

**THE ROCKY ROAD TO RECONCILIATION:
EXPLORING THE EFFECTS OF ABORIGINAL TITLE JURISPRUDENCE ON
THE RELATIONSHIP BETWEEN FIRST NATIONS
AND THE CROWN IN CANADA**

by

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Abstract

The purpose of this paper is to explore the effects of Aboriginal title jurisprudence on the relationship between First Nations and the Crown in Canada, paying particular attention to the *Tsilhqot'in* case involving the Tsilhqot'in Nation's Aboriginal title claim for lands in British Columbia. Findings show that the 2007 British Columbia Supreme Court's trial judgement in *Tsilhqot'in Nation v. British Columbia* attempted to improve relations between the Tsilhqot'in and the Crown by placing equal weight on oral history and oral tradition evidence, adopting a broad and flexible standard of occupation, affirming the inapplicability of the *Forest Act* to Aboriginal title lands, and expressing an opinion on Tsilhqot'in Aboriginal title to facilitate the subsequent process of negotiations. Nonetheless, the trial judgement failed to provide the Tsilhqot'in people with a declaration of Aboriginal title, due to a defect in their pleadings. By contrast, while the 2012 British Columbia Court of Appeal's decision in *William v. British Columbia* correctly allowed the Tsilhqot'in appeal on the issue of pleadings, it largely contributed to subverting relations between the Tsilhqot'in Nation and the Crown by interfering with the factual findings of the trial judge, creating a false dichotomy between site-specific and territorial claims, endorsing a narrow and stringent standard of occupation, articulating a preference for Aboriginal rights over Aboriginal title, and putting forward a hollow conception of reconciliation, which fails to place equal weight on the Aboriginal and non-Aboriginal perspectives. The *Tsilhqot'in* case confirms the broader pattern of Canadian Aboriginal title jurisprudence, whereby courts consistently dismiss Aboriginal title claims, either on procedural grounds to avoid dealing with their merits, or on substantive grounds to safeguard the interests of the Canadian state and society.

Preface

This thesis is original, unpublished, independent work by the author, É. Horrocks-Denis.

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Dedication

To my loving family

1 Introduction

Aboriginal title jurisprudence is the most controversial and indeterminate body of law in Canada.¹ Following the entrenchment of Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*², judges were left with the difficult task of defining the nature and scope of Aboriginal title, and clarifying its connection to Aboriginal rights.³ In the landmark decision of *Delgamuukw v. British Columbia*, released in 1997, the Supreme Court of Canada adopted a relatively broad and generous definition of Aboriginal land rights, holding that Aboriginal title constitutes “the right to the exclusive use and occupation of the land,” which includes “the right to choose to what uses land can be put,” and has an “inescapable economic component.”⁴ The Court also set out extensive tests for the proof, infringement, justification, and extinguishment of Aboriginal title, but did not apply these standards in *Delgamuukw*, instead sending the case back to trial because of procedural issues and flaws in the evidentiary record.⁵

Since the development of a theoretical framework for the recognition of Aboriginal title in *Delgamuukw*, several land claims have reached the level of the Supreme Court of Canada, but none has succeeded.⁶ Consequently, considerable uncertainty remains about the

¹ K. McNeil, “Aboriginal Title and Aboriginal Rights: What’s the Connection?” (1997) 36:1 *Alta Law Rev* 117 at 117-118.

² *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Constitution Act, 1982*]. Section 35(1) reads: “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

³ J. Borrows, “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission” (2001) 46 *McGill LJ* 615 at 645; K. McNeil, “Aboriginal Title and the Supreme Court: What’s Happening?” (2006) 69 *Sask L Rev* 281 at 305; B. Slattery, “The Metamorphosis of Aboriginal Title” (2006) 85 *Can Bar Rev* 255 at 255-256.

⁴ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 166 [hereinafter *Delgamuukw*].

⁵ *Ibid.* at paras. 76-77, 107-108, 170-171, 184-186; K. McNeil, “Aboriginal Rights in Transition: Reassessing Aboriginal Title and Governance” (2001) 31:1/2 *Am Rev Can Stud* 317 at 319-320.

⁶ See Justice Groberman’s introduction to Aboriginal title in *William v. British Columbia*, 2012 BCCA 285 (CanLII), <<http://canlii.ca/t/frt8m>> (retrieved on July 30, 2013) [hereinafter *William v. British Columbia*], at paras. 159-160.

precise nature and extent of Aboriginal title rights.⁷ This uncertainty is frustrating for Aboriginal title litigants and for those who perceive the potential of courts to act as agents of societal change in the broader process of reconciliation. The Supreme Court's reluctance to accept Aboriginal title claims likely results from the vast areas of land involved in such cases, and its apprehensions regarding the potential consequences of recognizing Aboriginal title lands on the interests of third parties and the regulatory powers of the federal and provincial governments.⁸ However, the Court's hesitance to apply its own theory of Aboriginal title to recognize concrete geographical areas hinders the resolution of outstanding land claims, and compromises the potential reconciliation between Aboriginal and non-Aboriginal peoples in Canada.

The purpose of this paper is to review the evolution of Aboriginal title jurisprudence and explore its effects on the relationship between First Nations⁹ and the Crown in Canada.¹⁰ Accordingly, the trial and appellate court decisions in the *Tsilhqot'in* case, which involves the Aboriginal rights and title claims of the Tsilhqot'in Nation to two portions of its traditional territory in the west central interior of British Columbia, will be studied to assess

⁷ G. Christie, "Judicial Justification of Recent Developments in Aboriginal Law" (2002) 17:2 CJLS 41 at 51-52; B. Donovan, "The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law's Crooked Path and the Hollow Promise of *Delgamuukw*" (2001) 35:1 UBC L Rev 43 at 44-45; McNeil, *supra* note 1 at 117-118.

⁸ *William*, *supra* note 6 at paras. 158-161. See also Christie, "Judicial Justification", *supra* note 7 at 62-64; K. Wilkins, "Take Your Time and Do it Right: *Delgamuukw*, Self-Government Rights and The Pragmatics of Advocacy" (2000) 27:2 Man LJ 241 at 246-249; D. G. Newman, "Tsilhqot'in Nation v. British Columbia and Civil Justice: Analyzing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History" (2006) 43 Alta L Rev 433 at 444-445.

⁹ The terms 'Indigenous peoples,' 'Aboriginal peoples,' 'native peoples,' and 'First Nations' are employed interchangeably in this paper to refer to the native population of North America, organized in distinct and self-governing societies, prior to the arrival of European settlers.

¹⁰ This paper is based on the assumption that it is appropriate to articulate and interpret the constitutional rights of Aboriginal peoples in Canada in a language and institutional context that is non-Aboriginal. While many Aboriginal peoples may reject this analytical approach because they regard the Canadian legal and political structure as illegitimate and oppressive, I believe that it is possible to interpret the Aboriginal rights entrenched in section 35(1) of the *Constitution Act, 1982* in a manner that recognizes, protects and promotes the self-determination and social, cultural and economic development of First Nations in Canada. See W. F. Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982. Part I: The Interpretive Prism of Section 25" (1988) 22:1 UBC L Rev 21 at 22.

the impact of the Supreme Court of Canada's jurisprudential framework for Aboriginal title on Crown-First Nation relations.

On 24 January 2013, the Supreme Court agreed to hear the appeal in *Roger William et al. v. British Columbia et al.*,¹¹ in November 2013, granting costs to the Tsilhqot'in Nation for both the application for leave to appeal and the appeal, regardless of the ultimate disposition of the case. Legal experts across the country, including Kent McNeil, Gordon Christie, and Sébastien Grammond, consider *Roger William* as the most important Aboriginal title case since *Delgamuukw*, as its outcome will have serious implications for the modern-day treaty process in British Columbia, as well as for the resolution of unsettled land claims in the rest of Canada.¹²

Given the significant economic and jurisdictional aspects of Aboriginal title, this paper posits that, by accepting Aboriginal title claims, courts would help to improve relations between Aboriginal peoples and the Crown. That is, by recognizing the right of Aboriginal peoples to the ownership and management of natural resources on and under portions of their traditional territories, declarations of Aboriginal title would ensure their cultural survival and economic development in the twenty-first century. Conversely, courts would contribute to hindering reconciliation between First Nations and the Crown by dismissing Aboriginal title

¹¹ *Roger William, on his own behalf and on behalf of all other members of the Xenigwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation v. Her Majesty the Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region et al.*, online: Judgements of the Supreme Court of Canada, Applications for Leave, File No. 34986 (January 24, 2013) <<http://scc.lexum.org/>> (retrieved on July 30, 2013) [hereinafter *William et al. v. British Columbia et al.*].

¹² Canadian Press, "B.C. First Nation's land claim headed for Supreme Court" online: *Globe and Mail* (January 24, 2013) <<http://www.theglobeandmail.com/news/british-columbia/bc-first-nations-land-claim-headed-for-supreme-court/article7779212/>> (retrieved on July 30, 2013); P. O'Neil, "Supreme Court of Canada agrees to hear B.C. natives land claims case" online: *Vancouver Sun* (January 24, 2013) <<http://www.vancouversun.com/news/Supreme+Court+Canada+agrees+hear+native+land+claims+case/7866869/story.html>> (retrieved on July 30, 2013); K. McNeil, "Reconciliation and Third-Party Interests: Tsilhqot'in Nation v. British Columbia" (2010) 8:1 *Indigenous LJ* 7 at 8.

claims, thereby depriving the former of the possibility of exercising a limited form of self-government and maintaining a moderate livelihood in the modern era.

This essay is structured in three main sections. First, I survey the common law of Aboriginal title¹³ from the late nineteenth century to the present, focusing on the following cases: *St. Catherine's Milling and Lumber Company v. The Queen*;¹⁴ *Province of Ontario v. Dominion of Canada*;¹⁵ *Calder et al. v. British Columbia*;¹⁶ *Guerin v. The Queen*;¹⁷ *R. v. Adams*;¹⁸ *R. v. Côté*;¹⁹ *Delgamuukw v. British Columbia*;²⁰ and *R. v. Marshall*; *R. v. Bernard*.²¹ I devote particular attention to changes in the definition of the nature and content of Aboriginal title, the fiduciary relationship between First Nations and the Crown, the interaction between Aboriginal title and Aboriginal rights, as well as the tests for the proof of Aboriginal title and justification of Aboriginal title infringements. Second, I examine the application of the theoretical framework for the recognition of Aboriginal title in the British Columbia Supreme Court's trial decision in *Tsilhqot'in Nation v. British Columbia*,²² delivered by Justice Vickers in 2007, and the British Columbia Court of Appeal's reasons and conclusions in *William v. British Columbia*,²³ pronounced by Justice Groberman in June

¹³ The statutory law of Aboriginal title is not discussed in this paper due to time and space considerations. The Supreme Court of Canada's recent Aboriginal title rulings in *Wewaykum Indian Band*, *Haida Nation*, *Taku River*, and *Manitoba Metis*, which deal with the honour and fiduciary duty of the Crown vis-à-vis First Nations, are excluded from the scope of this analysis for the same reasons. See *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14.

¹⁴ *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 [hereinafter *St. Catherine's Milling*].

¹⁵ *Province of Ontario v. Dominion of Canada*, [1909] S.C.R. 1 [hereinafter *Province of Ontario*].

¹⁶ *Calder et al. v. Attorney-General of British Columbia*, [1973] S.C.R. 313 [hereinafter *Calder*].

¹⁷ *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [hereinafter *Guerin*].

¹⁸ *R. v. Adams*, [1996] 3 S.C.R. 101 [hereinafter *Adams*].

¹⁹ *R. v. Côté*, [1996] 3 S.C.R. 139 [hereinafter *Côté*].

²⁰ *Delgamuukw*, *supra* note 4.

²¹ *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 [hereinafter *Marshall and Bernard*].

²² *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 [hereinafter *Tsilhqot'in Nation*].

²³ *William*, *supra* note 6.

2012. Finally, I turn to the consequences of the trial and appellate decisions in the *Tsilhqot'in* case for the future of Aboriginal title and reconciliation between First Nations and the Crown in Canada.

Findings show that the British Columbia Supreme Court's trial judgement in *Tsilhqot'in Nation v. British Columbia* sincerely sought to harmonize relations between the Tsilhqot'in people and the Crown by prioritizing the Aboriginal perspective in the assessment of oral history and oral tradition evidence, adopting a broad and flexible standard of occupation, affirming the unconstitutionality of attempts by British Columbia to manage forestry resources on Tsilhqot'in title lands through the application of the *Forest Act*²⁴, and expressing an opinion on Tsilhqot'in Aboriginal title to facilitate the subsequent process of negotiations. Yet, the trial judge ultimately failed to reach an "honourable settlement" between the Tsilhqot'in and the Crown, by refusing to grant the Aboriginal community a declaration of title, due to a defect in their pleadings.²⁵ The rationale behind this dismissal was the trial judge's principled but perhaps naïve belief that the resolution of Aboriginal title claims would be better served by negotiation than litigation.²⁶ Consequently, the trial ruling in *Tsilhqot'in Nation* has negative ramifications for the future of Aboriginal title rights, suggesting that courts could decline to make declarations of Aboriginal title if they perceive the adversarial structure of the Canadian judicial system and legal strictures as precluding the ultimate goal of reconciliation between Aboriginal and non-Aboriginal peoples in Canada.²⁷

²⁴ *Forest Act*, R.S.B.C. 1996, c. 157 [hereinafter *Forest Act*].

²⁵ McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 7-25; *Tsilhqot'in Nation* (B.C.S.C.), *supra* note 22 at para. 1382.

²⁶ D. Lambert, "The Tsilhqot'in Case" (2012) 70:6 *Advocate* 819; McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 7-14.

²⁷ McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 13-14; G. R. Shiveley, "Negotiation and Native Title: Why Common Law Courts are Not Proper Fora for Determining Native Land Title Issues" (2000) 33 *Vand J Transnat'l L* 427 at 456-462; R. Yurkowski, "'We are All Here to Stay': Addressing Aboriginal Title Claims After *Delgamuukw v. British Columbia*" (2000) 31 *VUWLR* 471 at 472, 493.

By contrast, even though Justice Groberman allowed the Tsilhqot'in appeal on the issue of pleadings, the British Columbia Court of Appeal's appellate decision in *William v. British Columbia* contributed to subverting relations between the Tsilhqot'in people and the Crown, by interfering with the factual findings of the trial judge, creating a false dichotomy between site-specific and territorial Aboriginal title claims, adopting a narrow and rigid standard of occupation, manifesting a preference for Aboriginal rights over Aboriginal title, and endorsing a hollow conception of reconciliation, which fails to place equal weight on the Aboriginal and non-Aboriginal perspectives.²⁸ The Court of Appeal's decision in *William* bodes ill for the future of Aboriginal title in Canada because it employs the language of site-specificity, intensity of use, and cultural security as a rhetorical mechanism to reduce if not outright remove the economic and jurisdictional elements of Aboriginal title.

The trial and appellate decisions in the *Tsilhqot'in* case confirm the pattern of Canadian Aboriginal title jurisprudence, whereby courts consistently dismiss Aboriginal title claims, either on procedural grounds to avoid dealing with their merits, or on substantive grounds to safeguard the interests of the Canadian state and society. This tendency reflects the strategic decision-making of courts seeking to safeguard their institutional legitimacy vis-à-vis other political institutions and the public, by delegating the resolution of Aboriginal land claims to the democratic process. Nonetheless, in light of the historical context and structural imbalance of power between First Nations and the federal and provincial governments, Canadian judges must fulfil their role in the broader process of reconciliation by recognizing and affirming the existence of Aboriginal title rights in Canada.

²⁸ Lambert, "The Tsilhqot'in Case", *supra* note 26 at 820; L. Mandell, "Aboriginal Title Over the Buffalo Jump: Decision of the British Court of Appeal in the *Tsilhqot'in* Case" online: (2012) [Mandell Pinder Barristers and Solicitors] 1 at 1-12.

2 Overview of the Common Law of Aboriginal Title

This section surveys the evolution of the common law of Aboriginal title in Canada's high courts. The historical review reveals that a narrow, rigid conception of Aboriginal title, as a political "personal and usufructuary right," contingent upon the good will of the Crown, prevailed during the first eighty-five years following Confederation.²⁹ By contrast, a broad, flexible conception of Aboriginal title, as a *sui generis* legal right inherent in the prior occupation of First Nations, has emerged in the last four decades of Aboriginal rights jurisprudence. Nonetheless, remnants of imperialism and paternalism persist in contemporary Aboriginal law, as implicit in the Supreme Court of Canada's refusal to call into question the sovereignty and underlying title of the Crown to all lands in Canada, its unilateral imposition of an inherent limit on the scope of Aboriginal title, and its creation of a relaxed test for the justification of Aboriginal title infringements, *inter alia*.³⁰

2.1 *St. Catherine's Milling*: Aboriginal Title as a "Personal and Usufructuary Right"

The existence of Aboriginal title in Canada was first recognized by the Judicial Committee of the Privy Council in the decision of *St. Catherine's Milling and Lumber Company v. The Queen*, handed down in the late 1880s.³¹ Aboriginal litigants did not directly participate in this case, which sought to determine whether lands located within the boundaries of Ontario belonged to the provincial or federal government, in light of the 1873 cession treaty between the Dominion of Canada and the Salteaux tribe of Ojibeway Indians.³²

²⁹ *St. Catherine's Milling*, *supra* note 14 at 54.

³⁰ See e.g. J. Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537 at 548; P. Macklem, "What's Law Got to Do with It? The Protection of Aboriginal Title in Canada" (1997) 35:1 Osgoode Hall LJ 125 at 132-137.

³¹ The Judicial Committee of the Privy Council acted as Canada's highest tribunal in criminal cases from 1867 to 1888, and civil law cases from 1867 to 1949, when the Supreme Court of Canada became the country's final court of appeal.

³² *St. Catherine's Milling*, *supra* note 14 at 47; McNeil, "Aboriginal Title and the Supreme Court", *supra* note 3 at 282-284.

Lord Watson, writing for the majority, ruled that although the federal government has exclusive power over “Indians, and [l]ands reserved for the Indians,” pursuant to section 91(24) of the *Constitution Act, 1867*³³, it does not have the right to interfere with Ontario’s beneficial interest in the lands within its provincial boundaries.³⁴ However, the most interesting aspect of this judgement is Lord Watson’s discussion of the nature of First Nations’ interest in the lands following their surrender. Specifically, Lord Watson characterized “Indian title” as “a personal and usufructuary right, dependent upon the good will of the Sovereign.”³⁵ The term “usufructuary” suggests that Aboriginal peoples have the right to engage in hunting, gathering, trapping and other traditional activities on Crown lands, short of waste or destruction. In contrast, the qualifier “personal” signifies that Aboriginal title is inalienable except to the Crown.³⁶ Underlying the inalienability of Aboriginal title is the paternalistic idea that Aboriginal peoples require protection from corrupt European colonizers to preserve their homelands; this rationale is explicit in the text of the *Royal Proclamation, 1763*³⁷.

Furthermore, Lord Watson held that the “Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden.”³⁸ The use of the phrase “mere burden” betrays the imperialism of the Lordships sitting on the Privy

³³ *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), s. 91(24) [hereinafter *Constitution Act, 1867*].

³⁴ *St. Catherine’s Milling*, *supra* note 14 at 59-60.

³⁵ *Ibid.* at 54.

³⁶ O. W. MacLaren, M. Barry, and K. Sangster, “Tsilhqot’in Nation v. British Columbia” (2011) 43 *Survey Review* 123 at 124-125.

³⁷ *Royal Proclamation, 1763*, R.S.C. 1985, App. II, No. 1 [hereinafter *Royal Proclamation, 1763*]. The *Royal Proclamation, 1763* in part provides: “[a]nd whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, to prevent such Irregularities for the future, [...], We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement [...]” See also K. McNeil, “Self-Government and the Inalienability of Aboriginal Title” (2002) 47 *McGill LJ* 473 at 477-481, 509-510.

³⁸ *St. Catherine’s*, *supra* note 14 at 58.

Council bench, who believed that the land rights of Aboriginal nations are attributed to the bounty of the Sovereign rather than to their occupation of North American territory prior to European settlement. The Privy Council thus endorsed a contingent conception of Aboriginal title, which denies the existence of Aboriginal legal rights to land use and possession, except if these rights have been expressly acknowledged by a Crown act.³⁹

Given that Lord Watson's comments on the nature of Aboriginal title were made in *obiter dicta*—that is, were incidental to the point of law being decided—they were not supposed to be binding on lower courts. Yet, for eighty-five years following the Privy Council's decision in *St. Catherine's Milling*, Canadian courts continuously conceptualized Aboriginal title as a “personal and usufructuary right, dependent upon the good will of the Sovereign,” treating the Lordships' *dicta* as an authoritative judgement on the nature of Aboriginal title in Canada.⁴⁰

2.2 Province of Ontario: Aboriginal Title as a “Mere Burden”

The Supreme Court of Canada confirmed the Privy Council's conception of Aboriginal title in its decision in *Province of Ontario v. Dominion of Canada*, delivered in 1909.⁴¹ At issue was whether Ontario had a legal obligation to reimburse the federal government for the cost of executing the 1873 North-West Angle Treaty No. 3 with the Salteaux tribe of Ojibeway Indians, which removed the Aboriginal title from the lands passed on to the province at Confederation.⁴² The federal government argued that the Privy Council had not determined the state of the law on the substance and scope of Aboriginal title in *St. Catherine's Milling*, and that Aboriginal title represented more than a “personal and

³⁹ B. Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada” (1996) 34:1 Osgoode Hall LJ 101 at 103-108.

⁴⁰ Donovan, “The Law's Crooked Path”, *supra* note 7 at 50-52.

⁴¹ *Ibid.* at 52-55, 88-89.

⁴² *Province of Ontario*, *supra* note 15 at 1-2.

usufructuary right” contingent on the bounty of the Sovereign. Rather, Aboriginal peoples’ interest in the lands, prior to their sale, cession, or extinguishment, was a right of “occupation and possession,” analogous to title in equitable fee simple.⁴³

The Court was not responsive to the federal government’s position, deciding instead that the province was not liable for the expenses incurred in carrying out Treaty No. 3, because “the treaty was not made for the benefit of Ontario, but in pursuance of the general policy of the Dominion in dealing with Indians” as well as the “maintenance of peace, order and good government” in Canada.⁴⁴ Justice Idington, writing for the majority, reaffirmed Lord Watson’s description of “Indian title” as “a personal and usufructuary right, dependent upon the good will of the Sovereign,” and that such title had been extinguished in the province of Ontario through the application of Treaty No. 3.⁴⁵ Justice Duff also rejected Aboriginal peoples’ interest in reserve lands, as a “usufruct” and “mere burden” on Crown title, employing the paternalistic language of Lord Watson.⁴⁶ Justice Davies dissented on the question of Ontario’s liability for the financial costs of implementing the treaty, but he believed that the “court should feel itself bound by the clear and definite pronouncement” made by the Privy Council on the nature of native title in the case of *St. Catherine’s Milling*. Justice Davies was not ready to concede that “such pronouncement was nothing more than a mere dictum of Lord Watson’s which we should ignore as not correctly expressing the law on the subject.”⁴⁷ The Supreme Court of Canada thus elevated the Lordships’ opinion on the nature of Aboriginal land rights in Canada to the status of a legally binding doctrine.⁴⁸

⁴³ *Ibid.* at 36-38; Donovan, “The Law’s Crooked Path”, *supra* note 7 at 52-55.

⁴⁴ *Province of Ontario*, *supra* note 15 at 2; Donovan, “The Law’s Crooked Path”, *supra* note 7 at 53.

⁴⁵ *Province of Ontario*, *supra* note 15 at 107, 112.

⁴⁶ *Ibid.* at 36-38; Donovan, “The Law’s Crooked Path”, *supra* note 7 at 54.

⁴⁷ *Province of Ontario*, *supra* note 15 at 94-95.

⁴⁸ Donovan, “The Law’s Crooked Path”, *supra* note 7 at 50-55, 88-89.

The Supreme Court's decision to endorse the Privy Council's definition of Aboriginal title as a "personal usufruct," in *Province of Ontario v. Dominion of Canada*, subsequently informed not only lower court decisions but also the federal government's approach to Aboriginal land claims. Ottawa had acknowledged the existence of Aboriginal land rights prior to their cession or surrender and regarded these rights as tantamount to equitable fee simple in the early twentieth century, but by the late 1960s its official position was that Aboriginal title rights did not exist in Canada.⁴⁹ The case of *Province of Ontario* reveals the impact of the Supreme Court of Canada's judgements on the recognition of Aboriginal title in the political sphere; as we will see below, this judicial power can be employed to either strengthen or hamper the recognition and protection of Aboriginal peoples' land rights.

2.3 *Calder*: Aboriginal Title as an Inherent Legal Right

The Judicial Committee of the Privy Council's narrow, imperialist view of Aboriginal title as a "personal and usufructuary right," contingent upon the good will of the Crown, influenced Canada's high courts for almost a century. However, the Supreme Court of Canada's 1973 decision in *Calder et al. v. Attorney-General of British* heralded a positive shift in Aboriginal rights jurisprudence.⁵⁰ This case involved the claim of the Nisga'a Indian Tribe for a declaration "that the Aboriginal title, otherwise known as the Indian title, of the [Nisga'a], [...] has never been lawfully extinguished."⁵¹ Six justices recognized that Aboriginal title existed. However, they split three to three about whether a series of colonial

⁴⁹ *Ibid.* at 55-56; D. Sanders, "The Supreme Court of Canada and the 'Legal and Political Struggle' over Indigenous Rights" (1990) 22:3 *Can Ethn Stud* 122 at 122; see also Canada, Statement of the Government of Canada on Indian Policy (White Paper), presented to the First Session of the Twenty-Eighth Parliament by the Hon. Jean Chrétien (Ottawa: Department of Indian Affairs and Northern Development, 1969).

⁵⁰ Borrows, "Domesticating Doctrines", *supra* note 3 at 645; Donovan, "The Law's Crooked Path", *supra* note 7 at 56-62; MacLaren, Barry, and Sangster, "Tsilhqot'in Nation v. British Columbia", *supra* note 36 at 125, 132; Sanders, "The Legal Political Struggle", *supra* note 49 at 122; Slattery, "The Organic Constitution," *supra* note 39 at 101-103, 107.

⁵¹ *Calder*, *supra* note 16 at 317.

proclamations and ordinances, enacted between 1858 and 1871, manifested a “unity of intention” to extinguish Aboriginal title in what is now British Columbia. As a result, the Nisga’a did not obtain the sought declaratory relief, on the preliminary grounds that the Court had no jurisdiction to make such a declaration, in the absence of a fiat of the Lieutenant Governor of British Columbia.⁵²

Nonetheless, Justice Judson, who wrote for the three judges concluding that title had been extinguished, rejected the Privy Council’s conception of Aboriginal title as a “personal or usufructuary right, dependent upon the good will of the Sovereign.”⁵³ Instead, he affirmed that Aboriginal title arises from “the fact that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.”⁵⁴ Accordingly, Aboriginal title does not derive from any statutory or regulatory scheme, but rather flows from First Nations’ historic occupation and possession of their traditional territories.⁵⁵ The Supreme Court of Canada’s decision in *Calder* thus repudiated its colonial past by conceptualizing Aboriginal title as an inherent, legal right as opposed to a contingent, political interest. The Court’s judgement in *Calder* also provided the impetus for the federal government to reverse its previous position that Aboriginal title did not exist in Canada, and to start negotiating the settlement of unresolved land claims with Aboriginal peoples in certain regions of the country.⁵⁶

⁵² *Ibid.* at 315, 345.

⁵³ *Ibid.* at 328.

⁵⁴ *Ibid.*

⁵⁵ *Calder*, *supra* note 16 at 376; Macklem, “What’s Law Got to Do with It?” *supra* note 30 at 128; Slattery, “The Organic Constitution”, *supra* note 39 at 109-110.

⁵⁶ Donovan, “The Law’s Crooked Path and the Hollow Promise of *Delgamuikw*”, *supra* note 7 at 55; Sanders, “The ‘Legal Political Struggle’ over Indigenous Rights”, *supra* note 49 at 124.

2.4 *Guerin: Sui Generis* Interest and Fiduciary Duty

In the 1984 case of *Guerin v. The Queen*, the Supreme Court of Canada was faced with the entrenchment of Aboriginal land rights in section 35(1) of the *Constitution Act, 1982* and explored its legal ramifications for the relationship between First Nations and the Crown. At issue was whether the appellants, the Chief and councillors of the Musqueam Indian Band, were entitled to recover damages from the federal government with respect to the lease to a golf club on the land of the Musqueam Indian Reserve.⁵⁷ Justice Dickson, writing for the majority, acknowledged that the “*sui generis* interest which Indians have in the land is personal in the sense that it cannot be transferred to a grantee.”⁵⁸ The Court thus reaffirmed the Privy Council’s conception of Aboriginal title as inalienable to third parties. However, it departed from the ruling in *St. Catherine’s Milling* by defining the proprietary interest of Aboriginal peoples in the land as “*sui generis*” or unique. Aboriginal land rights are *sui generis*, since they are neither European nor Indigenous in source or substance, but rather form a special, unwritten, intersocietal body of law.⁵⁹

Furthermore, the Supreme Court ruled that this *sui generis* interest “gives rise upon surrender to a distinctive fiduciary duty on the part of the Crown to deal with the land for the benefit of the surrendering Indians.”⁶⁰ Specifically, Justice Dickson decided that, if the Crown “breaches this fiduciary duty,” “it will be liable to the Indians” for damages.⁶¹ The Crown’s violation of its fiduciary obligation vis-à-vis Aboriginal peoples thus entails actual legal consequences, not only political costs. Given that the federal government had

⁵⁷ *Guerin*, *supra* note 17 at 364.

⁵⁸ *Ibid.* at 382.

⁵⁹ Macklem, “What’s Law Got to Do with It?” *supra* note 30 at 127; McNeil, “Aboriginal Rights in Transition”, *supra* note 5 at 319-320; Slattery, “The Organic Constitution”, *supra* note 39 at 108-112; Slattery, “The Metamorphosis of Aboriginal Title”, *supra* note 3 at 270-271.

⁶⁰ *Guerin*, *supra* note 17 at 382.

⁶¹ *Ibid.* at 376.

unilaterally obtained a significantly less valuable lease than that promised to the Musqueam Nation, the Crown was deemed to have breached its fiduciary duty to the band.⁶² Accordingly, the Court upheld the trial judge's decision and awarded the Musqueam people ten million dollars in damages.⁶³ *Guerin* is thus significant in asserting the *sui generis* nature of Aboriginal title, as well as the legally enforceable fiduciary relationship between First Nations and the Crown.⁶⁴

2.5 *Adams and Côté: Interaction between Aboriginal Rights and Title*

The Supreme Court of Canada elucidated the relationship between Aboriginal title and Aboriginal rights in the rulings of *R. v. Adams* and *R. v. Côté*, which were jointly released in October 1996, and dealt with the Aboriginal fishing rights of the Mohawk in the province of Quebec.⁶⁵ More importantly, these cases inquired whether Aboriginal rights must be necessarily linked to a claim for Aboriginal title to land, or whether an Aboriginal right may arise independently of a claim for Aboriginal title.⁶⁶ Chief Justice Lamer, delivering the majority judgement in *Adams*, addressed two “radically different” understandings of the relationship between Aboriginal title and Aboriginal rights.⁶⁷ Traditionally, Aboriginal title was conceived of as a bundle of individual rights, having no independent content. However, Chief Justice Lamer rejected this approach for another, holding that Aboriginal title is a single manifestation of a broader conception of Aboriginal rights.⁶⁸ The Court thus created a spectrum of Aboriginal rights, recognized and affirmed by

⁶² *Ibid.* at 389, 488.

⁶³ *Ibid.* at 391.

⁶⁴ Macklem, “What’s Law Got to Do with It?” *supra* note 30 at 128; McNeil, “Aboriginal Title and Aboriginal Rights,” 118, 144-145.

⁶⁵ McNeil, “Aboriginal Rights in Transition”, *supra* note 5 at 317-329; McNeil, “Aboriginal Title and Aboriginal Rights”, *supra* note 1 at 118-125.

⁶⁶ *Adams*, *supra* note 18 at para. 3; *Côté*, *supra* note 19 at para. 3.

⁶⁷ *Delgamuukw*, *supra* note 4 at para. 137.

⁶⁸ *Ibid.*; *Adams*, *supra* note 18 at paras. 24-25.

section 35(1) of the *Constitution Act, 1982*, varying with their degree of attachment to the land. At one extreme, there are Aboriginal rights *simpliciter*, which are “practices, customs and traditions that are integral to the distinctive culture of the group claiming the right,” but lack a sufficient degree of connection to the land to support a title claim.⁶⁹ At the opposite extreme, there is Aboriginal title, which provides more than the right to engage in cultural activities, conferring “the right to the land itself.”⁷⁰ In the centre, there are activities that are exercised on and intimately connected to a particular piece of land. If these activities fail to prove title to the land, they may receive constitutional protection as site-specific rights.⁷¹

However, the Chief Justice emphasized that “a site-specific hunting or fishing right does not, simply because it is independent of Aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish *on the tract of land in question.*”⁷² By restricting the scope of site-specific rights, this caveat reveals the Supreme Court’s cautious behaviour in the assessment of Aboriginal rights claims. Presumably, the motive behind the majority decision was a fear that the recognition of the hunting or fishing rights of a particular Aboriginal group would create a domino effect, bringing other Aboriginal communities to assert and exercise analogous rights in other parts of the province, to the detriment of the interests of the larger Canadian society. This decision thus hints at the two main goals that tend to guide Aboriginal rights jurisprudence: on the one hand, the Court seeks to preserve its institutional legitimacy vis-à-vis the federal and provincial governments and the public; on the other hand, it strives to maintain intercultural peace and harmony in Canada.

⁶⁹ *Adams*, *supra* note 18 at para. 26; citation from *Delgamuukw*, *supra* note 4 at para. 138.

⁷⁰ *Delgamuukw*, *supra* note 4 at para. 138.

⁷¹ *Adams*, *supra* note 18 at para. 30; *Delgamuukw*, *supra* note 4 at para. 138.

⁷² *Adams*, *supra* note 18 at para 30 [emphasis in original].

2.6 *Delgamuukw*: Theoretical Framework for Aboriginal Title

In the monumental decision of *Delgamuukw v. British Columbia*, delivered in 1997, the Supreme Court of Canada delved into the substance and scope of the constitutional protection provided by section 35(1) of the *Constitution Act, 1982* to common law Aboriginal title.⁷³ This case concerned the claims of the Gitskan and Wet'suwet'en peoples for declarations of Aboriginal title and self-government over distinct portions of their traditional territories in northwest British Columbia, in an area amounting to 58,000 square kilometres.⁷⁴ The Gitskan and Wet'suwet'en Nations had continuously lived on their homelands for over three thousand years. These lands had never been ceded to nor bought by the Crown, by treaty or otherwise. Both the British Columbia Supreme Court and the British Columbia Court of Appeal dismissed the Aboriginal communities' title claims.⁷⁵ The Supreme Court of Canada's reasons and conclusions regarding procedural and evidentiary issues, the nature and quality of Aboriginal title, the proof of Aboriginal title, and the justification of Aboriginal title infringements are reviewed below.

2.6.1 Procedural and Evidentiary Issues

The Supreme Court remanded this case to trial on account of procedural issues and evidentiary uncertainties.⁷⁶ Specifically, Chief Justice Lamer, writing for the majority, found that the Gitskan and Wet'suwet'en pleadings were flawed in two respects. First, claims to ownership and jurisdiction at the trial level were replaced by collective claims to Aboriginal title and self-government at the appellate level. Second, the individual claims by each house

⁷³ *Delgamuukw*, *supra* note 4 at para. 1.

⁷⁴ *Ibid.* at paras. 7, 73.

⁷⁵ Donovan, "The Law's Crooked Path", *supra* note 7 at 79-80.

⁷⁶ *Delgamuukw*, *supra* note 4 at paras. 76-77, 107-108, 170-171, 184-186.

were combined into two collective claims, one on behalf of each nation.⁷⁷ The *ratio decidendi* of this case was thus that a problem in the pleadings would cause prejudice to British Columbia. As stated by John Borrows, “this finding seems rather formalistic and inflexible,” given the disparity in the parties’ resources, and the longstanding denial of Aboriginal rights in the province.⁷⁸ Furthermore, the Supreme Court held that a new trial was necessary, because the trial judge did not give independent weight to oral history evidence, and failed to take into account the Aboriginal perspective, contrary to the interpretive principles laid down in the case of *R. v. Van der Peet*.⁷⁹ The Court’s refusal to rule on the Gitskan and Wet’suwet’en peoples’ claims for Aboriginal title and Aboriginal self-government may reflect its reasonable fear of making a decision which would have a monumental impact on the interests of third parties, the power of the provincial government, as well as social peace and stability more broadly.⁸⁰ Nevertheless, in light of the considerable length, complexity, and cost of this trial, the Court’s refusal to rule on the merits of the case is a cause for concern for future Aboriginal litigants, indicating that common law courts may not be the best forum for advancing Aboriginal title claims.⁸¹

⁷⁷ *Delgamuukw*, *supra* note 4 at paras. 73-77.

⁷⁸ Borrows, “Sovereignty’s Alchemy”, *supra* note 30 at 548-553; see also D. Lambert, “Three Points about Aboriginal Title” (2012) 70:3 Advocate 349 at 349-350.

⁷⁹ *Delgamuukw*, *supra* note 4 at paras. 107-108; *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 68 [hereinafter *Van der Peet*].

⁸⁰ Wilkins, “Take Your Time and Do it Right”, *supra* note 8 at 242-249.

⁸¹ The trial entailed 76 witnesses, 53 affidavits, 9200 documents, and lasted 374 days of court time. See *Delgamuukw*, *supra* note 4 at paras. 5-6, 89; McNeil, “Aboriginal Rights in Transition”, *supra* note 5 at 319-320. On the broader structural and ideological barriers to judicial independence and reconciliation in Aboriginal rights and title cases, see Borrows, “Sovereignty’s Alchemy”, *supra* note 30 at 548-553; P. H. Russell, “High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence” (1988) 61 Sask L Rev 247; Shiveley, “Negotiation and Native Title”, *supra* note 27 at 456-462; M. E. Turpel, “Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences” (1989) 6 Can Hum Rts YB 3; Yurkowski, “We are All Here to Stay”, *supra* note 27 at 472, 493.

2.6.2 Nature and Content of Aboriginal Title

Nonetheless, the Supreme Court's decision in *Delgamuukw* is significant, since it identified the three *sui generis* dimensions of Aboriginal title. The first *sui generis* aspect of Aboriginal title is its source, namely, "the prior occupation of Canada by Aboriginal peoples."⁸² The Court thus reaffirmed its rejection of the Privy Council's imperialist conception of Aboriginal title as contingent on the good will of the Crown, in favour of a vision of title as stemming from the pre-existence of Aboriginal societies.⁸³ Second, Aboriginal title is *sui generis* insofar as it is communal: "Aboriginal title cannot be held by individual Aboriginal persons; it is a collective right to land held by all members of an Aboriginal nation."⁸⁴ Therefore, Aboriginal title is bestowed on collective bodies that have the legal personality required to possess property in their own right.⁸⁵ The collective nature of Aboriginal title implies that it has a jurisdictional quality, which differentiates it from fee simple estates and other land rights.⁸⁶ That is, the title-holding Aboriginal community must have the degree of self-government necessary to regulate the use and distribution of land within the community.⁸⁷ The third *sui generis* aspect of Aboriginal title is its inalienability, which signifies that "lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown."⁸⁸

⁸² *Delgamuukw*, *supra* note 4 at para. 114.

⁸³ Slattery, "The Metamorphosis of Aboriginal Title", *supra* note 3 at 110.

⁸⁴ *Delgamuukw*, *supra* note 4 at para. 115.

⁸⁵ McNeil, "Aboriginal Title and the Supreme Court", *supra* note 3 at 286-287.

⁸⁶ *Ibid.*

⁸⁷ Borrows, "Domesticating Doctrines", *supra* note 3 at 654; D. Lambert, "Van der Peet and *Delgamuukw*: Ten Unresolved Issues" (1998) 32:2 UBC L Rev 249 at 267-268; McNeil, "Aboriginal Rights in Transition", *supra* note 5 at 320-321; McNeil, "Aboriginal Title and the Supreme Court", *supra* note 3 at 286-287; McNeil, "Self-Government and the Inalienability of Aboriginal Title", *supra* note 37 at 477, 481-488.

⁸⁸ *Delgamuukw*, *supra* note 4 at para. 113.

2.6.3 Proof of Aboriginal Title

In *Delgamuukw*, the Supreme Court developed the first test for the proof of Aboriginal title. In order to put forward a claim for Aboriginal title, the First Nation claiming the right must fulfil three different criteria. First, “the land must have been occupied prior to sovereignty.”⁸⁹ Reliance on the date of sovereignty assertion rather than that of contact distinguishes the *Delgamuukw* test for the proof of Aboriginal title from the *Van der Peet* test for the proof of Aboriginal rights.⁹⁰ According to Chief Justice Lamer, requisite occupancy can be substantiated either by establishing the fact of physical occupation or by demonstrating the existence of Aboriginal laws in relation to land prior to European sovereignty. The former approach to the proof of occupancy complies with the common law rule that “title is presumed from possession,” whereas the latter seeks to accommodate Aboriginal legal systems.⁹¹ Second, if present occupation is depended upon to prove prior occupation, there must be continuity between present and past occupation.⁹² However, in light of evidentiary difficulties, the Court held that Aboriginal title claimants need not show “an unbroken chain of continuity” between present and pre-sovereignty occupation.⁹³ Third, occupation must have been exclusive at the time of sovereignty.⁹⁴ The Court defined exclusivity as “the ability to exclude others from the lands held pursuant to title,” acknowledging that trespass by other Aboriginal groups on a given territory does not necessarily undercut the community’s claims to exclusive occupation.⁹⁵ Rather, a First Nation’s laws in relation to trespass could reinforce its claims to exclusive control of the

⁸⁹ *Delgamuukw*, *supra* note 4 at para. 143.

⁹⁰ *Ibid.* at para. 144; *Van der Peet*, *supra* note 79 at para. 60.

⁹¹ *Delgamuukw*, *supra* note 4 at paras. 146-151; K. McNeil, “The Onus of Proof of Aboriginal Title” (1999) 37:4 Osgoode Hall LJ 775 at 782-784, 800-801; Yurkowski, “We are All Here to Stay”, *supra* note 27 at 489.

⁹² *Delgamuukw*, *supra* note 4 at para. 143.

⁹³ *Ibid.* at para. 153; *Van der Peet*, *supra* note 79 at para. 65.

⁹⁴ *Delgamuukw*, *supra* note 4 at para. 143.

⁹⁵ *Ibid.* at para. 155.

land.⁹⁶ In addition, Chief Justice Lamer accepted that “joint title could arise from shared exclusivity.”⁹⁷ The possibility of shared title is significant, since Aboriginal title cases often involve competing claims by distinct Aboriginal communities.⁹⁸

2.6.4 Justification of Aboriginal Title Infringements

In *Delgamuukw*, the Supreme Court decided that Aboriginal title rights are not absolute, but rather can be restricted by the Crown.⁹⁹ Accordingly, if an Aboriginal group successfully establishes its title to a piece of land, the onus of proof shifts to the Crown to justify infringements on this title. Similar to the test for the justification of Aboriginal rights limitations, laid down in *R. v. Sparrow*,¹⁰⁰ the first stage of the justificatory analysis involves evaluating whether the infringement on Aboriginal title furthers a “compelling and substantial” legislative purpose.¹⁰¹ In light of the precedents established in *R. v. Gladstone*,¹⁰² the Court recognized that “the range of legislative objectives that can justify the infringement of Aboriginal title is fairly broad.”¹⁰³ Former Chief Justice Lamer contended that the breadth of these objectives was warranted by the need to “reconcil[e] the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty.”¹⁰⁴ Examples of valid legislative goals identified by the Court include agriculture, forestry, mining, economic growth, and the “settlement of foreign populations.”¹⁰⁵

⁹⁶ *Ibid.* at paras. 156-157.

⁹⁷ *Ibid.* at para. 158.

⁹⁸ *Ibid.* at para. 185.

⁹⁹ *Delgamuukw*, *supra* note 4 at para. 160.

¹⁰⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

¹⁰¹ *Delgamuukw*, *supra* note 4 at para. 161.

¹⁰² *R. v. Gladstone*, [1996] 2 S.C.R. 723 [hereinafter *Gladstone*].

¹⁰³ *Delgamuukw*, *supra* note 4 at para. 165.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

The second stage of the test of justification investigates whether “the infringement is compatible with the special fiduciary relationship between the Crown and [A]boriginal peoples.”¹⁰⁶ The *Delgamuukw* justificatory test is distinguished from the *Sparrow* test, in highlighting the relevance of three aspects of Aboriginal title. First, Aboriginal title represents “the right to *exclusive* use and occupation of the land.”¹⁰⁷ The title-holding community could thus potentially exclude private citizens and corporations from engaging in any activity on their lands. Second, Aboriginal title has “an inescapable *economic component*.”¹⁰⁸ That is, Aboriginal peoples themselves have the right to reap the economic rewards of their lands, not merely the right to share in the profits resulting from another party’s exploitation of their title lands.¹⁰⁹ This aspect of Aboriginal title signifies that lands held pursuant to title could be put to modern uses, thereby protecting and promoting the economic development of Aboriginal communities.¹¹⁰ Third, Aboriginal title involves the “*right to choose* to what uses the land can be put.”¹¹¹ This feature of Aboriginal title means that the fiduciary relationship between First Nations and the Crown may be fulfilled by the participation of the former in decisions made in relation to their lands. Accordingly, Aboriginal title always imposes a “duty of consultation” on the Crown, which may at times require the full consent of the relevant Aboriginal community.¹¹² Furthermore, the Crown’s failure to engage in consultation “in good faith” would be considered a breach of fiduciary obligation at common law, in agreement with the Court’s decision in *Guerin*.¹¹³

¹⁰⁶ *Delgamuukw*, *supra* note 4 at para. 162.

¹⁰⁷ *Ibid.* at para. 166 [emphasis in original].

¹⁰⁸ *Ibid.* [emphasis in original].

¹⁰⁹ Dufraimont, “From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada” (2000) 58:1 UT Fac L Rev 2 at at 20-22.

¹¹⁰ *Delgamuukw*, *supra* note 4 at para. 169.

¹¹¹ *Ibid.* at para. 166 [emphasis in original].

¹¹² *Ibid.* at para. 168.

¹¹³ *Ibid.*

2.6.5 Limits on the Nature and Scope of Aboriginal Title

The Supreme Court of Canada's decision in *Delgamuukw* suggests that Aboriginal title is the most important Aboriginal right, since it encompasses a certain degree of self-determination and economic development, which would allow First Nations to survive and flourish in the twenty-first century.¹¹⁴ Nevertheless, several aspects of the ruling significantly restrict the nature and scope of Aboriginal title rights and cast doubt on the Court's capacity to adjudicate on Aboriginal rights in an impartial and independent manner.

First, the Court's test for the proof of Aboriginal title imposes a high burden of proof on the Aboriginal group claiming the right. As discussed earlier, former Chief Justice Lamer held that Aboriginal title claimants must prove their exclusive and continuous occupation of land since the pre-sovereignty period. Yet, it is unclear why Aboriginal peoples should bear the burden of proving their title against that of European settlers, given that Aboriginal groups were here first.¹¹⁵ The Court's uncritical acceptance of Crown sovereignty and underlying title over lands in North America is discriminatory, holding Aboriginal societies to a higher standard in establishing title, which the Crown itself could not satisfy.¹¹⁶

Second, the test for the justification of Aboriginal title infringements misinterprets the constitutional division of powers. Specifically, most of the "compelling and substantial" legislative objectives identified by the Court are situated within provincial areas of jurisdiction. Consequently, former Chief Justice Lamer seems to have assumed that British Columbia possesses the legislative authority to infringe Aboriginal title rights. Yet, this

¹¹⁴ Borrows, "Domesticating Doctrines", *supra* note 3 at 654; Lambert, "Van der Peet and Delgamuukw", *supra* note 87 at 267-268; MacLaren *et al.*, "Tsilhqot'in Nation v. British Columbia", *supra* note 36 at 134; McNeil, "Aboriginal Title and the Supreme Court", *supra* note 3 at 285-287; McNeil, "Aboriginal Rights in Transition", *supra* note 5 at 320-321; McNeil, "Self-Government and the Inalienability of Aboriginal Title", *supra* note 37 at 477, 481-488, 509-510.

¹¹⁵ McNeil, "The Onus of Proof of Aboriginal Title", *supra* note 91 at 777.

¹¹⁶ Borrows, "Sovereignty's Alchemy", *supra* note 30 at 572-573; McNeil, "Aboriginal Rights in Transition", *supra* note 5 at 320; McNeil, "The Onus of Proof of Aboriginal Title", *supra* note 91 at 775-803.

assumption is inconsistent with Chief Justice Lamer's conclusion attained elsewhere that the federal government has exclusive competence over "Indians, and [l]ands reserved for the Indians," pursuant to section 91(24) of the *Constitution Act, 1867*. Judicial uncertainty and confusion surrounding this constitutional issue remains to be definitively resolved.¹¹⁷

Setting the division of powers problem aside, the list of "compelling and substantial" purposes for the justification of Aboriginal title infringements identified by the Supreme Court in *Delgamuukw* is also problematic because the development of agriculture, forestry, and mining would involve not only British Columbia's regulation of Aboriginal title lands, but also the extraction of the resources from those lands, not for the benefit of Aboriginal peoples, but rather for the benefit of the province and private corporations. For Kent McNeil, "this looks more like expropriation than infringement."¹¹⁸ The Supreme Court of Canada's decision to call colonization a "compelling and substantial" purpose for the infringement of Aboriginal title rights also makes a mockery of the history of dispossession of First Nations in the province.¹¹⁹ Moreover, the majority's justificatory standard does not demand any concession on the part of the Crown, contrary to the broader objective of reconciliation, which requires mutual compromises.¹²⁰ By subordinating the constitutionally protected rights of Aboriginal peoples to the socioeconomic interests of the province, the Supreme

¹¹⁷ *Constitution Act, 1867*, *supra* note 33 at s. 91(24). On the division of powers problem, see Lambert, "Van der Peet and *Delgamuukw*", *supra* note 87 at 265-267; K. McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 *Sask L Rev* 431; McNeil, "Aboriginal Rights in Transition", *supra* note 5 at 320-321; K. McNeil, "The Vulnerability of Indigenous Land Rights in Australia and Canada" (2004) 42:2 *Osgoode Hall LJ* 271 at 292-293.

¹¹⁸ McNeil, "Aboriginal Rights in Transition", *supra* note 5 at 319. See also Dufraimont, "From Regulation to Recolonization", *supra* note 109 at 24-26, 30; McNeil, "The Vulnerability of Indigenous Land Rights", *supra* note 117 at 292-293.

¹¹⁹ Borrows, "Domesticating Doctrines", *supra* note 3 at 648-649; Borrows, "Sovereignty's Alchemy", *supra* note 30 at 568-569; Dufraimont, "From Regulation to Recolonization", *supra* note 109 at 24-26, 30; Lambert, "Three Points about Aboriginal Title", *supra* note 78 at 349-350; K. McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 *Indigenous LJ* 1 at 25.

¹²⁰ J. Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 *Am Indian L Rev* 37 at 61.

Court seems to have employed “reconciliation” as a tool to legitimate almost any limitation on Aboriginal land rights for the benefit of non-Aboriginal Canadians. This disingenuous definition of reconciliation does violence to the remedial intent underlying section 35(1) of the Constitution.¹²¹

Finally, the Supreme Court unilaterally imposed an inherent limitation on the scope of Aboriginal title rights. Specifically, Chief Justice Lamer held that the capacity of the title-holding community to decide how to allocate the land is “subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples.”¹²² According to the Court, the inherent limit on Aboriginal title flows from its *sui generis* nature, and aims at safeguarding the intrinsic value of land for future generations.¹²³ However, this restriction subverts the right of Aboriginal peoples to self-government and economic growth, because it obliges Aboriginal groups to surrender their lands to the Crown, if they seek to use them for unspecified “non-Aboriginal purposes.”¹²⁴

Hence the Supreme Court of Canada’s unilateral imposition of restrictions on the substance and scope of Aboriginal title reflects residues of imperialism and paternalism in the country’s high courts, which undermine the relationship between First Nations and the Crown.¹²⁵

¹²¹ *Ibid.*; R. L. Barsh and J. Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand” (1997) 42:4 McGill LJ 993 at 999; Borrows, “Domesticating Doctrines”, *supra* note 3 at 648-649; Borrows, “Sovereignty’s Alchemy”, *supra* note 30 at 568-569; Dufraimont, “From Regulation to Recolonization”, *supra* note 109 at 12-17; McNeil, “Reconciliation and the Supreme Court”, *supra* note 119 at 4-10, 17-19, 23-25.

¹²² *Delgamuukw*, *supra* note 4 at para. 166.

¹²³ *Ibid.* at paras. 125-132; McNeil, “Aboriginal Title and the Supreme Court”, *supra* note 3 at 286.

¹²⁴ *Delgamuukw*, *supra* note 4 at 131; citation from Borrows, “Sovereignty’s Alchemy”, *supra* note 30 at 570-571; Donovan, “The Law’s Crooked Path,” *supra* note 7 at 88.

¹²⁵ Borrows, “Domesticating Doctrines”, *supra* note 3 at 652-653; Borrows, “Sovereignty’s Alchemy”, *supra* note 30 at 570-571; McNeil, “Aboriginal Title and the Supreme Court”, *supra* note 3 at 286; McNeil, “Self-Government and the Inalienability of Aboriginal Title”, *supra* note 37 at 479.

2.7 *Marshall and Bernard: Divergent Standards of Occupation*

The Supreme Court of Canada's decision in *R. v. Marshall; R. v. Bernard* is of paramount importance, since it evaluated the validity of an Aboriginal title claim for the first time since *Delgamuukw*.¹²⁶ These consolidated cases inquired whether the Mi'kmaq in Nova Scotia and New Brunswick could engage in commercial logging on Crown lands without authorization, pursuant to Aboriginal title or treaty rights.¹²⁷ The concurring judgements reached the same conclusion, specifically, that the respondents lacked Aboriginal title or treaty rights to log on Crown lands for commercial purposes, and thus restored their convictions.¹²⁸ However, the majority and minority decisions interpreted the *Delgamuukw* standard for the proof of prior occupation, in very different ways. These divergent understandings of Aboriginal title are discussed below.

2.7.1 *Majority Decision: Rigid and Narrow Standard of Occupation*

In assessing whether the respondents possessed Aboriginal title to the lands they logged, Chief Justice McLachlin, writing for the majority in *Marshall and Bernard*, set out a rigid and narrow standard of occupation for the proof of Aboriginal title. Specifically, Chief Justice McLachlin stated that “exclusive possession in the sense of intention and capacity to control is required to establish [A]boriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing, or exploiting resources.”¹²⁹ Chief Justice McLachlin's test for the proof of occupancy is thus more onerous than that laid down by former Chief Justice Lamer in *Delgamuukw*, because it requires evidence of intensive and regular use of lands. While intensity and regularity reflect

¹²⁶ McNeil, “Aboriginal Title and the Supreme Court”, *supra* note 3 at 281-282.

¹²⁷ *Marshall and Bernard*, *supra* note 21 at paras. 1-2, 5.

¹²⁸ *Ibid.* at paras. 6, 35, 110.

¹²⁹ *Ibid.* at para. 70.

the sedentary form of agriculture found in the “English country garden” or foreign plantation, they are incompatible with the nomadic or semi-nomadic lifestyles of the overwhelming majority of Indigenous peoples in the pre-sovereignty period.¹³⁰ Therefore, Chief Justice McLachlin’s high standard of occupation means that First Nations will face even greater challenges in gaining rights of ownership and control over their traditional territories and natural resources in the future.¹³¹

Furthermore, the majority’s test for the proof of Aboriginal title in *Marshall and Bernard* deviates from that developed in *Delgamuukw* by focusing on the fact of physical occupation to establish Aboriginal title, consistent with common law rules surrounding possession.¹³² Yet, in *Delgamuukw*, the Lamer Court had held that the existence of Aboriginal customs and laws in relation to land could also demonstrate the requisite occupation. By failing to incorporate Aboriginal legal systems in the new standard of occupation required for the proof of Aboriginal title, Chief Justice McLachlin disregarded the Aboriginal perspective, contrary to the interpretive principles articulated in the cases of *Sparrow*, *Van der Peet*, and *Delgamuukw*.¹³³

Such insensitivity to the Aboriginal perspective is also implicit in the translation theory of Aboriginal title, put forward by the majority in *Marshall and Bernard*. According to Chief Justice McLachlin, the task of the judiciary “is to translate the pre-sovereignty

¹³⁰ P. L. A. H. Chartrand, “*R. v. Marshall; R. v. Bernard: The Return of the Native*” (2006) 55 UNBLJ 135 at 135-140

¹³¹ MacLaren *et al.*, “Tsilhqot’in Nation v. British Columbia”, *supra* note 36 at 132.

¹³² McNeil, “Aboriginal Title and the Supreme Court”, *supra* note 3 at 227-300; McNeil, “The Onus of Proof of Aboriginal Title”, *supra* note 91 at 782-784, 800-801.

¹³³ *Delgamuukw*, *supra* note 4 at paras. 146-151; *Sparrow*, *supra* note 100 at 1112; *Van der Peet*, *supra* note 79 at paras. 49-50. See also Chartrand, “The Return of the Native”, *supra* note 130 at 140-142; Mandell, “Aboriginal Title Over the Buffalo Jump”, *supra* note 28 at 7; McNeil, “Aboriginal Title and the Supreme Court”, *supra* note 3 at 227-300.

Aboriginal right to a modern common law right.”¹³⁴ Aboriginal title is thus perceived as a “translated right held under English common law.”¹³⁵ Yet, Aboriginal title does not derive from the translation of Aboriginal customary practices into non-Aboriginal legal categories. Rather, Aboriginal title represents a unique intersocietal right, which bridges the gap and guides the interplay between Indigenous and non-Indigenous legal systems. Consequently, Chief Justice McLachlin’s conception of Aboriginal title signals a strong departure from the *sui generis* approach previously adopted by the Supreme Court. Moreover, by distorting the nature and limiting the scope of Aboriginal title, the majority decision in *Marshall and Bernard* is likely to intensify grievances and undermine the ultimate goal of reconciliation between First Nations and the Crown.¹³⁶

2.7.2 Minority Decision: Broad and Flexible Standard of Occupation

The concurring judgement of Justices LeBel and Fish agreed with the Chief Justice’s ultimate disposition of the appeal, but was “concerned” about several aspects of her reasons. Justice LeBel, delivering the minority decision, affirmed that “the approach adopted by the majority is too narrowly focused on common law concepts related to property interests.”¹³⁷ That is, Chief Justice McLachlin’s test for the proof of Aboriginal title relies on the fact of physical occupation rather than Aboriginal legal systems to establish possession. In light of the nature of land use by native peoples, the test for the proof of Aboriginal title laid down by the majority “may prove to be fundamentally incompatible with a nomadic or semi-nomadic lifestyle.”¹³⁸ Accordingly, Justice LeBel argued that “[o]ccupation should be proved by

¹³⁴ *Marshall and Bernard*, *supra* note 21 at para. 70.

¹³⁵ Slattery, “The Metamorphosis of Aboriginal Title”, *supra* note 3 at 280.

¹³⁶ *Ibid.* at 277-281.

¹³⁷ *Marshall and Bernard*, *supra* note 21 at para. 110.

¹³⁸ *Ibid.* at para. 126. See also Chartrand, “The Return of the Native”, *supra* note 130 at 140; MacLaren, Barry, and Sangster, “Tsilhqot’in Nation v. British Columbia”, *supra* note 36 at 132.

evidence not of regular and intensive use of the land but of the traditions and culture of the group that connect it to the land.”¹³⁹ By removing the requirements of regularity and intensity of use, the minority’s standard of occupation is significantly less onerous than that of the majority, and thus may facilitate the acquisition of land rights by Aboriginal title claimants. The minority’s standard of occupancy also manifests more sensitivity to the Aboriginal perspective by emphasizing the special bond between the Aboriginal group and its land base. Consequently, the minority’s less stringent test for the proof of Aboriginal title is more conducive to the reconciliation of First Nations with the Crown.

2.8 Summary of Overview of the Common Law of Aboriginal Title

In sum, this section reviewed the evolution of Canadian Aboriginal title jurisprudence from the late nineteenth century to the present. Findings show a shift from a narrow, rigid conception of Aboriginal title to a broad, flexible understanding of Aboriginal title. However, elements of imperialism and paternalism persist in contemporary Aboriginal title law, as implicit in the Supreme Court’s consistent refusal to call into question the sovereignty and radical title of the Crown, its unilateral imposition of limits on the use of Aboriginal title lands, the high onus of proof on Aboriginal title claimants to establish exclusive, pre-sovereignty occupation, and the low burden of proof for the Crown to justify infringements on Aboriginal title.¹⁴⁰ While these factors significantly constrain the nature and scope of Aboriginal land rights, Aboriginal title nevertheless remains the most valuable Aboriginal right, since its jurisdictional and economic dimensions may allow Aboriginal societies to survive and thrive in the modern era.

¹³⁹ *Marshall and Bernard*, *supra* note 21 at para. 140.

¹⁴⁰ Borrows, “Domesticating Doctrines”, *supra* note 3 at 652-653; Borrows, “Sovereignty’s Alchemy”, *supra* note 30 at 570-573; McNeil, “Aboriginal Rights in Transition”, *supra* note 5 at 320; McNeil, “Aboriginal Title and the Supreme Court”, *supra* note 3 at 286; McNeil, “The Onus of Proof of Aboriginal Title”, *supra* note 91 at 775-803; McNeil, “Self-Government and the Inalienability of Aboriginal Title”, *supra* note 37 at 479.

3 Competing Conceptions of Aboriginal Title and Reconciliation in the *Tsilhqot'in* Case

The purpose of this section is to study the application of the jurisprudential framework for the recognition of Aboriginal title, in the trial and appellate decisions in the *Tsilhqot'in* case, and explore its effects on the relationship between First Nations and the Crown in Canada. I presume that the preservation of Aboriginal title's potential for self-rule and economic growth would serve to improve relations between First Nations and the Crown, whereas its reduction or elimination would exacerbate tensions and compromise the ultimate goal of reconciliation between Aboriginal and non-Aboriginal Canadians. Justice Vickers' decision in *Tsilhqot'in Nation v. British Columbia* reveals a genuine attempt to further reconciliation between the Tsilhqot'in Nation and the Crown by prioritizing the Aboriginal perspective in the evaluation of oral history and oral tradition evidence, adopting a large and liberal standard of occupation, identifying an Opinion Title Area, and affirming the invalidity of attempts by British Columbia to regulate forestry resources on Tsilhqot'in title lands. Nevertheless, Justice Vickers did not succeed in attaining a just and "honourable settlement" between the Tsilhqot'in and the Canadian state, by dismissing the former's application for a declaration of Aboriginal title, due to a problem in their pleadings.¹⁴¹

In contrast, while Justice Groberman, writing for the British Columbia Court of Appeal, correctly allowed the appeal on the pleadings issue, his reasons and conclusions in *William v. British Columbia* contributed to undermining relations between the Tsilhqot'in people and the Crown by interfering with the factual findings of the trial judge, misinterpreting the law on territoriality and site-specificity, adopting a narrow and rigid

¹⁴¹ McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 7-25; *Tsilhqot'in Nation*, *supra* note 22 at para. 1382.

standard of occupation, articulating a preference for Aboriginal rights over Aboriginal title, and endorsing a hollow conception of reconciliation, which subordinates the constitutional rights of Aboriginal peoples to the interests of the Canadian state and society.¹⁴²

3.1 *Tsilhqot'in Nation v. British Columbia*: Trial Court Decision

The British Columbia Supreme Court's trial decision in *Tsilhqot'in Nation v. British Columbia* is the closest any court has come to making a declaration of Aboriginal title in Canada. The four hundred and fifty-eight page judgement, penned by Honourable Mr. Justice Vickers, was released on November 20th, 2007, after three hundred and thirty-nine days of trial, which extended over almost five years and cost tens of millions of dollars.¹⁴³ Similar to *Delgamuukw*, *Tsilhqot'in Nation* deals with a claim for Aboriginal title to lands in central British Columbia.¹⁴⁴ The action was brought by Roger William, in his representative capacity as Chief of the Xenigwet'in, one of the six bands comprising the Tsilhqot'in Nation.¹⁴⁵ The Tsilhqot'in applied for a declaration of Aboriginal rights and a declaration of Aboriginal title to two separate parts of the Cariboo-Chilcotin region of British Columbia, defined as the Tachelach'ed (Brittany Triangle) and the Trapline Territory. The Claim Area includes 438,000 hectares of land and forms about five percent of what the Tsilhqot'in perceive to be their traditional territory.¹⁴⁶ This action was triggered by British Columbia's authorization of commercial logging in the traditional territory of the Tsilhqot'in in the

¹⁴² Lambert, "The Tsilhqot'in Case", *supra* note 26 at 819-830; Mandell, "Aboriginal Title Over the Buffalo Jump", *supra* note 28 at 1-12.

¹⁴³ Lambert, "The Tsilhqot'in Case", *supra* note 26 at 819; MacLaren *et al.*, "Tsilhqot'in Nation v. British Columbia", *supra* note 36 at 126, 135; McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 8; D. G. Newman, and D. Schweitzer, "Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v. British Columbia*" (2008) 41:2 UBC L Rev 249 at 255.

¹⁴⁴ *Tsilhqot'in Nation*, *supra* note 22 at para. 28.

¹⁴⁵ *Ibid.* at para. 34.

¹⁴⁶ *Ibid.* at para. 40.

1980s, without the community's consent.¹⁴⁷ Issues raised by the proceedings include whether the Tsilhqot'in people are entitled to a declaration of Aboriginal title to all or parts of the Claim Area, whether the *Forest Act* applies to Aboriginal title lands, and whether the undertaking of any forest development activity by the province would unjustifiably infringe the Tsilhqot'in Nation's Aboriginal title rights in the Claim Area.¹⁴⁸ The trial judge's reasons and conclusions on these and other issues are explored below.

3.1.1 Preliminary Issue: "All or Nothing" Aboriginal Title Claim

Similar to the Supreme Court of Canada's decision in *Delgamuukw*, the British Columbia Supreme Court's trial judgment in *Tsilhqot'in Nation* dismissed the Aboriginal title claim on procedural grounds.¹⁴⁹ Mr. Justice Vickers, delivering the trial decision, granted the Tsilhqot'in a declaration of Aboriginal rights to hunt and trap animals and birds throughout the Claim Area, including the right to capture and use wild horses, and the right to trade in skins and pelts "as a means of securing a moderate livelihood."¹⁵⁰ However, he declined to issue a declaration of Aboriginal title, due to a defect in the Tsilhqot'in people's pleadings.¹⁵¹ In the statement of claim, the Tsilhqot'in sought a declaration of Aboriginal title to two distinct regions, namely the Tachelach'ed (Brittany Triangle) and the Trapline Territory. The statement of claim did not explicitly request declaratory relief over parts of those areas, in the event that the court was not convinced that Tsilhqot'in Aboriginal title existed throughout the Claim Area. Yet, in final argument, Chief Roger William argued on behalf of the Tsilhqot'in Nation that a declaration could be made with respect to any portions

¹⁴⁷ *Ibid.* at para. 38. When the forest companies gave up plans to log in the Claim Area, the action against them was discontinued.

¹⁴⁸ *Ibid.* at para. 101.

¹⁴⁹ Lambert, "The Tsilhqot'in Case", *supra* note 26 at 819.

¹⁵⁰ *Tsilhqot'in Nation*, *supra* note 22 at paras. 1240-1241, 1265.

¹⁵¹ *Ibid.* at paras. 129, 961.

of the Claim Area that the trial court found to be subject to Aboriginal title.¹⁵² In response, British Columbia argued that the absence of the magic words “or any portions thereof” in William’s statement of claim meant that the court could only find Aboriginal title to the entire Claim Area, or reject the claim altogether.¹⁵³ The trial judge ultimately sided with the province, concluding that the case was structured as an “all or nothing claim,” and to allow the Tsilhqot’in to retroactively seek a declaration of title over portions of the Claim Area would be prejudicial to the Crown in right of British Columbia and Canada.¹⁵⁴

3.1.2 Treatment of Oral History and Oral Tradition Evidence

In the course of this lengthy trial, the court heard oral history and oral tradition evidence, and received a large number of historical documents. Evidence was tendered in a wide variety of fields, including archaeology, anthropology, history, cartography, hydrology, biology, linguistics, forestry, and forest ecology.¹⁵⁵ Despite the trial judge’s conclusion on the pleadings issue, he decided to assess the evidence and issue a non-binding opinion on Tsilhqot’in Aboriginal title to facilitate the subsequent process of negotiations. Before doing so, however, Justice Vickers articulated his preferred methodological approach for the interpretation of oral history and oral tradition evidence in Aboriginal rights and title cases. Whereas the Supreme Court of Canada has employed the phrases “oral tradition” and “oral history” interchangeably, the trial judge differentiated between these terms, following anthropologist Jan Vansina’s categorization of oral evidence in *Oral Evidence as History*. Oral histories refer to “reminiscences, hearsay, or eyewitness accounts about events and

¹⁵² *William*, *supra* note 6 at paras. 49-50.

¹⁵³ *Tsilhqot’in Nation*, *supra* note 22 at paras. 106, 120.

¹⁵⁴ *Ibid.* at para. 129; McNeil, “Reconciliation and Third-Party Interests”, *supra* note 12 at 8.

¹⁵⁵ *Tsilhqot’in Nation*, executive summary.

situations which are contemporary; that is, which occurred during the lifetime of the occupants.”¹⁵⁶

By contrast, oral traditions denote remembrances and stories about events and situations that “are no longer contemporary,” but have been transmitted from the past to the present generation of Aboriginal peoples by word of mouth.¹⁵⁷ Therefore, oral tradition evidence is the only form of evidence available to Aboriginal rights and title claimants, in relation to events or situations that occurred prior to European contact or sovereignty.¹⁵⁸ Given the evidentiary difficulties of establishing prior occupation, Justice Vickers stated that “[t]rial judges are not to impose impossible burdens on Aboriginal claimants. The goal of reconciliation can only be achieved if oral tradition evidence is placed on an equal footing with historical documents.”¹⁵⁹ Accordingly, the trial judge attempted to overcome the “Eurocentric tendency” to rely on written records rather than unwritten accounts, by placing equal weight on oral history and oral tradition evidence, and considering the entire body of evidence from the Aboriginal perspective.¹⁶⁰

3.1.3 Proof of Aboriginal Title: Occupation, Continuity and Exclusivity

Applying his methodological framework for the assessment of oral history and oral tradition evidence, Justice Vickers considered the evidence of the Tsilhqot’in Nation’s use and occupation of the Claim Area from three different perspectives.¹⁶¹ First, Justice Vickers

¹⁵⁶ J. Vansina, *Oral Tradition as History* (Madison: The University of Wisconsin Press, 1985) at 12-13, cited by Justice Vickers in *Tsilhqot’in Nation*, *supra* note 22 at para 141.

¹⁵⁷ Vansina, *Oral Tradition as History*, *supra* note 156 at 12-13, cited by Justice Vickers in *Tsilhqot’in Nation*, *supra* note 22 at paras. 141-142.

¹⁵⁸ *Tsilhqot’in Nation*, *supra* note 22 at para. 143; see also Newman and Schweitzer, “Between Reconciliation and the Rule(s) of Law”, *supra* note 143 at 267.

¹⁵⁹ *Tsilhqot’in Nation*, *supra* note 22 at paras. 152, 203. On evidentiary challenges faced by Aboriginal rights and title claimants, see MacLaren *et al.*, “Tsilhqot’in Nation v. British Columbia”, *supra* note 36 at 127.

¹⁶⁰ *Tsilhqot’in Nation*, *supra* note 22 at para. 196; see also Newman and Schweitzer, “Between Reconciliation and the Rule(s) of Law”, *supra* note 143 at 267-271.

¹⁶¹ *Tsilhqot’in Nation*, *supra* note 22 at para. 946.

identified sites in the Claim Area characterized by a certain degree of permanency, such as villages, cultivated fields, and camping sites.¹⁶² Second, he interpreted the occupation of the Claim Area from the standpoint of land use, discovering a “clear pattern of Tsilhqot’in seasonal gathering” in various places in the Claim Area.¹⁶³ Third, the trial judge examined evidence of use of the Claim Area after the assertion of Crown sovereignty, observing that the historical pattern of seasonal resource gathering in several locations of the Claim Area continued over time.¹⁶⁴ While this test of occupancy reflects common law rules surrounding possession, it fails to take into account Tsilhqot’in laws in relation to land use.¹⁶⁵ Justice Vickers concluded that “there was an extensive network of trails” created and used by the Tsilhqot’in people inside and outside of the Claim Area, prior to European contact and Crown sovereignty in the former colony of British Columbia.¹⁶⁶ He also confirmed that the Tsilhqot’in people have occupied the Claim Area for over two hundred and fifty years.¹⁶⁷ However, the trial judge failed to find regular use in the entire area of the Tachelach’ed and Trapline Territory. Furthermore, he refused to issue a declaration of Tsilhqot’in Aboriginal title to smaller sections of the Claim Area, because they were not separately pleaded.¹⁶⁸

Nevertheless, Justice Vickers accepted counsel’s invitation to express an opinion on Tsilhqot’in Aboriginal title “to assist the parties in the negotiations that lie ahead.”¹⁶⁹ Applying the test for the proof of Aboriginal title, laid down in *Delgamuukw* and expanded in

¹⁶² *Ibid.* at para. 947.

¹⁶³ *Ibid.* at para. 948.

¹⁶⁴ *Ibid.* at para. 950.

¹⁶⁵ McNeil, “Aboriginal Title and the Supreme Court”, *supra* note 3 at 227-300; McNeil, “The Onus of Proof of Aboriginal Title”, *supra* note 91 at 782-784, 800-801.

¹⁶⁶ *Ibid.* at para. 679. Justice Vickers identified the moment of contact as 1793, whereas the unilateral assertion of sovereignty by the Crown in the former colony of British Columbia was accepted as occurring in 1846, the date the Treaty of Oregon was concluded. See *Ibid.* at paras. 601-602 and 1211-1212.

¹⁶⁷ *Ibid.* at para. 677.

¹⁶⁸ *Ibid.* at para. 957. See also discussion on the preliminary issue at paras. 106-129.

¹⁶⁹ *Ibid.* at para. 958, citation at para. 961.

Marshall and Bernard, the trial judge identified the land that the Tsilhqot'in continuously and exclusively occupied at the moment of sovereignty assertion from three viewpoints: village sites, cultivated fields, and trail networks. Specifically, the Opinion Title Area forms approximately forty percent of the Claim Area, comprising the "land, rivers, lakes and many trails" occupied and used by members of the Tsilhqot'in society "as definite tracts of land on a regular basis" for hunting, gathering, fishing, and trapping purposes.¹⁷⁰ According to Justice Vickers, "this is the land over which they held exclusionary control," and that afforded the Tsilhqot'in Nation security and continuity in the face of Crown sovereignty.¹⁷¹

The trial judge emphasized that his opinion on Tsilhqot'in land rights was not binding on the parties, in light of his conclusion on the pleadings. However, he conceded that, if he were wrong on the preliminary issue, his conclusion on Tsilhqot'in Aboriginal title, in relation to lands within the Tachelach'ed and Trapline Territory, would be "binding on the parties as a finding of fact in these proceedings."¹⁷² Finally, Justice Vickers expressed his hope that identifying the Opinion Title Area would "assist the parties to achieve a fair and lasting resolution" of the title claim, and realize "a reconciliation of all interests" involved.¹⁷³ As a result, the trial decision delivered by the British Columbia Supreme Court in *Tsilhqot'in Nation v. British Columbia* is the closest any Canadian court has come to issuing a declaration of Aboriginal title in Canada.¹⁷⁴

¹⁷⁰ *Ibid.* at para. 960.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.* at para. 961.

¹⁷³ *Ibid.* at para. 962.

¹⁷⁴ MacLaren *et al.*, "Tsilhqot'in Nation v. British Columbia", *supra* note 36 at 126, 135; Newman and Schweitzer, "Between Reconciliation and the Rule(s) of Law", *supra* note 143 at 255.

3.1.4 Division of Powers and the Doctrine of Interjurisdictional Immunity

After expressing a non-binding opinion on Tsilhqot'in Aboriginal title over portions of the Tachelach'ed and Trapline Territory, Mr. Justice Vickers explored the legal effects of British Columbia's *Forest Act* on the Tsilhqot'in people's land rights. He affirmed that the province's legislative and regulatory regime for the management of forestry resources must respect the constitutional division of powers.¹⁷⁵ Specifically, he held that the doctrine of interjurisdictional immunity protects the core of federal jurisdiction from provincial interference with its exclusive powers over "Indians, and [l]ands reserved for the Indians," pursuant to section 91(24) of the *Constitution Act, 1867*.¹⁷⁶ This doctrine developed by the Supreme Court of Canada posits that any provincial law that is in pith and substance concerned with Aboriginal peoples and their lands "is *ultra vires* of the province."¹⁷⁷ Moreover, provincial laws of general application may apply to First Nations as long as they do not touch the core of "Indianness," or in today's vernacular, the core of Aboriginal title.¹⁷⁸

Applying the doctrine of interjurisdictional immunity, the trial judge made three important conclusions. First, Aboriginal rights protected in section 35(1) of the *Constitution Act, 1982* are part of the core of federal jurisdiction under section 91(24) of the *Constitution Act, 1867*, such that provincial laws cannot extinguish Aboriginal rights.¹⁷⁹ Second, "[t]he *Forest Act*, an [a]ct of general application, cannot apply to Aboriginal title land because its provisions all go to the core of Aboriginal title. The management, acquisition, removal and

¹⁷⁵ *Tsilhqot'in Nation*, *supra* note 22 at para. 1001.

¹⁷⁶ *Constitution Act, 1867*, *supra* note 33 at s. 91(24); McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 15-19.

¹⁷⁷ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 67, cited in *Tsilhqot'in Nation*, *supra* note 22 at para. 1001.

¹⁷⁸ *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55, at para. 14; *Delgamuukw*, *supra* note 4 at paras. 177-178; *R. v. Morris*, [2006] 2 S.C.R. 915, 2006 SCC 59, at para. 84, cited in *Tsilhqot'in Nation*, *supra* note 22 at paras. 1001, 1045.

¹⁷⁹ *Tsilhqot'in Nation*, *supra* note 22 at para. 1045.

sale of [timber] falls within the protected core of federal jurisdiction.”¹⁸⁰ Third, although the provisions of the *Forest Act* do not extinguish Aboriginal title, their application affects the core of Aboriginal title. Therefore, “[t]he doctrine of interjurisdictional immunity is engaged and the *Forest Act* is inapplicable” where it interferes with the forest resources found on Aboriginal title lands.¹⁸¹

3.1.5 Justification of Aboriginal Title Infringements

Justice Vickers concluded that the provisions of the *Forest Act* do not apply to Aboriginal title lands by virtue of the division of powers and the doctrine of interjurisdictional immunity. Nevertheless, in case he were wrong on this constitutional issue, Justice Vickers decided to determine whether the application of the *Forest Act* infringes on Tsilhqot’in Aboriginal title. He adapted the test for the infringement of Aboriginal rights, set out by the Supreme Court of Canada in *Sparrow*, to the context of Aboriginal title. The trial judge implicitly situated the test of infringement in the context of reconciliation, asserting that, “to have significance for Aboriginal people, Aboriginal title must bring with it the collective right to plan for the use and enjoyment of that land for generations to come.”¹⁸² According to Justice Vickers, the unilateral imposition of the provincial forestry regulation scheme “removes the ability of the Tsilhqot’in people to control the uses to which the land is put, [...] and to realize certain economic gains associated with harvesting rights.”¹⁸³ The *Forest Act* also denies members of the Tsilhqot’in

¹⁸⁰ *Ibid.* at para. 1031.

¹⁸¹ *Ibid.* at para. 1032. Nonetheless, Justice Vickers’ conclusion on the inapplicability of the *Forest Act* to Tsilhqot’in Aboriginal title lands is not binding on the parties to the proceedings given his conclusion on the preliminary issue. This means that Aboriginal title must be proven on particular pieces of land before provincial regulatory schemes cease applying to those lands. See Newman and Schweitzer, “Between Reconciliation and the Rule(s) of Law”, *supra* note 143 at 272-273.

¹⁸² *Tsilhqot’in Nation*, *supra* note 22 at para. 1064.

¹⁸³ *Ibid.* at para. 1066.

Nation “their preferred means of enjoying the benefits” of their title lands.¹⁸⁴ Hence the trial judge held that the “cumulative effect” of British Columbia’s decisions with respect to logging on Aboriginal title lands constitutes “a *prima facie* infringement and requires justification.”¹⁸⁵

Accordingly, Justice Vickers applied the two-part test for the justification of Aboriginal title infringements, laid down in *Delgamuukw*. First, the infringement must advance a “compelling and substantial” legislative purpose. Even though the trial judge acknowledged that “forestry falls within the range of government activities that might justify the infringement of Aboriginal title,” he concluded that British Columbia did not demonstrate that it has a compelling and substantial legislative objective for forestry activities in the Claim Area, because “[...] there was no evidence that logging in the Claim Area was economically viable.”¹⁸⁶ The province thus failed the first part of the test.

Nevertheless, Justice Vickers moved on to the second stage of the justificatory analysis, to assess whether the provincial forestry management scheme is compatible with the fiduciary relationship between the Tsilhqot’in Nation and the Crown. In accordance with the jurisdictional component of Aboriginal title, identified in *Delgamuukw*, he affirmed that the Crown always has a duty of consultation in the context of Aboriginal title cases, and thus must involve the Tsilhqot’in people in decisions made with respect to their title lands.¹⁸⁷ After evaluating the entire evidentiary record, Justice Vickers concluded that, by refusing to recognize and accommodate Aboriginal title claims, British Columbia “has failed in its

¹⁸⁴ *Ibid.* at para. 1066.

¹⁸⁵ *Ibid.* at para. 1066.

¹⁸⁶ *Ibid.* at para. 1107. Another reason cited by the trial judge was that “there is no compelling evidence that it is or was necessary to log the claim area to deter the spread of the 1980s mountain pine beetle infestation.” See *Ibid.* at para. 1108.

¹⁸⁷ *Ibid.* at paras. 1112; 1114; *Delgamuukw*, *supra* note 4 at paras. 164, 168.

obligation to consult with the Tsilhqot'in people," contrary to the fiduciary duty and honour of the Crown. Hence "the province has failed to justify its infringement of Tsilhqot'in Aboriginal title."¹⁸⁸ However, this finding was not binding on the parties to these proceedings, as the judge had not granted the Tsilhqot'in a declaration of Aboriginal title.

3.1.6 Reconciliation as a Balancing Game

Throughout his decision in *Tsilhqot'in Nation v. British Columbia*, Mr. Justice Vickers defined reconciliation as a process to "balance Tsilhqot'in interests and needs with the interests and needs of the broader society."¹⁸⁹ The trial judge articulated his "consistent hope that, whatever the outcome [of the case,] it would ultimately lead to an early and honourable reconciliation with the Tsilhqot'in people."¹⁹⁰ However, he lamented the fact that the reluctance of governments to recognize the full significance of section 35(1) of the *Constitution Act, 1982* has situated the issue of reconciliation within the courtroom, "one of our most adversarial settings."¹⁹¹ As a result, the trial judge came to see the "Court's role as one step in the process of reconciliation."¹⁹² Accordingly, even though Justice Vickers was unable to make a declaration of Aboriginal title, he expressed an opinion on Tsilhqot'in Aboriginal title, as a means to facilitate the subsequent process of negotiations between the Crown and the Tsilhqot'in people.¹⁹³ The trial judge emphasized that "there will have to be compromises on all sides if a just and lasting reconciliation is to be achieved."¹⁹⁴ He also specified that the "impoverished view of Aboriginal title advanced by Canada and British

¹⁸⁸ *Tsilhqot'in Nation*, *supra* note 22 at para. 1141.

¹⁸⁹ *Ibid.* at para. 1369.

¹⁹⁰ *Ibid.* at para. 1338.

¹⁹¹ *Ibid.* at para. 1350; see also Lambert, "The Tsilhqot'in Case", *supra* note 26 at 820; McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 9-10.

¹⁹² *Tsilhqot'in Nation*, *supra* note 22 at para. 1340; see also McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 9-10.

¹⁹³ *Tsilhqot'in Nation*, *supra* note 22 at para. 1375.

¹⁹⁴ *Ibid.* at para. 21.

Columbia, characterized by the plaintiff as the ‘postage stamp’ approach to Aboriginal title, cannot be allowed to pervade and inhibit genuine negotiations.”¹⁹⁵ Justice Vickers’ recurrent calls for negotiations in *Tsilhqot’in Nation* echo those of then Chief Justice Dickson and Justice La Forest in *Sparrow* and former Chief Justice Lamer in *Delgamuukw*, suggesting that Canadian courts may feel uncomfortable with their role in the process of reconciliation between First Nations and the Crown, and would prefer to delegate this fundamental task to democratically elected branches of government.¹⁹⁶

In the following section, I turn to the consequences of Justice Vickers’ conclusion on the preliminary issue, treatment of oral evidence, approach to the test for the proof of Aboriginal title, discussion of the division of powers and doctrine of interjurisdictional immunity, application of the test for the justification of Aboriginal title infringements, and vision of reconciliation on the relationship between First Nations and the Crown.

3.1.7 Justice Vickers’ Naïve Vision of Reconciliation

The British Columbia Supreme Court’s trial judgement in *Tsilhqot’in Nation v. British Columbia* has mixed implications for relations between the Crown and First Nations in Canada. On the one hand, Justice Vickers’ conclusion on the preliminary issue is likely to undercut the confidence of Aboriginal peoples in the Canadian judicial system and the Crown. In particular, the *ratio decidendi* that the federal and provincial governments would suffer prejudice from the “all or nothing” structure of the *Tsilhqot’in*’s Aboriginal title claim is likely to be construed as ludicrous and offensive, in light of the stark history of

¹⁹⁵ *Ibid.* at para. 1376.

¹⁹⁶ Justices Dickson and La Forest stated in *Sparrow*, *supra* note 100 at 1105, that section 35(1) of the *Constitution Act*, 1982 “provides a solid constitutional base upon which subsequent negotiations can take place.” Similarly, former Chief Justice Lamer concluded his judgement in *Delgamuukw* by affirming, *supra* note 4 at para. 186, that “[u]ltimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve [...] ‘the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.’ Let us face it, we are all here to stay.” See also Newman, “*Tsilhqot’in Nation v. British Columbia and Civil Justice*”, *supra* note 8 at 444-445.

dispossession and cultural assimilation of Indigenous peoples in British Columbia and Canada.¹⁹⁷ According to Kent McNeil, although the inconsistency between the Tsilhqot'in's statement of claim and final argument may have been a legitimate legal reason to refuse to make a declaration of Aboriginal title, it should have been discovered and resolved earlier through amendment.¹⁹⁸ Moreover, in light of the enormous length, cost and complexity of the legal proceedings in this case, the trial judge's dismissal of the Tsilhqot'in people's Aboriginal title claim, on account of a minor defect in the pleadings, is almost tragic.¹⁹⁹ These findings suggest that common law courts are perhaps not the most appropriate setting to solve Aboriginal title claims, on account of their adversarial structure, strict adherence to formalistic rules of procedure, and the substantial time and monetary resources required for a protracted litigation process.²⁰⁰ Therefore, the trial ruling's refusal to recognize Aboriginal title is likely to heighten tensions between the Tsilhqot'in Nation and the Crown, and to undercut the broader, long-term objective of reconciling Aboriginal peoples with the Canadian state and society.

On the other hand, various parts of his reasons suggest that Justice Vickers sincerely sought to facilitate the attainment of an early and "honourable settlement" with the Tsilhqot'in Nation, and to harmonize relations between First Nations and the Crown.²⁰¹

First, his decision furthered the objective of reconciliation by attributing priority to the

¹⁹⁷ *Tsilhqot'in Nation*, *supra* note 22 at para. 129. See also Borrows, "Sovereignty's Alchemy", *supra* note 30 at 548-553; Lambert, "Three Points about Aboriginal Title", *supra* note 78 at 349.

¹⁹⁸ McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 9.

¹⁹⁹ *Ibid.*

²⁰⁰ Borrows, "Sovereignty's Alchemy", *supra* note 30 at 548-553; Russell, "High Courts and the Rights of Aboriginal Peoples", *supra* note 81 at 274-276; Shiveley, "Negotiation and Native Title", *supra* note 27 at 427-249, 456-462; Turpel, "Aboriginal Peoples and the Canadian Charter", *supra* note 81 at 5-6; Yurkowski, "We are All Here to Stay", *supra* note 27 at 472, 493.

²⁰¹ *Tsilhqot'in Nation*, *supra* note 22 at para. 1382.

Aboriginal perspective in the assessment of oral history and oral tradition evidence.²⁰² Justice Vickers was cognizant of the evidentiary difficulties inherent in the adjudication of Aboriginal rights and title claims in general, and the Tsilhqot'in's land claim in particular. The Tsilhqot'in lacked a written language until the last half of the twentieth century; therefore, "the history of the Tsilhqot'in people is an oral history," which can only be accessed by listening to their legends and stories.²⁰³ The absence of Tsilhqot'in written records raised a number of evidentiary issues; that is, the plaintiffs had to prove their exclusive, pre-sovereignty occupation of the Tachelach'ed and Trapline Territory centuries later and without the help of a written history.²⁰⁴

As a result, Justice Vickers decided to relax standard rules of evidence to accommodate the perspective of Aboriginal peoples, consonant with the interpretive principles set out by the Supreme Court of Canada in the cases of *Van der Peet* and *Delgamuukw*.²⁰⁵ Specifically, he attempted to avoid the "Eurocentric tendency" to rely on the written word by consistently giving equal weight to oral tradition evidence and historical evidence.²⁰⁶ According to Dwight Newman, Justice Vickers' treatment of the evidence reflects a "reasonable effort toward [...] the practical reconciliation" of the Aboriginal and common law perspectives, which may help lower courts determine the admissibility and weight attributed to oral history and oral tradition evidence in future Aboriginal rights and title cases.²⁰⁷ Consequently, the trial judge's approach to the interpretation of oral history

²⁰² Newman and Schweitzer, "Between Reconciliation and the Rule(s) of Law", *supra* note 143 at 267-271.

²⁰³ *Tsilhqot'in Nation*, *supra* note 22 at para. 131.

²⁰⁴ *Ibid.* at para. 132. See also MacLaren *et al.*, "Tsilhqot'in Nation v. British Columbia", *supra* note 36 at 127.

²⁰⁵ *Delgamuukw*, *supra* note 4 at paras. 80-84, 112, 147-149, 156; *Van der Peet*, *supra* note 79 at paras. 49-50.

²⁰⁶ *Tsilhqot'in Nation*, *supra* note 22 at para. 203.

²⁰⁷ Justice Vickers' approach to the admissibility and interpretation of oral history and oral tradition evidence is discussed in detail in the *Tsilhqot'in Nation* order, delivered in 2004. See *William et al. v. British Columbia et al.*, 2004 BCSC 148 (CanLII), <<http://canlii.ca/t/1gfg9>> (retrieved on July 30, 2013) [hereinafter *Tsilhqot'in*

and oral tradition evidence could potentially increase the faith of First Nations in the fairness of the Canadian judicial process.

Second, the test for the proof of Aboriginal title in *Tsilhqot'in Nation* aimed at reconciling First Nations with the Crown. While Justice Vickers failed to incorporate the Tsilhqot'in people's laws in relation to land into his test of occupancy, his willingness to assess the evidence of the Tsilhqot'in people's use and occupation of the Claim Area in a variety of ways manifests sensitivity to the Aboriginal perspective. This flexible approach to the evidence signals a departure from the stringent standard of occupation set out by the Supreme Court of Canada's majority decision in *Marshall and Bernard*, which requires "regular occupancy or use of definite tracts of land."²⁰⁸ Rather, by studying the Tsilhqot'in people's seasonal migration patterns, land use, and degree of attachment to the land, the trial judge implicitly endorsed the minority judgement's more generous standard of occupation.²⁰⁹ This occupancy standard serves to accommodate the semi-nomadic lifestyles of most Aboriginal peoples in the pre-sovereignty period, since it takes into account "the traditions and culture of the group that connect it to the land."²¹⁰ Consequently, by adopting a broad and liberal standard of occupation for the proof of Aboriginal title, the trial ruling is likely to facilitate findings of Aboriginal title, and strengthen the relationship between First Nations and the Crown in Canada.

Third, Justice Vickers tried to improve relations between the Tsilhqot'in people and the Crown, by clarifying the precise nature and location of Tsilhqot'in title lands in British

Nation Order]; see also MacLaren *et al.*, "Tsilhqot'in Nation v. British Columbia", *supra* note 36 at 126, 128-129; Newman, "Tsilhqot'in Nation v. British Columbia and Civil Justice", *supra* note 8 at 444-446, 449.

²⁰⁸ *Marshall and Bernard*, *supra* note 21 at para. 70.

²⁰⁹ MacLaren *et al.*, "Tsilhqot'in Nation v. British Columbia", *supra* note 36 at 132, 136; Newman and Schweitzer, "Between Reconciliation and the Rule(s) of Law", *supra* note 143 at 249-256.

²¹⁰ *Marshall and Bernard*, *supra* note 21 at paras. 131, 140.

Columbia. As mentioned earlier, Justice Vickers was “unable to find regular use” of land throughout the Tachelach’ed and Trapline Territory, and could not make “a declaration of Tsilhqot’in Aboriginal title to smaller areas included within the whole,” since they had not been separately pleaded.²¹¹ Nonetheless, the trial judge offered an opinion on Tsilhqot’in Aboriginal title, indicating sites inside and outside the Claim Area that were occupied by the Tsilhqot’in people at the time of sovereignty assertion to a degree sufficient to merit a finding of Aboriginal title.²¹² This opinion was meant to “assist the parties in the negotiations that lie ahead” and “achieve a reconciliation of all interests.”²¹³ Therefore, even though Justice Vickers declined to make a declaration of Aboriginal title, he genuinely attempted to foster reconciliation and dialogue between the Tsilhqot’in people and representatives of the federal and provincial Crown, by identifying the Opinion Title Area.

Fourth, the trial judge reinforced the relationship between First Nations and the Crown by concluding that the *Forest Act* is inapplicable to Aboriginal title lands under the constitutional division of powers and doctrine of interjurisdictional immunity.²¹⁴ Justice Vickers acknowledged the serious implications that this ruling will have on British Columbia’s ability to regulate Aboriginal title lands. Specifically, the inapplicability of the *Forest Act* to Aboriginal title lands signifies that British Columbia lacks the constitutional authority to grant interests in the timber located on Tsilhqot’in title lands to third parties. The province also lacks the power to oversee forest development projects on these lands.²¹⁵ Nonetheless, he believed that these conclusions were compatible with the primary role of Parliament in affairs relating to Aboriginal peoples in Canada. The trial judge declared that

²¹¹ *Ibid.* at para. 957.

²¹² *Ibid.* at para. 960.

²¹³ *Ibid.* at paras. 961-962.

²¹⁴ *Tsilhqot’in Nation*, *supra* note 22 at paras. 1031-1032, 1045.

²¹⁵ *Ibid.* at para. 1002; McNeil, “Reconciliation and Third-Party Interests”, *supra* note 12 at 15-19.

“[t]he denial or avoidance of this constitutional responsibility is unacceptable if there is to be a just reconciliation in this era of decolonization.”²¹⁶ He also expressed approval for Kent McNeil’s opinion that British Columbia “has been violating Aboriginal title in an unconstitutional and therefore illegal fashion ever since it joined Canada in 1871. What is truly disturbing is not that the province can no longer do so, but that it has been able to get away with it for so many years.”²¹⁷ This represents a strong statement in favour of the Aboriginal title rights of First Nations in Canada, suggesting that the federal government will have to compensate Aboriginal peoples for the continued violation of their land rights in British Columbia.

Fifth, Mr. Justice Vickers furthered the goal of reconciliation by affirming that, even if his conclusions on the constitutional issues were wrong, the application of British Columbia’s *Forest Act* would still unjustifiably infringe Tsilhqot’in Aboriginal title rights. As aforementioned, the trial judge found that the *Forest Act* constitutes a *prima facie* infringement on Tsilhqot’in Aboriginal title, because this forestry framework “removes the ability of the Tsilhqot’in people to *control the uses* to which the land is put, [...] and to realize certain *economic gains* associated with harvesting rights.”²¹⁸ By recognizing and affirming the economic and jurisdictional aspects of Aboriginal title, the trial judge created constitutional space for the self-government and economic development of the Tsilhqot’in Nation in the twenty-first century.

Furthermore, given British Columbia’s failure to acknowledge and accommodate the Aboriginal rights and title claims advanced by the Tsilhqot’in, the trial court concluded that

²¹⁶ *Tsilhqot’in Nation*, *supra* note 22 at para. 1046.

²¹⁷ K. McNeil, “Aboriginal Title and Section 88 of the *Indian Act*” (2000) 34:1 UBC L Rev 159 at 194, cited in *Tsilhqot’in Nation*, *supra* note 22 at para. 1047.

²¹⁸ *Tsilhqot’in Nation*, *supra* note 22 at para. 1066 [emphasis added].

“the [p]rovince has failed in its obligation to consult with the Tsilhqot’in people,” and “failed to justify its infringement of Tsilhqot’in Aboriginal title.”²¹⁹ This conclusion reflects Justice Vickers’ commitment to the principles of “deep consultation and accommodation” in the context of Aboriginal rights and title claims, as well as his willingness to hold the provincial Crown to a high standard in its dealings with Aboriginal peoples.²²⁰ Consequently, the trial court’s judgement in *Tsilhqot’in Nation* contributed to reinforcing the fiduciary relationship between First Nations and the Crown and the broader objective of reconciliation in Canada.

Finally, even though Justice Vickers envisaged the ultimate goal of reconciliation throughout his decision and sought to facilitate the subsequent process of negotiations between the Tsilhqot’in people and agents of the Crown, he may have failed to appreciate the lack of political incentives and public support for the provincial and federal governments to negotiate in good faith with representatives of the Tsilhqot’in Nation, and make concessions to their claims for rights of use and occupation of the Tachelach’ed and Trapline Territory. Since the constitutional entrenchment of Aboriginal and treaty rights in 1982, the governments of British Columbia and Canada have systematically denied First Nations the opportunity to exercise their Aboriginal title rights recognized and affirmed by the Constitution. The denial is inferred from the fact that the federal and provincial governments have fought every single case involving claims for Aboriginal title.²²¹

While the formal land claims process purports to promote just and lasting land settlements between First Nations and the Crown, Canada and British Columbia have both imposed the inclusion of “extinguishment clauses” in modern-day treaties, such as Nisga’a

²¹⁹ *Ibid.* at para. 1141.

²²⁰ *Ibid.*

²²¹ Christie, “Judicial Justification of Recent Developments in Aboriginal Law”, *supra* note 7 at 62-64; Lambert, “Three Points about Aboriginal Title”, *supra* note 78 at 349-350.

and James Bay agreements, as a means to prohibit Aboriginal communities from pursuing rights and title claims in court.²²² This situation suggests that the stark imbalance of power between First Nations and the Crown often precludes the negotiation process from fully appreciating and accommodating the land claims of Aboriginal peoples. Despite the flaws of the Canadian judicial system, it is still better equipped than politicians to protect and promote the constitutional rights of Aboriginal peoples in Canada, due to its relatively impartial and nonpartisan nature.²²³ From this perspective, the tendency of Canadian courts to reject title claims on procedural as opposed to substantive grounds could be perceived as an abdication of judicial power to protect the constitutional rights of Aboriginal peoples rather than as sensitivity and deference to the legislative and executive branches of government.

The foregoing analysis shows that Justice Vickers was an inspired and principled judge who sincerely sought to participate in the “larger process of reconciliation between the Tsilhqot’in people and broader Canadian society,” by considering oral evidence from the Aboriginal perspective, adopting a large and liberal standard of occupation for the proof of Aboriginal title, expressing an opinion on Tsilhqot’in Aboriginal title, and asserting the unconstitutionality of British Columbia’s attempts to control Tsilhqot’in title lands through the *Forest Act*.²²⁴ However, the trial decision ultimately failed to attain an “honourable settlement with Tsilhqot’in people,” by declining to issue a declaration of Aboriginal title, due to a defect in the Nation’s pleadings.²²⁵ Since Justice Vickers could have found a way around the pleadings issue, had he believed a declaration of Aboriginal title would have been

²²² *Ibid.*; T. Gordon, “Canada Empire, and Indigenous People in the Americas” (2006) 2:1 Soc Stud 47 at 59-60; P. Rynard, “‘Welcome In, But Check Your Rights at the Door’: The James Bay and Nisga’a Agreements in Canada” (2000) 33:2 CJPS 211; Yurkowski, “We are All Here to Stay”, *supra* note 27 at 495.

²²³ Christie, “Judicial Justification”, *supra* note 7 at 60-64.

²²⁴ *Tsilhqot’in Nation*, *supra* note 22 at para. 18.

²²⁵ *Ibid.* at para. 1382.

fair and just remedy in the circumstances, his failure to grant the Tsilhqot'in declaratory relief seems to have been informed by his naïve preference for negotiation over litigation in the resolution of Aboriginal title claims.²²⁶ Consequently, the trial ruling in *Tsilhqot'in Nation* has dire ramifications for the future of Aboriginal title litigation, intimating that courts could decline to issue declarations of Aboriginal title, if judges construe the “winner take all” approach of the judicial system and the constraints of the law as obstructing the broader objective of reconciliation between Indigenous and non-Indigenous Canadians.²²⁷

3.2 *William v. British Columbia: Court of Appeal Decision*

Following the trial decision in *Tsilhqot'in Nation v. British Columbia*, the parties to the proceedings attempted to attain a settlement, but ultimately found it necessary to continue with the appeal.²²⁸ Justice Vickers' decision to issue a non-binding opinion as to the title area thus failed to assist the parties in finding common ground.²²⁹ A three-judge panel of the British Columbia Court of Appeal, composed of Madam Justice Levine, Mr. Justice Tysoe, and Mr. Justice Groberman, heard the appeals in the Tsilhqot'in case for six days in November 2010. After being reserved for more than nineteenth months, the Court of Appeal's judgement in *William v. British Columbia* was finally released by Mr. Justice Groberman on 27 June 2012, with Justices Levine and Tysoe concurring in the reasons. The

²²⁶ Lambert, “The Tsilhqot'in Case”, *supra* note 26 at 820; McNeil, “Reconciliation and Third-Party Interests”, *supra* note 12 at 7-14.

²²⁷ Borrows, “Sovereignty's Alchemy”, *supra* note 30 at 548-553; McNeil, “Reconciliation and Third-Party Interests”, *supra* note 12 at 13-14; Russell, “High Courts and the Rights of Aboriginal Peoples”, *supra* note 81 at 274-276; Shiveley, “Negotiation and Native Title”, *supra* note 27 at 427-249, 456-461; Turpel, “Aboriginal Peoples and the Canadian Charter”, *supra* note 81 at 5-6; Yurkowski, “We are All Here to Stay”, *supra* note 27 at 472, 493.

²²⁸ *William*, *supra* note 6 at para. 28; R. Matas, “B.C. turns to courts after negotiations fail in landmark case” online: *Globe and Mail*, February 26, 2009 <<http://www.theglobeandmail.com/news/british-columbia/bc-turns-to-courts-after-negotiations-fail-in-landmark-case/article1154149/>> (retrieved on July 30, 2013).

²²⁹ Nevertheless, Justice Groberman, writing for the Court of Appeal, emphasized that neither the fact that the parties were unable to settle this matter short of appeal nor the fact that the Court disagreed with him on certain issues of law should be regarded as reducing Justice Vickers' “thorough understanding and careful analysis of the evidence” in the trial decision. See *William*, *supra* note 6 at paras. 29 and 164.

Court of Appeal’s decision upheld the trial ruling granting the Tsilhqot’in a declaration of Aboriginal rights to hunt and trap animals and birds throughout the Claim Area, including the right to capture and use wild horses “for transportation and work,” and the right to trade in skins and pelts for the purposes of securing a “moderate livelihood.”²³⁰

However, the Court of Appeal dismissed the Tsilhqot’in Nation’s claim for Aboriginal title to the Tachelach’ed and Trapline Territory for four main reasons. First, although the Court found that the Tsilhqot’in’s claim for Aboriginal title to the Tachelach’ed and Trapline Territory was not structured as an “all or nothing claim,” it was concerned with the competing conceptions of Aboriginal title advanced by the plaintiff and defendants.²³¹ Second, the Aboriginal title claim advanced by Roger William on behalf of the Tsilhqot’in was framed as a territorial claim rather than a site-specific claim.²³² Third, Justice Groberman considered himself free to set aside Justice Vickers’ findings of fact on Tsilhqot’in Aboriginal title, because he decided that a “broad territorial claim” does not constitute a valid foundation for an Aboriginal title claim.²³³ Fourth, the Court held that an overly broad declaration of Aboriginal title is at odds with the ultimate goal of reconciliation; rather, the recognition of Aboriginal rights would be sufficient to ensure the cultural security of native peoples in the twenty-first century.²³⁴ These conclusions are discussed in detail below.

3.2.1 Preliminary Issue: “All or Nothing” Aboriginal Title Claim

First, the Court of Appeal rejected Justice Vickers’ ruling that Roger William’s land claim was structured as an “all or nothing claim,” such that the Court lacked the jurisdiction

²³⁰ *Ibid.* at paras. 267, 288, 344.

²³¹ *Ibid.* at paras. 117-118, 344.

²³² *Ibid.* at paras. 214, 217-218, 344.

²³³ *Ibid.* at paras. 219-225, 344.

²³⁴ *Ibid.* at paras. 219, 235-239.

to issue a declaration of Tsilhqot'in Aboriginal title to discrete portions of the Claim Area.²³⁵ Specifically, Justice Groberman stated “[t]he claim was sufficiently pleaded to allow the Court to find that Aboriginal title had been proven in respect of only part of the Claim Area,” without prejudice to the federal or provincial Crown.²³⁶ Underlying this finding was the perceived necessity for judicial suppleness and sensitivity to the Aboriginal perspective in the context of Aboriginal title cases. Prior to the assertion of Crown sovereignty, the occupation of traditional territories by most First Nations did not tend to be delimited by precise natural boundaries, but rather remained “ill-defined and fluid.”²³⁷ As a result, Justice Groberman recognized that “to require proof of Aboriginal title precisely mirroring the claim would be too exacting,” especially in the case of such semi-nomadic peoples as the Tsilhqot'in.²³⁸ The Court of Appeal thus rejected the Crown's argument that the way in which Roger William structured his application for relief on behalf of the Tsilhqot'in would be prejudicial to British Columbia and Canada.²³⁹ However, the Court was concerned that the territorial theory of Aboriginal title advanced by the Tsilhqot'in would cause prejudice to the provincial and federal governments, who adhered to a site-specific understanding of title.²⁴⁰ These competing conceptions of land rights are articulated below.

3.2.2 Site-Specific v. Territorial Aboriginal Title Claims

In *William v. British Columbia*, the Court of Appeal differentiated between two different types of Aboriginal title claims, namely territorial and site-specific claims.²⁴¹ According to the Court, Roger William's case was based on a territorial theory of Aboriginal

²³⁵ *Ibid.* at para. 103.

²³⁶ *Ibid.* at para. 117.

²³⁷ *Ibid.* at para. 118.

²³⁸ *Ibid.*

²³⁹ *Ibid.* at para. 107.

²⁴⁰ *Ibid.* at paras. 120-126.

²⁴¹ *Ibid.* at para. 205.

title, because he presumed that “occupation” could be established by revealing the physical presence and the seasonal resource-gathering patterns of the Tsilhqot’in Nation at and around the time of sovereignty.²⁴² In contrast, British Columbia and Canada embraced a site-specific conception of title, arguing that Aboriginal title could only be declared over definite tracts of land that were regularly and intensively used by First Nations in the pre-sovereignty period.²⁴³ Roger Williams argued on behalf of the Tsilhqot’in that by asking semi-nomadic groups to demonstrate the intensive and regular use of clearly identifiable tracts of land, the provincial and federal governments were adopting a “postage stamp” approach to title, which is fundamentally incompatible with the Aboriginal perspective.²⁴⁴

Nonetheless, the Court of Appeal accepted the defendants’ characterization of Williams’ claim as a “territorial” one.²⁴⁵ The Aboriginal leader did not attempt to show that the Tsilhqot’in physically occupied the entire Claim Area, either at all times or on a seasonal basis. Rather, he demonstrated that the Tsilhqot’in lived in different parts of the Claim Area at different periods. The fact that the area being claimed represented only a fraction of the region, regarded as the traditional territory of the Tsilhqot’in, did not preclude the claim from being described as territorial rather than site-specific.²⁴⁶ Furthermore, the Court of Appeal held that a broad territorial claim constituted an inappropriate basis for an Aboriginal title right, and failed to comply with the tests for the proof of exclusive, pre-sovereignty occupation laid down in *Delgamuukw* and *Marshall and Bernard*.²⁴⁷ Instead, Aboriginal title could only be claimed over specific sites subject to regular and intensive historical use.²⁴⁸

²⁴² *Ibid.* at para. 120.

²⁴³ *Ibid.* at para. 211.

²⁴⁴ *Ibid.* at para. 210.

²⁴⁵ *Ibid.* at paras. 215, 217.

²⁴⁶ *Ibid.* at para. 217.

²⁴⁷ *Ibid.* at paras. 219-225, 344.

²⁴⁸ *Ibid.* at paras. 224-225.

Responding to the concerns raised by the minority decision in *Marshall and Bernard*, Justice Groberman emphasized that the requirements of site-specificity, intensity and regularity of use would not prevent such semi-nomadic peoples as the Tsilhqot'in from fulfilling the standard of occupation for the purpose of a title claim.²⁴⁹

3.2.3 Intensity and Regularity of Use

In applying the standard of intensive and regular occupation, the Court of Appeal decided that the Tsilhqot'in did not meet the test for the proof of Aboriginal title. While Roger William showed that the Tsilhqot'in had engaged in hunting, trapping, and fishing in different parts of the Claim Area in the period around 1846, Justice Groberman belittled these cultural activities as occurring “more or less on an opportunistic basis.”²⁵⁰ William also presented evidence of attempts by the Tsilhqot'in to restrict the access of outsiders to their traditional territory to prove their exclusive occupation of the Claim Area prior to the assertion of Crown sovereignty in 1846; however, the Court dismissed this evidence as “anecdotal” and thus unreliable.²⁵¹ Moreover, Justice Groberman perceived the absence of permanent villages, and cultivated or enclosed fields in the traditional territory of the Tsilhqot'in as detrimental to their title claim.²⁵² Consequently, the Court of Appeal decided that, “[e]xcept in respect of a few specific sites, the evidence did not establish regular presence on or intensive occupation of definite tracts of land within the Claim Area.”²⁵³ The more rigid standard of occupation set out by the Court of Appeal thus obstructed the recognition of Tsilhqot'in Aboriginal title.

²⁴⁹ *Ibid.* at para. 222.

²⁵⁰ *Ibid.* at paras. 214, 216.

²⁵¹ *Ibid.*

²⁵² *Ibid.* at paras. 215-216.

²⁵³ *Ibid.* at para. 215.

The Court of Appeal contended that “it is not clear what precise test the [trial] judge applied in determining whether Tsilhqot’in occupancy of the Claim Area was sufficient to found title.”²⁵⁴ Although the trial judge did not identify and define a clear standard of occupation, it is obvious that he believed that occupation could be established on a regional or territorial basis.²⁵⁵ Given that Justice Vickers had dealt with the evidence of pre-sovereignty occupation within the framework of a territorial rather than a site-specific claim, Justice Groberman regarded himself as free to reject the trial judge’s findings of fact to the effect that the Tsilhqot’in Nation had Aboriginal title to the Opinion Title Area, constituting approximately forty percent of the Claim Area.²⁵⁶ Nevertheless, in light of the significant uncertainty surrounding the law of Aboriginal title and the nature of this “test case,” Justice Groberman decided that his dismissal of the title claim would not prevent the Tsilhqot’in from advancing new actions for Aboriginal title to definite tracts of land within the Tachelach’ed and Trapline Territory in the future.²⁵⁷

3.2.4 Cultural Security and Reconciliation

The Court of Appeal’s decision in *William v. British Columbia* did not express significant concerns about the repercussions of its rejection of Chief Roger William’s Aboriginal title claim for the economic future of the Tsilhqot’in Nation. Justice Groberman was “not convinced” that the relationship between the Tsilhqot’in Nation and their land “requires the recognition of Aboriginal title on a territorial basis.”²⁵⁸ Instead, this connection would call for the Court to acknowledge the existence of Aboriginal rights respecting the

²⁵⁴ *Ibid.* at para. 228.

²⁵⁵ *Ibid.* at para. 229.

²⁵⁶ *Ibid.* at paras. 240-241. See also Lambert, “The Tsilhqot’in Case”, *supra* note 26 at 820-821.

²⁵⁷ *William*, *supra* note 6 at para. 241, 344.

²⁵⁸ *Ibid.* at para. 233.

cultural values of the Tsilhqot'in community.²⁵⁹ According to the Court of Appeal judge, William's position with respect to Tsilhqot'in Aboriginal title did not take into consideration the fact that "title is not the only tool available to provide cultural security to the Tsilhqot'in;" rather, "various types of Aboriginal rights afford cultural security and safeguard the capacity of First Nations to continue to engage in traditional lifestyles."²⁶⁰ The result of this approach to Aboriginal title for such semi-nomadic groups as the Tsilhqot'in would not be "a patchwork of unconnected 'postage stamp' areas of title, but rather a network of specific sites over which title can be proven," linked by large areas in which different forms of identifiable Aboriginal rights can be exercised.²⁶¹ Justice Groberman viewed this understanding of the interaction between Aboriginal title and Aboriginal rights as "entirely consistent" with the customs of Indigenous peoples, as well as with the purposes behind the entrenchment of Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*.²⁶²

The Court of Appeal judge also believed that this conception of the interplay between Aboriginal title and Aboriginal rights was compatible with the ultimate objective of reconciliation.²⁶³ Justice Groberman repeatedly affirmed that he regarded broad territorial claims for Aboriginal title as "antithetical to the goal of reconciliation," which requires that "the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians."²⁶⁴ Recalling former Chief Justice Lamer's conclusion in *Delgamuukw* that "we are all here to

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.* at para. 236.

²⁶¹ *Ibid.* at para. 238.

²⁶² *Ibid.*

²⁶³ *Ibid.* at para. 239.

²⁶⁴ *Ibid.* at para. 219.

stay,” Justice Groberman called for mutual concessions on the part of the Crown and First Nations to facilitate the peaceful co-existence of Aboriginal and non-Aboriginal Canadians.

In the following subsection I explore the implications of the Court of Appeal’s conclusion on the preliminary issue, conception of the law of territoriality and site-specificity, requirement of regular and intensive use for the proof of Aboriginal title, and vision of reconciliation for the relationship between First Nations and the Crown.

3.2.5 Justice Groberman’s Hollow Conception of Reconciliation

By allowing the appeal on the pleadings issue, the British Columbia Court of Appeal infused a certain degree of flexibility into outdated rules of procedure and helped to restore the confidence of Aboriginal peoples in the Canadian judicial system. Nevertheless, Justice Groberman’s conclusions in *William v. British Columbia* largely subverted relations between First Nations and the Crown for four main reasons.

First, Justice Groberman violated the principle of non-interference by setting aside the factual findings of the trial judge with respect to Tsilhqot’in Aboriginal title. In *Tsilhqot’in Nation v. British Columbia*, Justice Vickers had recognized that if his interpretation of the preliminary issue were wrong, then his conclusion on Tsilhqot’in Aboriginal title, insofar as it applied to land within the Tachelach’ed and the Trapline Territory, would be binding on the parties as a finding of fact in the proceedings.²⁶⁵ Given that Justice Groberman ruled in *William v. British Columbia* that the trial judge had committed an error of law with respect to the pleadings issue, one would assume that the Court of Appeal would grant the Tsilhqot’in Nation a declaration of Aboriginal title to the relevant region of the Opinion Title Area.

Yet, Justice Groberman refused to provide the Tsilhqot’in with declaratory relief, preferring instead to revisit Justice Vickers’ findings of fact. This decision contravenes the

²⁶⁵ *Tsilhqot’in Nation*, *supra* note 22 at para. 961.

general principle of non-interference laid down by the Supreme Court of Canada in *Delgamuukw*, such that “appellate courts should not substitute their own findings of fact for those of the trial judge,” absent a “palpable and overriding error.”²⁶⁶ In general, appellate intervention would be justified “where the courts below have misapprehended or overlooked material evidence.”²⁶⁷ In the context of section 35(1) cases in particular, appellate interference would be warranted by the failure of a trial court to grasp the evidentiary difficulties in adjudicating Aboriginal rights claims when first, implementing the rules of evidence and second, evaluating the evidence before it.²⁶⁸ Consequently, the British Columbia Court of Appeal’s decision to interfere with the factual findings made by the British Columbia Supreme Court, despite the lack of a “palpable and overriding error” in the trial judge’s treatment of the evidence, may be construed as an error of law and a manifestation of judicial activism or overreaching.

Second, the majority judgement misinterpreted the law of site-specificity and territoriality. As aforementioned, Justice Groberman decided in *William v. British Columbia* that only site-specific as opposed to territorial claims for Aboriginal title are legally tenable and likely to succeed in court.²⁶⁹ This is the first time that the concept of site-specificity has been applied to Aboriginal title, though it is relatively familiar in Aboriginal rights jurisprudence.²⁷⁰ Site-specific rights are situated at the centre of the spectrum of Aboriginal rights, defined by the Supreme Court of Canada in *Adams* and *Côté*, with Aboriginal rights *simpliciter* and Aboriginal title at the two other extremes. In these joint cases, then Chief

²⁶⁶ *Delgamuukw*, *supra* note 4 at para. 78, citing *Stein et al. v. ‘Kathy K’ et al. (The Ship)*, [1976] 2 S.C.R. 802 at 278.

²⁶⁷ *Delgamuukw*, *supra* note 4 at para. 78, citing *Chartier v. Attorney-General of Quebec*, [1979] 2 S.C.R. 474, at 493.

²⁶⁸ Citation from *Delgamuukw*, *supra* note 4 at para. 80; *Van der Peet*, *supra* note 79 at para. 68.

²⁶⁹ *William*, *supra* note 6 at paras. 220-225, 231, 239; Mandell, “Aboriginal Title Over the Buffalo Jump”, *supra* note 28 at 2.

²⁷⁰ Lambert, “The Tsilhqot’in Case”, *supra* note 26 at 823.

Justice Lamer ruled that site-specific rights provide constitutional protection to activities, which are exercised on and linked to a particular piece of land, but lack a sufficient degree of connection to establish title.²⁷¹

Yet, the Court of Appeal's reasons fail to appreciate that site-specificity is a concept that applies to Aboriginal rights, not Aboriginal title.²⁷² As stated by the Supreme Court of Canada in *Delgamuukw*, "Aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive [A]boriginal cultures. Site-specific rights can be made out even if title cannot."²⁷³ This passage clearly shows that site-specific Aboriginal rights are conceptually distinct from Aboriginal title. Aboriginal title represents the broadest Aboriginal right, which is not confined to site-specific activities, but rather "confers [...] the right to the land itself."²⁷⁴ As a legal right to the exclusive use and occupation of land, it makes more sense for Aboriginal title claims to be conceptualized and structured in a broad, territorial manner than in narrow, site-specific terms. By arbitrarily restricting the scope of Aboriginal title to specific sites, the Court of Appeal compromised the potential of Aboriginal title to protect the economic development and self-determination of Indigenous peoples in the twenty-first century.

Furthermore, whereas the Supreme Court failed to define "definite tracts of land" in *Delgamuukw*, the Court of Appeal conflated this phrase with "specific sites" in its decision in *William v. British Columbia*.²⁷⁵ Examples of specific sites cited by the Court of Appeal as

²⁷¹ *Adams*, *supra* note 18 at para. 26.

²⁷² Lambert, "The Tsilhqot'in Case", *supra* note 26 at 824.

²⁷³ *Delgamuukw*, *supra* note 4 at para. 138.

²⁷⁴ *Ibid.* See also Borrows, "Domesticating Doctrines", *supra* note 3 at 654; Lambert, "Van der Peet and *Delgamuukw*", *supra* note 87 at 267-268; MacLaren *et al.*, "Tsilhqot'in Nation v. British Columbia", *supra* note 36 at 134; McNeil, "Aboriginal Title and the Supreme Court", *supra* note 3 at 285-287; McNeil, "Aboriginal Rights in Transition", *supra* note 5 at 320-321; McNeil, "Self-Government and the Inalienability of Aboriginal Title", *supra* note 37 at 477, 481-488, 509-510.

²⁷⁵ Lambert, "The Tsilhqot'in Case", *supra* note 26 at 824.

satisfying the standard of occupation for Aboriginal title include “salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps.”²⁷⁶ While this list refers to places where site-specific Aboriginal rights could indeed be located and exercised, it does not indicate definite tracts of land exclusively occupied by Aboriginal peoples prior to sovereignty.²⁷⁷ Former British Columbia Court of Appeal judge Douglas Lambert points out that a buffalo jump may be situated on Aboriginal title land, “but no one would think of it as being occupied exclusively as a buffalo jump by [a particular] Aboriginal people.”²⁷⁸ To conceive of Aboriginal title as “site-specific” in the sense the phrase has been used in Aboriginal rights jurisprudence is simply incorrect.²⁷⁹ Moreover, most Aboriginal peoples do not contemplate their traditional territories in terms of discrete and independent sites, but rather as complex, overlapping regions united by a shared spirit. The idea that First Nations strictly depended on promontories or rocks for fishing and salt licks for their sustenance and survival flouts not only the Aboriginal perspective but also common sense.²⁸⁰ Therefore, the Court of Appeal’s partial and fragmented as opposed to comprehensive and unified conception of land jeopardizes the economic and jurisdictional components of Aboriginal title.²⁸¹

Third, the Court of Appeal set out a stringent standard of occupation for the proof of Aboriginal title, which disregards the Aboriginal perspective, especially that of nomadic or semi-nomadic groups. In his analysis, Justice Groberman decided that “Aboriginal title can only be proven over a definite tract of land[,] the boundaries of which are reasonably capable

²⁷⁶ *William*, *supra* note 6 at para. 221.

²⁷⁷ *Ibid.* at para. 220.

²⁷⁸ Lambert, “The Tsilhqot’in Case”, *supra* note 26 at 824.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.* at 353; Mandell, “Aboriginal Title Over the Buffalo Jump”, *supra* note 28 at 4.

²⁸¹ *Ibid.*

of definition.”²⁸² The appellate judge also ruled that “a certain regularity and intensity of presence is needed before it will count as occupancy.”²⁸³ The Court of Appeal thus implicitly defined occupation as the regular presence or intensive use of definite tracts of land. This definition reflects that adopted by the McLachlin majority in the consolidated cases of *Marshall and Bernard*; however, it deviates from the test of occupation set out by the Supreme Court in *Delgamuukw*.²⁸⁴ In the latter case, former Chief Justice Lamer declared that there were two main methods for Aboriginal title claimants to meet the occupancy test: first, by demonstrating the existence of Aboriginal laws and regulations in relation to land; second, by proving the physical presence of Aboriginal peoples in the pre-sovereignty period.²⁸⁵ Former Chief Justice Lamer also held that physical occupation could be established in “a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.”²⁸⁶ The Supreme Court carefully left the question of intensity of use amounting to occupation to be determined on a case-by-case basis.²⁸⁷

The test for the proof of Aboriginal title adopted by the Court of Appeal in *William v. British Columbia* is thus more onerous than that endorsed by the Supreme Court of Canada in *Delgamuukw*, because it requires evidence of intensive and regular land use. While intensity and regularity reflect and reinforce the sedentary form of agriculture preferred by European settlers, these requirements are incompatible with the nomadic or semi-nomadic lifestyles of the vast majority of Aboriginal groups in the pre-sovereignty era, including the Tsilhqot’in

²⁸² *William*, *supra* note 6 at para. 230.

²⁸³ *Ibid.* at para. 225.

²⁸⁴ *Marshall and Bernard*, *supra* note 21 at paras. 56, 70.

²⁸⁵ *Delgamuukw*, *supra* note 4 at paras. 147-149.

²⁸⁶ *Ibid.* at para. 149.

²⁸⁷ Lambert, “The Tsilhqot’in Case”, *supra* note 26 at 825.

Nation. The Court of Appeal's onerous standard of occupation signifies that First Nations will face even greater obstacles to obtaining rights of ownership and control over their traditional territories and natural resources in the future.²⁸⁸ The test for the proof of Aboriginal title articulated by the Court of Appeal in *William* also departs from that developed in *Delgamuukw*, for it exclusively focuses on the fact of physical occupation to demonstrate Aboriginal title.²⁸⁹ By singling out the requirement of "the regular use of definite tracts of land" from former Chief Justice Lamer's discussion of occupation in *Delgamuukw*, Justice Groberman respected common law rules surrounding possession, but overlooked the legal system and customs of the Tsilhqot'in Nation. The Court of Appeal's judgement thus failed to reconcile the Aboriginal perspective with the common law, contrary to the constitutional principles laid down by the Supreme Court of Canada in the landmark cases of *Sparrow*, *Van der Peet*, and *Delgamuukw*.²⁹⁰

Fourth, the Court of Appeal's judgement in *William v. British Columbia* undermined relations between First Nations and the Crown by articulating a strong preference for Aboriginal rights over Aboriginal title. In *William*, Justice Groberman ruled that "title is not the only tool available to provide cultural security to the Tsilhqot'in."²⁹¹ Rather, "[t]he cultural security and continuity of First Nations can be preserved by recognizing their title to [...] 'definite tracts of land,' and by acknowledging that they hold other Aboriginal rights in much more extensive territories."²⁹² This statement contradicts the continuum of Aboriginal

²⁸⁸ Chartrand, "The Return of the Native", *supra* note 130 at 135.

²⁸⁹ McNeil, "Aboriginal Title and the Supreme Court", *supra* note 3 at 227-300; McNeil, "The Onus of Proof of Aboriginal Title", *supra* note 91 at 782-784, 800-801.

²⁹⁰ *Delgamuukw*, *supra* note 4 at paras. 146-151; *Sparrow*, *supra* note 100 at 1112; *Van der Peet*, *supra* note 79 at paras. 49-50. See also Chartrand, "The Return of the Native", *supra* note 130 at 140-142; Lambert, "The Tsilhqot'in Case", *supra* note 26 at 825; Mandell, "Aboriginal Title Over the Buffalo Jump", *supra* note 28 at 7; McNeil, "Aboriginal Title and the Supreme Court", *supra* note 3 at 227-300.

²⁹¹ *William*, *supra* note 6 at para. 235.

²⁹² *Ibid.* at para. 237.

rights created by the Supreme Court of Canada in *Adams*, which posits that Aboriginal title is the most powerful legal tool available to Aboriginal litigants, since it represents the right to the exclusive possession of property.²⁹³

The result of the Court of Appeal's ruling if it were law would be to confine Aboriginal title to hunting and trapping rights over definite and intensively used tracts of land, as they were traditionally exercised in the pre-sovereignty period. This site-specific conception of Aboriginal title might be sufficient for sustenance purposes; however, it would effectively preclude the Tsilhqot'in people from deriving any economic benefits from their homelands, either by the application of their Aboriginal title rights, or by compensation for the infringement of these rights by the federal or provincial governments.²⁹⁴ According to Justice Groberman's theory of title, as soon as the Tsilhqot'in community were to commence the commercial exploitation of its title lands, these lands would become the absolute legal property of the Crown. Yet, the Crown's assertion of sovereignty and title over the Tachelach'ed and Trapline Territory would be illegitimate, in light of the absence of a formal treaty between the Tsilhqot'in Nation and the Crown.²⁹⁵ Moreover, it is only through the ownership and control of resources on and under their Aboriginal title lands that the Tsilhqot'in would obtain the means to maintain a moderate livelihood in the modern era.²⁹⁶

To paraphrase Douglas Lambert, "sustenance [and] trapping rights will not do the trick in

²⁹³ *Adams*, *supra* note 18 at paras. 26, 30. See also Borrows, "Domesticating Doctrines", *supra* note 3 at 654; Lambert, "Van der Peet and Delgamuukw", *supra* note 87 at 267-268; MacLaren *et al.*, "Tsilhqot'in Nation v. British Columbia", *supra* note 36 at 134; McNeil, "Aboriginal Title and the Supreme Court", *supra* note 3 at 285-287; McNeil, "Aboriginal Rights in Transition", *supra* note 5 at 320-321; McNeil, "Self-Government and the Inalienability of Aboriginal Title", *supra* note 37 at 477, 481-488, 509-510.

²⁹⁴ Lambert, "The Tsilhqot'in Case", *supra* note 26 at 829-830; Mandell, "Aboriginal title over the Buffalo Jump", *supra* note 28 at 1-2.

²⁹⁵ Mandell, "Aboriginal Title Over the Buffalo Jump", *supra* note 28 at 1-2, 7.

²⁹⁶ Lambert, "The Tsilhqot'in Case", *supra* note 26 at 829-830.

201[3].”²⁹⁷ Consequently, by articulating a preference for the judicial recognition of Aboriginal rights over Aboriginal title, Justice Groberman seems to have used the language of cultural security to obscure and erase the economic and jurisdictional aspects of Aboriginal title. This rhetorical strategy flouts the fiduciary duty and honour of the Crown in its dealings with Aboriginal peoples.

Finally, the Court of Appeal’s decision in *William v. British Columbia* undermines the relationship between First Nations and the Crown by endorsing a hollow conception of reconciliation, which allows the sovereignty of the Crown and the socioeconomic interests of non-Aboriginal Canadians to trump the constitutional rights of Aboriginal peoples. In *William*, Justice Groberman ruled that an “overly broad recognition of Aboriginal title” is not conducive to the ultimate goal of reconciliation, which requires “a practical compromise that can protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and with the well-being of all Canadians.”²⁹⁸ This definition of reconciliation is fundamentally flawed because it places more weight on the welfare of the non-Aboriginal majority than the constitutional rights of Aboriginal peoples, contrary to legal principles and precedent.²⁹⁹ As suggested by the Supreme Court of Canada’s decision in *Sparrow*, the Aboriginal perspective should be prioritized in the balancing of Aboriginal rights and non-Aboriginal interests, consistent with the “special trust relationship and the responsibility” of the Crown vis-à-vis First Nations in Canada.³⁰⁰ Yet, Justice Groberman’s idea of reconciliation does just the opposite, by subordinating the constitutionally protected rights of Aboriginal peoples to the socioeconomic interests of non-Aboriginal Canadians.

²⁹⁷ *Ibid.* at 823.

²⁹⁸ *William*, *supra* note 6 at para. 239.

²⁹⁹ *Delgamuukw*, *supra* note 4 at paras. 81-82, 84, 112, 147-148, 156-15; *Sparrow*, *supra* note 100 at 1112, *Van der Peet*, *supra* note 79 at paras. 49-50.

³⁰⁰ *Sparrow*, *supra* note 100 at 1115-1116.

In sum, Justice Groberman may have helped to improve the confidence of Aboriginal peoples in the Canadian judicial system by allowing the appeal on the pleadings issue, thereby injecting some suppleness into rigid rules of procedure. Nevertheless, the Court of Appeal's decision in *William v. British Columbia* largely undercut relations between First Nations and the Crown in Canada, by interfering with the factual findings of the trial judge on Tsilhqot'in Aboriginal title, misinterpreting the law of site-specificity and territoriality, endorsing a narrow and stringent standard of occupation for the proof of Aboriginal title, expressing a preference for Aboriginal rights over Aboriginal title in the provision of cultural security, and adhering to a hollow vision of reconciliation, which subordinates the constitutional rights of Aboriginal peoples to the sovereignty of the Crown and the socioeconomic interests of non-Aboriginal Canadians.

4 Future of Aboriginal Title and Reconciliation in Canada

This section aims at assessing the ramifications of the trial and appellate decisions in the *Tsilhqot'in* case for the future of Aboriginal title and reconciliation between First Nations and the Crown in Canada. The *Tsilhqot'in* case reflects the overarching pattern of Canadian Aboriginal title jurisprudence, whereby courts consistently reject Aboriginal title claims, either on procedural grounds to avoid dealing with their merits, or on substantive grounds to defend the interests of the Canadian state and society. This pattern points to two different types of deficiencies in the Canadian judicial system, which pose significant obstacles to the recognition of Aboriginal title lands and the broader objective of reconciliation between First Nations and the Crown: specifically, structural and ideological limitations.³⁰¹

On a structural level, the Canadian judicial system seems to be unable to adequately acknowledge and accommodate the demands of Aboriginal peoples, due to its adversarial structure, strict adherence to legal rules of procedure and precedent, and the excessive time and cost involved in the litigation of Aboriginal rights claims.³⁰² These structural constraints were present in the case of *Calder*, since the *ratio decidendi* of the Supreme Court of Canada's decision was that it lacked the jurisdiction to grant the Nisga'a Nation a declaration of Aboriginal title to lands in the northwest of British Columbia, in the absence of a fiat from the Lieutenant Governor of the province.³⁰³ The case of *Delgamuukw* also illustrates the structural limits to the judicial recognition of Aboriginal title, since the Supreme Court justices declined to decide on the merits of the Gitskan and Wet'suwet'en peoples' claims for Aboriginal title and self-government in northwest British Columbia, remanding the case to

³⁰¹ Russell, "High Courts and the Rights of Aboriginal Peoples", *supra* note 81 at 274.

³⁰² On the structural obstacles to the adjudication of Aboriginal rights and title cases, see Borrows, "Sovereignty's Alchemy", *supra* note 30 at 548-553; Shiveley, "Negotiation and Native Title", *supra* note 27 at 456-462; and Yurkowski, "We are All Here to Stay", *supra* note 27 at 472, 493.

³⁰³ *Calder*, *supra* note 16 at 315, 317, 345.

trial, due to problems in the pleadings and flaws in the evidentiary record.³⁰⁴ The British Columbia Supreme Court's trial ruling in *Tsilhqot'in Nation v. British Columbia* further exemplifies the structural restrictions on reconciliation between First Nations and the Crown. Even though Justice Vickers was sympathetic and sensitive to the perspectives and aspirations of the Tsilhqot'in people, he ultimately dismissed their Aboriginal title claim on account of a minor defect in the structure of their pleadings.³⁰⁵ Given the enormous length, complexity and costs associated with these three cases, "not only in economic but in human terms as well," the frequent refusal of Canadian courts to address the merits of Aboriginal title claims, in order to comply with rigid rules of procedure, casts doubt on the justiciability of Aboriginal land claims in Canada.³⁰⁶

On an ideological level, the Canadian judicial system seems to be systematically biased against Aboriginal claimants, because courts are mainly "non-Aboriginal in their membership," display limited knowledge and understanding of the cultural values and world views of Aboriginal peoples, and are ultimately "too tied to the dominant society to [serve] as truly independent and impartial adjudicators" of Aboriginal rights and title claims.³⁰⁷ Ideological barriers to judicial independence and impartiality can be inferred from the legal constructs of Crown sovereignty and radical title that prevail in Canadian Aboriginal rights jurisprudence.³⁰⁸ The uncritical acceptance of Crown sovereignty and underlying title by Canadian courts could be construed as illegitimate, since First Nations were never formally

³⁰⁴ *Delgamuukw*, *supra* note 4 at paras. 76-77, 107-108, 170-171, 184-186.

³⁰⁵ *Tsilhqot'in Nation*, *supra* note 22 at paras. 129, 961.

³⁰⁶ *Delgamuukw*, *supra* note 4 at para. 186.

³⁰⁷ On the ideological barriers to judicial independence in the context of Aboriginal rights cases, see Russell, "High Courts and the Rights of Aboriginal Peoples", *supra* note 81, quotation at 274-275. See also Borrows, "Sovereignty's Alchemy", *supra* note 30; Macklem, "What's Law Got to Do with It?" *supra* note 30; and Turpel, "Aboriginal Peoples and the Canadian Charter", *supra* note 81.

³⁰⁸ On the uncritical acceptance of Crown sovereignty and underlying title in Canadian Aboriginal rights jurisprudence, see *e.g.* Borrows, "Sovereignty's Alchemy", *supra* note 30 at 572-573; Christie, "Judicial Justification", *supra* note 7 at 67.

conquered by European colonizers in North America, nor did they surrender their self-government and land rights to the Crown following Confederation.³⁰⁹

The Supreme Court of Canada's decision in the consolidated cases of *Marshall and Bernard* indicates that ideological factors effectively frustrate findings of Aboriginal title, since the majority endorsed an exacting standard of occupation for the proof of Aboriginal title, which the Mi'kmaq failed to meet. This standard reflects common law rules rather than Aboriginal laws in relation to land use, and conflicts with the semi-nomadic lifestyles of most First Nations in the pre-sovereignty period.³¹⁰ Ideological impediments to judicial independence and impartiality are also implicit in the British Columbia Court of Appeal's judgement in *William v. British Columbia*, which denied the Tsilhqot'in people's application for Aboriginal title, because the "broad and territorial" structure of the claim was deemed to be "antithetical to the goal of reconciliation."³¹¹ The Court of Appeal contended that reconciliation requires that "the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians."³¹² This definition of reconciliation is disingenuous, insofar as it demands that Aboriginal peoples concede their constitutional rights to accommodate the socioeconomic interests of non-Aboriginal Canadians in the case of a conflict.

The Canadian judiciary's frequent rejection of Aboriginal title claims for procedural reasons may in part be explained, but certainly not justified, by strategic judicial decision-

³⁰⁹ On the questionable origins of European sovereignty and settlement, see *e.g.* J. Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38:2 UBC L Rev 285; K. Ladner and M. McCrossan, "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order" in ed. J. B. Kelly and C. P. Manfredi, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) at 265-266.

³¹⁰ *Marshall and Bernard*, *supra* note 21 at paras. 70. See also Chartrand, "The Return of the Native", *supra* note 130 at 135-140; MacLaren *et al.*, "Tsilhqot'in Nation v. British Columbia", *supra* note 36 at 132.

³¹¹ *William*, *supra* note 6 at para. 219.

³¹² *Ibid.*

making. This model conceptualizes judges as strategic rational actors who attempt to maximize their preferences in the face of internal and external constraints.³¹³ Consistent with Alexander Hamilton's famous formulation in *Federalist 78*, this paradigm claims that courts must maintain their institutional legitimacy to survive, since they possess the power neither of the purse nor the sword, and thus depend on the legislative and executive branches of government to implement their decisions.³¹⁴ Additionally, given that lower courts confront the constant threat of appeal, they are more likely than their appellate counterparts to respect the norm of *stare decisis*, or to decide points of law according to legal precedent, in order to rally the support of their colleagues higher up in the judicial hierarchy.³¹⁵

As a court of final instance, the Supreme Court of Canada does not face the threat of appeal, but justices are nonetheless constrained by the need to negotiate and bargain with their colleagues to reach a majority decision.³¹⁶ Since the Supreme Court gained control over its docket in 1975, it has tended to hear a greater number of "hard cases," in which the language of legal principles and precedents is unclear. As a result of their docket control, Supreme Court justices have more leeway to engage in judicial policy-making.³¹⁷ The Court's discretionary power is further enhanced in the field of Aboriginal rights, since section 35(1) of the *Constitution Act, 1982* is subject to neither the reasonable limits clause in

³¹³ On the strategic model of judicial decision-making, see R. Knopff, D. Baker and S. LeRoy, "Courting Controversy: Strategic Judicial Decision Making" in J. B. Kelly and C. P. Manfredi, ed., *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver; Toronto: UBC Press, 2009) at 66-69; C. Manfredi, "Strategic Behaviour and the Canadian Charter of Rights and Freedoms" in D. E. Abelson, P. James, and M. Lusztig, ed. *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada* (Montreal: McGill-Queen's University Press, 2002) at 147-167; and P. T., Spiller and R. Gely, "Strategic Judicial Decision Making" in G. A. Caldeira, R. D. Kelemen, and K. W. Whittington, ed., *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2009) at 1-22.

³¹⁴ L. Hausegger and T. Riddell, "The Changing Nature of Public Support for the Supreme Court of Canada" (2004) 37:1 CJPS 23 at 23; V. Radmilovic, "Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec *Secession Reference* and Beyond" (2010) 43:3 CJPS 843 at 845.

³¹⁵ Knopff, Baker and LeRoy, "Courting Controversy", *supra* note 313 at 66.

³¹⁶ *Ibid.*; Manfredi, "Strategic Behaviour and the Canadian Charter", *supra* note 313 at 150.

³¹⁷ D. R. Songer, S. W. Johnson, C. L. Ostberg, and M. E. Wetstein, *Law, Ideology and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 2012) at 45-47, 56.

section 1 nor to the notwithstanding clause in section 35(1) of the *Canadian Charter of Rights and Freedoms*.³¹⁸ The exclusion of section 35(1) from the scope of these provisions, which generally create space for legislative responses to judicial decisions, means that the Supreme Court enjoys finality over the constitutional interpretation of Aboriginal rights in Canada.³¹⁹

Yet, the Supreme Court of Canada seems to be uncomfortable with its virtually unconstrained power to adjudicate on Aboriginal rights and title claims. The repeated calls for negotiation and compromise made by Justices Dickson and La Forest in *Sparrow*, and former Chief Justice Lamer in *Delgamuukw*, hint at the Court's hesitance to issue formal declarations of Aboriginal title, and unease with its role in the broader process of reconciliation.³²⁰ The strategic model of judicial decision-making would construe the Court's cautionary behaviour as a rational and reasonable means to preserve its institutional legitimacy, in the face of the public's fears of the potential effects of Aboriginal title rights on the interests of third parties and the regulatory powers of the federal and provincial governments.³²¹ This paradigm would also predict that the uncertainty, high visibility, and controversy surrounding most Aboriginal land claims compound the Court's tendency to cultivate institutional legitimacy and support from external actors and institutions.³²²

Nevertheless, the reticence of Canadian courts to recognize Aboriginal title lands is disconcerting for those who regard Aboriginal title as a powerful legal tool, which could

³¹⁸ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 1 and 33 [hereinafter *Canadian Charter*].

³¹⁹ V. Radmilovic, "A Strategic Approach to Judicial Legitimacy: Supreme Court of Canada and the Marshall Case" (2010) 15:1 *Rev Const Stud* 77 especially at 93.

³²⁰ See *supra* note 194 and accompanying text.

³²¹ On public apprehensions of the potential recognition of Aboriginal title and self-government rights in Canada, see Wilkins, "Take Your Time and Do it Right", *supra* note 8 at 252-266.

³²² Radmilovic, "Strategic Legitimacy Cultivation", *supra* note 314 at 850-852; Radmilovic, "A Strategic Approach to Judicial Legitimacy", *supra* note 319 at 89-90.

afford titleholders a limited form of self-determination and economic development in the twenty-first century.³²³ While courts are tempted to delegate the resolution of Aboriginal title claims to the democratic process, genuine negotiations between First Nations and the federal and provincial governments are precluded by the stark and systemic imbalance of power between these parties. This disparity of power may be deduced from Canada and British Columbia's successive policies of cultural assimilation and territorial dispossession of Indigenous peoples, as well as their decisions to fight against every single Aboriginal title case that has come before the Supreme Court, since the entrenchment of Aboriginal and treaty rights in section 35(1) in the *Constitution Act, 1982*.³²⁴

In light of the historical context, the Canadian judiciary's self-proclaimed preference for negotiations over litigation in the resolution of Aboriginal title claims seems more like an abdication of judicial power than a manifestation of judicial deference to elected governments. Despite their structural flaws, courts are better positioned than the federal and provincial governments to uphold the honour and fiduciary duty of the Crown to First Nations by recognizing and affirming Aboriginal title rights. While the judicial acceptance of Aboriginal title claims would have radical consequences for the interests of third parties and for the provinces' constitutional authority to regulate Aboriginal title lands, Canadians must accept these short-term costs, as a means to redress past injustices and advance the long-term goal of reconciliation between First Nations and the Crown.³²⁵

³²³ Borrows, "Domesticating Doctrines", *supra* note 3 at 654; Lambert, "Van der Peet and Delgamuukw", *supra* note 87 at 267-268; MacLaren *et al.*, "Tsilhqot'in Nation v. British Columbia", *supra* note 36 at 134; McNeil, "Aboriginal Title and the Supreme Court", *supra* note 3 at 285-287; McNeil, "Aboriginal Rights in Transition", *supra* note 5 at 320-321; McNeil, "Self-Government and the Inalienability of Aboriginal Title", *supra* note 37 at 477, 481-488, 509-510.

³²⁴ Christie, "Judicial Justification of Recent Developments in Aboriginal Law", *supra* note 7 at 62-64; Lambert, "Three Points about Aboriginal Title", *supra* note 78 at 349-350.

³²⁵ See McNeil, "Aboriginal Title and Section 88 of the *Indian Act*", *supra* note 217 at 194, cited in *Tsilhqot'in Nation*, *supra* note 22 at para. 1047; McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 21-5.

5 Conclusion

To conclude, this paper explored the effects of Aboriginal title jurisprudence on the relationship between First Nations and the Crown in Canada. Particular attention was devoted to the *Tsilhqot'in* case, which deals with the Aboriginal rights and title claims of the Tsilhqot'in people to portions of its traditional territory in the west central interior of British Columbia. Legal scholars across the country concur that the *Tsilhqot'in* case, scheduled for argument in November 2013, is the most significant Aboriginal title case to be decided by the Supreme Court of Canada since *Delgamuukw v. British Columbia*, as it will have serious implications for the modern-day treaty process in British Columbia and the settlement of outstanding land claims in the rest of Canada.³²⁶

In light of the significant jurisdictional and economic dimensions of Aboriginal title identified by the Supreme Court in *Delgamuukw*, this paper presumed that the judicial acceptance of Aboriginal title claims would help to harmonize relations between Aboriginal peoples and the Crown, by allowing for the cultural and economic flourishing of First Nations in the twenty-first century.³²⁷ Conversely, the judicial rejection of Aboriginal title claims was interpreted as undermining relations between First Nations and the Crown, by preventing the former from exercising a limited form of self-determination and maintaining a moderate livelihood in the modern era.³²⁸

³²⁶ Canadian Press, "B.C. First Nation's land claim headed for Supreme Court", *supra* note 12; O'Neil, "Supreme Court of Canada agrees to hear B.C. natives land claims case", *supra* note 12; McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 8.

³²⁷ Borrows, "Domesticating Doctrines", *supra* note 3 at 654; Lambert, "Van der Peet and Delgamuukw", *supra* note 87 at 267-268; McNeil, "Aboriginal Title and the Supreme Court", *supra* note 3 at 285-287; McNeil, "Aboriginal Rights in Transition", *supra* note 5 at 320-321; McNeil, "Self-Government and the Inalienability of Aboriginal Title", *supra* note 37 at 477, 481-488, 509-510.

³²⁸ Mandell, "Aboriginal Title Over the Buffalo Jump", *supra* note 28 at 1-2; Lambert, "The Tsilhqot'in Case", *supra* note 26 at 820-822.

Results revealed that the 2007 British Columbia Supreme Court's trial decision in *Tsilhqot'in Nation v. British Columbia* genuinely attempted to reconcile the Tsilhqot'in people with the Crown by giving precedence to the Aboriginal perspective in the evaluation of oral evidence, endorsing a broad and flexible standard of occupation, expressing an opinion on Tsilhqot'in Aboriginal title, and affirming that the *Forest Act* is inapplicable to and unjustifiably infringes on Tsilhqot'in title lands. Nonetheless, the trial judge ultimately failed to facilitate the attainment of an early and honourable settlement between the Tsilhqot'in people and the Crown, by declining to issue a declaration of Aboriginal title, because of a defect in their pleadings.³²⁹ Given that Justice Vickers could have bypassed this preliminary issue, the trial decision has negative implications for the future of Aboriginal title litigation, since it suggests that courts could decline to issue declarations of Aboriginal title, if they regard the constraints of the law and the adversarial structure of the Canadian judicial system as incompatible with the ultimate goal of reconciliation between Aboriginal and non-Aboriginal peoples in Canada.³³⁰

By contrast, the 2012 British Columbia Court of Appeal's ruling in *William v. British Columbia* largely contributed to undercutting relations between the Tsilhqot'in Nation and the Crown by interfering with the factual findings of the trial judge, establishing an artificial dichotomy between site-specific and territorial Aboriginal title claims, endorsing a narrow and stringent standard of occupation, articulating a preference for Aboriginal rights over Aboriginal title, and advancing a hollow vision of reconciliation, which does not place equal weight on the Aboriginal and common law perspectives.³³¹ The Court of Appeal's

³²⁹ McNeil, "Reconciliation and Third-Party Interests", *supra* note 12 at 7-25.

³³⁰ *Ibid.* at 13-14.

³³¹ Lambert, "The Tsilhqot'in Case", *supra* note 26 at 819-830; Mandell, "Aboriginal Title Over the Buffalo Jump", *supra* note 28 at 1-12.

judgement in *William* has dire ramifications for the future of Aboriginal title, because it relied on the concepts of site-specificity, intensity of use, and cultural security to constrain the economic and jurisdictional components of Aboriginal title.

Finally, the lower court decisions in the *Tsilhqot'in* case confirm the larger pattern of Canadian Aboriginal title jurisprudence, whereby courts consistently dismiss Aboriginal title claims, either on procedural grounds to avoid dealing with merits, or on substantive grounds to safeguard the interests of the Canadian state and society. This tendency likely reflects the strategic decision-making of courts, which seek to preserve their institutional legitimacy vis-à-vis external political actors and the public, by delegating the resolution of Aboriginal land claims to the democratic process. Nevertheless, given historical grievances and the structural disparity of power between First Nations and the federal and provincial governments, Canadian courts and judges must fulfil their role in the broader process of reconciliation by recognizing and affirming the existence of Aboriginal title rights in Canada.

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