

# Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v. British Columbia*

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*The manner in which conflicts between Aboriginal title to land and private third-party interests should be dealt with is a major issue in Canadian law and policy. The matter came up at trial in *Tsilhqot'in Nation v. British Columbia*, and again was left unresolved. However, Justice Vickers did acknowledge the vital importance of the issue and the need to reconcile these conflicting interests through honourable negotiations. While admitting that a courtroom is not the appropriate forum for achieving reconciliation, he provided detailed analysis of the applicable legal principles and insights into the public policy considerations that should guide the negotiations.*

*This article examines these aspects of Justice Vickers' judgment and suggests more specific ways in which Aboriginal title and third-party interests might be reconciled through the process of negotiation. It proposes a context-based approach that seeks to redress the historical injustice of the wrongful taking of Aboriginal lands, without disregarding the current interests of innocent third parties. The monetary costs of reconciliation, it is argued, should be borne by the real wrongdoers, namely the provincial and Canadian governments.*

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[T]his judgment features Tsilhqot'in people as they strive to assert their place as First Peoples within the fabric of Canada's multi-cultural society. The richness of their language, the story of their long history on this continent, the wisdom of their oral traditions and the strength and depth of their characters are a significant contribution to our society. Tsilhqot'in people have survived despite centuries of colonization. The central question is whether Canadians can meet the challenges of decolonization.

Mr. Justice David H. Vickers, *Tsilhqot'in Nation v. British Columbia*<sup>1</sup>

There can be little doubt that *Tsilhqot'in Nation v. British Columbia* is the most significant Aboriginal title case to be decided in Canada since *Delgamuukw v. British Columbia*.<sup>2</sup> Like *Delgamuukw*, it arose from a claim to Aboriginal title over a large area in the interior of British Columbia, resulting in a prolonged and complex trial.<sup>3</sup> The Tsilhqot'in people commenced the legal proceedings after the provincial government in the 1980s authorized logging activities within their traditional territory in the Cariboo-Chicotin region, lying between the City of Williams Lake and the crest of the Pacific Range of mountains to the west. The Tsilhqot'in people, many of whom lacked adequate housing and employment, were frustrated and angry that timber was being removed from their lands without their consent and without economic benefits to their communities. They sought a declaration of Aboriginal title to the claim area, and of Aboriginal rights to hunt and trap birds and animals, capture wild horses, and trade in furs and other animal products to obtain a moderate livelihood.

Like the judgment of the Supreme Court of Canada in *Delgamuukw*, the trial decision in *Tsilhqot'in Nation* did not resolve the Aboriginal title claim. While declaring that the Tsilhqot'in people have the other specified Aboriginal rights throughout the claim area, Justice Vickers decided that a declaration of title could not be issued because the pleadings had framed the case as an "all or nothing" claim over the entire claim area, and title to the whole area had not been established by the evidence. He said it would be prejudicial to the defendants (the Crown in right of British Columbia and Canada) "[t]o allow the plaintiff to now seek declarations over portions of the Claim Area."<sup>4</sup>

1 2007 BCSC 1700, [2008] 1 C.N.L.R. 112 at para. 20 [*Tsilhqot'in Nation*]. Note that all three parties (the Tsilhqot'in Nation, British Columbia and Canada) filed notices of appeal from Justice Vickers' judgment, and then a year was spent trying to negotiate a settlement. Concluding that insufficient progress had been made in the settlement discussions, British Columbia and Canada applied to have the stay of proceedings order lifted and this application was granted on February 26, 2009, in *William v. British Columbia*, [2009] 2 C.N.L.R. 385 (B.C.C.A.), allowing the appeal to proceed.

2 [1997] 3 S.C.R. 1010 [*Delgamuukw*].

3 The trial in *Tsilhqot'in Nation* took 339 days, stretching over almost four and a half years, and involved evidence "in the fields of archeology, anthropology, history, cartography, hydrology, wildlife ecology, ethnoecology, ethnobotany, biology, linguistics, forestry and forest ecology": *Tsilhqot'in Nation*, *supra* note 1 at ii (C.N.L.R. 119).

4 *Ibid.* at para. 129.

Justice Vickers nonetheless found that Aboriginal title had been established over a large area, both inside and outside the claim area, and offered his opinion that the plaintiff would have been entitled to a declaration of title had the case been properly pleaded. He wrote a lengthy judgment explaining the basis for this opinion, and dealing with a variety of other issues, such as constitutional authority over Aboriginal title lands, infringement of Aboriginal title, *Tsilhqot'in* Aboriginal rights apart from title, and limitations of actions.

While the defect in the pleadings may have been a valid legal reason for denying a declaration of Aboriginal title, one has to wonder why this matter was not identified earlier and resolved through amendment.<sup>5</sup> Why spend four and a half years in a courtroom, with all the attendant effort and expense, to arrive at an inconclusive result? If there is a judicial explanation for this,<sup>6</sup> it may lie in Justice Vickers' realization that a court is not the appropriate venue for achieving justice through reconciliation of the rights of Aboriginal peoples with the interests of Canadian society generally. This article will analyze this aspect of his decision, paying particular attention to inevitable conflicts between Aboriginal title and third-party interests, and suggest ways of reconciling these interests through the process of negotiations.

## I Aboriginal Title and Reconciliation

In a lengthy section on "Reconciliation" at the end of his judgment in *Tsilhqot'in Nation*, Justice Vickers was quite explicit about the limited capacity of courts to resolve claims of this nature. He wrote:

In an ideal world, the process of reconciliation would take place outside the adversarial milieu of a courtroom. This case demonstrates how the Court, confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title, is ill equipped to effect a reconciliation of competing interests. That must be reserved for a treaty negotiation process. Despite this fact, the question remains: how can this Court participate in the process of reconciliation between *Tsilhqot'in* people, Canada and British Columbia in these proceedings?<sup>7</sup>

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5 A post-judgment amendment was sought by the plaintiffs, but refused by Vickers J. because to allow it "at this point would be unfair and prejudicial to the defendants": *Tsilhqot'in Nation v. British Columbia*, 2008 BCSC 600, at para. 13.

6 In saying this, I do not intend to blame Justice Vickers. Early on, he tried to get defence counsel to admit *Tsilhqot'in* occupation (this probably would have avoided the pleading issue), without avail: "I confess that early in this trial, perhaps in a moment of self-pity, I looked out at the legions of counsel and asked if someone would soon be standing up to admit that *Tsilhqot'in* people had been in the Claim Area for over 200 years, leaving the real question to be answered. My view at this early stage of the trial was that the real question concerned the consequences that would follow such an admission. I was assured that it was necessary to continue the course we were set upon. My view has not been altered since I first raised the issue almost five years ago." *Tsilhqot'in Nation*, *supra* note 1 at para. 1373.

7 *Ibid.* at para. 1357.

Given that Canada's adversarial judicial system is designed "to produce a win/lose result,"<sup>8</sup> Justice Vickers was acutely aware of the next-to-impossible task facing judges who are asked to achieve reconciliation by balancing historical Aboriginal rights and contemporary interests. Recognizing that "the actions of courts have the potential to diminish the possibility of reconciliation ever occurring,"<sup>9</sup> he quoted the following passage from a recent article by Professor Brian Slattery:

... the successful settlement of aboriginal claims must involve *the full and unstinting recognition of the historical reality of aboriginal title, the true scope and effects of Indigenous dispossession, and the continuing links between an Indigenous people and its traditional lands*. So, for example, to maintain that "nomadic" or "semi-nomadic" peoples had historical aboriginal title to only a fraction of their ancestral hunting territories, or to hold that aboriginal title could be extinguished simply by Crown grant, is to rub salt into open wounds. However, by the same token, *the recognition of historical title, while a necessary precondition for modern reconciliation, is not in itself a sufficient basis for reconciliation, which must take into account a range of other factors*. So, for example, to suggest that historical aboriginal title gives rise to modern rights that automatically trump third party and public interests constitutes an attempt to remedy one grave injustice by committing another.<sup>10</sup>

With evident frustration, Justice Vickers observed:

Courts should not be placed in this invidious position merely because governments at all levels, for successive generations, have failed in the discharge of their constitutional obligations. Inevitably this decision and others like it run the risk of rubbing salt into open wounds.<sup>11</sup>

The constitutional obligations Justice Vickers seems to have had in mind were the obligation of Canada to play a central role in Aboriginal affairs and negotiate treaties, and the obligation of British Columbia not to appropriate Aboriginal lands or grant third-party interests in relation thereto before Aboriginal title had been dealt with by treaty.<sup>12</sup> The "invidious position" courts have been placed in as a result of these failures is this: when claims such as this come to court, judges are faced with the task of trying to achieve reconciliation of the competing interests so plainly identified by Slattery, but are unable to do so, given the constraints of the law and the inappropriate adversarial context in which judges are obliged to make their decisions.

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8 *Ibid.* at para. 1360.

9 *Ibid.* at para. 1367.

10 *Ibid.*, quoting Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255 at 282 (Slattery's italics; footnotes omitted).

11 *Tsilhqot'in Nation*, *supra* note 1 at para. 1368.

12 See *ibid.* at paras. 1045-49.

So Justice Vickers' message to the parties seems to be that Professor Slattery is right about what is needed, but that the courts cannot deliver because reconciliation can only be achieved through negotiation, not litigation.<sup>13</sup> Justice Vickers found support for this conclusion in recent Supreme Court of Canada jurisprudence. He acknowledged that the Supreme Court has determined that the purpose behind the recognition and affirmation of Aboriginal rights by s. 35(1) of the *Constitution Act, 1982*<sup>14</sup> is reconciliation of the Aboriginal peoples' prior occupation of Canada with the Crown's assertion of sovereignty.<sup>15</sup> But he also distinguished between the meaning assigned to reconciliation by the late Chief Justice Antonio Lamer, who first identified this purpose in *R. v. Van der Peet*,<sup>16</sup> and the views of the current Chief Justice, Beverley McLachlin, who dissented in that case.<sup>17</sup> In *R. v. Gladstone*,<sup>18</sup> Chief Justice Lamer used the concept of reconciliation to broaden the legislative objectives that could justify infringements of Aboriginal rights.<sup>19</sup> Obviously preferring the views of Justice McLachlin (as she then was), Justice Vickers observed that the result of Chief Justice Lamer's approach

... is that the interests of the broader Canadian community, as opposed to the constitutionally entrenched rights of Aboriginal peoples, are to be foremost in the consideration of the Court. In that type of analysis, reconciliation does not focus on the historical injustices suffered by Aboriginal peoples. It is reconciliation on terms imposed by the needs of the colonizer.<sup>20</sup>

After noting that Lamer C.J. "expanded the list of justifiable infringements of Aboriginal title" in *Delgamuukw*,<sup>21</sup> Justice Vickers quoted from McLachlin C.J.'s unanimous judgment in *Haida Nation v. British Columbia (Minister of Forests)*,<sup>22</sup> where "she revisited her vision of reconciliation through negotiated settlements":<sup>23</sup>

13 See also *ibid.* at para. 1370, where he referred to Professor Slattery's "principles of recognition," before stating at para. 1371: "This is, of course, not a task for a court. However, in the context of treaty negotiation, it strikes me as a convenient starting point."

14 Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

15 *Tsilhqot'in Nation*, *supra* note 1 at paras. 1345-47, referring especially to *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*], and *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*].

16 *Van der Peet*, *supra* note 15.

17 See also Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 *Indigenous L.J.* 1.

18 *Gladstone*, *supra* note 15.

19 See Kent McNeil, "How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?" (1997) 8:2 *Constitutional Forum* 33, also in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 281 [*Emerging Justice?*].

20 *Tsilhqot'in Nation*, *supra* note 1 at para. 1350.

21 *Ibid.* at para. 1352, referring to *Delgamuukw*, *supra* note 2.

22 [2004] 3 S.C.R. 511 [*Haida Nation*].

23 *Tsilhqot'in Nation*, *supra* note 1 at para. 1353.

Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition and “[i]t is always assumed that the Crown intends to fulfil its promises” (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.<sup>24</sup>

Justice Vickers obviously took solace in the shift in *Haida Nation* from reconciliation through justifiable infringement to reconciliation through negotiated settlements, but that did not resolve his dilemma. One gets a sense of his angst in the following passage, which introduces his discussion of reconciliation:

Throughout the course of the trial and over the long months of preparing this judgment, my consistent hope has been that, whatever the outcome, it would ultimately lead to an early and honourable reconciliation with Tsilhqot’in people. After a trial of this scope and duration, it would be tragic if reconciliation with Tsilhqot’in people were postponed through seemingly endless appeals. The time to reach an honourable resolution and reconciliation is with us today.<sup>25</sup>

So what is a judge in his position to do? Justice Vickers said he had “come to see the Court’s role as one step in the process of reconciliation.”<sup>26</sup> He continued:

For that reason, I have taken the opportunity to decide issues that did not need to be decided. For example, I have been unable to make a declaration of Tsilhqot’in Aboriginal title. However, I have expressed an opinion that the parties are free to use in the negotiations that must follow.<sup>27</sup>

This brings us back to his refusal to issue a declaration of Aboriginal title. While the pleadings provided a convenient justification for this refusal, I think he could have gotten around this problem if he had thought a declaration was not only warranted, but also appropriate. In my respectful opinion, he refused the declaration because it would not have been the appropriate means for arriving at the reconciliation that he acknowledged could be achieved only

24 *Haida Nation*, *supra* note 22 at para. 20, quoted in *Tsilhqot’in Nation*, *supra* note 1 at para. 1353. The reference is to *R. v. Badger*, [1996] 1 S.C.R. 771 [*Badger*].

25 *Tsilhqot’in Nation*, *supra* note 1 at para. 1338.

26 *Ibid.* at para. 1375.

27 *Ibid.* Consequently, in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2008] 3 C.N.L.R. 87 (B.C.C.A.) at para. 18 [*Okanagan Indian Band*], Mackenzie J.A., in upholding an order for severance of Aboriginal title and Aboriginal rights issues in connection with the harvesting of timber by members of the Okanagan Indian Band, described the Aboriginal title portion of Vickers J.’s judgment in *Tsilhqot’in Nation* as “admittedly *obiter dicta*.” See also *per* Donald J.A. (dissenting) at para. 53.

through negotiations. His purpose in writing a lengthy judgment that, in his words, “decide[d] issues that did not need to be decided,” was to force Canada and British Columbia to modify their views on Aboriginal title, and push the parties into honourable negotiations that would result in genuine reconciliation, a goal unattainable in court. He wrote:

What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a “postage stamp” approach to title, cannot be allowed to pervade and inhibit genuine negotiations. A tract of land is not just a hunting blind or a favourite fishing hole. Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided “cultural security and continuity” to Tsilhqot'in people for better than two centuries.

A tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people. The recognition of the long-standing presence of Tsilhqot'in people in the Claim Area is a simple, straightforward acknowledgement of an historical fact.<sup>28</sup>

Turning to matter of reconciliation, he continued:

Given this basic recognition, how are the needs of a modern, rural, Indigenous people to be met? How can their contemporary needs and interests be balanced with the needs and interests of the broader society? That is the challenge that lies in the immediate future for Tsilhqot'in people, Canada and British Columbia.<sup>29</sup>

In sum, the crux of Justice Vickers' dilemma was that a declaration of the Tsilhqot'in people's title would have satisfied Professor Slattery's “principles of recognition” of historical rights, but not the requirement in Slattery's “principles of reconciliation” that the interests of third parties and of broader Canadian society be taken into account.<sup>30</sup> In Justice Vickers' view, that aspect of reconciliation had to be attained through genuine negotiations. As I have said, I think this was the underlying reason for his refusal to issue a declaration of Aboriginal title.

If this conclusion is correct, what are the implications for Aboriginal title litigation? Will judges always shy away from declarations of title because the adversarial nature of the Canadian legal system and the limitations of the law

28 *Tsilhqot'in Nation*, *supra* note 1 at paras. 1376-77. Regarding proof of Aboriginal title, Vickers J. discussed (at paras. 554-83) the Supreme Court's decision in *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, but found distinguishing differences: “In *Marshall*; *Bernard* the persons accused both attempted to prove Aboriginal title at specific sites. Here the plaintiff's evidence is not limited to site specific use and occupation. The evidence ranges over tracts of land. The plaintiff argues the evidence proves a regular use of these tracts of land as well as use of site specific locations, sufficient to warrant a declaration of Aboriginal title” (para. 582).

29 *Tsilhqot'in Nation*, *supra* note 1 at para. 1378.

30 See Slattery's “preliminary sketch” of these principles in his article, *supra* note 10 at 283-285, quoted in *Tsilhqot'in Nation*, *supra* note 1 at paras. 1370 and 1372. See also Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 *Supreme Court L. Rev.* 595.

make it impossible for them to achieve the desired goal of reconciliation? In reflecting on these questions, let us focus on a particularly troublesome aspect of this problem, namely the existence of third-party interests in areas subject to Aboriginal title claims.

## II Aboriginal Title and Third-Party Interests in *Tsilhqot'in Nation*

Justice Vickers was able to avoid confronting the issue of third-party interests directly because the plaintiff had not pleaded any infringement of its Aboriginal title rights on privately held lands in the claim area,<sup>31</sup> and the forest companies authorized by the province to harvest timber in the claim area had abandoned their logging plans.<sup>32</sup> He nonetheless remarked that the granting of private interests by British Columbia, including fee simple estates, could not have extinguished the *Tsilhqot'in* people's title because the Supreme Court decided in *Delgamuukw* that the province has lacked the constitutional authority to extinguish Aboriginal title since joining Canada in 1871.<sup>33</sup> The province lacks this authority because Aboriginal title is within exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians," as provided by s. 91(24) of the *Constitution Act, 1867*,<sup>34</sup> and so the power to extinguish Aboriginal title is an exclusively federal power.<sup>35</sup>

Justice Vickers remarked that the legal effect of provincial grants of private interests on Aboriginal title lands is nonetheless uncertain, and might have some impact on the application or exercise of Aboriginal rights, including Aboriginal title rights. Again invoking the need to balance interests, he wrote that "[r]econciliation of competing interests will be dependent on a variety of factors, including the nature of the interests, the circumstances surrounding the transfer of the interests, the length of the tenure, and the existing land use."<sup>36</sup> But if the province has lacked the constitutional authority to extinguish Aboriginal title since joining Canada, how could it create interests that

31 *Tsilhqot'in Nation*, *supra* note 1 at para. 993. Vickers J. relied on *Cheslatta Carrier Nation v. British Columbia*, [2001] 1 C.N.L.R. 10 (B.C.C.A.).

32 *Tsilhqot'in Nation*, *supra* note 1 at para. 39.

33 *Ibid.* at paras. 996-97, relying on *Delgamuukw*, *supra* note 2 at paras. 172-76.

34 30 & 31 Vict., c. 3 (U.K.).

35 Note, however, that since the enactment of s. 35(1) of the *Constitution Act, 1982*, *supra* note 14, even Parliament cannot extinguish Aboriginal title without Aboriginal consent: see *Van der Peet*, *supra* note 15 at para. 28; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 11. For detailed discussion, see Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 *Ottawa L. Rev.* 301.

36 *Tsilhqot'in Nation*, *supra* note 1 at para. 1000. See also *Hupacasath First Nation v. British Columbia (Minister of Forests)*, [2009] 1 C.N.L.R. 30 (B.C.S.C.) at paras. 216-22. Note that Vickers J. stated in *Tsilhqot'in Nation* at para. 999 that his conclusion that private interests might have an impact "is consistent with the view of the Ontario Court of Appeal in *Chippewas of Sarnia Band v. Canada (Attorney General)*, [2001] 1 C.N.L.R. 56" [*Chippewas of Sarnia*]. For reasons why this decision should not apply in British Columbia, see *infra* note 64.



might impact on the application or exercise of Aboriginal title rights? Does this mean that provincial grants of private interests could infringe Aboriginal title, as long as the infringement fell short of outright extinguishment?

Although Justice Vickers did not address these questions in his discussion of privately held lands, legal answers can nonetheless be found in his treatment of “Constitutional Issues – Division of Powers,” where he dealt with the application of the doctrine of interjurisdictional immunity.<sup>37</sup> Briefly stated, this doctrine protects the core of exclusive federal jurisdiction under s. 91 of the *Constitution Act, 1867*<sup>38</sup> from provincial intrusions that impair or have an adverse impact on certain federal powers, whether or not Parliament has exercised its legislative authority in relation to the matter in question.<sup>39</sup> A long line of Supreme Court of Canada decisions has determined that this doctrine applies to s. 91(24), thus protecting the core of federal jurisdiction over “Indians” and “Lands reserved for the Indians” from provincial intrusion.<sup>40</sup> In *Delgamuukw*, Chief Justice Lamer summarized the constitutional position:

... s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on “Indianness” or the “core of Indianness”.<sup>41</sup>

Elaborating on the extent of the core of s. 91(24) jurisdiction, Lamer C.J. stated:

The core of Indianness encompasses the whole range of aboriginal rights that are protected by s. 35(1). Those rights include rights in relation to land; that part of

37 *Tsilhqot'in Nation*, *supra* note 1 at paras. 1001-49.

38 *Supra* note 34.

39 In *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, Binnie and LeBel J.J. modified the doctrine somewhat to allow for limited provincial intrusion into federal heads of power, as long as the intrusion is incidental to the exercise of a provincial power and does not impair federal jurisdiction. See also *British Columbia (Attorney General) v. Lafarge Canada Inc.*, [2007] 2 S.C.R. 86; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19. Previously, the jurisprudence seemed to exclude any provincial intrusion into identifiable cores of federal powers: e.g., see *Alberta (Attorney General) v. Putnam*, [1981] 2 S.C.R. 267; *Bell Canada v. Quebec (CSST)*, [1988] 1 S.C.R. 749; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437. For a useful overview of the doctrine, see Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007), loose-leaf edition at 15-25 to 15-34.

40 See especially *Natural Parents v. Superintendent of Child Welfare*, [1975] 2 S.C.R. 751 at 760-761, Laskin C.J.; *Four B Manufacturing Ltd. v. U.G.W.A.*, [1980] 1 S.C.R. 1031; *Dick v. The Queen*, [1985] 2 S.C.R. 309 [Dick]; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Paul v. Paul*, [1986] 1 S.C.R. 306; *R. v. Francis*, [1988] 1 S.C.R. 1025; *Delgamuukw*, *supra* note 2; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at paras. 109-11; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 [Paul]; *R. v. Morris*, [2006] 2 S.C.R. 915 [Morris]. For detailed discussion, see Kent McNeil, “The Métis and the Doctrine of Interjurisdictional Immunity: A Commentary” in Frederica Wilson and Melanie Mallet, eds., *Métis-Crown Relations: Rights, Identity, Jurisdiction, and Governance* (Toronto: Irwin Law, 2008), 289.

41 *Delgamuukw*, *supra* note 2 at para. 181.

the core derives from s. 91(24)'s reference to "Lands reserved for the Indians". But those rights also encompass practices, customs and traditions which are not tied to land as well; that part of the core can be traced to federal jurisdiction over "Indians". Provincial governments are prevented from legislating in relation to both types of aboriginal rights.<sup>42</sup>

The Supreme Court recently had an opportunity to apply the doctrine of interjurisdictional immunity in *R. v. Morris*.<sup>43</sup> In that case, a treaty right to hunt was successfully used to defend two members of the Tsartlip Band of the Saanich Nation against charges of hunting at night with lights, on Vancouver Island, in violation of British Columbia's *Wildlife Act*.<sup>44</sup> Although three members of the Court dissented on the ground that night hunting is inherently dangerous and so cannot be a treaty right, the whole Court agreed that provincial game laws that impair treaty rights cannot apply to the holders of those rights because treaty rights are within the core of Parliament's s. 91(24) jurisdiction.

In *Tsilhqot'in Nation*, Justice Vickers applied *Delgamuukw* and *Morris*. He rejected the defendants' argument that the doctrine of interjurisdictional immunity protects Aboriginal title only from extinguishment, not infringement, by provincial laws. Referring to Lamer C.J.'s statement in *Delgamuukw* that Aboriginal rights and title "may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments,"<sup>45</sup> he explained:

A provincial law of general application that does not touch upon core Indian-ness applies to the exercise of Aboriginal rights, including Aboriginal title. In my view, the Chief Justice referred to these laws in the foregoing passage from *Delgamuukw*. When the Chief Justice stated that provincial laws that infringe Aboriginal rights must pass the test of justification, he was not signalling that the doctrine of interjurisdictional immunity would never apply to a consideration of s. 35 rights.<sup>46</sup>

Justice Vickers found confirmation for this interpretation in *Morris*, which he said made clear "that provincial laws found to infringe upon Aboriginal treaty rights are constitutionally inapplicable due to the operation of the doctrine of interjurisdictional immunity."<sup>47</sup> In this regard, he could not find

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42 *Ibid.* at para. 178.

43 *Supra* note 40. For commentary, see Kerry Wilkins, "R. v. Morris: A Shot in the Dark and Its Repercussions" (2008) 7 *Indigenous L.J.* 1.

44 S.B.C. 1982, c. 57.

45 *Delgamuukw*, *supra* note 2 at para. 160, citing *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*], and *R. v. Côté*, [1996] 3 S.C.R. 139 [*Côté*].

46 *Tsilhqot'in Nation*, *supra* note 1 at para. 1020. See also paras. 1041-44, where Vickers J. explained that activities authorized under the *Forest Act*, R.S.B.C. 1996, c. 157, could infringe Aboriginal rights other than title if the impact of them did not go to the core of Indianness and the infringement was justified in accordance with the test in *Sparrow*, *supra* note 45.

47 *Tsilhqot'in Nation*, *supra* note 1 at para. 1021.

“any principled reason for treating Aboriginal rights, including title, protected by s. 35, any differently than Aboriginal treaty rights.”<sup>48</sup>

Justice Vickers’ conclusion that the doctrine of interjurisdictional immunity protects Aboriginal title from provincial infringements that go to the core of Indianness, as well as from provincial extinguishment, must be correct. In addition to being supported by the *Morris* decision, it follows logically from the combined decisions in *Dick*<sup>49</sup> and *Delgamuukw*.<sup>50</sup> In *Dick*, Beetz J. assumed *as a matter of fact* that hunting was within the core of Indianness of the Shuswap people, and continued:

On the basis of this assumption and subject to the question of referential incorporation which will be dealt with in the next chapter, it follows that the *Wildlife Act* could not apply to the appellant *ex proprio vigore*, and, in order to preserve its constitutionality, it would be necessary to read it down to prevent its applying to appellant in the circumstances of this case.<sup>51</sup>

In *Delgamuukw*, Chief Justice Lamer held that Aboriginal rights, including title, are also within the core of Indianness. It follows that provincial laws cannot apply of their own force to infringe Aboriginal title in ways that impact on this core for the same reason that the provincial game laws could not interfere with Aboriginal hunting in *Dick*.<sup>52</sup>

In *Dick*, Justice Beetz concluded that the relevant provisions of the provincial *Wildlife Act*,<sup>53</sup> while not applicable to the appellant of their own force, had been referentially incorporated into federal law by s. 88 of the *Indian Act*.<sup>54</sup> Considering s. 88 in *Tsilhqot'in Nation*, Justice Vickers observed:

Section 88 of the *Indian Act* makes some provincial laws applicable to Indians by referential incorporation in the *Indian Act*. That section provides that the provincial laws of general application “are applicable to and in respect of Indians ...” There is no reference to the second element of s. 91(24), “Lands reserved for the Indians”.<sup>55</sup>

48 *Ibid.* at para. 1022. Vickers J. relied on *Van der Peet*, *supra* note 15 at paras. 19-20. See also *Badger*, *supra* note 24; *Côté*, *supra* note 45; *R. v. Marshall*, [1999] 3 S.C.R. 456, [1999] 3 S.C.R. 533.

49 *Supra* note 40.

50 *Supra* note 2.

51 *Dick*, *supra* note 40 at 321.

52 For discussion and supporting analysis, see McNeil, *supra* note 40.

53 R.S.B.C. 1979, c. 433, now R.S.B.C. 1996, c. 488.

54 R.S.C. 1970, c. 1-6, now R.S.C. 1985, c. 1-5. Section 88, as amended by S.C. 2005, c. 9, s. 151, provides: “Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal and Statistical Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.”

55 *Tsilhqot'in Nation*, *supra* note 1 at para. 1035.

Relying principally on British Columbia Court of Appeal decisions,<sup>56</sup> Justice Vickers concluded that s. 88 “is directed only to ‘Indians’ and cannot be used to invigorate provincial legislation in its application to Aboriginal title lands.”<sup>57</sup>

Justice Vickers determined that, while “[p]rovincial management of timber and the acquisition, removal and sale of timber by third parties under the provisions of the *Forest Act* does not extinguish Aboriginal title,” those provisions nonetheless “go to the core of ‘Indianness’, or put in contemporary language, go to the core of Aboriginal title,” and so “do not apply to Aboriginal title land under the doctrine of interjurisdictional immunity.”<sup>58</sup> Those provisions go to the core of Indianness because they affect a primary Aboriginal asset, namely standing timber that is owned by Aboriginal titleholders,<sup>59</sup> in two vital ways: first, by purporting “to manage the asset in such a way as to render meaningless that Aboriginal right to manage the very land over which Aboriginal title is held,” and second, by authorizing the transfer of that asset to third parties.<sup>60</sup>

But if the provisions of the *Forest Act* authorizing removal and sale of timber to third parties do not apply to Aboriginal title lands for constitutional division-of-powers reasons, provincial grants of timber harvesting rights on Aboriginal title lands would be *ultra vires*, and therefore void and of no effect.<sup>61</sup> Surely, the same conclusion must apply to any provincial grants of in-

56 *Derrickson v. Derrickson* (1984), 51 B.C.L.R. 42 at 46 (aff’d, [1986] 1 S.C.R. 285, without deciding this issue); *Paul v. Forest Appeal Commission* (2001), 89 B.C.L.R. (3d) 210 at para. 76 (rev’d, *Paul*, *supra* note 40, on other grounds); *Haida Nation v. British Columbia (Minister of Forests)*, [2002] 4 C.N.L.R. 117 (B.C.C.A.), Lambert J.A. at paras. 78-79 (aff’d in part, [2004] 3 S.C.R. 511, without addressing this issue). Vickers J. also relied on Laskin J.’s dissent (on other grounds) in *Cardinal v. Attorney General of Alberta*, [1974] S.C.R. 695 at 727, and Lysyk J.’s extensive analysis in *Stoney Creek Indian Band v. British Columbia*, [1999] 1 C.N.L.R. 192 (B.C.S.C.), rev’d on other grounds, [2000] 2 C.N.L.R. 345 (B.C.C.A.).

57 *Tsilhqot’in Nation*, *supra* note 1 at para. 1039. He found academic support for this conclusion in Brian Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 779-781, and Kent McNeil, “Aboriginal Title and Section 88 of the *Indian Act*” (2000) 34 U.B.C. L. Rev. 159. See also Kerry Wilkins, “‘Still Crazy After All These Years’: Section 88 of the *Indian Act* at Fifty” (2000) 38 Alta. L. Rev. 458 at 483-497.

58 *Tsilhqot’in Nation*, *supra* note 1 at para. 1045. See also *Okanagan Indian Band*, *supra* note 27, *per* Donald J.A. (dissenting) at para. 53.

59 See *Tsilhqot’in Nation*, *supra* note 1 at paras. 963-81, where Vickers J. discussed the *Forest Act*, *supra* note 46, and concluded it could not apply to Aboriginal title lands because its application is limited by its terms to Crown timber on Crown lands (this is a matter of statutory interpretation, distinct from the constitutional issue of interjurisdictional immunity). Like timber on private lands, timber on Aboriginal title lands is included within the Aboriginal titleholders’ “right to the land itself”: *ibid.* at paras. 974-80, quoting (at para. 976) from *Delgamuukw*, *supra* note 2 at para. 140. See also para. 1054, where Vickers J. stated: “The Crown does not have a present proprietary interest in such [i.e., Aboriginal title] lands.”

60 *Tsilhqot’in Nation*, *supra* note 1 at para. 1030. See also paras. 1044-49.

61 *Ultra vires* executive acts are void: see *Burrard Power Co. v. Canada* (1910), 43 S.C.R. 27, aff’d [1911] A.C. 87 (P.C.); *St. Ann’s Island Shooting and Fishing Club v. Canada*, [1950] S.C.R. 211; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; and cases cited *infra* in note 64.

terests on Aboriginal title lands, including fee simple estates, leaseholds and mineral rights, as they would all infringe the Aboriginal titleholders' "right to the exclusive use and possession of land, including the use of natural resources,"<sup>62</sup> in ways that would go to the core of Indianness. So although Vickers J. observed that the jurisprudence is not clear on "the consequences of underlying Aboriginal rights, including Aboriginal title, on the various private interests that exist in the Claim Area,"<sup>63</sup> the implication from his own analysis of the doctrine of interjurisdictional immunity is that exclusive federal jurisdiction over Aboriginal title lands renders those private interests void.<sup>64</sup> Entry by the grantees would therefore be trespass.<sup>65</sup> Moreover, provincial statutes of limitation would not prevent the Aboriginal titleholders from recovering possession that had been wrongfully taken from them by grantees of the provincial Crown because those statutes would likewise be rendered inapplicable by exclusive federal jurisdiction and interjurisdictional immunity. Addressing the province's contention that the *Limitation Act*<sup>66</sup> barred actions based on unjustified infringements of Aboriginal title, Justice Vickers relied on *Delgamuukw* and *Morris* to conclude

62 *Tsilhqot'in Nation*, *supra* note 1 at para. 978 (see also para. 537), relying on *Delgamuukw*, *supra* note 2 at paras. 111, 117 and 140.

63 *Tsilhqot'in Nation*, *supra* note 1 at para. 999.

64 In addition to the division-of-powers rationale for this conclusion, cases of long-standing authority have held that a Crown grant of an interest that is inconsistent with an existing interest is void, at least to the extent of the inconsistency: see *Case of Alton Woods* (1600), 1 Co. R. 40b at 44a (K.B.); *Alcock v. Cooke* (1829), 5 Bing. 340 at 348 (C.P.); *In the matter of Islington Market Bill* (1835), 3 Cl. & F. 513 at 515 (H.L.); *Bristow v. Cormican* (1878), 3 App. Cas. 641 (H.L.); *Attorney-General for the Isle of Man v. Mylchreest* (1879), 4 App. Cas. 294 (P.C.); *City of Vancouver v. Vancouver Lumber Company*, [1911] A.C. 711 at 721 (P.C.); *McLean Gold Mines Ltd. v. Attorney-General for Ontario* (1925), 58 Ont. L.R. 64 (Ont. C.A.), *rev'd* on other grounds, [1927] A.C. 185 (P.C.). Compare *Chippewas of Sarnia*, *supra* note 36 at para. 261, where the Ontario Court of Appeal held that a Crown patent that conflicts with an existing property right is valid until set aside by a court. With all due respect, this is inconsistent with the other cases cited in this note, and so is of questionable authority: for detailed discussion, see McNeil, *supra* note 35 at 332-342. Moreover, the Crown patent in *Chippewas of Sarnia* pre-dated Confederation, and so was not *ultra vires* for division-of-powers reasons. This aspect of *Chippewas of Sarnia* therefore has no application to provincial grants in British Columbia that postdate the province's entry into Canada in 1871.

65 See *Oliver Butler's Case* (1681), 2 Ventr. 344 at 344 (Ch.), *aff'd* (1685), 3 Lev. 220 (H.L.) (entry under a void patent is remediable by trespass); *Entick v. Carrington* (1765), 19 St. Tr. 1029 (C.P.) (entry under an unlawful Crown warrant is an actionable trespass), approved in *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145; *Friesen v. Forest Protection Ltd.* (1978), 22 N.B.R. (2d) 146 (N.B.Q.B.) (Minister of Natural Resources had no statutory authority to authorize acts amounting to trespass on private lands); *Sulisz v. Flin Flon (City)*, [1979] 3 W.W.R. 728 (Man. Q.B.) (demolition of buildings by a municipality without lawful authority is an actionable trespass). See also Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37 *Osgoode Hall L.J.* 775, especially at 797-800, also in *Emerging Justice?*, *supra* note 19, 136 at 155-158.

66 Now R.S.B.C. 1996, c. 266.

that British Columbia's *Limitation Act* is constitutionally inapplicable to claims for unjustified infringement of Aboriginal title. To conclude that the *Limitation Act* applies to such a claim would mean that with the passage of time and the application of the provisions of the Act, the Province could effectively extinguish Aboriginal title. Granting the Province the ability to extinguish Aboriginal title is contrary to law. Provincial laws that affect Aboriginal title lands go to the core of Indianness and do not apply to those lands. This is true even though the law purports to be of general application.<sup>67</sup>

These conclusions regarding the invalidity of provincial grants of interests on Aboriginal title lands and the inapplicability of provincial statutes of limitation follow inexorably from Justice Vickers' analysis of the constitutional division-of-powers and the doctrine of interjurisdictional immunity. Moreover, we have seen that his conclusions regarding those issues were mandated by the authority of the Supreme Court of Canada, especially *Dick*, *Delgamuukw* and *Morris*.<sup>68</sup> But as he recognized, the problems arising from this situation had been created not by judges, but by governments that, "for successive generations, have failed in the discharge of their constitutional obligations."<sup>69</sup> If, as they should have done, Canada and British Columbia had negotiated treaties for the surrender of Aboriginal title before the province granted interests to private parties, the "invidious position" Justice Vickers found himself in with respect to those interests would never have arisen. This raises the question to be addressed in the final part of this article, namely, who is responsible and who should pay for the wrongful taking of Aboriginal title lands in British Columbia?

67 *Tsilhqot'in Nation*, *supra* note 1 at para. 1314. He distinguished *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, and *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, because those cases originated in the Federal Court, and so provincial statutes of limitation applied as federal law through referential incorporation by the Federal Court Act, R.S.C. 1985, c. F-7, s. 39(1). Compare *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372, where the Supreme Court applied the Alberta *Limitation of Actions Act*, now the *Limitations Act*, S.A. 1996, c.L-15.1, to bar most of the claims in an action brought in the Alberta Court of Queen's Bench by Aboriginal claimants, involving, *inter alia*, surrender of reserve lands and breach of fiduciary obligations (at para. 12, the Court held nonetheless that "the claim for an accounting for the proceeds of sale" of the land was not barred, as it "is a continuing claim and not caught by the *Limitation of Actions Act*"). Although the issue of whether the provincial statute of limitations could apply so as "to trench upon Aboriginal or treaty rights" had been referred to (but not dealt with) by the Alberta Court of Appeal in the case (*Papaschase Indian Band No. 136 (Descendants of) v. Canada (Attorney General)*, [2007] 2 C.N.L.R. 283 at para. 145), the Supreme Court did not mention the matter. On the contrary, the Court stated at para. 9: "We note that no notice of a constitutional question was given, and that no constitutional challenges lie before the Court."

68 See text accompanying notes 40-52 *supra*.

69 *Tsilhqot'in Nation*, *supra* note 1 at para. 1368. See text accompanying notes 8-12 *supra*.

### III The Time for Reconciliation Is Now

In his judgment, Justice Vickers said that “[t]he time to reach an honourable resolution and reconciliation is with us today.”<sup>70</sup> As we have seen, he acknowledged the inability of courts to achieve this result, and threw the matter back to the parties to negotiate an honourable settlement that would take into account the competing interests of the Aboriginal titleholders, third parties and the broader Canadian public. At the same time, he pointed to the failures of “governments at all levels, for successive generations,” to discharge “their constitutional obligations,”<sup>71</sup> and chastised Canada and British Columbia for their “impoverished view of Aboriginal title,” which he said “cannot be allowed to pervade and inhibit genuine negotiations.”<sup>72</sup> His message to the federal and provincial governments is clear: negotiate Aboriginal title claims in an honourable way that, in Brian Slattery’s words, involves “the full and unstinting recognition of the historical reality of aboriginal title, the true scope and effects of Indigenous dispossession, and the continuing links between an Indigenous people and its traditional lands,” while taking into account other relevant factors, especially “third party and public interests.”<sup>73</sup>

Justice Vickers deserves credit for his forthright decision and his refusal to refashion Canadian law to deny the existence of Aboriginal title where it comes into conflict with other interests, including third-party interests.<sup>74</sup> His judgment shows that, as a matter of law, Aboriginal title ought to prevail over provincially created interests that are inconsistent with it, but, as a matter of reconciliation, compromises will have to be reached through honourable negotiations. So how should third-party interests be dealt with in the negotiations between First Nations and the federal and provincial governments? Even though these interests are probably invalid for the legal and constitutional reasons Justice Vickers has outlined, reconciliation would not be achieved if they were ignored. Worse still, ignoring them could have dire political consequences for the federal and provincial governments, and could push non-Aboriginal property holders in British Columbia into open confrontation with First Nations. And why, one may ask, should those property holders be the ones to pay the price for the failures of governments to discharge their consti-

70 *Ibid.* at para. 1338. See text accompanying note 25 *supra*.

71 *Ibid.* at para. 1368. See text accompanying note 11 *supra*.

72 *Ibid.* at para. 1376. See text accompanying note 28 *supra*.

73 Slattery, *supra* note 10 at 282, quoted in *Tsilhqot'in Nation*, *supra* note 1 at para. 1367 (italics removed). See text accompanying note 10 *supra*.

74 Compare *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (Aust. H.C.), and *Chippewas of Sarnia*, *supra* note 36. For detailed discussion of the ways in which those decisions deviate from long-standing legal principles, see Kent McNeil, “Racial Discrimination and Unilateral Extinguishment of Native Title” (1996) 1 A.I.L.R. 181 (also in *Emerging Justice?*, *supra* note 19 at 357), and McNeil, *supra* note 35 at 327-344.

tutional obligations? Surely, responsibility for these wrongs should rest with the governments that committed them, not with private citizens who in most cases are innocent of any personal wrongdoing.<sup>75</sup>

I would like to offer some suggestions for dealing with this troubling issue of third-party interests on Aboriginal title lands. The starting point would be acceptance of Justice Vickers' conclusion, which is firmly rooted in Canadian constitutional law, that the creation of such interests by British Columbia could not have extinguished Aboriginal title. Moreover, it follows from his analysis of the doctrine of interjurisdictional immunity and of supporting Supreme Court of Canada decisions that any substantial provincial interference with the Aboriginal titleholders' exclusive rights of possession and use of their lands would also be unconstitutional, and so even the creation of limited interests such as logging and mining rights would be invalid. In situations where resource extraction rights have been wrongfully granted by the province, one solution would be for the province to acknowledge the invalidity of these rights and pay compensation for having wrongly granted them.<sup>76</sup> The Aboriginal titleholders would be entitled to compensation for loss of use and damage to their land,<sup>77</sup> and the grantees might be entitled to compensation for losses caused by the invalidation of their interests. Alternatively, the Aboriginal titleholders might agree that, if compensation for past violation of their rights was paid by the province, they would allow the resource extraction to continue on their own terms.<sup>78</sup> Such an agreement could include an Aboriginal management role and share of the profits, along with other benefits such as employment for community members. Thus, resource extraction would not necessarily cease on Aboriginal title lands, but in future would be subject to control by the Aboriginal titleholders<sup>79</sup> who would benefit rather than suffer

75 See McNeil, *supra* note 17 at 17-18.

76 Federal contribution to payment of compensation would probably be appropriate, given that the federal government also shirked its constitutional obligations: see text accompanying note 71 *supra*.

77 In *Tsilhqot'in Nation*, *supra* note 1 at para. 978, Vickers J. stated that infringement of Aboriginal title by the province would give rise to a "remedy in damages." He stated further at para. 1336: "The resources on Aboriginal title land belong to the Tsilhqot'in people and the unjustified removal of these resources would be a matter for appropriate compensation." See also *Delgamuukw*, *supra* note 2 at para. 169. More generally, see Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for Their Breach* (Saskatoon: Purich Publishing, 2001).

78 This might or might not require federal involvement, depending on whether it amounted to an alienation of Aboriginal title: see Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 McGill L.J. 473, especially at 502-508.

79 This would be part of the decision-making authority that Aboriginal peoples have over their lands, as recognized by Lamer C.J. in *Delgamuukw*, *supra* note 2 at para. 115, and accepted by Vickers J. in *Tsilhqot'in Nation*, *supra* note 1 at para. 507. See also para. 1048, where Vickers J. stated: "Aboriginal title confers a right to the land itself, and the right to determine how it will be used."



from it. Of course, the appropriate solution would depend on the circumstances and would be the product of negotiations.

Resource extraction does not generally entail exclusive possession of land, and so can coexist with Aboriginal uses if it is done in ways that respect the environment and the special relationship Aboriginal titleholders have with their traditional territories. Fee simple and leasehold estates are a different matter as they do entail exclusive possession and so come into direct conflict with the exclusive possession rights of Aboriginal titleholders. Moreover, fee simple holders, in particular, often make substantial “improvements” on the land,<sup>80</sup> including construction of homes and businesses. To dispossess these people because the province never had the authority to create the interests they thought they had received would clearly be unjust, with the injustice increasing with the age of the interests and the value of the improvements. In the absence of a wrong committed by the landholder, a compromise solution in this situation would be for legal validity to be conferred on these interests, perhaps retroactively. In return, the Aboriginal titleholders should receive replacement lands, or compensation for the loss of their Aboriginal title lands, from the wrongdoers, namely the province that unlawfully granted the interests, and the Canadian government that shirked its constitutional responsibilities by failing to assert its constitutional authority and negotiate treaties.<sup>81</sup>

Providing these private interests with legal validity would not necessarily affect constitutional jurisdiction over them. This would depend on the manner in which legal validity was conferred. One option would be for the Aboriginal titleholders to execute absolute surrenders of their title to these lands to the

80 I have put “improvements” in quotation marks because they might not be regarded as such by the Aboriginal titleholders.

81 On these responsibilities, see generally Kent McNeil, “Fiduciary Obligations and Federal Responsibility for the Aboriginal Peoples” in *Emerging Justice?*, *supra* note 19, 309. Providing replacement lands or compensation is consistent with the United Nations Declaration on the Rights of Indigenous Peoples, adopted on September 13, 2007, by the General Assembly, Resolution 61/295, UN Doc. A/RES/61/295, Art. 28:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Although Canada voted against the Declaration along with Australia, New Zealand, and the United States, 144 countries voted in favour. Canada’s opposition therefore does not diminish the value of the Declaration as an international instrument that sets norms and standards for the treatment of indigenous peoples by United Nations member states, including the tiny minority that voted against it. See Claire Charters, “Indigenous Peoples and International Law and Policy” in Benjamin J. Richardson, Shin Imai and Kent McNeil, eds., *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009), 161.

Crown,<sup>82</sup> thereby converting them into provincial Crown lands under provincial jurisdiction.<sup>83</sup> The province would then be able to confer legal validity on the private interests by confirming its previously void grants. This would probably be the preferable approach in urban and other heavily populated areas, in part because it would also preserve the authority of municipal governments.

In other parts of the province where there are fewer privately held lands, placing these lands under provincial jurisdiction might not be appropriate because it could create an administratively unworkable patchwork of Aboriginal title lands and privately held lands that would be subject to different jurisdictions and potentially different laws. In that context, it would be preferable for federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*<sup>84</sup> to be retained.<sup>85</sup> These privately held lands would also be subject to the governmental authority of the Aboriginal titleholders, whether exercised as an element of their inherent right of self-government over their Aboriginal title lands, or as an explicit jurisdictional power set out in a modern-day treaty such as the Nisga'a Final Agreement.<sup>86</sup> These arrangements would be more than fair to the third parties, as their previously invalid interests would be validated and protected. Federal and Aboriginal jurisdiction over their interests is a constitutional reality these third parties would have to accept,<sup>87</sup> as the prov-

82 Surrenders to the Crown would be required because Aboriginal title is otherwise inalienable: see *Delgamuukw*, *supra* note 2 at paras. 113 and 129, and discussion in McNeil, *supra* note 78. The federal government would have to be a party to these surrenders because it has exclusive constitutional authority to extinguish Aboriginal title: *Delgamuukw* at paras. 173-81.

83 See *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.).

84 *Supra* note 34 and accompanying text.

85 Long-term leases of Indian reserve lands might provide a model for this as First Nation title to those lands and federal jurisdiction over them is preserved: e.g., see *Musqueam Indian Band v. Glass*, [2000] 2 S.C.R. 633. However, legislation might be required for interests equivalent to fee simple estates to be held subject to reversionary Aboriginal title: see *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657.

86 Initialled 4 August 1998: *Nisga'a Final Agreement Act*, S.C. 2000, c. 7; *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2. See *Campbell v. British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1 (B.C.S.C.). For detailed discussion, see Kent McNeil, "Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence" in Hamar Foster, Heather Raven, and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007), 129, and "The Inherent Right of Self-Government: Emerging Directions for Legal Research" (West Vancouver: National Centre for First Nations Governance, 2004), online: National Centre for First Nations Governance <<http://fngovernance.org/pdf/KentMcNeilInherent0105.pdf>>.

87 On the extent of Aboriginal jurisdiction and its paramountcy over federal jurisdiction in the absence of justifiable infringement, see Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (West Vancouver: National Centre for First Nations Governance, 2007), online: National Centre for First Nations Governance <[http://fngovernance.org/pdf/Jurisdiction\\_of\\_Inherent\\_Rights.pdf](http://fngovernance.org/pdf/Jurisdiction_of_Inherent_Rights.pdf)>. Compare Canada, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2, *Restructuring the Relationship* (Ottawa: Minister of Supply and Services, 1996), Pt. 1, 213-224.

ince's lack of jurisdiction over Aboriginal title lands has now been exposed.<sup>88</sup>

Whatever the legal position, some people may balk at the financial cost of compensating Aboriginal titleholders for wrongful taking of their lands. But when privately held lands are expropriated by governments, fair compensation is paid out of the public purse.<sup>89</sup> Why should Aboriginal peoples be treated any differently? If anything, other Canadians should repay Aboriginal peoples generously for allowing us to be here and for sharing the land and resources of this wealthy country with us. Moreover, we are all aware of the statistics that place the Aboriginal population at the bottom of the socio-economic scale on virtually every indicator, from income to life expectancy.<sup>90</sup> The legal wrongs that Justice Vickers identified in his decision are partly responsible for this situation. Canadians are collectively responsible for righting these wrongs as much as possible, and we should bear the cost. As Justice Vickers said, "[t]he central question is whether Canadians can meet the challenges of decolonization."<sup>91</sup> I believe we can, and that an important step in this direction is to recompense Aboriginal peoples for the wrongful taking of their lands.

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88 *Tsilhqot'in Nation*, *supra* note 1 at paras. 1001-49. For academic support, see Nigel Bankes, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317; Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431 (also in *Emerging Justice?*, *supra* note 19, 249); Kerry Wilkins, "Negative Capacity: of Provinces and Lands Reserved for the Indians" (2002) 1 Indigenous L.J. 57.

89 See generally Eric C.E. Todd, *Law of Expropriation and Compensation in Canada*, 2d ed. (Toronto: Carswell, 1992); Keith Davies, *Law of Compulsory Purchase and Compensation*, 5th ed. (London: Butterworths, 1994).

90 For judicial confirmation, see *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 59.

91 *Tsilhqot'in Nation*, *supra* note 1 at para. 20.

