* (Vancouver: Talonbooks, 1999).

²¹ For a discussion of land pre-emption by settlers in the area, see Ruth W. Sandwell, *Contesting Rural Space: Land Policy and the Practices of Resettlement on Saltspring Island, 1859-1891* (Montreal: McGill-Queens University Press, 2005).

The site was known to be archeologically significant at the time of purchase. In 1966, it was registered as an Archeological Site. In 1974, it was further designated as a Heritage Site under the *British Columbia Heritage Act* because human remains had been found on the site. When Mr. Slawsky purchased the land it had been rezoned for residential development and he purchased the property for that purpose. In 2010, an archeological impact assessment identified 15 stone burial cairns on the Islet. In 2011, Mr. Slawsky obtained a building permit from the municipal authority. He took this action after securing site permits from the British Columbia Archeological Branch under the *British Columbia Heritage Act*. When construction began the stone cairns were to be preserved by encasing them in the foundation of the house for their “protection”.

First Nations from the Saanich Peninsula, Cowichan Valley, and beyond objected to the house being built. They tried to persuade Mr. Slawsky to cease from constructing his house on what they regarded as their ancestors burial site. They also attempted to convince the province to intervene.

In an August 2012 letter to Minister of Forests, Lands and Natural Resource Operations Steve Thomson, Penelakut Chief Earl Jack wrote: ‘The disturbance of the dead is dangerous to the living, who may suffer sickness, poor fortune or death. For this reason, the dead were placed in cemeteries, such as burial islets, distant from village life. Only those persons who own the traditional ritual knowledge to deal with the dead may visit the cemeteries and care for the spirits through ceremonial practices’.²²

First Nations from the area also engaged in a public campaign to pressure the province to purchase the land. This activity garnered significant support throughout southern British Columbia and led to a series of First Nations blockades, stop-work orders and other activities designed to halt construction.²³ However, despite public support, First Nations and other protestors were initially unsuccessful in persuading the owner or the province to stop construction. It was not until the

²² Katherine Gordon Palmer, “Uncharted Territory”, FOCUS online, Victoria’s Magazine of People, Ideas and Culture, January 2015, online: <<http://focusonline.ca/?q=node/819>> [hereinafter “Palmer”].

²³ For a broader contextualization of blockades in Canada see Yale D. Belanger & P. Whitney Lackenbauer, eds., *Blockades or Breakthroughs? Aboriginal Peoples Confront the Canadian State* (Montreal: McGill-Queen’s Press, 2015).

Tsilhqot'in decision was released that First Nations gained the leverage necessary to bring additional pressure to bear on the province.

On November 10, 2014, Chief William Seymour of the Cowichan Tribes wrote the Premier of British Columbia and Mr. Slawsky. On behalf of his Nation he claimed Aboriginal title to the so-called privately owned land. Chief Seymour stated:

The construction on Grace Islet for residential purposes is unacceptable to the Cowichan Tribes. Cowichan Tribes has not and does not consent to it. We understand that Minister Thomson was proceeding to the provincial treasury board for monies necessary to repurchase the fee simple title granted by British Columbia in the lands of Grace Islet. We have not heard of any progress in this regard over the last three months. If the province fails to solve the Grace Islet dispute promptly, through repurchase of the fee simple interest from Mr. Slawsky, then Cowichan Tribes is prepared to proceed with legal action as outlined in the attached draft statement of claim.²⁴

With this letter, the stage was fully set for Aboriginal title's conflict with Mr. Slawsky's fee simple title, on the site regarded by the Cowichan Nation as containing unextinguished Aboriginal title land. Cowichan Nation lawyers drafted a statement of claim which accompanied Chief Seymour's letter. They sought a declaration that:

- (a) the descendants of the Cowichan Nation, including the Cowichan Tribes, have Aboriginal title to Grace Islet by virtue of section 35(1) of the *Constitution Act, 1982*;
- (b) the Crown grant in fee simple interest in Grace Islet unjustifiably infringes Cowichan Aboriginal Title to these lands;
- (c) the Crown Grant of fee simple interest is invalid;
- (d) the descendants of the Cowichan Nation, including the Cowichan Tribes, are entitled, as against British Columbia, to the lands of Grace Islet.²⁵

These allegations illustrate that Aboriginal title and private ownership interests were on a collision course. While Chief Seymour

²⁴ November 10, 2014, from Chief William Seymour of the Cowichan Tribes (on file with author).

²⁵ NOTICE OF CIVIL CLAIM, David Robbins, LL.P., Woodward and Company, In the Supreme Court of British Columbia, BETWEEN Cowichan Tribes and Squxulenuhw, also known as William C. Seymour Sr., on their own behalf, and on behalf of all other descendants of the Cowichan Nation PLAINTIFFS AND her Majesty the Queen in right of the Province of British Columbia and Barry Norman Slawsky DEFENDENTS (on file with author).

was quick to point out that the First Nation was not claiming private lands more generally in the area,²⁶ saying that this situation was “completely exceptional”,²⁷ the matter nevertheless raised fears throughout the region that other people’s private lands were at risk.²⁸

By way of contrast Mr. Slawsky presented his own views in a local newspaper, the *Victoria Times Colonist*, in the following way:

I am the owner of Grace Islet in Ganges Harbour at Saltspring Island. I purchased the property in 1990 because I thought it was a beautiful location. Since then, I have worked through a complex group of governmental regulations in order to receive approval to build my retirement home here.

Throughout this comprehensive process, I have been guided by professional environmental and archeological consultants in my determination to be respectful of First Nations. The provincial Archaeology Branch carried out extensive consultation efforts with First Nations, as recently explained by Lands and Forests Minister Steve Thomson in the *Times Colonist*. My site-alteration permit from the province includes numerous conditions that respect First Nations concerns.

After 24 years of ownership of this property, some vocal critics claim I am building a home in a known First Nations cemetery. Nothing could be further from the truth.

.....

With the exception of three bone fragments, two found in 2006 and one found in 2007, nearly a decade ago, there has been no finding at any time of any trace of human remains anywhere on Grace Islet.

Neither of these two findings in 2006 and 2007 is anywhere near the location of my home.

.....

²⁶ In response to a question about whether private property would be claimed throughout their traditional territory Chief Seymour said he: “doesn’t agree that the Grace Islet case will set a precedent of that nature. ‘I hope it doesn’t do that. It shouldn’t. First Nations have never been after private land.’ Cowichan haven’t asked for private property to be expropriated as part of their treaty negotiations”, Palmer, *supra*, note 22.

²⁷ Chief Seymour said that going to court was a strategy of last resort. He said: “I really hope we don’t have to go to court.” He says the First Nation has had little choice but to take this dramatic step: “We’ve been forced to this point.” Palmer, *supra*, note 22.

²⁸ The lawyer for Mr. Slawsky said: “This is going to ignite a firestorm of controversy if now private land is no longer something you can buy with any certainty”, Palmer, *supra*, note 22.

I am confident that, over time, people of goodwill will see past the rhetoric and consider the facts for themselves.²⁹

The Penelakut, Halalt, Tsartlip, Tseycum and Tsawwassen First Nations also declared interests in the site, in addition to the Cowichan Nation.³⁰ Each claimed Grace Islet as an ancestral burial site.³¹ These claims are a by-product of centuries-long interlocking relationships where First Nations members married across community and national lines.³² While Cowichan threatened the province with the suit, Chief Seymour also recognized neighbouring Nations would also have claims to the site.³³ He said: “For Cowichan to claim totally exclusive use wouldn’t be right. Our neighbours used Grace Islet too. We will definitely talk to them and deal with that aspect if we go to court.”³⁴ This approach is consistent with the *Tsilhqot’in* decision which recognized that Aboriginal groups could possess shared exclusivity in land.³⁵ The Court has also been clear that Aboriginal groups can have exclusive occupation in land even though other groups are entitled to share.³⁶

²⁹ Barry N. Slawsky, *Victoria Times Colonist*, August 6, 2014, online: <<http://www.timescolonist.com/opinion/op-ed/comment-owner-gives-his-side-on-grace-islet-issue-1.1296716>>.

³⁰ A broader historical overview of First Nations in this area is found in Homer Barnett, *The Coast Salish of British Columbia* (Eugene: University of Oregon Press, 1955).

³¹ Coast Salish burial practices are discussed in Brian Thom, *The Dead and the Living: Burial Mounds and Cairns and the Development of Social Classes in the Gulf of Georgia Region* (Master’s thesis, University of British Columbia, 1995) (on file with author).

³² For a discussion of broader relationships to land in the area see Brian David Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property, and Territory in the Coast Salish World* (Ph.D. Dissertation, McGill University, 2005); Wayne Suttles, *Coast Salish Essays* (Vancouver: Talon Books, 1987), at 209-32.

³³ In addition to Aboriginal title claims, the treaty right of First Nations on the Saanich Peninsula may also be relevant to Grace Islet. Douglas Treaties contains the clause:

... our village sites and enclosed fields are to be kept for our own use, for the use of our children, and for those who may follow after us and the land shall be properly surveyed hereafter. It is understood, however, that the land itself, with these small exceptions, becomes the entire property of the white people for ever; it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly.

In addition, the Tsawwassen have a treaty with Canada and the British Columbia government which was implemented in April 2009. A map (which is an official part of the Tsawwassen Treaty) shows Grace Islet as being surrendered by the Tsawwassen First Nation to Canada.

³⁴ Palmer, *supra*, note 22.

³⁵ *Tsilhqot’in Nation*, *supra*, note 2, at paras. 48-49; *Marshall*, *supra*, note 15, at para. 57. See also *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941).

³⁶ *Delgamuukw*, *supra*, note 15, at para. 157: “... aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.”

The Chief's position also illustrates the *Delgamuukw* principle that exclusive occupation can be shared between First Nations as "recognized by either de facto practice or by the aboriginal system of governance".³⁷ The Chief's declaration is also consistent with Hul'qumi'num law.³⁸

In February of 2015, in response to these developments, the provincial government purchased Grace Islet from Mr. Slawsky. The acquisition seemingly occurred at the request of the Cowichan Nation. This action was also presumably taken to avoid potentially precedent-setting litigation that favourably pitted Aboriginal title against "private" ownership. The purchase price for Grace Islet was \$5.45 million, which consisted of \$850,000 for the land and \$4.6 million as a settlement for additional costs and losses incurred by Mr. Slawsky.³⁹ While both the private owner and the First Nation suffered losses in this case, the First Nations were not compensated for their loss. Nevertheless, at the time of purchase the land was turned over to the Nature Conservancy of Canada to preserve the natural environment and protect the burial site.⁴⁰ To commemorate this action, and express their relief about the Islet's protection, celebrations and ceremonies were held by Elders and members of the Tseycum, Tsawout, Tsartlip, Cowichan, Pauquachin, Lyackson, Stz'uminus, Penelakut and Halalt First Nations.⁴¹

This example illustrates that private ownership and Aboriginal title do not necessarily occupy two unrelated legal worlds. Overlapping claims can occur: not just among Aboriginal peoples' claims, but between Aboriginal and non-Aboriginal people. There will be instances where Indigenous peoples feel that they cannot, in good conscience,

See also *Marshall, supra*, note 15, at para. 55 and Kent McNeil, "Exclusive Occupation and Joint Aboriginal Title" (February 2015) (on file with author).

³⁷ *Delgamuukw, supra*, note 15, at paras. 158-159.

³⁸ Sarah Morales, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* (Victoria: Ph.D. Law, 2014), at 256-85.

³⁹ Wendy Stueck, "British Columbia pays \$5.45-million for Grace Islet", *The Globe and Mail*, February 16, 2015. The \$4.6 million amount included "costs incurred over the past two decades by the landowner and his lost opportunity for future enjoyment of the property", the province said in a statement Monday. Costs also reflect the expense of putting in utilities and materials for a "high-end house".

⁴⁰ For information concerning Nature Conservancy of Canada ownership, see "A Graceful Resolution: NCC joins forces with the BC Government and First Nations to Protect Grace Islet", online: <<http://www.natureconservancy.ca/en/where-we-work/british-columbia/stories/a-graceful-resolution.html>>.

⁴¹ British Columbia News Release, "Ceremony Celebrates Grace Islet Partnership", March 17, 2015, online: <http://www2.news.gov.bc.ca/news_releases_2013-2017/2015FLNR0035-000350.htm>.

avoid claiming Aboriginal title over land which is purportedly subject to fee simple. While it is obvious that burial and other sacred sites are one place where such interests may intersect, it is possible that other types of land may be subject to simultaneous “Aboriginal” and “private” claims. While First Nations were very clear throughout the Grace Islet dispute that they had no interest in disturbing private ownership, it is possible to envision other scenarios where First Nations will claim Aboriginal title over “private” lands. Since Aboriginal title includes rights to use the land for a wide variety of purposes,⁴² there may be occasions where First Nations attempt to subordinate private ownership to advance their own constitutionally recognized economic, social or political interests in such lands.⁴³

Given the high stakes involved, the Constitution’s potential for protecting and/or attenuating private interests in land in the face of Aboriginal title is real — and complex. The province cannot buy land and put it into protected status every time a conflict arises with Aboriginal title, as occurred with Grace Islet. This would be too expensive. An *ad hoc* approach would also be economically disruptive given the uncertainty this would generate in real estate and other markets. A series of one-off solutions would also be politically dangerous. Frustration and anger would mount if Indigenous and other people saw their lands under constant legal siege. Therefore, the Supreme Court’s doctrinal framework must be canvassed to determine whether *Tsilhqot’in* and other Aboriginal rights decisions provide guidance in addressing this pressing issue.⁴⁴ I believe guidance is available to address these conflicts in ways which avoid stereotyping both Indigenous peoples land rights, and the nature of private ownership in land.

⁴² For discussion of Tsilhqot’in resource rights after the *Tsilhqot’in* case, see Nigel Banks, “The implications of the Tsilhqot’in (William) and Grassy Narrows (Keewatin) Decisions of the Supreme Court of Canada for the Natural Resources Industries” (2015) *Journal of Energy and Natural Resources Law*.

⁴³ “Gitxsan First Nation Evicting Rail, Logging, Sport Fishing Interests”, July 10, 2014, CBC News, online: <<http://www.cbc.ca/news/canada/british-columbia/gitxsan-first-nation-evicting-rail-logging-sport-fishing-interests-1.2703664>> [hereinafter “CBC News”].

⁴⁴ There are claims to Aboriginal title in other parts of Canada, where First Nations claim that they either did not enter into treaties with the Crown or that their treaties did not extinguish Aboriginal title. This issue was raised in *Marshall*, *supra*, note 15, at para. 84: “The Crown argued that even if common law aboriginal title is established, it was extinguished by statutes passed between 1774 and 1862 relating to forestry on Crown lands. Since aboriginal title is not established, it is unnecessary to consider this issue.”

2. Abandoning Absolutes in the Common Law, Constitutional Law and Indigenous Law

No one has absolute interests in land in Canada. Law mediates these competing and complementary claims to protect individuals and advance the public interest. Thus while a fee simple interest is the common law's "largest known estate in land",⁴⁵ it is not an unqualified interest.⁴⁶ Privately owned land can be subject to mortgages, leases, liens, easements, zoning regulations, expropriation orders, taxation, treaty rights, contractual obligations and other statutory, common law and equitable limitations.⁴⁷ Crown ownership can also be restricted by private interests carved out from the Crown's beneficial interest.⁴⁸ Constraints on ownership for Aboriginal peoples also exist when dealing with Aboriginal title.⁴⁹ Aboriginal title rights are subject to inherent limits.⁵⁰ In the *Tsilhqot'in* case the Supreme Court wrote that "rights that are recognized and affirmed are not absolute".⁵¹ These limitations also advance broader public interests.⁵² Thus, all landholders in Canada (Aboriginal, Crown, third-party) have less than an absolute interest in their lands for our mutual health and benefit.

As in the Grace Islet case, Indigenous peoples' own laws do not often frame relationships in absolute terms.⁵³ This is particularly the case

⁴⁵ *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2, s. 3.

⁴⁶ William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press ed., 1979), Vol. 2, at 411.

⁴⁷ See generally, Bruce Ziff, *Principles of Property Law*, 6th ed. (Toronto: Carswell, 2014).

⁴⁸ Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), at 40-41.

⁴⁹ Despite rejecting the idea that land in Canada was *terra nullius* upon European arrival, the Supreme Court nevertheless accepts the proposition that the Crown has underlying, radical, or allodial title to land in Canada: *Tsilhqot'in Nation*, *supra*, note 2, at para. 69. If the land was not vacant when Europeans arrived, and Indigenous peoples never gave underlying title to the Crown, it is hard to accept the proposition that the Court has rejected the idea of *terra nullius* in Canadian law. It seems as though the Crown has underlying title through assumptions that it was the Crown's to claim because there was some type of vacuum underlying Indigenous occupation of lands. For a discussion of this point see John Borrows, "The Durability of Terra Nullius" (2015) U.B.C. L. Rev. See also John Borrows, "Aboriginal Title in *Tsilhqot'in v. British Columbia* [2014] SCC 44", August 2014 Māori L. Rev., online: <<http://maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqot-in-v-british-columbia-2014-scc-44/>>.

⁵⁰ *Tsilhqot'in Nation*, *supra*, note 2, at para. 74.

⁵¹ *Tsilhqot'in Nation*, *supra*, note 2, at para. 119.

⁵² *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1113 (S.C.C.) [hereinafter "*Sparrow*"]; *R. v. Gladstone*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723, at paras. 74-75 (S.C.C.) [hereinafter "*Gladstone*"].

⁵³ However, there are instances where First Nations have claimed rights to evict private interests in land; see CBC News, *supra*, note 43.

when relating to land.⁵⁴ Constraints on ownership often flow from principles of balance, reciprocity and respect within these legal traditions.⁵⁵ We saw this in how Chief Seymour presented his peoples' case. Sharing is a prominent principle within Indigenous law.⁵⁶ Thus, perhaps even more than the common law, there is significant room for variegated property interests within a First Nations legal context. While Aboriginal title may be vested in a broader collective, sharing is facilitated within these communities through governance structures which encourage reciprocity and mutual aid.⁵⁷ Thus, rights to use and occupy and benefit from land may reside in a particular clan, house group, family or individual.⁵⁸ Indigenous law can also recognize and affirm many interests, including "private" interests.⁵⁹ The fact that

⁵⁴ In fact, I recently heard Chief Roger William of the Tsilhqot'in Nation state that Tsilhqot'in law recognizes private ownership interests within their territory. Chief Roger William said private ownership is a strongly protected interest under Tsilhqot'in law. He noted that the Tsilhqot'in people do not want to dispossess people who live on their traditional territory and claim ownership from a Crown source. They want to convert the source of this ownership from a Crown to an Aboriginal grant and thus desire to see this land have a stronger foundation. In fact, he said the Tsilhqot'in people want to treat these people better than the Crown did when it purported to hold the beneficial interest in Tsilhqot'in land. Chief William said his people understand that private ownership from a Crown source in British Columbia flows from a flawed original grant. The Tsilhqot'in people want to give non-native owners of their land even greater protection under the Tsilhqot'in legal system. Chief Roger William, Canadian Bar Association, Aboriginal Lawyers Forum, May 2, 2015, Tulalip Reservation, Washington State.

⁵⁵ For examples of Indigenous constitutional legal principles which promote balance, reciprocity and respect, see generally *Nipissing, Gichi-Naaknigewin*, August 2013, online: <http://www.bobgoulais.com/wp-content/uploads/nfn_constitution_final_august_8_20131.pdf>; *The Constitution of the Nisga'a Nation*, October 1998, Preamble and Section 2, online: <<http://www.nisgaanation.ca/sites/default/files/legislation/Constitution%20of%20the%20Nisga%27a%20Nation%20-%201998-10-01.pdf>>; *Nunatsiavut Constitution Act*, December 2005, online: <<http://www.nunatsiavut.com/wp-content/uploads/2014/03/IL%202005-02%20-%20E.pdf>>.

⁵⁶ Royal Commission on Aboriginal Peoples, *Sharing the Harvest: The Road to Self-Reliance, Report of the National Round Table on Aboriginal Economic Development and Resources* (Ottawa: Supply and Services, 1993).

⁵⁷ For a discussion of governance relationships with Aboriginal title, see Jeremy Webber, "The Public-Law Dimension of Indigenous Property Rights" in Nigel Bankes and Timo Koivurova, eds., *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Oxford: Hart, 2013), at 79-102.

⁵⁸ Kenneth H. Bobroff, "Retelling Allotment: Indian Property Rights and the Myth of Common Ownership" (2001) 54 *Vanderbilt L. Rev.* 1559 [hereinafter "Bobroff"]; Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" in Jeremy Webber and Colin M. Macleod, eds., *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010), at 45; Justin B. Richland, *Arguing with Tradition: The Language of Law in Hopi Tribal Court* (Chicago: University of Chicago Press, 2008); *Chilkat Indian Village, IRA v. Johnson* (November 3, 1993) 20 *Indian Law Reporter* 6727, No. 90-01 (Chilkat Indian Village Tribal Court).

⁵⁹ An example of so-called private interests being protected by Indigenous law is often hidden in plain sight. Their force does not solely rely on Canadian law compelling the Crown and

Aboriginal title is held on a collective basis often obscures more particularized land rights which exist within First Nations.⁶⁰ As is the case in the common law, these interests also aim to protect individuals and enhance reciprocal obligations for people's mutual benefit.⁶¹

Furthermore, constitutional jurisprudence facilitates and limits the rights and interests of all Canadians.⁶² It does this through doctrines related to reconciliation, fundamental justice, reasonableness and proportionality.⁶³ This is a more general feature of Canada's Constitutional tradition and it is also present when dealing with Indigenous peoples. In *R. v. Oakes*, the Supreme Court of Canada described key constitutional values which may at times justify limitations on our rights: "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity and faith in social and political institutions which enhance the participation of individuals and groups in society."⁶⁴ In an Aboriginal rights context, some of these limitations also flow from the fact that Canadian constitutional law springs from Indigenous and common law sources.⁶⁵ These principles, in

Indigenous peoples to abide by these agreements. Treaties made with Indigenous peoples are made through Indigenous representatives drawing on the authority of their laws. Thus, when treaties are signed in good faith, Indigenous law works to protect subsequent Crown interests created from lands agreed to be shared through these agreements. For a fuller discussion of the role of Indigenous law in treaty-making, interpretation and implementation see Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).

⁶⁰ Bobroff, *supra*, note 58, see particularly 1571-1600.

⁶¹ Perhaps this is why the Supreme Court has held that Aboriginal title is subject to an "inherent limit" in any land use practice in order to respect the "ongoing nature of the group's attachment" to their territories through time. *Tsilhqot'in Nation*, *supra*, note 2, at para. 67; *Delgamuukw*, *supra*, note 15, at para. 116.

⁶² For a range of opinions on this issue see Grant Huscroft, Bradley W. Miller, Gregoire Webber, eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014).

⁶³ Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012); Professor Moshe Cohen-Eliya, Dr. Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge: Cambridge University Press, 2013); David Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

⁶⁴ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at 136 (S.C.C.) [hereinafter "*Oakes*"].

⁶⁵ Ultimately, all land law in Canada partially flows from Aboriginal title; either through its extinguishment or modification to allow for the creation of private ownership interests, or through its continued existence which accommodates private ownership interests. Since Aboriginal peoples owned all the land in what is now Canada prior to Canadian law's creation, Aboriginal ownership rights are sustained under the doctrine of continuity until they are clearly and plainly extinguished (before 1982), or modified (after 1982) through modern treaties or justifiable infringements. The Court has been very clear that accommodation of Aboriginal rights and Crown interests is necessary where Aboriginal rights have not been extinguished: *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*"].

addition to those articulated in the *Oakes* test, should also guide the relationship between Aboriginal title and private ownership.

Since Aboriginal rights are formed through inter-societal law they are mutually modified by both Indigenous and common law perspectives.⁶⁶ This means that both Aboriginal title and non-Aboriginal property interests are limited by the other's legal perspectives within Canadian law. For example, by ruling that Aboriginal title is not absolute, the Court ensured that the Crown was not completely stripped of future opportunities to share the land's benefits, even though it vacated the province's wrongfully asserted beneficial interest.⁶⁷ Thus the Crown has the ability to limit (though not extinguish) Aboriginal land rights — despite not holding beneficial interests in Aboriginal title lands.

As noted, limitations on Aboriginal land rights also flow from section 35(1)'s "framework" which exists "to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public".⁶⁸ In making this statement the Court is clear that Aboriginal title exists "in relationship" with other legal interests in Canada more generally. The Grace Islet scenario demonstrated how negotiation can work to tentatively reconcile the rights and duties of government to First Nations and other citizens. This view of section 35(1) illustrates that whenever Aboriginal "rights" are affirmed corresponding "duties" attach to government action, including those involving its allocation and use of land. As former Yale Law Professor W.N. Hohfeld wrote, "[A] duty is the invariable correlative of that legal relation which is most properly called a right or claim."⁶⁹ "Duty" and "right" are correlative terms.

⁶⁶ Thus Canadian law must recognize property and other land rights limitations which flow from Indigenous law and its interaction with broader Canadian law. The Supreme Court of Canada has observed that Aboriginal rights are *sui generis*, meaning they are unique and of their own kind. As such they incorporate and bridge Indigenous law and common law perspectives, see John Borrows and Len Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference" (1997) 36 Alberta L. Rev. 9. Since a "morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives", *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 42 (S.C.C.) [hereinafter "*Van der Peet*"]. Aboriginal title must itself be responsive to the liberties and limits found within these legal systems.

⁶⁷ Despite its positive effects, this holding is nevertheless problematic from a First Nation's perspective because it upholds the Crown's troubling acquisition of underlying title to their land by accepting the doctrine of *terra nullius* (despite assertions to the contrary). See John Borrows, "Canada's Colonial Constitution" in Michael Coyle and John Borrows, *The Right(s) Relationship: Treaties and Canadian Law* (Toronto: University of Toronto Press, under consideration).

⁶⁸ *Tsilhqot'in Nation*, *supra*, note 2, at para. 118.

⁶⁹ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Walter Wheeler Cook, ed. (New Haven and London: Yale University Press, 1919) at 35-64. I have made these same points in John Borrows, "Let Obligations Be Done" in Hamar Foster,

Whenever “a right is invaded, a duty is violated”.⁷⁰ Third parties such as private owners may have direct obligations to Aboriginal peoples related to the avoidance of nuisance and trespass.⁷¹ While third parties are not ultimately responsible for consulting and accommodating Aboriginal peoples when Aboriginal rights may be infringed,⁷² they are nevertheless directly affected by the provincial Crown’s obligations to Aboriginal peoples.⁷³ In this sense Aboriginal title affirmatively exists in relationship to other interests besides those of the Crown in Canada.⁷⁴

The Court’s framework should thus cause us to see section 35(1)’s reciprocal protections and limitations. In the first instance, Crown’s claims are limited by Aboriginal title. For example, Crown “incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land”.⁷⁵ At the same time Aboriginal title is limited by Crown action whenever it can establish justifiable reasons for infringing that title. For such limitations to “justify overriding the Aboriginal title-holding group’s wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown’s fiduciary obligation to the group”.⁷⁶

Heather Raven & Jeremy Webber, eds., *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007), at 201.

⁷⁰ *Lake Shore & M. S. R. Co. v. Kurtz* (1894), 10 Ind. App. 60, 37 N.E. 303, at 304.

⁷¹ *Tsilhqot’in Nation*, *supra*, note 2, at para. 90: “The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.”

⁷² The Court has limited the “obligation on third parties to consult or accommodate” claims as they relate to Aboriginal rights because “[t]he Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests.” *Haida Nation*, *supra*, note 65, at para. 53.

⁷³ In *Sparrow*, the Indian fishery was “given priority over the interests of other user groups”: *Sparrow*, *supra*, note 52, at para. 81. *Gladstone*, *supra*, note 52, at para. 62: “The doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users.” *Delgamuukw*, *supra*, note 15, at para. 167: “The exclusive nature of aboriginal title is relevant to the degree of scrutiny of the infringing measure or action. For example, if the Crown’s fiduciary duty requires that aboriginal title be given priority, then it is the altered approach to priority that I laid down in *Gladstone* which should apply.”

⁷⁴ For a comparative view on the relationship of Aboriginal title lands to other interests see Kent McNeil, “Co-Existence of Indigenous Rights and Other Interests in Land in Australia and Canada” (1997) 3 *Canadian Native Law Reporter* 1-18.

⁷⁵ *Tsilhqot’in Nation*, *supra*, note 2, at para. 86.

⁷⁶ *Tsilhqot’in Nation*, *supra*, note 2, at para. 77.

The presence of mutually constraining protections and limitations (for both the Crown and Aboriginal peoples) demonstrates that neither party can make absolute claims to land in British Columbia when Aboriginal title is recognized by the courts.⁷⁷ In the cause of strengthening both parties, each party can limit the other party's interests, though in varied degrees in different circumstances. Reconciliation is the overriding goal of Aboriginal rights jurisprudence.⁷⁸ This objective exists to protect both individual and the broader public interest, which includes the Aboriginal public too.⁷⁹

3. Limiting Absolutes: Section 35(1) and Section 92(13)

For most of Canada's history, almost without exception, the Aboriginal public interest in land has not been effectively protected.⁸⁰ Aboriginal peoples have been (and at present are actively being) unjustly deprived of their lands and resources with tragic consequences.⁸¹ In colloquial terms, their land has and is being stolen and they are greatly suffering as a result of this loss.⁸² Concomitantly, non-Aboriginal land owners have secured vast quantities of land at the expense of Aboriginal peoples.⁸³ In much of British Columbia Aboriginal title was given to

⁷⁷ It should be noted that the land right which constitutes Aboriginal title exists within Indigenous peoples' own legal systems without regard to Canadian Court recognition. What the Canadian law labels as Aboriginal title is an Indigenous land interest recognized within Indigenous legal systems long before contact, even if it has only been recognized by the Canadian state recently.

⁷⁸ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 32 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 1 (S.C.C.); *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013] S.C.J. No. 14, [2013] 1 S.C.R. 623, 2013 SCC 14, at paras. 66-67 (S.C.C.).

⁷⁹ *Tsilhqot'in Nation*, *supra*, note 2, at paras. 81 and 82: "... the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. ... To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective."

⁸⁰ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services, 1996), Vol. 2, Part II, Chapter 4, online: <<http://caid.ca/RRCAP2.4.pdf>>.

⁸¹ Tom Flanagan, Christopher Alcantara & Andre Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's University Press, 2012).

⁸² A guide for researching this issue is found at Union of British Columbia Indian Chiefs, *Stolen Lands, Broken Promises: Researching the Indian Land Question in British Columbia*, 2d ed. (Vancouver: Union of British Columbia Indian Chiefs, 2005), online: <http://d3n8a8pro7vhm.cloudfront.net/ubcic/legacy_url/560/Stolen_20Lands__20Broken_20Promises.pdf?1426350430>.

⁸³ *Sparrow*, *supra*, note 52, at 1103: "And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this

third parties without any transfer, sale or surrender.⁸⁴ Indigenous land rights were unilaterally pre-empted by settlers throughout most of British Columbia history without any input from Aboriginal peoples.⁸⁵ This process continues today.⁸⁶ The same statute that granted the right of pre-emption to settlers denied the same to Aboriginal peoples.⁸⁷ Now, with each judicial recognition of Aboriginal title,⁸⁸ Aboriginal land-holdings might expand and be more adequately protected. As a result non-Aboriginal property interests may from time-to-time diminish in favour of Aboriginal peoples.

This is a consequence of Aboriginal rights being constitutionally protected — and privately owned lands not enjoying this same heightened status.⁸⁹ While it is true that section 92(13) gives the provinces jurisdiction over “property and civil rights”, this grant of

Court, see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654). As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35, at 37 (B.C.S.C.): “We cannot recount with much pride the treatment accorded to the native people of this country.”

⁸⁴ See generally Hamar Foster, “Letting Go the Bone: The Idea of Indian Title in British Columbia 1849-1927” in Hamar Foster & John McLaren, eds., *Essays in the History of Canadian Law: Volume VI: The Legal History of British Columbia and the Yukon* (Toronto: University of Toronto Press, 1995), at 28; Paul Tennant, *Aboriginal Peoples and Politics in British Columbia: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990), at 289.

⁸⁵ For a discussion of the unilateral dispossession of Aboriginal peoples in British Columbia, see generally Jean Barman, *The West Beyond the West: A History of British Columbia* (Toronto: University of Toronto Press, 1996); Cole Harris, *Making Native Space: Colonialism Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002).

⁸⁶ Land is regularly alienated to non-Aboriginal people in British Columbia despite never having been sold, transferred or surrendered by Aboriginal people. For one prominent example of this process, see *Adams Lake Indian Band v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, [2013] B.C.J. No. 1026, 50 B.C.L.R. (5th) 86, 2013 BCSC 877 (B.C.S.C.); *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, [2012] B.C.J. No. 1661, 35 B.C.L.R. (5th) 253, 2012 BCCA 333 (B.C.C.A.); *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, [2011] B.C.J. No. 1519, 21 B.C.L.R. (5th) 286, 2011 BCCA 339 (B.C.C.A.); *R. v. Manuel*, [2008] B.C.J. No. 557, 293 D.L.R. (4th) 713, 231 C.C.C. (3d) 468 (B.C.C.A.).

⁸⁷ Robin Fisher, *Contact and Conflict: Indian-European relations in British Columbia, 1774-1890* (Vancouver: UBC Press, 1992), at 171.

⁸⁸ I must re-emphasize at this point that in my view, the right to land the Court has recognized as Aboriginal title exists within Indigenous legal systems before and regardless of state recognition. Aboriginal title can refer to the pre-existing rights to land held by Indigenous peoples under their own legal systems. On the other hand, it can refer to the often-unsatisfactory way that these rights have been interpreted and affirmed by the courts by blending the common law and Indigenous legal traditions.

⁸⁹ When the Constitution was patriated property rights were considered but a decision was taken to not enumerate them in *Canada's Constitution Act 1982*, see Clare F. Beckton, “The Impact on Women of Entrenchment of Property Rights in the Canadian Charter of Rights and Freedoms” 9 *Dalhousie L.J.* (1985) 288.

power cannot be exercised in a way which transgresses Aboriginal rights unless the province justifies such acts within section 35(1)'s framework.⁹⁰ Furthermore, section 109 of the *Constitution Act, 1867* also limits provincial interests when Aboriginal title is found to exist.⁹¹ For example, the province does not have the power to extinguish Aboriginal title through a private grant.⁹² The Crown's interests in lands are subject to Aboriginal rights and the Crown cannot profit from this future, contingent interest without first dealing with Aboriginal title.⁹³ As the

⁹⁰ *Tsilhqot'in Nation*, *supra*, note 2, at para. 103:

Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act, 1982*. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

⁹¹ Section 109 of the *Constitution Act, 1867*, on its face, subordinates a province's beneficial interest in particular land within the province to such pre-existing rights or interests as pertain to that same land. Kent McNeil has argued that when land is subject to Aboriginal title, a province cannot grant that land to third parties free of the Aboriginal title (*i.e.*, that the third party's interest is subject to the pre-existing Aboriginal interest): 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 448-49.

⁹² In *Delgamuukw*, *supra*, note 15, para. 175, the Supreme Court held that provincial grants of fee simple interests to third parties cannot and do not extinguish Aboriginal title:

The province responds by pointing to the fact that underlying title to lands held pursuant to aboriginal title vested with the provincial Crown pursuant to s. 109 of the *Constitution Act, 1867*. In its submission, this right of ownership carried with it the right to grant fee simples which, by implication, extinguish aboriginal title, and so by negative implication excludes aboriginal title from the scope of s. 91(24). The difficulty with the province's submission is that it fails to take account of the language of s. 109, which states in part that:

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada . . . at the Union . . . shall belong to the several Provinces . . . subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Although that provision vests underlying title in provincial Crowns, it qualifies provincial ownership by making it subject to the "any Interest other than that of the Province in the same". In *St. Catherine's Milling*, the Privy Council held that Aboriginal title was such an interest, and rejected the argument that provincial ownership operated as a limit on federal jurisdiction. . . . Thus, although on surrender of Aboriginal title the province would take absolute title, jurisdiction to accept surrenders lies with the federal government. The same can be said of extinguishment — although on extinguishment of Aboriginal title, the province would take complete title to the land, the jurisdiction to extinguish lies with the federal government.

⁹³ *Haida Nation*, *supra*, note 65, at para. 59:

. . . [T]he Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35

Tsilhqot'in case now demonstrates, Aboriginal title confirms land rights which are constitutionally protected under the *Constitution Act, 1982*. As such, section 92(13) or 109 of the *Constitution Act, 1867* should not be construed in ways which automatically overturn Aboriginal peoples' pre-existing title and land management regimes.

Aboriginal title in British Columbia is a prior and senior right to land.⁹⁴ It stems from the fact that Aboriginal peoples used and occupied land prior to European arrival.⁹⁵ It also flows from constitutional principles which recognize that these rights have not been extinguished.⁹⁶ Indigenous law created Aboriginal title as an independent legal interest prior to Canada and the province coming into existence.⁹⁷ *Tsilhqot'in* law has a pre-existing and continuing force which was prominent in establishing title.⁹⁸ *Tsilhqot'in* Elders testified about the continuity of their ways of life in their own language using their legal traditions.⁹⁹

deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59). ...

⁹⁴ *Delgamuukw*, *supra*, note 15, at para. 114:

... aboriginal title ... arises from possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward: see Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (1997), 135, at p. 144. This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that "aboriginal title pre-dated colonization by the British and survived British claims of sovereignty" (also see *Guerin*, at p. 378).

⁹⁵ *Van der Peet*, *supra*, note 66, at paras. 43-45.

⁹⁶ *Guerin v. Canada*, [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335, at 379-82 (S.C.C.) [hereinafter "*Guerin*"].

⁹⁷ *Id.*, at 385 (Aboriginal title is an independent legal interest). For a general discussion of the Indigenous law foundations of Aboriginal title see Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Oxford: Hart Publishing, 2014).

⁹⁸ Continuity of Aboriginal traditions and customs is an integral part of Aboriginal rights law: *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, [2001] S.C.J. No. 33, [2001] 1 S.C.R. 911, at para. 12 (S.C.C.) and *Connolly v. Woolrich*, [1867] Q.J. No. 1, 17 R.J.R.Q. 75, at 79 (Que. S.C.), *affd* as *Johnstone v. Connelly*, [1869] J.Q. no 1, 1 R.L. 253 (Que. C.A.). Continuity of occupation as part of this broader doctrine is necessary to prove Aboriginal title, *Tsilhqot'in Nation*, *supra*, note 2, at paras. 45-46, 57. For further information concerning Indigenous law and continuity in the *Tsilhqot'in Nation* case see Hamar Foster, "One Good Thing: Law, Elevator Etiquette and Litigating Aboriginal Rights in Canada" (2010) 37 *Advoc. Q.* 66-86; Dwight G. Newman, "Tsilhqot'in Nation v. British Columbia and Civil Justice: Analyzing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History" (2005) 43 *Alberta L. Rev.* 433.

⁹⁹ *Tsilhqot'in Nation v. British Columbia*, [2007] B.C.J. No. 2465, 65 R.P.R. (4th) 1, 2007 BCSC 1700, at paras. 149, 167, 176, 360, 362, 381, 397, 399, 403, 431-435 (B.C.S.C.).

Indigenous law was key to establishing a sufficiency of Indigenous social organization which was necessary to prove title.¹⁰⁰ Tsilhqot'in rules of conduct were central to proving that they historically and presently occupied land in the contested region.¹⁰¹ In making these statements the Supreme Court implicitly affirmed that Indigenous legal traditions can give rise to enforceable obligations within Canadian law.¹⁰² Social organization should be treated as a synonym for self-government.¹⁰³ When a Nation organizes itself socially on a territorial basis, and through its own laws controls land, makes decisions about its use, and excludes others, we should conclude that such a Nation governs itself.¹⁰⁴ First

¹⁰⁰ *Id.*, at para. 429:

'... the Tsilhqot'in had laws, and that those for which there is evidence appear to have been broadly similar to the laws of other many North American Aboriginal groups'. ... [T]here was evidence 'that supports the view that chiefs had specific lands within Tsilhqot'in territory and that these lands descended on some sort of hereditary principle.' I too am satisfied that an examination of the historical records leads to a conclusion that Tsilhqot'in people did consider the land to be their land. They also had a concept of territory and boundaries, although this appears to have been enlarged following the movements of the mid-nineteenth century.

¹⁰¹ *Id.*, at paras. 433-434:

Some of the stories and legends told to the Court by Tsilhqot'in elders include: Lhin Desch'osh, the legend of how the land was transformed and the animals made less dangerous; Ts'il?os and ?Eniyud; How Raven Stole the Sun; A Story of Raven Stealing Fire; The Story of Salmon Boy; The Story of the Woman and the Bear; The Story of Lady Rock; The Story of Qit'ax Xen, a boy raised by his grandmother; The Story of Guli, the Skunk; A Story About a Brother and a Sister; A Story About an Owl; Two Sisters and the Stars; and; Frog Steals a Baby.

This is not a complete list but it is representative of the legends I heard. Each carries with it an underlying message or moral that is intended to instruct and inform Tsilhqot'in people in the way they are to lead their lives. *They set out the rules of conduct*, a value system passed from generation to generation. (Emphasis added)

See also *Id.*, at para. 431: "Various Tsilhqot'in elders testified about dechen ts' edilhtan (the laws of our ancestors)."

¹⁰² A similar point is made in Val Napoleon, *Tsilhqot'in Law of Consent* (on file with author). See also Jeremy Webber, "The Public-Law Dimension of Indigenous Property Rights" in Nigel Bankes & Timo Koivurova, eds., *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Oxford: Hart, 2013), 79.

¹⁰³ In *Delgamuukw*, *supra*, note 15, at para. 189, Lamer C.J.C. observed: "... the foundation of 'aboriginal title' was succinctly described by Judson J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, where, at p. 328, he stated: 'the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.'" (emphasis added)

¹⁰⁴ For a discussion of contemporary Tsilhqot'in legal traditions as they relate to governance see Hadley Friedland, Jessica Asch, Maegan Hough, Renee McBeth, Al Hanna, from the Indigenous Law Research Unit, *Tsilhqot'in Legal Traditions Report* (2014) (unpublished, archived with Val Napoleon and Tsilhqot'in National Government). For related materials see "Revitalizing Indigenous Laws", Indigenous Bar Association, online: <<http://indigenousbar.ca/indigenoulaw/>>.

Nations governance is an important dimension of Aboriginal title. It cannot not be proven or exercised without this broader dimension being present.

Furthermore, as noted, through the *Tsilhqot'in Nation* decision we now know that the Crown in right of the province of British Columbia does not possess beneficial interests in lands subject to Aboriginal title. Crown interests in timber, minerals and other land uses on Aboriginal title lands are now prohibited, subject to a high justificatory standard.¹⁰⁵ Thus, within territories where Aboriginal title is recognized, private ownership in these areas might have to be attenuated where it derives from a faulty Crown grant. Private land ownership may have to give-way to unextinguished Aboriginal title and territorial Aboriginal governance of these lands. Since Tsilhqot'in land was not "*terra nullius*" when the Crown purported to grant "ownership" to non-Tsilhqot'in people, the fact that the land was and is owned by the Tsilhqot'in Nation undermines the legitimacy if not the legality of the Crown's grant.¹⁰⁶

Thus, Crown grants to so-called private owners might be presumptively (though not absolutely) void or voidable.¹⁰⁷ As mentioned, this is because the Crown did not constitutionally possess a legal interest which allowed it to grant un-surrendered Aboriginal land to non-Aboriginal peoples in the first instance. It must be remembered that private land ownership on Aboriginal title lands is derived from faulty Crown grants. If a person possesses a faulty land title it cannot pass good title to a third party.¹⁰⁸ The Crown cannot give to others what it does not

¹⁰⁵ *Tsilhqot'in Nation*, *supra*, note 2, at para. 112:

It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.

¹⁰⁶ For a discussion of the distinction between legality and legitimacy in Canadian constitutional law see *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 33 (S.C.C.) [hereinafter "*Secession of Quebec*"]: "In our constitutional tradition, legality and legitimacy are linked."

¹⁰⁷ "A 'void' patent is said to be one that has no legal effect whatsoever, while a 'voidable' patent is one that does have effect unless and until it is set aside." *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2000] O.J. No. 4804, 51 O.R. (3d) 641, at para. 261 (Ont. C.A.) [hereinafter "*Chippewas of Sarnia*"]. See the *Chippewas of Sarnia* case more generally for a discussion of the potential distinction between void and voidable, at paras. 261, 293-295.

¹⁰⁸ For a discussion of the principle of *nemo dat quod non habet* (title holders can only give that which they validly hold) in a recent case see Douglas Harris & Karin Mickelson, "Finding Nemo Dat in the Land Title Act: A Comment on Gill v. Bucholtz" (2012) 45 U.B.C. L. Rev. 205.

itself possess.¹⁰⁹ Despite the potential bluntness of this position I believe the law may be more nuanced. The holders of the Crown's flawed grant would not be without remedies and protection. Their presence on Aboriginal title land can be protected by Indigenous law, future treaties and Canada's broader constitutional framework.

As noted in the previous section, Indigenous peoples' own laws can accommodate a wide variety of interests. If private owners have accrued entitlements under Indigenous law through their long presence on Indigenous lands it could be possible to continue to protect these interests. Even though the Crown wrongfully created these interests they may nevertheless be sustained under the jurisdiction of an Indigenous legal system. As discussed, the Constitution can give force to these interests as it regards Indigenous peoples' own laws as part of Canada's constitutional structure.¹¹⁰ Furthermore the Crown could recognize this result through treaties, which would likewise secure constitutional protection for private ownership within Indigenous legal systems.

Understanding that treaties can protect non-Aboriginal property within Indigenous legal systems,¹¹¹ demonstrates that it is not always necessary to extinguish Aboriginal interests in favour of Crown interests.¹¹² In the past Indigenous peoples have been asked to extinguish or modify their rights and title and protect their remaining interests within non-Indigenous systems.¹¹³ The tables could be turned, as contemplated by the Court's framework. Crown claims and interests in land could be extinguished or modified and non-Aboriginal owners could receive their protections through Aboriginal legal systems. Reconciliation should not always force

¹⁰⁹ For a discussion of this issue in the Australian context see Kent McNeil, "A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?" (1990) 16 *Monash University L. Rev.* 91-110.

¹¹⁰ For a discussion of this issue more generally, John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2015) (forthcoming) [hereinafter "Borrows, 'Canada's Indigenous Constitution'"].

¹¹¹ In fact, it should be more strongly recognized that Indigenous treaties are a mechanism of protecting non-Aboriginal property interests. When Indigenous peoples consent to sharing their land with others in peace and friendship, this is a pledge to recognize and affirm non-Aboriginal people's interests in land, that they will create by virtue of Indigenous permission. For more discussion, see Office of the Treaty Commissioner, *Office of the Treaty History, Statement of Treaty Issues: Treaties as a Bridge to the Future* (Saskatoon: Office of the Treaty Commission, 1998).

¹¹² Brian Egan, "Towards Shared Ownership: Property, Geography, and Treaty Making in British Columbia" (2013) 95 *Geografiska Annaler: Series B, Human Geography*, 33-50; for a similar argument regarding history treaties, see Michael Asch, *On Being Here to Stay: Treaty and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).

¹¹³ For an overview of treaty history in Canada, see J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009).

the Aboriginal interest to “give-way”. Sometimes it is the Crown or private interests which must be modified or eliminated in advancing this goal. The symmetry presented by this option takes us deeper into the realm of equality. It advances the principle of non-discrimination in transforming the parties’ relationship in a more just way. The reciprocity underlying this approach should also cause other Canadians to think twice when asking Aboriginal peoples to extinguish or modify their interests — knowing that the same request may be made of them during negotiations to protect non-Aboriginal interests.¹¹⁴

Of course, protecting non-Indigenous land through Indigenous governance systems must overcome the long-standing principle that: “Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties.”¹¹⁵ Courts could tenaciously hold to this principle and either invalidate private ownership or deny Aboriginal title over such lands.¹¹⁶ This would be unfortunate. Both results seem less than satisfactory because of their bluntness and zero-sum implications. This does not advance the spirit of reconciliation.¹¹⁷ The Courts should strive to protect each interest, as vigorously as possible, with priority being afforded to Aboriginal title because of its constitutional undergirding, particularly when compared to the non-constitutional aspects of private ownership.

¹¹⁴ In this respect, insecurity in Aboriginal land rights might be seen as signalling a similar insecurity in non-native property rights. Thus, Aboriginal peoples might function as a “canary in a coalmine” for other Canadians. As the leading theorist of United States Federal Indian law wrote:

... the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner’s canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.

Felix S. Cohen, “Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy” (1953) 62 Yale L.J. 348, at 390.

¹¹⁵ *Delgamuukw*, *supra*, note 15, at para. 113.

¹¹⁶ It should also be noted that the rule itself, that Aboriginal title can only be surrendered to the Crown, while now an important part of Canadian law, was initially a legal fiction invented by Marshall J. of the United States Supreme Court to tidy up non-Aboriginal peoples’ claims to Aboriginal lands after the revolution. Previous practice in North America recognized that Aboriginal peoples could pass good title to non-Indigenous purchasers. The practice was squelched by Marshall J. to strengthen federalist interests in the post-Republic period, as part of a broader effort to knit the United States more strongly into a centralized political power. For an excellent discussion of this history, see Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Disposessed Indigenous Peoples of Their Land* (New York: Oxford University Press, 2007).

¹¹⁷ A recent discussion of reconciliation in the Canadian context is found in Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation* (Ottawa: Library and Archives Canada, 2015), online: <<http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Principles%20of%20Truth%20and%20Reconciliation.pdf>>.

This approach more fully embodies the principle of reconciliation which underlies Aboriginal rights.¹¹⁸ Safeguarding private ownership through Aboriginal people's management of Aboriginal title lands is consistent with Canada's broader constitutional methodologies which strive to apply principles of proportionality, reasonableness, fairness and fundamental justice. A "large, liberal and generous" approach in favour of Aboriginal rights is warranted.¹¹⁹ Part of this liberality would include protecting private land holdings through Aboriginal title through Indigenous legal systems. The broader public interest could thus be advanced in protecting Aboriginal title lands,¹²⁰ and this interest includes the Aboriginal public too.¹²¹ At the same time the general public's interests in land should not create a general prospective rule which could be used to dispossess Indigenous peoples of their land through non-consensual Crown grants.¹²²

Furthermore, the Crown could negotiate treaties with Indigenous peoples to secure the recognition and affirmation of private ownership under Crown or Aboriginal protection. This could facilitate reconciliation. Since private lands may be affected by Aboriginal title rights the Crown now has a greater incentive to enter into treaties with First Nations in British Columbia. It can either confirm through agreement that private lands are protected under Indigenous peoples' own laws, or it can make arrangements to place private ownership explicitly within Crown registry systems. As the United States Supreme Court wrote in the seminal case of *United States v. Winans*, "treaties are a grant of rights from the Indians".¹²³ Until a First Nations grants land

¹¹⁸ For a fuller discussion of the mutuality underlying reconciliation see Jeffery G. Hewitt, "Reconsidering Reconciliation: The Long Game" (2014) 67 S.C.L.R. (2d) 259.

¹¹⁹ *Sparrow*, *supra*, note 52, at para. 56: "When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded."

¹²⁰ *Tsilhqot'in Nation*, *supra*, note 2, at paras. 1, 23, 71, 77, 81, 82, 84, 118, 125, 139. I am not clear how the general public interest became a justification for infringing Aboriginal rights when the leading case which introduced the infringement analysis said: "We find the 'public interest' justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights."; *Sparrow*, *supra*, note 52, para. 72.

¹²¹ *Tsilhqot'in Nation*, *supra*, note 2, at para. 81: "... the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public".

¹²² The Crown cannot presently invoke the public interest and create private rights on Aboriginal title lands and expect to prevail: *Tsilhqot'in Nation*, *supra*, note 2, at para. 124.

¹²³ *United States v. Winans* (1905), 198 U.S. 371, at 381, 25 S. Ct. 662 [hereinafter "*Winans*"]. The United States Supreme Court stated: "In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted."

rights to British Columbia to create private ownership rights within an Aboriginal title area,¹²⁴ the power to use and occupy Aboriginal title lands is “reserved to the Indians”.¹²⁵ If Indigenous land was granted without a treaty this would problematically imply that such lands were *terra nullius*, a proposition the Supreme Court itself rejected in the *Tsilhqot’in* decision.¹²⁶

In the absence of such treaties, Aboriginal title embodies a constitutionally protected interest in land,¹²⁷ which may not be immediately registerable under British Columbia’s *Land Title Act*.¹²⁸ Thus, private land holdings held within Aboriginal title land may suffer from this same defect unless the parties act to confirm such titles. While Aboriginal title has priority over non-Aboriginal property interests by virtue of their constitutional protection, this does not mean that a declaration of Aboriginal title will automatically defeat non-Aboriginal interests and their accommodation within Indigenous legal systems. Remember, Aboriginal title is not absolute. Similarly, to repeat, the protection of private ownership is also conditional. This is particularly the case when land was wrongfully carved out of Aboriginal title

¹²⁴ Even within a treaty context First Nations may still have rights to use Crown grants of land (such as fee simple lands). See *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771, at paras. 54, 58, 60, 65, 66, 68 (S.C.C.) and *R. v. Bartleman*, [1984] B.C.J. No. 1760, [1984] 3 C.N.L.R. 114 (B.C.C.A.).

¹²⁵ *Winans*, *supra*, note 123.

¹²⁶ For academic critiques of *terra nullius* and the doctrine of discovery see Robert J. Miller, Jacinta Ruru, Larissa Behrendt & Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010); Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990).

¹²⁷ The Supreme Court compares private land with Aboriginal title in the *Tsilhqot’in Nation* decision in para. 109:

The Act is silent on Aboriginal title land, meaning that there are three possibilities: (1) Aboriginal title land is “Crown land”; (2) Aboriginal title land is “private land”; or (3) the *Forest Act* does not apply to Aboriginal title land at all. For the purposes of this appeal, there is no practical difference between the latter two.

Tsilhqot’in Nation, *supra*, note 2, at para. 109.

¹²⁸ British Columbia *Land Title Act*, R.S.B.C. 1996, c. 250. Cases which have denied the registration of Aboriginal land interests in provincial and territorial land registries include *R. v. Paulette*, [1976] S.C.J. No. 89, [1977] 2 S.C.R. 628 (S.C.C.); *Uukw v. British Columbia*, [1986] B.C.J. No. 3270, [1986] 4 C.N.L.R. 111 (B.C.S.C.), *revd* [1987] B.C.J. No. 610, [1988] 1 C.N.L.R. 173 (B.C.C.A.), leave to appeal to S.C.C. refused [1987] S.C.C.A. No. 181, 12 B.C.L.R. (2d) xxxiv; *Lac La Ronge Indian Band v. Beckman*, [1990] S.J. No. 218, 70 D.L.R. (4th) 193 (Sask. C.A.); *Chippewas of Kettle and Stony Point v. Canada*, [1994] O.J. No. 1073, 4 C.N.L.R. 34 (Ont. Gen. Div.); *James Smith Indian Band v. Saskatchewan (Master of Titles)*, [1995] S.J. No. 213, 123 D.L.R. (4th) 280 (Sask. C.A.); *Skeetchestn v. British Columbia (Registrar of Land Titles)*, [2000] B.C.J. No. 1916, [2001] 1 C.N.L.R. 310 (B.C.C.A.).

territory without Indigenous participation or consent. In the *Tsilhqot'in Nation* decision the Supreme Court wrote that “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”.¹²⁹

Perhaps, as I am suggesting, an appropriate justification for past non-consensual infringements of Aboriginal title will see private ownership interests incorporated and protected within Indigenous legal systems, supported and upheld by the honour of the Crown. In such circumstances private ownership will be protected but this does not mean that the private interest will rest on Crown law alone;¹³⁰ so-called private ownership would owe its existence to both Indigenous law and the common law.¹³¹ In these circumstances, unlike Aboriginal title interests, private interests on Aboriginal title could be alienable to other parties. The land would still be marketable. Mortgages could be secured against such lands to facilitate private use. Land use planning and municipal-like services could be also provided and managed by the First Nation but this would not undermine the owner’s secured interest. First Nations taxation of private interests on Aboriginal title lands could not be levied in such a way as to amount to expropriation of this interest without justification and just compensation: reconciliation, proportionality, reasonableness, fairness and fundamental justice would demand that court’s supervise the relationship to ensure such outcomes, as I have been arguing. At the same time escheat-like provisions would favour the Aboriginal group in

¹²⁹ *Tsilhqot'in Nation*, *supra*, note 2, at para. 124.

¹³⁰ In finding guidance about how private ownership and Aboriginal title interacts the Court might choose to modify early principles found in the United States Supreme Court case called *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, at 593. In that case the Court held that a grant of private title purchased directly from the Piankeshaw and Illinois Indians could not be sustained in a United States Court. However, the Court affirmatively held that remedies for securing titles purchased from the Indians could be pursued under Indian Law. Private ownership in British Columbia (in the circumstances I am describing) would not derive from a non-Indigenous source, thus distinguishing this article’s example from the *Johnson* case. At the same time, Indigenous law might recognize Crown created rights within Aboriginal title territories and thus provide protection for them in these instances. Under this theory the flawed creation of Crown grants to third parties could protect these private interests while at the same time justifying this infringement by ensuring that Aboriginal title is diminished as minimally as possible in the circumstances.

¹³¹ As the Supreme Court of Canada wrote in *Van der Peet*, *supra*, note 66, at para. 42: “a morally and politically defensible conception of Aboriginal rights will incorporate both legal perspectives”.

question and governance and protection of so-called private interests could be facilitated through Indigenous law.¹³²

Note the mutuality embedded in this analysis: Aboriginal title is not an absolute right, nor is privately held land with an area of declared Aboriginal title an absolute interest. At the same time privately held lands in Aboriginal title lands cannot simply remain under Crown control, as noted, because the Crown's grant is flawed — it was created within a territory where it did not have the beneficial interest. Indigenous law must *ex proprio vigore* (of their own force) protect private interests, or by referential incorporation of these interests through constitutional frameworks, treaty arrangements and statutes. The point is that private property's relationship with Aboriginal title may be constitutionally protected through Aboriginal governance. In this article I am not trying to detail every aspect of the relationship between Aboriginal title and private ownership. I am attempting to open space for further discussion in light of the Court's broader framework. I am exploring one path opened by the Court when it said Aboriginal title is not absolute. In my view, when considering rights to land, the Court's rejection of absolute propositions for Aboriginal parties must also be applied to non-Aboriginal parties. It must open a space for mutuality and reconciliation. This is necessary to create a constitutionally consistent jurisprudence.

At the same time, constitutionalized Aboriginal title rights should obviously trump non-constitutionalized property interests.¹³³ As I have argued, to hold otherwise would privilege non-Aboriginal interests over rights constitutionally protected within the country's highest law. This would be discriminatory. It would not treat Aboriginal and non-Aboriginal interests in a land in a way that respects the constitutional nature of Aboriginal rights. Privileging interests over constitutionally protected rights would be contrary to Canada's normal constitutional order. Thus we must not presume "private" ownership would universally limit declarations of Aboriginal title rights in Canada. It would be passing ironic if non-constitutionalized non-Aboriginal property interests were regarded as being absolute relative to Aboriginal title. Such a

¹³² This is similar to how Nisga'a law deals with third party interests within their treaty: "If, at any time, any parcel of Nisga'a Lands, or any estate or interest in a parcel of Nisga'a Lands, finally escheats to the Crown, the Crown will transfer, at no charge, that parcel, estate or interest to the Nisga'a Nation." *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2, s. 7.

¹³³ Kent McNeil, "Aboriginal Title as a Constitutionally Protected Property Right", in *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001), at 292.

conclusion would bring the administration of justice into disrepute because of the seeming bias such a result would reveal.

The need for fairness, reasonableness, proportionality and reconciliation, accomplished partially through the recognition and affirmation of Indigenous law and governance, is a key to understanding how private land rights might be interpreted in relation to Aboriginal title lands. The Court has been very clear that absolute positions are not constitutionally sustainable when section 35(1)'s framework is in force. These limitations would likewise be applicable to privately held lands. In themselves, private lands do not even enjoy direct constitutional protection.¹³⁴ Nonetheless, through the analysis developed in this article, private lands found on Aboriginal title territories would gain enhanced protection and enjoy a security of tenure through the constitutional means described herein. On declared title lands private property would gain constitutionally secure status through their relationship with Aboriginal title lands.

4. Distinguishing The *Chippewas* of the *Sarnia* Case

The Court's nascent framework for dealing with Aboriginal title has significant implications for privately held land within Aboriginal territories in British Columbia. Failing to hold private ownership as *absolutely* inviolable in the face of declarations of Aboriginal title would change "settled" expectations.

"Private" property owners potentially face a change in the source or scope of their tenures. There is no escaping this issue. This creates problems for such land owners in the short term. Even if Indigenous governance was formally accredited by the courts and/or treaties were signed, to place these lands more securely within Crown registries or within Indigenous legal systems, it would take time to accomplish these objectives. Aboriginal peoples possess greater bargaining power in

¹³⁴ The fact that there are limitations on Aboriginal title within Canada's constitutional framework is not to detract from Aboriginal title's great strength. Aboriginal title is a broad right to use land for a wide variety of purposes. While this is a very powerful right, even with this strength we must reject essentialism in understanding Aboriginal title. Likewise, under the Court's framework, we must also reject essentialism in relation to Crown land rights, *and* the Crown's creation of private land rights. The Court has rejected *a priori* determinations in this field. When Aboriginal title is raised each case engages a contextual inquiry. Thus, the answer to whether private property is affected by Aboriginal title may be: it depends on the circumstances of the case. For an extended discussion about the problems with essentialism in Aboriginal law, see Borrows, "Canada's Indigenous Constitution", *supra*, note 110.

relation to private land than was the case prior to the *Tsilhqot'in Nation* decision. Aboriginal title implications may constrain the Crown in acting quickly because it does not have the last word in this instance. It will also take time to test how Indigenous Nations' own laws would protect Crown-derived "private" property interests within Aboriginal title regimes. Even if private property owners were generously compensated by the Crown for the diminishment in their interests caused by the Crown's wrongful prior appropriation of Aboriginal title lands, it would take time to put these mechanisms in place.

There is no question that this creates unhealthy uncertainty for private owners in British Columbia. On the other hand First Nations continue to suffer losses if delays perpetuate other people's claims to Aboriginal title lands. They also encounter troubling and debilitating uncertainty. At one level it might be said that the parties face a zero-sum game, where victory for one group appears to be a substantial loss for the other group.

Indigenous peoples might say "welcome to the club". Aboriginal titles have long been insecure because of the privileging of non-Aboriginal interests in land.¹³⁵ Now, the polarity may be reversed. The illegal settlement of British Columbia upset millennia-old expectations concerning land use and occupation within Aboriginal territories.¹³⁶ The fact that this was contrary to British Proclamations and the common law,¹³⁷ as well as Indigenous peoples' own laws,¹³⁸ only made matters

¹³⁵ For an excellent article discussing the various ways in which Aboriginal land rights and interests have been treated by the courts, legislatures and through treaties, see Nigel Bankes, Sharon Mascher & Jonnette Watson Hamilton, "Recognition of Aboriginal Title and Its Relationship with Settler State Land Titles Systems" (2014) 47 U.B.C. L. Rev. 829.

¹³⁶ Cole Harris, *Making Native Space: Colonialism Resistance, and Reserves in British Columbia* (Vancouver: UBC Press, 2002).

¹³⁷ For a discussion of how the Royal Proclamation and common law should have protected Aboriginal lands rights, see Brian Slattery, "The Aboriginal Constitution" (2015) 67 S.C.L.R. (2d) 319.

¹³⁸ For a statement indicating the unlawfulness of British Columbia's taking of Aboriginal lands from an Indigenous legal perspective, see "Memorial To Sir Wilfrid Laurier, Premier of the Dominion of Canada", from the Chiefs of the Shuswap, Okanagan and Couteau Tribes of British Columbia, Presented at Kamloops, B.C., August 25, 1910, online: <<http://shuswapnation.org/to-sir-wilfrid-laurier/>>.

What have we received for our good faith, friendliness and patience? Gradually as the whites of this country became more and more powerful, and we less and less powerful, they little by little changed their policy towards us, and commenced to put restrictions on us. Their government or chiefs have taken every advantage of our friendliness, weakness and ignorance to impose on us in every way. They treat us as subjects without any agreement to that effect, and force their laws on us without our consent and irrespective of whether they are good for us or not. They say they have authority over us. They have broken down our old laws and customs (no matter how good) by which we regulated ourselves.

worse.¹³⁹ Indigenous peoples in British Columbia have long claimed that their titles have been insecure through the unlawful taking of their lands.¹⁴⁰ Compensation or incorporation within provincial property law regimes is not likely to reduce this experience of loss and alienation. Just as non-Aboriginal peoples might in some future day feel aggrieved if their land is held under Indigenous ownership or control, Indigenous peoples have long felt that most every gain for non-Aboriginal people resulted in a direct loss for their own communities.

We must not hide behind the language of reconciliation and pretend that each interaction will always be mutually beneficial at a micro-level, even if this is the overall macro-level result. Some people will lose in this context while other people will gain. In macro-level terms the historic losers in this process have been Aboriginal peoples. In the future, non-Aboriginal people might suffer some losses (even as others gain longer term land rights security) — *if* the Court applies the law in a non-discriminatory manner.¹⁴¹ This is what happens in a market context when government subsidies for private ownership relative to Aboriginal title

¹³⁹ For a description of the colonial displacement of Indigenous peoples in British Columbia see Cole Harris, *The Resettlement of British Columbia* (Vancouver: U.B.C. Press, 1997) 68-102; Paul Tennant, *Aboriginal Peoples and Politics of British Columbia* (Vancouver: UBC Press, 1990) 39-52, 96-113.

¹⁴⁰ See the representative quote from 1888 given by David McKay in *Calder v. British Columbia (Attorney-General)*, [1973] S.C.J. No. 56, [1973] S.C.R. 313, 34 D.L.R. (3d) 145, at 358 (S.C.C.):

... what we don't like about the Government is their saying this: "We will give you this much land". How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land -- our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish.

¹⁴¹ Canadian law has not always developed in a way which is non-discriminatory for Indigenous peoples: see *Sparrow*, *supra*, note 52, at para. 49: "And there can be no doubt that over the years the rights of the Indians were often honoured in the breach." For a discussion of judicial power can be exercised in troubling ways for Indigenous peoples, given the uneven allocations of political, legal and economic power in British Columbia, see Robin Ridington, "Fieldwork in Courtroom 53: A Witness to Delgamuukw" in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992), at 208; Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991); Boyce Richardson, *Drum Beat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989).

are removed. As noted, this would reverse the general polarity of how benefits have flowed in Canadian law. We must not overestimate these changes however: Indigenous peoples continue to face substantial disadvantages and experience unequal access to political, economic and legal power relative to the general population.¹⁴²

At the same time, we must not lose sight of the fact that reconciliation is the constitutional value which animates the recognition and affirmation of Aboriginal rights.¹⁴³ As the Supreme Court observed in the *Mikisew Cree* case: “The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.”¹⁴⁴ As far as possible Courts, Parliaments, Legislatures and Indigenous governments must do all they can to ensure no one is unjustly deprived of the benefits of their long-settled expectations regarding land use and occupation — and this goes for both Aboriginal title holders and third-party holders or private land interests. Furthermore, though there are great temptations to act otherwise, most Indigenous peoples recognize that the dispossession of their non-Aboriginal neighbours would not be just, fair, honourable or in accord with their society’s own law and morality.¹⁴⁵

“Welcome to the club” may seem like an appropriate first response when considering the insecurity of non-native title holders in the face of ongoing colonialism. Fortunately this view is not likely to prevail. Indigenous peoples are reasoning and reasonable people, which can be expressed through law.¹⁴⁶ Though they are extremely dissatisfied with and actively reject British Columbia’s colonialism many First Nations have been working to positively transform their relationships with the

¹⁴² National Aboriginal Economic Development Board, *Aboriginal Economic Progress Report*, June 2015, online: <<http://www.naedb-cndea.com/reports/NAEDB-progress-report-june-2015.pdf>>.

¹⁴³ M. Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in W. Kymlicka & B. Bashir, eds., *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008), 165.

¹⁴⁴ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 1 (S.C.C.).

¹⁴⁵ See the statement of various Indian Chiefs in Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984) and Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).

¹⁴⁶ Discussion about the role of Indigenous legal orders in Canadian law is found in Senwung Luk, “The Law of the Land: New Jurisprudence on Aboriginal Title” (2014) 67 S.C.L.R. (2d) 289.

province.¹⁴⁷ First Nations own internal legal processes and governance mechanisms need further activation and formal recognition to create justice in our land — not just for themselves, but for non-Aboriginal people as well.

Section 35(1) “does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated”.¹⁴⁸ As noted, this principle flows from the fact that “[i]n the Canadian legal tradition, no right is absolute”.¹⁴⁹ As the Ontario Court of Appeal observed in the *Chippewas of Sarnia* case: it is a “basic principle of our legal system that the right asserted by the claiming party must be considered in relation to the rights of others. The claiming party cannot not claim entitlement to the mechanical grant of an automatic remedy without regard to the consequences to the rights of others that might flow by reason of the complaining party’s own conduct, including any delay in asserting the claim.”¹⁵⁰ This statement, which was directed at Aboriginal peoples, can be “stood on its head”. Its implications can be reversed. As non-Aboriginal peoples make private claims in relation to Aboriginal title land — private owners cannot automatically be granted entitlements without weighing the consequences of these actions for Aboriginal peoples. While the Ontario Court of Appeal found that Aboriginal title rights were not absolute — this same statement should be applied with even greater strength to non-Aboriginal land interests (they are not absolute because such interests are not constitutionally protected).

In the *Chippewas of Sarnia* case, which is distinguishable from the situation in British Columbia, the calibration of Aboriginal and non-Aboriginal interests weighed in favour of non-native property holders.¹⁵¹ It was held that Aboriginal land rights were not absolute. As a result, remedies to which Aboriginal peoples were otherwise entitled were

¹⁴⁷ By way of example, the First Nations Summit has been actively involved over the past 20 years in seeking to reconcile with British Columbia. They have taken a leadership role in facilitating treaty negotiations under the British Columbia Treaty Commission, crafting a “New Relationship” with the province, and negotiating the 2006 Kelowna Accord. Unfortunately, each of these issues has or is floundering. For more information on British Columbia’s recent political history between First Nations and the British Columbia Crown see Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia* (Vancouver: Douglas and McIntyre, 2009); Christopher McKee, *Treaty Talks in British Columbia: Building a New Relationship*, 3d ed. (Vancouver: UBC Press, 2009).

¹⁴⁸ *Sparrow*, *supra*, note 52, at para. 65.

¹⁴⁹ *Chippewas of Sarnia*, *supra*, note 107, at para. 263.

¹⁵⁰ *Chippewas of Sarnia*, *supra*, note 107, at para. 264.

¹⁵¹ For a review and critique of this case, see Kent McNeil, “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion” (2001-2002) 33 *Ottawa L. Rev.* 301-46.

withheld from them. The Chippewa had initially sold their land to private individuals contrary to the Royal Proclamation, but the Crown Court subsequently patented it through an order-in-council.¹⁵² This was contrary to law, but equity intervened to protect the actions of “innocent” non-Chippewa purchasers who traced their title to a faulty Crown deed. While the Crown’s deeds were flawed (because the Crown patented land it did not purchase from the Indians, contrary to its own constitutional rules), the Court nevertheless sustained non-Aboriginal land interests derived from these faulty grants.¹⁵³ Thus, the Court held that non-native people were entitled to prevail over the Chippewa. This is because equity, which partially under-girds Aboriginal title, also applied to validate non-native people’s wrongfully-acquired lands.¹⁵⁴ The Court found that the Chippewa did not sue the land owners within the allotted period to defend recognition of their land rights.¹⁵⁵ The Chippewa grant of title to non-Crown purchasers was thus sustained. Non-native grantees were held secure in their lands because the Chippewa’s prior actions coupled with the doctrines of laches and acquiescence applied against the Chippewa of the Sarnia. Equity preserved non-native title in the face of what would otherwise be an Aboriginal entitlement to the land.

In the *Chippewas of Sarnia* case the Ontario Court of Appeal was keen to ensure that the “so-called” third party “good faith purchaser for value without notice” was not prejudiced through the delay of Aboriginal peoples in bringing their claims to court.¹⁵⁶ Thus, the Chippewa did not succeed in securing a remedy in relation to land to which they were otherwise entitled. Equity’s operation deprived them of what would have been rightfully theirs through the operation of other legal principles.¹⁵⁷

¹⁵² *Chippewas of Sarnia, supra*, note 107, at paras. 11, 47, 107-140

¹⁵³ In this case the Crown did not follow its own rules which required that a surrender of Aboriginal title land to non-native people could only be received by the Crown. In the *Chippewas of Sarnia* case the Crown and Aboriginal peoples wrongfully acquiesced to a private purchase of Aboriginal title land, which was subsequently resold to contemporary non-native land owners who traced their title to the Crown’s wrongful actions.

¹⁵⁴ *Chippewas of Sarnia, supra*, note 107, at paras. 284-291.

¹⁵⁵ Thus the equitable doctrine of laches and acquiescence defeated the Indigenous interest in the *Chippewas of Sarnia* case. *Chippewas of Sarnia, supra*, note 107, at paras. 297-302.

¹⁵⁶ *Chippewas of Sarnia, supra*, note 107, at paras. 303-309.

¹⁵⁷ Furthermore, unlike the *Chippewas of Sarnia* case, there will be no evidence throughout most of British Columbia that there was ever any surrender to third parties. In the *Chippewas of Sarnia* case, Chiefs of the Nation gave a grant to a third party and not the Crown. When the Ontario Court of appeal applied the rules of equity in the *Chippewas of Sarnia* case, this fact counted against them; no such thing occurred in most of British Columbia. Furthermore, British Columbia could not extinguish Aboriginal title through fee simple interests in the province. Thus, the facts which denied

The situation in most of British Columbia is far different from the facts at issue in the *Chippewas of Sarnia* case. Thus, the case is distinguishable. The Chippewa of the Sarnia transferred their lands directly to non-Crown purchasers in an earlier period of their history. In British Columbia there were few, if any, transfers of land by Indigenous peoples to non-Crown agents. In fact, there are very few transfers of land to the Crown throughout the province, as treaties were not pursued except in rare instances.¹⁵⁸

The same rules of equity which deprived Aboriginal title owners of entitlement to their lands in the *Chippewas of Sarnia* case should likewise operate to vacate, diminish or change non-Aboriginal property interests in British Columbia, as the case may be. As the Grace Islet example demonstrates, First Nations in the province have done nothing to contribute to their loss. While non-Aboriginal claimants in Ontario and British Columbia might be characterized as “innocent third party purchasers for value”, private property “owners” in British Columbia cannot trace their title to any Aboriginal acquiescence at any point in history. Furthermore, the same principles of equity which held Aboriginal entitlements in Ontario were not absolute — should recognize non-Aboriginal property interests are subject to equity’s same reach — and thus are also not absolute. Equity cannot only run in one direction, nor should it only benefit more powerful parties. Equity should also benefit Indigenous peoples.¹⁵⁹

Aboriginal peoples in most parts of British Columbia are “innocent third-party suppliers of land who received no value”.

Thus, this article suggests that *Chippewas of Sarnia*’s polarity should be reversed. This would enable Aboriginal peoples to secure remedies in regard to so-called private property when the Crown has acted to deprive Aboriginal peoples of the benefit of their title lands. The observation in the *Chippewas of Sarnia* case that “in Canadian law, that no legal title is absolute”, should apply as strongly to non-Aboriginal *interests* as to Aboriginal title *rights*. Thus, when considering wrongly acquired

the *Chippewas of Sarnia* remedy for wrongful Crown grants are very different in the case of British Columbia, where treaty making did not have much strength.

¹⁵⁸ Historic treaties were signed on Vancouver Island and the Peace River district of British Columbia. Contemporary treaties have been signed by the Nisga’a, Maanulth and Tsawwassen First Nations.

¹⁵⁹ For a fuller discussion of equity’s role in Aboriginal contexts see Leonard I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

non-native property interests, the law should characterize “private” interests in light of the fact that a declaration of Aboriginal title presumes that so-called private interests were wrongfully created to the prejudice of Aboriginal parties.

Thus we must conclude that “non-native people do not possess an automatic entitlement to their land without regard to the consequences to the rights” of Aboriginal peoples. To decide otherwise would be inequitable. Remember, Aboriginal title interests are now recognized as the senior, prior interest in land. Despite the fact that *Tsilhqot’in* and other Aboriginal title rights will only be more recently recognized in British Columbia, this does not undermine the fact that they pre-existed the assertion of sovereignty and continue to the present day.

5. Concluding Thoughts: Implications of Non-Absolutism — Reconciliation and the Consequences of Context

Thus, in the absence of treaties, non-Aboriginal property *interests* in British Columbia within Aboriginal title territories should only be assessed in relation to constitutionally recognized and affirmed Aboriginal title *rights*.¹⁶⁰ Through a brief examination of *Tsilhqot’in*’s framework I have concluded that a declaration of Aboriginal title can be made even in cases where private land interests are located in the claimed territory. The *Tsilhqot’in* decision, as I must again stress, did not directly consider the issue. Nevertheless the case is part of a developing framework which eschews absolutism and leads to the search for more nuanced positions. In this context I have argued that private property should not be automatically immune from a declaration of Aboriginal title.¹⁶¹

¹⁶⁰ As noted, Aboriginal title rights are part of the highest laws of the land under s. 35(1) of the *Constitution Act, 1982*. As I have noted previously, non-Aboriginal property rights are not protected under the *Canadian Charter of Rights and Freedoms* and therefore cannot claim constitutional protection. While legislatures have jurisdiction over “property and civil rights” under s. 92(13) of the *Constitution Act, 1867*, if a province exercised power under s. 92 in a manner which conflicts with s. 35(1) the private property interest would have to give way. The Aboriginal title interest would be paramount in these instances, subject to the Crown’s ability to justifiably infringe (not extinguish) Aboriginal rights under s. 35(1). Such justification requires that the Crown have a valid legislative objective in diminishing Aboriginal rights and that the Crown’s honour in such infringements is preserved.

¹⁶¹ If “occupation is a context-specific inquiry” for Aboriginal peoples (*Tsilhqot’in Nation*, *supra*, note 2, at para. 37), private land interests within the same territories must also be considered by reference to specific histories, and not essentialized principles. This is how consultation and accommodation proceeds under s. 35(1). It would be a discriminatory exercise of law to universalize the common law and contextualize Indigenous law. If any law is to be universalized, which I am not

There might be many concerns raised about this paper's conclusion.

First, it might be said that the potential existence of Aboriginal title throughout British Columbia places a cloud over non-Aboriginal titles. I acknowledge this may be true. In fact, it is one of the reasons I chose to write this article — to acknowledge “the elephant in the room”.¹⁶² Aboriginal peoples have long felt that their title was under a cloud. Aboriginal title has not enjoyed the same clarity or certainty as other land interests in Canada. This has not been a happy experience. Aboriginal land values have been reduced and their investments have been diminished. The conclusions in this article (to mix metaphors) place the shoe on the other foot; when non-Aboriginal people experience similar circumstances they might more seriously advocate for meaningful treaties. Perhaps the Court's vision of reconciliation will be enhanced because the parties are placed in a somewhat similar position, at least in this instance.¹⁶³

The *Tsilhqot'in* decision, by creating ambiguity for non-native peoples' property interests, might recalibrate power between the parties. I hope it does so in a way which simultaneously strengthens Indigenous peoples' hand while enhancing and protecting non-Indigenous land interests. The potential subjection of private ownership to a declaration of Aboriginal title might provide greater incentives to secure mutually acceptable treaty or other settlements, though it could just as easily deter courts from ever declaring

advocating, one would think it would be Indigenous law. It is the first law of the territory which has become Canada. One would thus think that subsequent legal assertions would be subject and secondary to these first laws, and thus more context-specific.

¹⁶² For an excellent article which develops an extended “elephant” metaphor in Aboriginal/Crown relationships, see Kerry Wilkins, “Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada” (2015) *Indigenous L.J.* (forthcoming):

The aim of the present discussion is to help in a small way to explicate the preoccupations of this metaphorical (but by no means imaginary) elephant and, perhaps in particular, to illuminate some of the context within which government lawyers deal, while at work, with Canadian law about indigenous peoples. Like it or not, and like them or not, government lawyers will very often be this elephant's spokespeople in conversations of consequence that take place with aboriginal communities. One has a better chance of getting somewhere in such conversations if one understands better how things seem to them.

¹⁶³ This is not to ignore the significant advantage in power that the Crown has relative to Indigenous peoples by virtue of their greater capitalization and control of wider issues of governance in Canada. The one small yet significant inroad suggested in this article to rebalance Crown/Aboriginal power nevertheless exists within a context where the Crown daily participates in the reproduction of colonial relationships throughout the province and country. For a discussion of colonialism's continuing grip over Aboriginal peoples in Canada, see Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

Aboriginal title, which would be discriminatory. The Supreme Court has repeatedly written that negotiation is the preferred avenue for reconciling Aboriginal and non-Aboriginal peoples.¹⁶⁴ If declarations and negotiations do not occur in British Columbia ambiguity will increase.

Second, in an Aboriginal context there are legal doctrines which help us deal with ambiguity. If we do not know how to characterize so-called private interests in the face of Aboriginal title we should conclude that the law is ambiguous. Constitutionally speaking, ambiguity would favour Aboriginal title rights over non-Aboriginal property interests. In *Gladstone*, the Supreme Court wrote: “Section 35(1) must be given a generous, large and liberal interpretation and uncertainties, ambiguities or doubts should be resolved in favour of the natives.”¹⁶⁵ These constitutionalized canons of construction are necessary to advance reconciliation. They are appropriate counter-weights to Canada’s historical and present manifestations of colonialism, racism and subordination experienced by Aboriginal peoples.¹⁶⁶ Courts must admit that racism and other forms of subordination have informed the development of property law in Canada to the detriment of Aboriginal peoples.¹⁶⁷ This has created injustice. This has led to ambiguity. The ambiguous nature of so-called private ownership in territories where Aboriginal title has been declared should cause the courts to resist universalizing non-native prioritization as a protected interest. It should cause the courts to recognize that Canada has created ambiguity through its unjust treatment of Aboriginal peoples which requires taking a large, liberal and generous approach to their resolution, in favour of Aboriginal peoples.

¹⁶⁴ *Haida Nation*, *supra*, note 65, at para. 14:

While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests.

See also *Sparrow*, *supra*, note 52, at para. 53:

Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power.

¹⁶⁵ *Gladstone*, *supra*, note 52, at para. 133.

¹⁶⁶ For a discussion of Aboriginal rights as a counterweight to Crown power see *Sparrow*, *supra*, note 52, at paras. 65 and 54:

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power....

.....

‘It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.’

¹⁶⁷ The Court has to use stronger words than found in *Sparrow*, *supra*, note 51, at para. 49: “And there can be no doubt that over the years the rights of the Indians were often honoured in the breach.”

Of course, we might (problematically) conclude that there is absolutely no ambiguity in Canada's treatment of Aboriginal peoples land and its relationship to private ownership. It may seem very clear to some people that historically Aboriginal peoples' land rights were meant to be subordinated in Canadian law. While this view may or may not be true,¹⁶⁸ it is exceedingly problematic.¹⁶⁹ It does not uphold the Honour of the Crown.¹⁷⁰ "It is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination."¹⁷¹ To uphold this system without repudiating its roots is to uphold the consequences of racism in the presently unjust allocation of property interests in contemporary British Columbia.¹⁷²

The same crisis the Supreme Court noted in regard to Aboriginal peoples' experience with the criminal justice is present in Aboriginal peoples' experience with the civil justice system (which includes Canada's property laws).¹⁷³ British Columbia's property law system empowers a continuing dispossession of Aboriginal peoples. Governments and private owners are perpetually enriched through "owning" land, which has never been sold by Indigenous peoples. The wrongful appropriation of lands and resources has impoverished Indigenous peoples. Despite the tremendous faith some Indigenous peoples continue to place in Canada's legal system, their mistreatment has also nourished distrust, enmity and fear of the state and its inhabitants. If this is not regarded as a crisis then the term has no meaning.

Despite these problems it might nevertheless (problematically) be said that non-Aboriginal private lands will and should always be securely held under provincial law even in the face of Aboriginal title. In such

¹⁶⁸ Michael Asch, *On Being Here to Stay: Treaty and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).

¹⁶⁹ *Sparrow*, *supra*, note 52, at para. 49:

As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."

¹⁷⁰ *Tsilhqot'in Nation*, *supra*, note 2, at para. 113: "the honour of the Crown requires it to respect the potential, but yet unproven claims".

¹⁷¹ *Mabo v. Queensland* (1992), 175 C.L.R. 1, at 41-42.

¹⁷² *Alexkor Ltd. and Another v. Richtersveld Community and Others* (CCT19/03), [2003] ZACC 18, 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) (October 14, 2003).

¹⁷³ The Supreme Court identified the crisis faced by the criminal justice system, relative to Aboriginal peoples, in *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at para. 64 (S.C.C.). There have been almost as many government reports chronicling Canada's property and civil rights crisis relative to Aboriginal peoples (including Aboriginal title), as there has been in the criminal justice sphere. In fact, this crisis is often noted with equal force on both fronts, with so-called criminal justice inquiries.

instances it could be argued there is simply no ambiguity in this area of the law. If this were true we would not require canons of construction to favour Aboriginal title. The argumentation necessary to accept this point would require some kind of universal statement in favour of non-Indigenous ownership — in order to eliminate ambiguity. This would require placing private ownership in a pre-eminent position relative to Aboriginal title, which seems next to impossible because of limitations found in section 109 of the *Constitution Act, 1867*. A declaration that private property was universally protected and undiminished in the face of Aboriginal title would also have to somehow retroactively accredit and accept the validity of wrongfully appropriated Aboriginal land. It would have to deal with the issue that private interests were secured through the Crown granting something it did not own. The extinguishment or unjustifiable infringement of Aboriginal title rights implied through this line of reasoning raises numerous legal obstacles,¹⁷⁴ in addition to troubling questions about the Crown's role in Canada.¹⁷⁵ It should be rejected.

Third, as stated at the outset, we must remember that we have long known that property interests under common law and statutes in British Columbia are less than absolute. Property has been analogized as a bundle of rights. Each stick in the bundle can be separated from the others in appropriate circumstances when dealing with “private interests”. On the “private” side this analogy can be applied even as we are careful not to carry it over into an Indigenous context because of Aboriginal title's territorial and governance implications.¹⁷⁶ The

¹⁷⁴ Extinguishment of Aboriginal title must be clear and plain, see *Sparrow, supra*, note 52, at 1099 and *Delgamuukw, supra*, note 15, at para. 180: “a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction”. The Supreme Court has written that the Crown in right of the province cannot extinguish Aboriginal title interests because such action would be *ultra vires* the province, see *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] S.C.J. No. 33, [2002] 2 S.C.R. 146, at para. 67 (S.C.C.): “it is clear that legislation which singles out aboriginal people for special treatment is *ultra vires* the province”. Furthermore, in *Delgamuukw* and *Tsilhqot'in* the Court did not accept arguments that Aboriginal title *prima facie* extinguished their Imperial, Federal or Provincial action.

¹⁷⁵ *Tsilhqot'in Nation, supra*, note 2, at para. 69: “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). 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.”

¹⁷⁶ Caution should be used in relation to the “bundle of sticks” analogy for Aboriginal title. Communal title could be pulled apart for Indigenous peoples when interests in land are analogized to a bundle of sticks. In Australia the “bundle of rights” concept has facilitated the piecemeal extinguishment of native title rights. This has occurred as claimants must prove that native title's

Tsilhqot'in Nation case has revealed the variegation which exists between Aboriginal title and private ownership.¹⁷⁷ These differences do not always have to be conflictual; there is room for mutual modification. So-called private property law recognizes easements, co-ownership, joint-ownership and other shared uses.¹⁷⁸ Municipal and provincial statutes can also lead to limitations of land uses to accommodate other users. Aboriginal title could be considered yet another limit on private ownership — with the additional weight of its constitutional status. More could be done to explore the less-than-absolute nature of non-native ownership and find ways to allow private property's limitations to dovetail with Aboriginal title's strength. The co-existence of Aboriginal title and private ownership does not always or usually have to be construed as a zero-sum game. Such dichotomization may be deployed by critics, but the Courts, Parliaments, Legislatures and Indigenous governments can choose other constructions of these rights.

Moreover, with Aboriginal title now recognized and affirmed new forms of property must be recognized to accommodate its existence.¹⁷⁹ Some of those interests would necessarily see private property give way to Aboriginal title. Other innovations might see private land interests subject to Aboriginal title. Perhaps there might be certain restrictions on private property alienation when it exists within an area which is

"rights and incidents" are sourced in "traditional law and custom". Then those rights and incidents are each independently subject to piecemeal extinguishment through the High Court's "inconsistency of interests" test, see *Western Australia v. Ward* (2002), 191 A.L.R. 1 (Aust. H.C.). This has been disastrous for native title claims pertaining to very complex statutory tenure grants over large areas of Crown land, such as pastoral and mining leases. Aboriginal title in Canada is constitutionally protected in a *sui generis* context and should not be subject to a similar extinguishment analysis. I would like to thank Kirsty Gover for this insight.

¹⁷⁷ *Tsilhqot'in Nation*, *supra*, note 2, at para. 72:

Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts".

¹⁷⁸ Mary Jane Mossman & Philip Girard, *Property Law: Cases and Commentary*, 3d ed. (Toronto: Emond Montgomery, 2014), at 522-23; Bruce Ziff, *Principles of Property Law*, 5th ed. (Toronto: Thomson Reuters, 2010), at 336-37.

¹⁷⁹ An example of new laws being developed in light of the declaration of *Tsilhqot'in* title is found through the creation of "Dasiqox Tribal Park: Nexwagwez? an — There for us", online: <<http://www.dasiqox.org/>>. The *Tsilhqot'in* have also drafted a Mining Policy to advance sustainability: see *Tsilhqot'in National Government, Tsi Ts'edetalhdez Gwa Dechen Ts'edilhtan, Mining Policy*, July 30, 2014, online: <<http://www.tsilhqotin.ca/PDFs/MiningPolicyDistribution.pdf>>.

recognized as Aboriginal title land. In such cases, subject to the principles of just compensation discussed earlier, some private lands might not be able to be sold except to the Aboriginal title holder, thus reversing the rule Aboriginal people cannot alienate their land except to the Crown.

Other private interests could interact with Aboriginal title rights to preserve both forms of use and occupation, and still allow for the free alienation of so-called privately owned land. For example, it would be interesting to explore how a *sui generis* condominium-like form of organization might be analogized and transformed in an Aboriginal title context. Aboriginal land interests could combine individual and collective ownership in new ways, which take inspiration from older shared visions of North American settler/Indigenous life.¹⁸⁰ Indigenous laws that protect both so-called common and private spaces might bring these interests together in new and productive ways.¹⁸¹ It would be possible to put use and ownership rights together in a manner which respects Aboriginal collective spaces alongside private spaces, in creating a new kind of strata-type form of organization. This could be done by statute if the Crown meets its high justificatory standard, or through equity, treaty, the common law or Indigenous law. Each of these sources of law continues to be relevant in constructing this *sui generis* area of the law.¹⁸²

Furthermore, Indigenous peoples might create *sui generis* leasehold interests for “private” parties in areas where Aboriginal title has been recognized. The parties might use treaties, statutes, equity, common law and Indigenous law, all within the broader constitutional framework highlighted herein. This would bring British Columbians full circle.

¹⁸⁰ For a discussion of how settlers and Indians had well-developed systems of shared commons and private property throughout North America between approximately 1600 to 1800, see Allan Greer, “Commons and Closure in the Colonization of North America” (2012) 117(2) *American Historical Review* 365.

¹⁸¹ Nobel Prize winning economist Elinor Ostrom has demonstrated how so-called commons land can be successfully managed, see *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990).

¹⁸² Costs of this resolution should be borne by Canada and the province that created the legal problem which requires a remedy (Kent McNeil, “Reconciliation and Third-Party Interests: *Tsilhqot’in Nation v. British Columbia*” (2010) 8 *Indigenous L.J.* 7). If not for the Crown’s failure to uphold the Royal Proclamation and recognize Indigenous peoples’ laws, governance and land rights, the parties would not be in this position. For a fuller discussion of third party interests and Aboriginal title see Howard Highland in his LLM thesis, *Constitutional Realism and Third Party Property Rights in Tsilhqot’in Nation v. British Columbia and Oneida Nation v. New York*, Osgoode Hall Law School, York University, Toronto, September 2011.

When Governor Douglas dealt with Aboriginal title and treaty issues in the province's pre-colonial regimes he intended that First Nations should be recognized as possessing the power to lease their reserved lands to non-native settlers.¹⁸³

Finally, in making all these points related to the reconciliation of Aboriginal title and private rights, I readily acknowledge the non-legal dimensions of this issue.¹⁸⁴ Significant forces are often arrayed against Indigenous peoples as numerical minorities in Canada. Indigenous peoples possess much fewer capital resources. They are underrepresented in political, media, social, economic and other forums. They are not usually found in places where power is channelled, generated, manipulated and exercised. There are both obvious and imperceptible power differentials between Aboriginal peoples on one side, and the

¹⁸³ I would like to thank James Tully for bringing this point to my attention. See Governor Douglas to the Secretary of State for the Colonies, February 9, 1859 in *British Columbia, Papers Connected with the Indian Land Question, 1850-1875* (Victoria: Government Printer, 1875), at 15 and Copy of Dispatch from Governor Douglas to the Right Honourable E.B. Lytton, March 14, 1859, in *British Columbia, Papers Connected with the Indian Land Question, 1850-1875* (Victoria: Government Printer, 1875), at 16. In both, Governor Douglas mentions that 100 per cent of the lease funds would go to the Indians for their self-sufficiency and independence. Unfortunately, Douglas was ignored or overturned: see Robin Fisher, "Joseph Trutch and Indian Land Policy" (1971-1972) 12 B.C. Studies 3. If you look at the Chief Commissioner's dispatch of 30/12/1869 (after Douglas' retirement), you can see what happened. He said that Douglas set up the lease system for the Songhees, the Bay Company people running the lease system abused it, and the holders of the leases refused to pay the money. They demanded to own the land outright. Douglas refused to do so and the settlers refused to pay. Douglas retired and the whole plan was abandoned (and the leaseholders presumably kept their land). In New Westminster in 1874 Douglas, during retirement, reaffirmed his system of discrete purchases for settlement; large reserves; and lease system, see Robert E. Cail, *Land, Man, and Law* (Vancouver: UBC Press, 1974), Appendix.

¹⁸⁴ Most books and articles I have written in this field problematize the role of power and societal influences which exist beyond the courts. A representative list of this work includes: John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010); John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2015) (forthcoming); John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U. Brit. Colum. L. Rev. 1; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1998) 22 American Indian L. Rev. 37; John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. The Queen" (1999) 37 Osgoode Hall L.J. 537; John Borrows, "Domesticating Doctrines: Aboriginal Peoples After the Royal Commission" (2001) 46 McGill L.J. 615; John Borrows, "Aboriginal Rights: Indian Agency and Taking What's not Yours" (2003) 22 Windsor Y.B. Access Just. 253; John Borrows, "(Ab)Originalism and Canada's Constitution" in J. Cameron & S. Lawrence, eds., *Constitutional Cases 2011* (2012) 58 S.C.L.R. (2d) 351; John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) Osgoode Hall L.J. 699; John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in v. the Queen*" (2015) 48 U. Brit. Colum. L. Rev. (forthcoming).

Crown and private owners on the other. The relationship between the parties is severely unbalanced; it strongly favours non-Aboriginal interests. This realpolitik should not be minimized, particularly when discussing private property, which seemingly lies at the heart of this agglomeration of power.

Nothing in this article should cause us to turn our gaze away from these raw truths. The deck is stacked against Aboriginal peoples when it comes to securing declarations of Aboriginal title in the face of private ownership. Sound doctrinal frameworks, while necessary, are not sufficient to positively transform our relationships. Yet, at the same time, we should also acknowledge that the legal system itself is meant to operate in a manner which is free of bias and without prejudice and prejudgment.¹⁸⁵ Courts aspire to explain, persuade and justify their positions rather than resort to raw power in generating their reasons.¹⁸⁶ Section 35(1) of the *Constitution Act, 1982*, in particular, “renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown”.¹⁸⁷ Whether these aspirations can be realized lies in the hands of non-Aboriginal judges and others with much more power than myself. This article stands as an invitation to face and address these opportunities and obstacles in light of our Constitution’s central commitments to the rule of law. It pleads for an approach which places respect at the centre of our relationships.¹⁸⁸ The resolution of potential conflicts between Aboriginal peoples and private ownership is a matter of fairness, proportionality, reasonableness, fundamental justice and reconciliation. It also implicates matters related to power, force,

¹⁸⁵ *Roncarelli v. Duplessis*, [1959] S.C.J. No. 1, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (S.C.C.); *R. v. Valente*, [1985] S.C.J. No. 77, [1985] 2 S.C.R. 673, at 685 (S.C.C.); *R. v. Genereux*, [1992] S.C.J. No. 10, [1992] 1 S.C.R. 259, at 283 (S.C.C.); *Beauregard v. Canada*, [1986] S.C.J. No. 50, [1986] 2 S.C.R. 56, at 69 (S.C.C.); *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), at 1155 cited with approval in *R. v. S. (R.D.)*, [1997] S.C.J. No. 84, [1997] 3 S.C.R. 484, 10 C.R. (5th) 1, at para. 105 (S.C.C.); *Secession of Quebec*, *supra*, note 106.

¹⁸⁶ As the Supreme Court has written: “Courts must be bulwarks against the tides of public opinion...”, *R. v. Hall*, [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309, at para. 128 (S.C.C.).

¹⁸⁷ *Sparrow*, *supra*, note 52, at para. 54, citing Professor Noel Lyon in “An Essay on Constitutional Interpretation” (1988) 26 Osgoode Hall L.J. 95 at 100.

¹⁸⁸ I have discussed this issue in a treaty context in John Borrows, “Indigenous Love, Law and Land in Canada’s Constitution” in Arthur Schfar & Steven Lecce, eds., *Fragile Freedoms: Human Rights in Global Context* (London: Oxford University Press, 2015) (under consideration).

coercion, manipulation and colonialism; this article is about Canada's future as a just or unjust society.¹⁸⁹

It is my contention that Canadians and Indigenous peoples possess great legal imagination and creativity. We have waited too long to draw upon Indigenous law in helping to solve our country's most pressing problems.¹⁹⁰ We now have an opportunity to put these systems together with common and civil law systems in productive, synergistic ways. The *Tsilhqot'in* decision has signalled that we must move past Canada's colonial derogation of Aboriginal rights. While many obstacles lie ahead, Canadians (and not just Indigenous peoples) are reasoning and reasonable people. We can construct solutions to problems we have long papered-over, in granting people interests in Aboriginal lands when the Crown did not legally or morally acquire these interests in an honourable fashion.

Aboriginal title can be recognized and affirmed where "private" lands are involved. At the same time we can rigorously protect "private" ownership even if it is not construed as an absolute interest. Using the *Tsilhqot'in* decisions framework I have argued that a more nuanced legal approach is within our reach to reconcile Aboriginal peoples' constitutional rights with other non-constitutionally protected property interests.

¹⁸⁹ For a view of Canada as a "Just Society", which argues for the abandonment of Aboriginal rights and other distinctions between Indigenous peoples and the Crown, see Peter A. Cumming & Neil H. Mickenberg, *Native Rights in Canada*, 2d ed. (Toronto: Indian-Eskimo Association of Canada, 1972), at 331. For an understanding of the broader policy context of the era when Pierre Trudeau's White Paper was introduced, see Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: Hurtig, 1969); Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981), at 171.

¹⁹⁰ Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Marcus D. Dubber and Tatjana Hörnle, eds., *Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014), at 225.