

# The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia

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## ARTICLES

### THE DURABILITY OF *TERRA NULLIUS*: *TSILHQOT'IN NATION V BRITISH COLUMBIA*

JOHN BORROWS<sup>†</sup>

Indigenous peoples across the world have long critiqued the idea that their lands were legally vacant when Europeans arrived on their shores.<sup>1</sup> Nevertheless, many countries with significant Indigenous populations were subject to legal regimes that confiscated Indigenous lands and destabilized their decision-making powers.<sup>2</sup> Though never perfected,<sup>3</sup> the

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<sup>1</sup> See Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010); Lindsay G Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005); Robert A Williams, Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

<sup>2</sup> See Permanent Forum on Indigenous Issues, *Preliminary study of the impact on indigenous peoples of the international legal construct known as the Doctrine of Discovery*, UNECOSOCOR, 2010, UN Doc E/C19/2010/13, online: <[www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.13%20EN.pdf](http://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.13%20EN.pdf)>.

<sup>3</sup> For a discussion of the legally pluralistic histories of encounter, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*

so-called doctrine of discovery was deployed to justify these actions.<sup>4</sup> It was premised on the notion that Indigenous peoples were inferior to other peoples.<sup>5</sup> Under this doctrine, lands were declared to be legally empty, allowing European law to control Indigenous peoples.<sup>6</sup>

The Supreme Court of Canada purported to deny a key aspect of this creed in the case of *Tsilhqot'in Nation v British Columbia*.<sup>7</sup> It wrote that “[t]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada”<sup>8</sup> If only this declaration were deeply true.<sup>9</sup> Canadian law still has *terra nullius* written all over it.<sup>10</sup> The same paragraph that purportedly denied *terra nullius*

(Cambridge, UK: Cambridge University Press, 2002); Lauren Benton & Richard J Ross, eds, *Legal Pluralism and Empires, 1500–1850* (New York: New York University Press, 2013).

- <sup>4</sup> Discriminatory assessments of Indigenous peoples’ legal and political status are found in *Johnson v M’Intosh*, where Chief Justice of the US Supreme Court John Marshall wrote: “On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants offered an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy”: *Johnson v M’Intosh*, 21 US 543 at 573–74, 5 L Ed 681 (1823) [*Johnson v M’Intosh*]. This view was accepted into Canadian law in *Guerin v R*, [1984] 2 SCR 335 at 378, 13 DLR (4th) 321 [*Guerin*]; *R v Sparrow*, [1990] 1 SCR 1075 at 1103, 70 DLR (4th) 385 [*Sparrow*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 145, 153 DLR (4th) 193 [*Delgamuukw*].
- <sup>5</sup> See Sidney L Harring, *White Man’s Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998) at 8–10.
- <sup>6</sup> See Stuart Banner, *How The Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, Mass: Harvard University Press, 2005).
- <sup>7</sup> 2014 SCC 44, [2014] 2 SCR 256 [*Tsilhqot'in Nation*].
- <sup>8</sup> *Ibid* at para 69.
- <sup>9</sup> For a discussion and critique of the long-standing operation of the doctrine of discovery in Canada, see Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 113–31.
- <sup>10</sup> For a discussion of the contradictions lying at the heart of Aboriginal rights jurisprudence, see Mariana Valverde, “The Crown in a Multicultural Age:

contains the following statement: “At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province.”<sup>11</sup> If that land was owned by Indigenous peoples prior to the assertion of European sovereignty, one wonders how the Crown acquired title in the same land by merely asserting sovereignty, without a version of *terra nullius* being deployed.<sup>12</sup> The Crown’s claim to underlying title on this basis “does not make sense.”<sup>13</sup> Some kind of legal vacuum must be imagined in order to create the Crown’s radical title. The emptiness at the heart of the Court’s decision is disturbing.<sup>14</sup>

Nevertheless, Canadian law took an important step towards repairing its relationships with Indigenous peoples with the *Tsilhqot'in Nation* decision.<sup>15</sup> It is an exceedingly strong decision. It demonstrates the intelligence, wisdom, honesty, humility, and humanity of an extraordinary group of jurists. It illustrates the Constitution’s recognition of Canada’s pre-existing legal systems in Canada,<sup>16</sup> which

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The Changing Epistemology of (Post)colonial Sovereignty” (2012) 21:1 Soc & Leg Stud 3.

<sup>11</sup> *Tsilhqot'in Nation*, *supra* note 7 at para 69.

<sup>12</sup> See Shiri Pasternak, “Jurisdiction and Settler Colonialism: Where Do Laws Meet?” (2014) 29:2 CJLS 145.

<sup>13</sup> The Supreme Court of Canada recognized that the doctrine of discovery “does not make sense” “[b]ecause it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted”: *Delgamuukw*, *supra* note 4 at para 145. For a critique of the Court’s crystallization theory, see John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia*” (1999) 37:3 Osgoode Hall LJ 537.

<sup>14</sup> For a careful and constructive critique of the view that Aboriginal land is devoid of law, see Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Oxford: Hart, 2014).

<sup>15</sup> See Brenda Gunn, “Case Note: *Tsilhqot'in Nation v British Columbia* 2014 SCC 44” 8:14 Indigenous L Bull 27.

<sup>16</sup> See *Tsilhqot'in Nation*, *supra* note 7 (the Supreme Court describing Aboriginal title as a “pre-existing legal right” at paras 12, 69).

generate present-day rights through the doctrine of continuity.<sup>17</sup> The case is very significant; it contains ground-shifting implications. Canada is a better place as a result of its 153 paragraphs. It sets a new world standard. I do not believe I am overstating the case's positive implications.

At the same time, it must be emphasized that the *Tsilhqot'in Nation* case is only *a* step in the right direction. Reconciliation between Indigenous peoples and the Crown still remains a long distance down the road.<sup>18</sup> One bold stride forward, however strong, does not a journey make.<sup>19</sup> The Crown (and courts) must shed further baggage to ensure the decision's trajectory continues. The Crown's unilateral claims to land in British Columbia must be further attenuated.<sup>20</sup> Nevertheless, to be balanced and fair, I must reemphasize that there are many positive elements to the case. It has prompted hope in many Indigenous

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<sup>17</sup> The doctrine of continuity is recognized throughout the *Tsilhqot'in Nation* decision. See *Tsilhqot'in Nation*, *supra* note 7 at paras 26, 32, 45–46, 50, 53, 57. The doctrine itself is explained in *Mitchell v MNR*, 2001 SCC 33 at para 10, [2001] 1 SCR 911 [citations omitted]:

... European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada.

<sup>18</sup> See Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation*, Cat No IR4-6/2015E (Ottawa: Library and Archives Canada, 2015), online: <[www.trc.ca](http://www.trc.ca)>.

<sup>19</sup> For a discussion of differential jurisprudential and theoretical paths towards reconciliation, see Joshua Nichols, "Claims of Sovereignty—Burdens of Occupation: *William* and the Future of Reconciliation" (2015) 48:1 UBC L Rev 221.

<sup>20</sup> For a discussion of the need for mutuality and respect in working towards reconciliation between Aboriginal peoples and the Crown, see Mark D Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165.

communities.<sup>21</sup> While the euphoria will fade, it would be unwise to minimize the decision's potential. *Tsilhqot'in Nation* contains many principles that might take us towards more mutually desirable legal destinations.<sup>22</sup> Whether this occurs depends on circumstances lying outside the four corners of the decision. Nevertheless, the case itself is a cause for celebration even as its flaws must not be overlooked.

This brief article canvasses aspects of the *Tsilhqot'in Nation* decision that both reject and reproduce the “discriminatory denigration of indigenous inhabitants, their social organization and customs” in Canadian law.<sup>23</sup> It demonstrates the doctrine of discovery's durability. It argues that further attention is needed to erase this concept from Canadian law.

## CASE CONTEXT

British Columbia lies on Canada's western edge. It is a mountainous land of jagged coastlines, deep forests, wild rivers, and high plateaus.<sup>24</sup> Politically, the province was created without much regard for the land's Indigenous inhabitants.<sup>25</sup> In fact, it was created in the face of First

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<sup>21</sup> The case's positive reception by Indigenous peoples is evidenced in the following views: “‘Tears and Cheers’ Greet Historic Supreme Court Ruling Handing Tsilhqot'in Major Victory”, *APTN* (26 June 2014), online: <aptn.ca>; Kathryn Blaze Carlson, “Land Claims Court Ruling Reshapes Resource Sector Nationwide”, *The Globe and Mail* (27 June 2014).

<sup>22</sup> See Kent McNeil, “The Doctrine of Discovery Reconsidered: Reflecting on Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* and Felix Hoehn, *Reconciling Sovereignities: Aboriginal Nations and Canada*”, Book Review [unpublished, on file with author].

<sup>23</sup> *Mabo v Queensland (No 2)*, [1992] HCA 23 at para 39, 175 CLR 1.

<sup>24</sup> For a description of British Columbia's natural history and geographic characteristics, see Jean Barman, *The West Beyond the West: A History of British Columbia*, 3rd ed (Toronto: University of Toronto Press, 1996).

<sup>25</sup> See Hamar Foster, “Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849–1927” in Hamar Foster & John McLaren, eds, *Essays in the History of Canadian Law*, vol 6 (Toronto: Osgoode Society for Canadian Legal History,

Nations' active resistance.<sup>26</sup> Barely concealed historical conflicts constantly simmer beneath the surface of a seemingly prosperous place.<sup>27</sup>

The Tsilhqot'in people are one of these Nations who never surrendered their land and independence. They are an Athapaskan-speaking people<sup>28</sup> of approximately 3,000 citizens, organized into 6 bands.<sup>29</sup> They live in what has been labelled central British Columbia, though they have resided there from time immemorial.<sup>30</sup> The Tsilhqot'in people possess distinct systems of law and governance.<sup>31</sup> They have a rich traditional economy and strong social bonds.<sup>32</sup> They are a

1995) 28; Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989* (Vancouver, BC: UBC Press, 1990).

<sup>26</sup> See Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver, BC: UBC Press, 2002).

<sup>27</sup> See Robin Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890*, 2nd ed (Vancouver, BC: UBC Press, 1992).

<sup>28</sup> For information on Athapaskan relationships, see RG Matson & Martin PR Magne, *Athapaskan Migrations: The Archaeology of Eagle Lake, British Columbia* (Tucson, Ariz: University of Arizona Press, 2007).

<sup>29</sup> For more information about current Tsilhqot'in political organization, see Tsilhqot'in National Government, online: <[www.tsilhqotin.ca](http://www.tsilhqotin.ca)>.

<sup>30</sup> For a discussion of Tsilhqot'in narratives about their place in their homelands, see David W Dinwoodie, *Reserve Memories: The Power of the Past in a Chilcotin Community* (Lincoln, Neb: University of Nebraska Press, 2002). For a discussion of the concept of time immemorial, see Lorraine Weir, "'Time Immemorial' and Indigenous Rights: A Genealogy and Three Case Studies (Calder, Van der Peet, Tsilhqot'in) from British Columbia" (2013) 26:3 J Historical Sociology 383.

<sup>31</sup> See Hadley Friedland et al, *Tsilhqot'in Legal Traditions Report* (2014) [unpublished, archived with Val Napoleon and the Tsilhqot'in National Government]. For related materials, see Indigenous Bar Association, online: <[indigenousbar.ca](http://indigenousbar.ca)>.

<sup>32</sup> See John Lerner et al, *Xeni Gwer'in Community-Based Climate Change Adaptation Plan* (31 March 2010), online: <[www.cakex.org](http://www.cakex.org)>. This report discusses how the Tsilhqot'in can build on their current economic and social strength to meet climate change issues by strengthening emergency procedures associated with fire and flooding; protecting and conserving potable water supplies; protecting shelter and infrastructure; protecting, conserving, and diversifying energy supplies and food supplies; diversifying livelihoods; and preserving traditional culture.

resilient people with an abiding commitment to sustainable living.<sup>33</sup> They are not afraid to assert their rights and they have constantly fought to retain and protect their land.<sup>34</sup>

The roots of the *Tsilhqot'in Nation* case are planted in the defence of their home.<sup>35</sup> A significant challenge to their lands was seeded hundreds of years ago when “[o]n June 4, 1792 Captain George Vancouver stepped ashore and claimed all of the land of what was later to become British Columbia on behalf of the British Crown”.<sup>36</sup> The Tsilhqot'in eventually felt the audacity of such claims.<sup>37</sup> After meeting European traders and explorers over the next 50 years, settlers began to encroach on Tsilhqot'in entitlements. When the unilateral survey and settlement of their territory commenced, they actively resisted.<sup>38</sup>

In 1864, the Tsilhqot'in blocked the construction of a road through their territory. In retaliation for mistreatment and other atrocities against

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<sup>33</sup> Jonaki Bhattacharyya et al, “It’s Who We Are: Locating Cultural Strength in Relationship with the Land” in John R Parkins & Maureen G Reed, eds, *Social Transformation in Rural Canada: Community, Cultures, and Collective Action* (Vancouver, BC: UBC Press, 2013) 211.

<sup>34</sup> For a description of early Tsilhqot'in views of their land, see David W Dinwoodie, “He Expects We Would Be Off from His Lands’: Reported Speech-Events in Tsilhqot'in Contact History” (2007) 49:1 *Anthropological Linguistics* 1.

<sup>35</sup> For a discussion of interpretations of historical conflict in the territory, see William J Turkel, *The Archive of Place: Unearthing the Pasts of the Chilcotin Plateau* (Vancouver, BC: UBC Press, 2007).

<sup>36</sup> *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 225, 1 CNLR 112 [*Tsilhqot'in Nation* BCSC].

<sup>37</sup> Chief Justice John Marshall wrote that discovery was based on an “extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea”: *Worcester v Georgia*, 31 US 515 at 517, 8 L Ed 483 (1832). These views are contextualized in Stephen Greenblatt, *Marvelous Possessions: The Wonder of the New World* (Chicago: University of Chicago Press, 1991).

<sup>38</sup> For further context, see Rich Mole, *The Chilcotin War: A Tale of Death and Reprisal* (Surrey, BC: Heritage House, 2009).

their people,<sup>39</sup> the Tsilhqot'in killed 19 settlers and expelled every non-native person from their territory.<sup>40</sup> It was war.<sup>41</sup> However, British Columbia colonial officials regarded Tsilhqot'in defence as criminal justice offences.<sup>42</sup> As a result, colonial officials hanged four Tsilhqot'in Chiefs under questionable legal proceedings.<sup>43</sup> The denial of due process drove a further wedge between the parties.<sup>44</sup> Deceit and dishonourable conduct have marked British Columbia's relations with First Nations peoples ever since.<sup>45</sup> Nevertheless the Tsilhqot'in continued to live on their territory with minimal external demands on their lands. This was the case until 1983, when the Province of British Columbia granted Carrier Lumber Ltd. a forest licence to cut trees in part of their territory.<sup>46</sup>

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<sup>39</sup> In 1864, Alfred Waddington, an entrepreneur from Victoria, was building a road that would exploit the newly discovered Caribou minefield in British Columbia. He used First Nations men for manual labour, but failed to pay them for their service. There is also evidence that his road crew forced Native women into prostitution, bartering food for sex. Suffering from the devastations of the smallpox epidemic, broken promises, and this humiliation, Chilcotin warriors retaliated and, in an act of war, killed dozens of surveyors as they trespassed. See Edward Sleigh Hewlett, "The Chilcotin Uprising of 1864" (1973) 19 BC Studies 50.

<sup>40</sup> For discussion of this conflict, see Terry Glavin, *Nemiah: The Unconquered Country* (Vancouver, BC: New Star Books, 1992).

<sup>41</sup> For a detailed account of the context surrounding these events, see Judith Williams, *High Slack: Waddington's Gold Road and the Bute Inlet Massacre of 1864* (Vancouver, BC: New Star, 1996).

<sup>42</sup> See Edward Sleigh Hewlett, "The Chilcotin Uprising of 1864" (1973) 19 BC Studies 50.

<sup>43</sup> For further discussion, see John Sutton Lutz, *Makúk: A New History of Aboriginal-White Relations* (Vancouver, BC: UBC Press, 2008) at 137–38.

<sup>44</sup> For a discussion of the lasting impacts of this denial of due process, see British Columbia, *Report on the Cariboo-Chilcotin Justice Inquiry*, Commissioner: Anthony Sarich (Victoria, BC: Cariboo-Chilcotin Justice Inquiry, 1993) at 30–32.

<sup>45</sup> See generally Tennant, *supra* note 25.

<sup>46</sup> See *Tsilhqot'in Nation*, *supra* note 7 at para 5.

## THE LOWER COURTS

Over the next 15 years the Tsilhqot'in resisted the province's actions through blockades, negotiations, and legal action.<sup>47</sup> In 1998 they eventually filed for a declaration of Aboriginal title before the courts. They claimed approximately 438,000 ha (4,380 km<sup>2</sup>) of land under subsection 35(1) of Canada's *Constitution Act, 1982*.<sup>48</sup> The case began in 2002 and resulted in a 339-day trial, which led to a judgement in their favour in 2007.<sup>49</sup> Justice Vickers of the British Columbia Supreme Court held that the Tsilhqot'in people were entitled to a declaration of Aboriginal title, though he refused to issue the declaration for procedural reasons.<sup>50</sup> Nevertheless, the 1,382-paragraph decision was exceptionally favourable to the Tsilhqot'in people. It contained detailed findings concerning use, occupation, and ownership of land in accordance with Tsilhqot'in legal traditions.

The trial decision was appealed to the British Columbia Court of Appeal. The matter did not turn out as well for the Tsilhqot'in at that level.<sup>51</sup> In 2012, the Court of Appeal overturned the trial judge's

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<sup>47</sup> For a general overview of the success of blockades and their interaction with negotiation and legal action in Canada, see Yale D Belanger & P Whitney Lackenbauer, eds, *Blockades or Breakthroughs?: Aboriginal Peoples Confront the Canadian State* (Montreal: McGill-Queen's Press, 2014); John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press), ch 2 [forthcoming in 2015].

<sup>48</sup> *William v British Columbia*, 2012 BCCA 285 at para 1, [2012] 3 CNLR 333 [*Tsilhqot'in Nation BCCA*]; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*].

<sup>49</sup> See *Tsilhqot'in Nation BCSC*, *supra* note 36.

<sup>50</sup> For further commentary on Justice Vickers's judgment, see Dwight G Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v. British Columbia*" (2008) 41:2 UBC L Rev 249.

<sup>51</sup> For commentary on the case at the British Columbia Court of Appeal, see Douglas Lambert, "The Tsilhqot'in Case" (2012) 70:6 Advocate 819; Constance MacIntosh, "*Tsilhqot'in Nation v BC*: Reconfiguring Aboriginal Title in the Name of Reconciliation" (2014) 47:1 UBC L Rev 167.

decision.<sup>52</sup> The Court of Appeal took a different view. It created a narrower test for Aboriginal title. The Court held that the Tsilhqot'in could only assert claims for site-specific occupation on small parcels of land. Their imputed low level of social organization did not entitle them to claim regular and exclusive use of wider territorial lands. The Court of Appeal held "that the Tsilhqot'in claim to title had not been established, but left open the possibility that in the future, the Tsilhqot'in might be able to prove title to specific sites within the area claimed".<sup>53</sup> Fortunately for the Tsilhqot'in, the Supreme Court of Canada later rejected this approach. It characterized the Court of Appeal's restrictive holding in this way:

For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.<sup>54</sup>

The Court of Appeal's decision was deeply disappointing from a Tsilhqot'in perspective. It implied that large portions of their land were legally vacant when Europeans arrived. Under the Court of Appeal's approach, Tsilhqot'in law and land use did not give them territory-wide title. This was basically a restatement of the doctrine of discovery: The Crown was empowered to claim and govern "vacant" lands located outside "small islands of [Aboriginal] title". An implied affirmation of *terra nullius* was a prominent part of the Court of Appeal's decision.

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<sup>52</sup> *Tsilhqot'in Nation* BCCA, *supra* note 48.

<sup>53</sup> *Tsilhqot'in Nation*, *supra* note 7 at para 8.

<sup>54</sup> *Ibid* at para 29.

## THE SUPREME COURT OF CANADA

### A. HOLDING

Fortunately for the Tsilhqot'in the Supreme Court of Canada disagreed with the Court of Appeal. As noted, the high court tried to erase *terra nullius* from Canadian law. The Supreme Court followed the trial judge's findings of facts. It reaffirmed a broader legal construction and recognized a larger conception of Aboriginal title. Thus, on 26 June 2014, the Supreme Court of Canada granted a declaration of Aboriginal title over Tsilhqot'in land. The Tsilhqot'in were recognized as holding "ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."<sup>55</sup> At the same time, as noted, the provincial Crown's overriding sovereignty and underlying title was strengthened in relation to Indigenous peoples without effectively justifying the reason for this conclusion.

### B. JURISPRUDENTIAL CONTEXT

In construing Aboriginal title broadly in favour of the Tsilhqot'in appellants while simultaneously reinforcing the province's political authority, the Supreme Court of Canada applied well-developed lines of judicial authority. It held that cases such as *Calder*,<sup>56</sup> *Guerin*,<sup>57</sup> *Sparrow*,<sup>58</sup> *Delgamuukw*,<sup>59</sup> and *Haida Nation*<sup>60</sup> established that:

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<sup>55</sup> *Ibid* at para 73.

<sup>56</sup> *Calder v Attorney-General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145 [*Calder* cited to SCR], cited in *Tsilhqot'in Nation*, *supra* note 7 at para 10. For commentary on the *Calder* case, see Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, The Calder Case, and the Future of Aboriginal Rights* (Vancouver, BC: UBC Press, 2007).

- The Crown's underlying title was always subject to established Aboriginal land interests;
- Aboriginal title recognized broad rights of land use and control;
- Aboriginal title could only be infringed by governments if they established a compelling and substantial public interest and acted in a manner that upheld their fiduciary duty;
- Consultation with Aboriginal peoples was necessary when resource development was proposed on claimed land; and
- Governments had a legal duty to engage in good faith negotiation to resolve Aboriginal title claims.<sup>61</sup>

In making these findings, the Court attempted to signal that it was not breaking new legal ground in recognizing Tsilhqot'in title.<sup>62</sup> There is some truth to this view. Many earlier cases (such as the ones cited above) support a large, liberal, and generous conception of Aboriginal rights. These cases allowed the Court to hold that Aboriginal title was to be broadly construed.

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<sup>57</sup> *Guerin*, *supra* note 4, cited in *Tsilhqot'in Nation*, *supra* note 7 at para 12. For commentary on the *Guerin* case, see James I Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* (Saskatoon: Purich Publishing, 2005).

<sup>58</sup> *Sparrow*, *supra* note 4, cited in *Tsilhqot'in Nation*, *supra* note 7 at para 13. For commentary, see Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29:1 *Alta L Rev* 498.

<sup>59</sup> *Delgamuukw*, *supra* note 4, cited in *Tsilhqot'in Nation*, *supra* note 7 at para 14. For a discussion of *Delgamuukw* and reconciliation, see P Dawn Mills, *For Future Generations: Reconciling Gitksan and Canadian Law* (Saskatoon: Purich Publishing, 2008).

<sup>60</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, cited in *Tsilhqot'in Nation*, *supra* note 7 at para 17. For a discussion of the implications of the *Haida* case in law, see Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009).

<sup>61</sup> *Tsilhqot'in Nation*, *supra* note 7 at para 18.

<sup>62</sup> In this regard, the Court wrote that "[t]he jurisprudence just reviewed establishes a number of propositions": *ibid.*

Nevertheless, while the cited cases support the Court's ultimate decision, the Court also ignored, reinterpreted, or downplayed other decisions that would have made it more difficult for the Tsilhqot'in to succeed in establishing title. For example, there is no discussion in the above list of *St Catharines Milling and Lumber Co*, which minimized Aboriginal title and effectively denied Aboriginal peoples from making claims to their lands for over 100 years.<sup>63</sup> Furthermore, the Court did not review the *Adams, Cote*, or *Sappier* cases, which separated Aboriginal title from Aboriginal rights,<sup>64</sup> thereby making it easier to construe Aboriginal claims without reference to title.<sup>65</sup> Additionally, the Court did not review the *Pamajewon* case, which downplayed the territorial nature of Aboriginal governance and jurisdiction.<sup>66</sup> The Court could have cited these less favourable opinions to deal with Aboriginal rights on much narrower grounds—but it did not. This choice greatly benefitted the Tsilhqot'in.

The selective invocation of cases enabled the Supreme Court to create a broader reading of Aboriginal rights. Thus, the jurisprudential context within which the Tsilhqot'in case was decided framed Aboriginal title claims in a positive light. One can only hope that this more large,

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<sup>63</sup> *St Catharines Milling and Lumber Company v The Queen* (1888), 14 App Cas 46, 4 Cart BNA 107 (PC). For commentary, see Kent McNeil, "Social Darwinism and Judicial Conceptions of Indian Title in Canada in the 1880s" (1999) 38:1 *Journal of the West* 68.

<sup>64</sup> *R v Adams*, [1996] 3 SCR 101, 138 DLR (4th) 657; *R v Côté*, [1996] 3 SCR 139, 138 DLR (4th) 385; *R v Sappier*; *R v Gray*, [2006] 2 SCR 686, 309 NBR (2d) 199. For a critique of separating rights from title, see Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36:1 *Alta L Rev* 117.

<sup>65</sup> *Adams*, along with *Côté* and *Sappier*, would have allowed the Court to characterize the Tsilhqot'in claims as less than title claims. This was the argument of the Attorney General for British Columbia. See *Tsilhqot'in Nation*, *supra* note 7 (Factum of the Respondent [FOR]) ("[t]his Court has repeatedly held that reconciliation involves recognition of Aboriginal rights but does not require acceptance of claims to Aboriginal title throughout traditional territories" at para 3).

<sup>66</sup> *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204. For commentary, see John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8:2 *Const Forum Const* 27.

liberal, and generous territorial view of Aboriginal rights will continue.<sup>67</sup> Such an approach is consistent with an important strand of Canada's constitutional heritage.<sup>68</sup> Its further application could make a significant difference when the issue of governance over territory-wide Aboriginal title lands comes before the courts in future cases.

The Court has recognized that Indigenous social organization is legally relevant to establishing title.<sup>69</sup> Since Indigenous land was not legally vacant when Europeans arrived, it is not a huge step to acknowledge that Indigenous forms of social organization are also protected as rights under subsection 35(1) of the *Constitution Act, 1982*.<sup>70</sup> A generous reading of the jurisprudential context sets the stage for a robust recognition of Indigenous governance over Indigenous lands. This is particularly the case if efforts to erase *terra nullius* persist as a priority in future decisions.

### C. SUFFICIENCY OF OCCUPATION

Social organization can be seen as a synonym for self-government.<sup>71</sup> When a Nation organizes itself over an entire territory, controls and

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<sup>67</sup> For a discussion of the development of large, liberal, and generous interpretations of Aboriginal rights, see Leonard Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 UNBLJ 11. For a related discussion of these concepts' genesis in the US context, see Charles F Wilkinson & John M Volkman, "Judicial Review of Indian Treaty Abrogation: 'As Long as the Water Flows, or Grass Grows Upon the Earth—How Long a Time Is That?'" (1975) 63:3 Cal L Rev 601.

<sup>68</sup> *Sparrow*, *supra* note 4 at 1106.

<sup>69</sup> *Tsilhqot'in Nation*, *supra* note 7 at paras 34–35 [citations omitted]:

The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective . . . . The Aboriginal perspective focuses on laws, practices, customs and traditions of the group. In considering this perspective for the purpose of Aboriginal title, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed".

<sup>70</sup> See John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38:2 UBC L Rev 285.

<sup>71</sup> See *Delgamuukw*, *supra* note 4, Lamer CJC (observing that "the foundation of 'aboriginal title' was succinctly described by Judson J . . . : 'the fact is that when the

makes decisions about the use of land, and excludes others in accordance with its laws, we should be clear about what we are saying—such a Nation governs itself. The sufficiency and continuity of Indigenous social organization was highly relevant in addressing the main point of contention in the *Tsilhqot'in Nation* case. In fact, the case revolved around the legal consequences of differing conceptions of Indigenous social organization. The main issue before the Supreme Court was a contrasting characterization of Indigenous governance relative to land (i.e., Tsilhqot'in social organization in their territory). Differing approaches to this question separated the decisions of the trial judge and the Court of Appeal.

In particular, the main point of controversy was whether the “semi-nomadic” Tsilhqot'in met a sufficiently high standard of occupation to establish title.<sup>72</sup> To deal with this issue, the Court had to discuss *Marshall; Bernard*, which implied that Mi'kmaq people in Nova Scotia were “too low on the scale of social organization” to establish title to lands on a territorial basis.<sup>73</sup> In that earlier case, a majority of the Supreme Court held that “[n]ot every nomadic passage or use will ground title to land. . . . In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out.”<sup>74</sup> The position of British Columbia,<sup>75</sup> Canada,<sup>76</sup> Quebec,<sup>77</sup>

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settlers came, the Indians were there, *organized in societies* and occupying the land as their forefathers had done for centuries” at para 189, citing *Calder, supra* note 56 at 328 [emphasis added]).

<sup>72</sup> *Tsilhqot'in Nation, supra* note 7 at para 29.

<sup>73</sup> Discussions of *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 [*Marshall; Bernard*] within the case are found in *Tsilhqot'in Nation, supra* note 7 at paras 39–44. For a critique of Aboriginal rights based on so-called lower levels of social organization, see *In Re Southern Rhodesia* (1918), [1919] AC 211 at 233–34, 34 TLR 595 (PC).

<sup>74</sup> *Marshall; Bernard, supra* note 73 at para 66.

<sup>75</sup> See *Tsilhqot'in Nation FOR, supra* note 65 at paras 19, 22, 56, 63–82.

<sup>76</sup> See *Tsilhqot'in Nation, supra* note 7 (Factum of the Respondent on behalf of the Attorney General of Canada at paras 8–9, 46, 53–54, 71).

and the Business Council of British Columbia<sup>78</sup> was that the Tsilhqot'in were like the Mi'kmaq—too nomadic to establish title. Tsilhqot'in adversaries argued that the Tsilhqot'in did not have the requisite social organization to establish Aboriginal title on a territorial basis because their level of social organization was “insufficient” to occupy and control land. As noted, this was also the position of the Court of Appeal.

In rejecting these narrower propositions, the Supreme Court of Canada found that the Tsilhqot'in had proven sufficiency of occupation necessary to establish Aboriginal title. The Court ruled that Tsilhqot'in social organization enabled them to enjoy continuous and exclusive possession of their lands. In other words, the Tsilhqot'in governed themselves in ways that gave rise to rights to territorial title (i.e., they had a sufficiency of social organization). The Tsilhqot'in exhibited “evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.”<sup>79</sup> Control and stewardship are hallmarks of effective governance,<sup>80</sup> and the Tsilhqot'in organized themselves in ways that secured their lands and resources.

In upholding Aboriginal title, the Supreme Court of Canada measured Tsilhqot'in title by both the Aboriginal and common law perspectives.<sup>81</sup> The Court deferred to the trial judge's findings of fact<sup>82</sup>

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<sup>77</sup> See *Tsilhqot'in Nation*, *supra* note 7 (Factum of the Intervener, the Attorney General of Quebec at paras 7–21).

<sup>78</sup> See *Tsilhqot'in Nation*, *supra* note 7 (Factum of the Interveners, the Business Council of British Columbia at para 9).

<sup>79</sup> *Tsilhqot'in Nation*, *supra* note 7 at para 38.

<sup>80</sup> See John Borrows, “Stewardship and the First Nations Governance Act” (2003) 29 *Queen's LJ* 103; William Nikolakis, Harry Nelson, “To Log or Not to Log? How Forestry Fits with the Goals of First Nations in British Columbia” (2015) 45:6 *Can J Forest Research* 639; Saturnino M Borrás Jr & Jennifer C Franco, “A ‘Land Sovereignty’ Alternative? Towards a Peoples’ Counter-Enclosure” (2012) *Transnational Institute Agrarian Justice Programme Discussion Paper*, online: <[www.tni.org](http://www.tni.org)>.

<sup>81</sup> *Tsilhqot'in Nation*, *supra* note 7 at paras 35–37.

and wrote that there is “no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held.”<sup>83</sup> The Court’s recognition of the territorial nature of Aboriginal title is a huge victory for the Tsilhqot’in. It shows that Canadian law can recognize and affirm estates in land that predate European arrival.<sup>84</sup> It demonstrates that Indigenous land use can be characterized in ways that do not denigrate Aboriginal peoples’ social organization.<sup>85</sup> This bodes well for future cases where social organization will figure prominently in claims to governance over these and similar Aboriginal title lands.

#### D. EVIDENCE AND INDIGENOUS LEGAL TRADITIONS

The Supreme Court of Canada affirmed the trial judge’s key findings of fact. It is worth noting (though the Supreme Court did not explicitly acknowledge this fact) that large portions of the *Tsilhqot’in Nation* case depended upon Tsilhqot’in Elders testifying and giving evidence on their territory.<sup>86</sup> The trial judge found that the Elders’ testimony demonstrated a wide-ranging relationship with all parts of the territory, which “evinces an intention on the part of the Aboriginal group to hold and possess the land in a manner comparable to what would be required to establish title at common law.”<sup>87</sup> Thus, Tsilhqot’in law was a key ingredient in ousting

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<sup>82</sup> *Ibid* at para 55.

<sup>83</sup> *Ibid* at para 42.

<sup>84</sup> For an extended argument that rejects the doctrine of discovery and applies Aboriginal title through a modified doctrine of tenure, see Howard Highland, *Constitutional Realism and Third Party Property Rights in Tsilhqot’in Nation v. British Columbia and Oneida Nation v. New York* (LLM Thesis, Osgoode Hall Law School, September 2011) [unpublished].

<sup>85</sup> For a discussion of some alternatives for recognizing territorial title for so-called nomadic peoples, see Brian J Burke, “Left Out in the Cold: The Problem with Aboriginal Title under Section 35(1) of the *Constitution Act, 1982* for Historically Nomadic Aboriginal Peoples” (2000) 38:1 Osgoode Hall LJ 1.

<sup>86</sup> See e.g. *Tsilhqot’in Nation* BCSC, *supra* note 36 at paras 360, 381, 397, 647.

<sup>87</sup> *Tsilhqot’in Nation*, *supra* note 7 at para 42.

the view that so-called nomadic Indigenous peoples resided on legally vacant lands at the time of European “discovery”.<sup>88</sup>

Tsilhqot’in Elders spoke volumes about Tsilhqot’in law,<sup>89</sup> and did so in their own language and in accordance with their own legal traditions.<sup>90</sup> Their rules of conduct and legal narratives were very prominent features of the case.<sup>91</sup> Tsilhqot’in invocations and applications

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<sup>88</sup> Tsilhqot’in law, which exists today, and existed before so-called discovery, is called “*dechen ts’edilhtan*”. These laws direct how land should be used and occupied, and were crucial to establishing the sufficiency of occupation necessary to establish title in this case. See *Tsilhqot’in Nation* BCSC, *supra* note 36 at para 431.

<sup>89</sup> See Hamar Foster, “One Good Thing: Law, Elevator Etiquette and Litigating Aboriginal Rights in Canada” (2010) 37 Adv Q 66; Dwight G Newman, “*Tsilhqot’in Nation v. British Columbia* and Civil Justice: Analyzing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History” (2005) 43:2 Alta L Rev 433.

<sup>90</sup> *Tsilhqot’in Nation* BCSC, *supra* note 36 at paras 149, 167, 176, 360, 362, 381, 397, 399, 403, 431–35.

<sup>91</sup> *Ibid* at paras 433–34 [emphasis added]:

Some of the stories and legends told to the Court by Tsilhqot’in elders include:

- Lhin Desch’osh, the legend of how the land was transformed and the animals made less dangerous;
- Ts’il?os and ?Eniyudl;
- How Raven Stole the Sun;
- A Story of Raven Stealing Fire;
- The Story of Salmon Boy;
- The Story of the Woman and the Bear;
- The Story of Lady Rock;
- The Story of Qit’ax Xen, a boy raised by his grandmother;
- The Story of Guli, the Skunk;
- A Story About a Brother and a Sister;
- A Story About an Owl;
- Two Sisters and the Stars; and,
- Frog Steals a Baby.

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

of Indigenous law were keys to establishing a sufficiency of Indigenous social organization necessary to prove title.<sup>92</sup> The trial judge accepted the fact that the “Tsilhqot'in people were a rule ordered society.”<sup>93</sup> The positive reception of oral tradition demonstrates the absolute centrality of Indigenous law in confirming Aboriginal rights.<sup>94</sup> In this respect, Indigenous law and governance is an essential part of Canada's constitutional framework.<sup>95</sup> Aboriginal title could not have been recognized and affirmed in this case without Indigenous law and social organization. The Court found that Tsilhqot'in law and social organization was in existence when the Crown asserted sovereignty and that there has been “continuity” in this organization down to the present day.<sup>96</sup>

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<sup>92</sup> *Ibid* at para 429, citing *Tsilhqot'in Nation* BCSC, *supra* note 36 (Evidence, Hamar Foster's report “Tsilhqot'in Law” prepared for the Court):

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

<sup>93</sup> *Tsilhqot'in Nation* BCSC, *supra* note 36 at para 431 (also noting that “[v]arious Tsilhqot'in elders testified about dechen ts'edilhtan (the laws of our ancestors)”).

<sup>94</sup> A similar point is made in greater detail in John Borrows, “Listening for a Change: The Courts and Oral Tradition” (2001) 39:1 Osgoode Hall LJ 1.

<sup>95</sup> For more discussion on this point, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

<sup>96</sup> After accepting that the Tsilhqot'in ‘sufficiently occupied’ their land, from both an Aboriginal and common law perspective (see *Tsilhqot'in Nation*, *supra* note 7 at paras 33–44, 55), the Court held that this occupation was continued in accordance with their social organization (i.e. governance) until the present day. See *ibid* at para 57:

The geographic proximity between sites for which evidence of recent occupation was tendered, and those for which direct evidence of historic occupation existed, further supported an inference of continuous occupation. Paragraph 945 states, under the heading of “Continuity”, that the “Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion”. I see no reason to disturb this finding.

In making these statements, the Supreme Court implicitly affirmed that Indigenous legal traditions can give rise to enforceable obligations within Canadian law.<sup>97</sup> The case highlights the ongoing importance of Indigenous peoples' own legal processes and substantive requirements as one of the pillars of Canadian law.<sup>98</sup> While future decisions will further sketch out the relationship between Indigenous and common law systems, the *Tsilhqot'in Nation* case reminds that "a morally and politically defensible conception of Aboriginal rights will incorporate both legal perspectives."<sup>99</sup>

#### E. RIGHTS CONFERRED BY ABORIGINAL TITLE

Having recognized that the Tsilhqot'in people possess Aboriginal title, the Supreme Court subsequently explored the scope of rights conferred through a broader recognition of Aboriginal title. It wrote that the rights that flow from Aboriginal title are very broad.<sup>100</sup> Since Tsilhqot'in title arose prior to European sovereignty, the Court called it an "independent legal interest" (meaning it was not created by the Crown or courts).<sup>101</sup> Additionally, they noted that Aboriginal title is also a

right to exclusive use and occupation of the land . . . for a variety of purposes, not confined to traditional or "distinctive" uses. In other words, Aboriginal title is a beneficial interest in the land . . . . In simple

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<sup>97</sup> A similar point is made in Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873. See also Jeremy Webber, "The Public-Law Dimension of Indigenous Property Rights" in Nigel Bankes & Timo Koivurova, eds, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Oxford: Hart, 2013) 79.

<sup>98</sup> For further discussion about the role of Indigenous legal orders in Canadian law, see Sengwun Luk, *The Law of the Land: New Jurisprudence on Aboriginal Title* (2014) 67 SCLR (2d) 289.

<sup>99</sup> *R v Van der Peet*, [1996] 2 SCR 507 at para 42, 137 DLR (4th) 289, citing Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17:2 Queen's LJ 350 at 412–13.

<sup>100</sup> *Tsilhqot'in Nation* BCSC, *supra* note 36 at para 67.

<sup>101</sup> *Ibid* at paras 12, 69.

terms, the title holders have the right to the benefits associated with the land—to use it, enjoy it and profit from its economic development.<sup>102</sup>

Furthermore, the Supreme Court of Canada held that the Crown does not retain any beneficial interest on Aboriginal title lands.<sup>103</sup> First Nations who have title can use their lands as they choose, subject to two limits: 1) Aboriginal title cannot be alienated except to the Crown, and 2) nor can it be encumbered, developed, or misused in ways that would prevent future generations of the group from using and enjoying it.<sup>104</sup> Despite these limits, the Court recognized that Tsilhqot'in land use is not “confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.”<sup>105</sup>

As noted, the breadth of this holding is unparalleled in Canadian law. While Aboriginal title theoretically existed in Canadian law prior to this decision, this is the first time an Indigenous group has actually secured a robust protection of their land rights in Canadian courts.<sup>106</sup> The Tsilhqot'in people possess natural resources, which are likely valued in the billions of dollars.<sup>107</sup> The Tsilhqot'in can protect their lands against

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<sup>102</sup> *Tsilhqot'in Nation*, *supra* note 7 at para 70 [citations omitted].

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid* at para 74.

<sup>105</sup> *Ibid* at para 75.

<sup>106</sup> The courts in *Calder*, *supra* note 56, *Delgamuukw*, *supra* note 4, and *Marshall; Bernard*, *supra* note 73 had recognized that Aboriginal title is justiciable, but they did not declare that it was extant in these cases.

<sup>107</sup> For a discussion of the contrast between Canadian and Australian legal approaches to Aboriginal title and resource development, see Richard Bartlett, “Indigenous Rights in and Control of Resource Development: The Contrast between the Australian and Canadian Law of Native Title” (2014) 33:3 *Austl Resources & Energy LJ* 311. For an estimation of the value of natural resources possessed by the Tsilhqot'in, see Mychaylo Prystupa, “First Nations ‘Pulling a Chilcotin’ in Resource Development Battles across Canada”, *National Observer* (20 June 2015), online: <[www.nationalobserver.com](http://www.nationalobserver.com)> (noting the example of a “proposed \$1.5-billion copper-gold project in the sacred Fish Lake area”).

environmental degradation, which has been one of their major goals.<sup>108</sup> They can also continue to run horses, hunt, fish, trap, and gather if they so choose.<sup>109</sup> They can prioritize these uses over other uses, despite the fact that their lands and resources might have higher market values if leased or licenced for other purposes.<sup>110</sup> All this demonstrates that the Tsilhqot'in now have a measure of control over their land that is largely akin to (though not exactly like) fee simple ownership.<sup>111</sup> As the Court wrote:

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.<sup>112</sup>

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<sup>108</sup> To protect their environment, the Nation subsequently created the Dasiqox Tribal Park, or Nexwagwez'an. See "Dasiqox Tribal Park: Nexwagwez'an—There for Us", online: <[www.dasiqox.org](http://www.dasiqox.org)>. They have also drafted a mining policy to advance sustainability. See Tsilhqot'in National Government, "Tsi Ts'edetalhdez Gwa Dechen Ts'edilhtan: Mining Policy" (30 July 2014), online: <[www.tsilhqotin.ca](http://www.tsilhqotin.ca)>.

<sup>109</sup> For a socio-ecological study of Tsilhqot'in resource management, see Jonaki Bhattacharyya & Stephen D Murphy, "Assessing the Role of Free-Roaming Horses in a Social-Ecological System" (2015) 56:2 *Environmental Management* 433.

<sup>110</sup> For a discussion of Tsilhqot'in resource rights in light of the *Tsilhqot'in Nation* case, see Nigel Bankes, "The Implications of the *Tsilhqot'in (William)* and *Grassy Narrows (Keewatin)* Decisions of the Supreme Court of Canada for the Natural Resources Industries", online: (2015) J Energy & Natural Resources L <[www.ibanet.org/Publications/jerl.aspx](http://www.ibanet.org/Publications/jerl.aspx)>, DOI: <10.1080/02646811.2015.1030916>.

<sup>111</sup> See *Tsilhqot'in Nation*, *supra* note 7 (explaining that Aboriginal title has a different source from fee simple title and that "what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*" at para 14 [emphasis in original]). Aboriginal title is *sui generis*: aside from its independent source, its recognition flows from the special relationship between Aboriginal peoples and the Crown, and "is not equated with fee simple ownership": *ibid* at para 72, citing *Delgamuukw*, *supra* note 4 at para 190.

<sup>112</sup> *Tsilhqot'in Nation*, *supra* note 7 at para 73.

Furthermore, in noting the breadth of Aboriginal title, it needs to be acknowledged that Tsilhqot'in title also imposes significant limits on the Crown's underlying title. In this spirit, the Court wrote that "Crown title . . . was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival."<sup>113</sup> Additionally, the "content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it."<sup>114</sup> These are substantial subtractions from the Crown's estate; they likewise legitimately constrain Crown sovereignty.<sup>115</sup> These limits substantially reduce the ability of the Crown to control, use, or benefit from land subject to Aboriginal title. However, the Crown still has a paramount legal interest in Aboriginal title lands. This is where the judgment becomes more problematic when considering whether the Court has really rejected the doctrine of discovery.

#### F. *TERRA NULLIUS* REPRODUCED

Despite the Supreme Court's purported refutation of *terra nullius* at paragraph 69 of the decision, the Court reproduced and reaffirmed one of the doctrine's most troubling aspects in that very same paragraph. The Court wrote, citing *Guerin*: "At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province."<sup>116</sup> This problematic claim rests on an empty incantation;<sup>117</sup> it is devoid of self-reflection concerning the

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<sup>113</sup> *Ibid* at para 69.

<sup>114</sup> *Ibid* at para 70 [citations omitted].

<sup>115</sup> The idea that subsection 35(1) constrains Crown sovereignty and constitutionally recognizes and affirms Crown obligations is discussed in John Borrows, "Let Obligations Be Done" in Foster, Raven & Webber, *supra* note 56, 201 at 212.

<sup>116</sup> *Tsilhqot'in Nation*, *supra* note 7 at para 69, citing *Guerin*, *supra* note 4.

<sup>117</sup> For a discussion of the "magical" elements of Crown sovereignty, see John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 95. This theme is developed in the Aboriginal title and treaty context in Colin G Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* (New York: Oxford University Press, 2013).

discriminatory denigration of Indigenous peoples' social organization that it implies.<sup>118</sup>

The declaration that Crown sovereignty can displace Indigenous sovereignty through a bare assertion presumes that the land is empty of governance or that Indigenous governance powers are inferior.<sup>119</sup> British words uttered half a world away diminished Tsilhqot'in jurisdiction. This implies there is some kind of emptiness underlying Aboriginal title that must be filled by Crown-derived law in order to avoid a legal vacuum. Yet the Tsilhqot'in people were in full possession of the land at the time—as the Court now recognizes. The Tsilhqot'in “historically acted in a way that would communicate to third parties that it held the land for its own purposes.”<sup>120</sup> They excluded others from their lands on a territorial basis.<sup>121</sup> They repelled the Crown's citizens during the Chilcotin War. In light of these findings, the assertion of Crown sovereignty leading to radical Crown title rests on an “*inanis iustificationem*”: an empty justification. It is a restatement of the doctrine of *terra nullius*, despite protestations to the contrary. The assertion of radical title retroactively affirms the Crown's appropriation of Indigenous legal interests without their knowledge or consent. In most other contexts, this would be called stealing. This fraud radically dispossesses each original owner.

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<sup>118</sup> For a critique of this approach in comparative terms, see Blake A Watson, “The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand” (2011) 34:2 Seattle UL Rev 507.

<sup>119</sup> This theme is extensively developed in Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012). For a discussion of this in the US context, see Joseph William Singer, “Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity” (2011) 86:3 Ind LJ 763.

<sup>120</sup> *Tsilhqot'in Nation*, *supra* note 7 at para 38.

<sup>121</sup> See *ibid* (concurring with the trial judge's finding “that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it” and conclusion “that the Tsilhqot'in treated the land as exclusively theirs” at para 58).

We must ask why the Crown—and not the Tsilhqot'in—has underlying title to the land in their territories. After all, the Tsilhqot'in people are its rightful, prior, and present owners, as the Supreme Court now acknowledges. It “does not make sense” to vest rights possessed by Indigenous peoples in other peoples through the mere act of assertion.<sup>122</sup> It requires a discriminatory denigration of Indigenous peoples' laws and ways of life to hold that Indigenous title and governance is subject to non-Indigenous paramount interests as a by-product of European sovereign assertions.<sup>123</sup> There is no Tsilhqot'in authority for such a proposition. There is no persuasive common law authority either—other than the Court saying it is so, and repeating this for generations.<sup>124</sup> This “bootstrapping” is not persuasive from a common law or Indigenous legal perspective.

Underlying Crown title and overarching Crown sovereignty do not respect the equality and dignity of peoples.<sup>125</sup> They do not facilitate the negotiation of first principles related to the Crown's legitimacy in Canada.<sup>126</sup> They imply that Indigenous peoples are politically subordinate because of their Aboriginal status.<sup>127</sup> They make the Crown

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<sup>122</sup> See John Borrows, “Sovereignty's Alchemy: An Analysis of *Delgamuukw v. the Queen*” (1999) 37:3 Osgoode Hall LJ 537.

<sup>123</sup> For a critical view of the Crown's claims in relation to Indigenous governance, see Kent McNeil, “Indigenous Nations and the Legal Relativity of European Claims to Territorial Sovereignty in North America”, in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Don Mills, Ont: Oxford University Press, 2013) 242.

<sup>124</sup> See *ibid.*

<sup>125</sup> See Patrick Macklem, “Distributing Sovereignty: Indian Nations and Equality of Peoples” (1993) 45:5 Stan L Rev 1311.

<sup>126</sup> See Kent McNeil, “Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest” in Alexandra Harmon, ed, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 35 at 37–38.

<sup>127</sup> See Steven T Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery* (Golden, Colo: Fulcrum, 2008).

the paramount power, rather than showing how power can be shared in reconciling legal interests in British Columbia.<sup>128</sup>

So we are left with a huge hole in the Supreme Court of Canada's reasoning. They say *terra nullius* was never part of Canadian law, but a profound emptiness nevertheless resides at the heart of the decision. This emptiness benefits the Crown and disadvantages Indigenous peoples. Many of the Court's foundationally questionable assumptions will continue to affect Aboriginal peoples as a result of the *Tsilhqot'in Nation* decision. The Crown will get the last word in land use decisions and the first word in governance decisions.<sup>129</sup> The ultimate framework for Indigenous land and governance will be set by the Crown.<sup>130</sup>

Thus, it is apparent that the doctrine of *terra nullius* has not been entirely or even largely expunged from Canadian law, despite the Supreme Court of Canada's protestations to the contrary. Aboriginal title is still a "burden on the underlying title asserted by the Crown at sovereignty."<sup>131</sup> The doctrine of discovery is alive and well in Canada. One wonders how the Supreme Court could bluntly state that it was rejecting *terra nullius* while leaving much of the doctrine intact. The Court's undermining of Indigenous constitutional rights and interests does not accord with its high-sounding statements.

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<sup>128</sup> See Justice Binnie in *Mitchell v MNR*, 2001 SCC 33 at para 129, [2001] 1 SCR 911 [emphasis in original]:

If the principle of "merged sovereignty" articulated by the Royal Commission on Aboriginal Peoples is to have any true meaning, it must include at least the idea that aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort.

<sup>129</sup> See Ghislain Otis, "Constitutional Recognition of Aboriginal and Treaty Rights: A New Framework for Managing Legal Pluralism in Canada?" (2014) 46:3 J Leg Pluralism & Unofficial L 320.

<sup>130</sup> Through this framework, the Crown and courts implicitly conclude that Europeans were somehow superior to Indigenous peoples when they asserted sovereignty in Canada. It is difficult to explain how Crown title "underlies" and has some sort of priority over Indigenous peoples without such questionable justifications.

<sup>131</sup> *Tsilhqot'in Nation*, *supra* note 7 at para 75.

G. *TERRA NULLIUS* EXPANDED

The remainder of this paper focuses on how the *Tsilhqot'in Nation* decision reproduces the doctrine of discovery's durability.<sup>132</sup> It demonstrates how *terra nullius's* effects persist through the fiction that the Crown somehow acquired radical or underlying title to Indigenous lands when European sovereignty was asserted.<sup>133</sup>

The negative implications of this approach create at least four significant challenges for Indigenous peoples: a) the Crown is empowered to justifiably infringe Aboriginal title, b) the Crown can shift the burden for proving Aboriginal title to Indigenous peoples, c) the Crown can subject Indigenous peoples to provincial jurisdiction, and d) the Courts can characterize Aboriginal title as existing within a legal vacuum when provincial legislation is not present. The problems with *terra nullius* are not just academic conundrums; they have significant negative effects in the real world. The Crown continues to benefit from the discriminatory denigration of Aboriginal peoples' social organization at the time so-called sovereignty was asserted over their lands.

1. INFRINGEMENT OF ABORIGINAL TITLE AND *TERRA NULLIUS*

First, one of the benefits the Crown receives through the assertion of sovereignty and gaining underlying title is that Aboriginal title can be infringed or diminished as a result of the Crown's superior position.<sup>134</sup>

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<sup>132</sup> For a more general discussion of this issue, see Shiri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014) 29:2 CJLS 145.

<sup>133</sup> See *Tsilhqot'in Nation*, *supra* note 7 at para 69. As noted in the last section, this result is puzzling since, as the Court recognized, Indigenous peoples owned the lands over which Crown sovereignty was asserted at the time such sovereignty was proclaimed. Though the land was not legally vacant, the Crown mysteriously became a paramount lord. There is no clear explanation about how the Crown acquired these superior interests: they certainly did not receive them from Indigenous peoples at the time of sovereignty assertion. Yet, despite these inconsistencies, Indigenous rights are made subordinate to Crown claims by the insertion of underlying title and overarching sovereignty.

<sup>134</sup> See *Tsilhqot'in Nation*, *supra* note 7 (fortunately for Aboriginal peoples, the diminishment of Aboriginal rights has to be justified, as "[n]either level of government is

The Crown's paramount status gives the government a right to encroach on Aboriginal title, and not the other way around: Aboriginal peoples have no right to unilaterally diminish or impede the Crown's constitutional or other rights.

For example, Aboriginal peoples cannot justifiably take non-Aboriginal lands to develop agriculture, forestry, mining, or hydroelectric power; facilitate general Indigenous economic development; protect the environment or endangered species; build infrastructure; or settle Indigenous populations, as the Crown is allowed to do in relation to Aboriginal lands.<sup>135</sup> At the same time, Canadian governments can infringe on Aboriginal title and engage in these actions if they can justify this in the broader public interest, and if they act in accordance with their fiduciary duties owed to Indigenous peoples.<sup>136</sup>

While the Court writes that the Crown's duties and abilities flow from the *sui generis*, special historical relationship between the Crown and Indigenous peoples,<sup>137</sup> one worries whether this characterization is merely an obscure way of incorporating and reproducing the colonial relationships that exist in Canada.<sup>138</sup> Calling such a relationship "special" is of no comfort to Indigenous peoples whose rights are diminished under that label; being "special" is not necessarily empowering in these circumstances.

## 2. RECOGNITION OF ABORIGINAL TITLE AND *TERRA NULLIUS*

Second, the subordinate nature of Aboriginal title and the continued application of *terra nullius* is evident in the fact that Tsilhqot'in title is

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permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group" at para 139).

<sup>135</sup> See *Delgamuukw*, *supra* note 4 at para 165.

<sup>136</sup> See *Tsilhqot'in Nation*, *supra* note 7 at para 71.

<sup>137</sup> See *ibid* at para 72.

<sup>138</sup> For discussions of how Canadian law reproduces colonialism through *sui generis* characterizations, see John Borrows & Leonard I Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36:1 *Alta L Rev* 9.

not presumed to exist in the same way that Crown sovereignty and Crown underlying title are assumed to exist. Unlike Crown title, Aboriginal title must be established by the courts or through agreement with the Crown.<sup>139</sup> This is often a difficult process. It is also an expensive process—an expense the Crown is spared. There are not many avenues for achieving recognition that are virtually costless for First Nations. On the other hand, the Crown is assumed to have established rights, which flow from the assertion of European sovereignty that dispossessed Indigenous peoples in the first place. The need for recognition places Indigenous peoples on an unequal playing field. This is very troubling.

The real-world consequence of *terra nullius's* continued operation is that it seems as if Aboriginal title will never be an enforceable interest within Canadian law without some kind of accreditation by a colonial emanation.<sup>140</sup> Aboriginal title, while labelled as an independent legal interest, never seems to be capable of finding recognition absent some action by an asserting sovereign's successors.<sup>141</sup> Thus, Aboriginal title is not as independent a right as the Supreme Court's language seems to suggest. Throughout the opinion, the Court makes the distinction between established or confirmed title on the one hand, and unproven

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<sup>139</sup> One might also conceive of the possibility that Aboriginal title could also be established by legislative means, as Canada argued occurs in Australia under the *Native Title Act 1993* (Cth). For an examination of how legislation recognizes Native title in Australia, see Lisa Strelein, *Compromised Jurisprudence: Native Title Cases since Mabo*, 2nd ed (Canberra: Aboriginal Studies Press, 2009). I have critiqued this legislation in John Borrows, "Practical Recolonisation?" (2005) 28:3 UNSWLJ 614.

<sup>140</sup> For a critique of problems in this regard in the US context, see Joseph W Singer, "Erasing Indian Country: The Story of *Tee-Hit-Ton Indians v. United States*" in Carole Goldberg, Kevin K Washburn & Philip P Frickey, eds, *Indian Law Stories* (New York: Foundation Press, 2011) 229.

<sup>141</sup> Indigenous peoples in New Zealand and Australia face this same challenge. See JGA Pocock, "Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi" (1998) 43:1 McGill LJ 481; Samantha Hepburn, "Statutory Interpretation and Native Title Extinguishment: Expanding Constructional Choices" (2015) 38:2 UNSWLJ 587.

title on the other.<sup>142</sup> If Indigenous peoples do not have established or confirmed title, the governments' obligations towards such groups are further diminished until such time as a non-Indigenous body accredits their interests (through treaty, legislation, or court declaration).<sup>143</sup>

The fact that Aboriginal title requires some official recognition process illustrates one of the greatest challenges for Indigenous groups flowing from the *Tsilhqot'in Nation* decision. The question is how Aboriginal title can be effectively established, confirmed, or proven by Indigenous groups when the state is arrayed against them. The Crown and courts have the upper hand in the recognition process. Court cases cost millions of dollars each, and First Nations do not have this kind of money available to them. The *Tsilhqot'in Nation* case was partially a publicly funded test case that allegedly cost tens of millions of dollars to bring to a successful conclusion.<sup>144</sup> The next case will not fall into such a

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<sup>142</sup> See *Tsilhqot'in Nation*, *supra* note 7 at paras 1–2, 12, 17, 27, 32, 37, 43, 48, 50, 78–80, 90–92, 114–17 (for references to established/confirmed title), 80, 113 (for references to unproven title). For a discussion of the problematic onus of proof on Aboriginal peoples in Aboriginal rights cases, see Kent McNeil, “The Onus of Proof of Aboriginal Title” (1999) 37:4 Osgoode Hall LJ 775, republished in Kent McNeil, *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) 136.

<sup>143</sup> See *Tsilhqot'in Nation*, *supra* note 7 (however, it should be noted that the Crown does have duties to Aboriginal peoples in the case of asserted yet unproven title interests: “[w]here Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest” at para 80; unfortunately, Crown duties are diminished as compared to proven Aboriginal title interests: “[b]y contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*” at para 80).

<sup>144</sup> See “Supreme Court Grants Land Title to BC First Nation in Historic Ruling That Could Impact Northern Gateway”, National Post (26 June 2014), online: <news.nationalpost.com>. For a discussion of costs and funding Aboriginal title cases, see *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 [*Okanagan*]. For a review of this case in context, see Joseph J Arvay & Alison Latimer, “Cost Strategies for Litigants: The Significance of *R. v. Caron*” (2011) 54 SCLR (2d) 427.

category, and thus public funding will not be available to bankroll it.<sup>145</sup> The cost of litigation will place a court-ordered declaration of Aboriginal title beyond the reach of most groups.

Furthermore, the 20-year-old treaty process in British Columbia has been a dismal failure up to this point.<sup>146</sup> First Nations are deeply indebted to Canadian governments from decades-long negotiations with very little to show for their efforts.<sup>147</sup> Very few agreements have been signed.<sup>148</sup> While the Crown may be compelled to change its narrow negotiation mandates in response to the *Tsilhqot'in Nation* decision,<sup>149</sup> the incentives

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<sup>145</sup> See *Okanagan*, *supra* note 144 (“criteria that must be present to justify an award of interim costs in this kind of case as follows . . . . The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases” at para 40). Since Aboriginal title has now been judicially determined and applied in British Columbia, future cases may not be eligible for funding because they do not meet the “newness” criteria.

<sup>146</sup> See Christopher McKee, *Treaty Talks in British Columbia: Building a New Relationship*, 3rd ed (Vancouver, BC: UBC Press, 2009); Fraser Institute, Studies in Aboriginal Policy, “Incomplete, Illiberal, and Expensive: A Review of 15 Years of Treaty Negotiation in British Columbia and Proposals for Reform”, by Mark Milke (Vancouver, BC: Fraser Institute, July 2008).

<sup>147</sup> For a discussion of Aboriginal land recognized under the BC treaty process, and land recognized through the *Tsilhqot'in Nation* decision, see Judith Sayers, “Treaties and Tsilhqot'in—Treaties at Risk?” (4 July 2014), *First Nations in British Columbia* (blog), online: <fnbc.info/blogs/judith-sayers/treaties-and-tsilhqot-treaties-risk>.

<sup>148</sup> Agreements achieved under the BC Treaty Process include the following: *Tla'amin Final Agreement Act*, SBC 2013, c 2; *Yale First Nation Final Agreement Act*, SBC 2011, c 11; *Tsawwassen First Nation Final Agreement Act*, SBC 2007, c 39; *Maa-nulth First Nations Final Agreement Act*, SBC 2007, c 43. For a critique of the BC Treaty Agreements, see Johnny Mack, “*Hoquotist*: Reorienting though Storied Practice” in Hester Lessard, Rebecca Johnson & Jeremy Webber, eds, *Storied Communities: Narratives of Contact and Arrival in Constituting Political Community* (Vancouver, BC: UBC Press, 2011) 287.

<sup>149</sup> These mandates have also been challenged before the Inter-American Commission on Human Rights. See Inter-American Commission on Human Rights, Report No. 105/09, on the admissibility of Petition 592-07, Hul'qumi'num Treaty Group, Canada (30 October 2009). For commentary, see Robert Williams Jr, *Savage*

to abide by the decision are few.<sup>150</sup> Other than court pressure (which, in addition to finances, may take decades to fully mount and implement), one might ask why the province would willingly create a process that significantly divests itself of decision-making power and land in order to accommodate broad recognition of Aboriginal title throughout British Columbia. It is not in their narrower economic or political interest to do so. Of course, the provincial or federal government could pass legislation that recognizes wide assertions of Aboriginal title. However, the Australian experience demonstrates how narrow such a course might be when it comes to proving Aboriginal title.<sup>151</sup>

Given the great challenges involved in establishing title, it is possible that the federal and provincial Crowns will continue to conduct themselves with a lightly modified status quo.<sup>152</sup> Governments might continue to choose to infringe Aboriginal title on a case-by-case basis and subject First Nations to costly legal defences while providing less than the full benefits available to Aboriginal peoples as contemplated under a broader reading of the *Tsilhqot'in Nation* decision.<sup>153</sup> While such a course

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*Anxieties: The Invention of Western Civilization* (New York: McMillan, 2012) at 219–36.

<sup>150</sup> For a general discussion of perverse incentives in Aboriginal title regimes, see David Ritter, *The Native Title Market* (Perth: University of Western Australia Press, 2009).

<sup>151</sup> See Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Sydney: Federation Press, 2008).

<sup>152</sup> The status quo, in terms of reallocating the general distribution of political power in Canada, has not been greatly altered through past Aboriginal decisions, Royal Commissions, or conflicts. See Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

<sup>153</sup> For a post-*Tsilhqot'in Nation* case where the provincial and federal Crown took this very approach, see *Sam v British Columbia*, 2014 BCSC 1783 at para 19, [2015] 5 WWR 390:

Nevertheless, I agree with the submissions of the defendants. *Tsilhqot'in* must be read in the context of what was at issue in that litigation. In my view, the court did not create a new principle of general application compelling negotiation in all aboriginal litigation. Rather, it commented that the honour of the Crown required the Crown to consult and accommodate

might not be costless to governments, as court decisions will often go against them, incrementalism is likely to hold many attractions in broader formal government circles.<sup>154</sup>

Of course governments could take more progressive paths, but there is a wealth of evidence to indicate that such moments are rare in the general scheme of things when considering Indigenous issues in Canada.<sup>155</sup> We often exist in a world of path dependencies.<sup>156</sup> One hundred and fifty years of harshly programmatic assimilation will not be easy to overturn. It is even possible that federal and provincial governments might silently conclude, as was once apocryphally attributed to President Andrew Jackson when the Cherokee Nation

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those claims in a manner proportionate to the strength of the case supporting the existence of the right or title claimed.

To understand this ruling in context, see *Tsilhqot'in Nation*, *supra* note 7 (stating that “[g]overnments are under a legal duty to negotiate in good faith to resolve claims to ancestral land” at para 18).

<sup>154</sup> See Kerry Wilkins, “Take Your Time and Do it Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy” (1999) 27:2 *Man LJ* 241.

<sup>155</sup> For a discussion of other missed opportunities in seizing the initiative when dealing with Indigenous issues in Canada, see Paul Tennant, “Aboriginal Rights and the Penner Report on Indian Self-Government” in Menno Boldt, J Anthony Long in association with Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 321; Dan Russell, *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver, BC: UBC Press, 2000) at 146–195; Courtney Jung, “Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society” in Arthur Paige, ed, *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge, UK: Cambridge University Press, 2011) 217; Fiona MacDonald, “Indigenous Peoples and Neoliberal ‘Privatization’ in Canada: Opportunities, Cautions and Constraints” (2011) 44:2 *Can J Political Science* 257.

<sup>156</sup> For an assessment of path dependencies, see Calvin Helin, *Dances with Dependency: Out of Poverty through Self-Reliance* (Vancouver, BC: Open Road Media, 2014). For alternative assessments of path dependencies for Aboriginal peoples, see Avigail Eisenberg, “Self-Determination versus Recognition: Lessons and Conclusions” in Avigail Eisenberg et al, eds, *Recognition versus Self-Determination: Dilemmas of Emancipatory Politics* (Vancouver, BC: UBC Press, 2014) 293 at 304–05.

succeeded in establishing title before the United States Supreme Court:<sup>157</sup> Chief Justice McLachlin has made her decision—now let her enforce it.

### 3. THE REJECTION OF INTERJURISDICTIONAL IMMUNITY AND *TERRA NULLIUS*

Third, the Supreme Court demonstrated the resilience of *terra nullius* in the *Tsilhqot'in Nation* case when it rejected the application of the interjurisdictional immunity doctrine to either subsection 91(24) of the *Constitution Act, 1867*<sup>158</sup> or subsection 35(1) of the *Constitution Act, 1982* when dealing with Aboriginal title.<sup>159</sup> Interjurisdictional immunity is a Canadian constitutional doctrine that prevents one level of government from encroaching on the core of the other level of government's jurisdictional grant of powers under sections 91 and 92 of the *Constitution Act, 1867*.<sup>160</sup> The application of this doctrine has often prevented provincial laws from applying to areas of federal authority if such application would affect the core of the federal grant of power.<sup>161</sup> For example, if interjurisdictional immunity were applied to Aboriginal title, this would preclude the provinces from using their power under

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<sup>157</sup> See Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Holt and Company, 1996) at 518.

<sup>158</sup> (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

<sup>159</sup> *Tsilhqot'in Nation*, *supra* note 7 at paras 150–151.

<sup>160</sup> See Dale Gibson, "Interjurisdictional Immunity in Canadian Federalism" (1969) 47:1 Can Bar Rev 40.

<sup>161</sup> See *Bell Canada v Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 179, 51 DLR (4th) 161. However, the modern trend in interjurisdictional immunity cases has been to apply it sparingly: see *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 24, 37, 67, 77, [2007] 2 SCR 3; *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134. For a commentary on the narrowing of interjurisdictional immunity in Canadian law, see Peter W Hogg & Rahat Godil, "Narrowing Interjurisdictional Immunity" (2008) 42 SCLR (2d) 623.

section 92 of the *Constitution Act, 1867* in matters that go to the core of “Indians and lands reserved for Indians” under subsection 91(24).<sup>162</sup>

Despite clear signals in earlier cases that provincial laws could not impair the status and capacity of “Indians and lands reserved for Indians” under federal authority,<sup>163</sup> the Supreme Court made new law and wrote that interjurisdictional immunity does not apply when considering the application of provincial laws to Aboriginal title lands.<sup>164</sup> As such, it held that “provincial laws of general application apply to lands held under Aboriginal title”.<sup>165</sup>

The Court’s conclusion cuts against a 250-year-old constitutional principle first outlined in the *Royal Proclamation of 1763*,<sup>166</sup> and accepted by many First Nations in central Canada in the 1764 Treaty of Niagara.<sup>167</sup> In so doing, the Supreme Court has eroded “The Aboriginal Constitution”.<sup>168</sup> The Aboriginal Constitution prevented local colonial

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<sup>162</sup> See *Delgamuukw*, *supra* note 4 at para 181.

<sup>163</sup> See *ibid*; *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915.

<sup>164</sup> See Nigel Banks & Jennifer Koshan, “Tsilhqot’in: What Happened to the Second Half of Section 91(24) of the Constitution Act, 1867?” (7 July 2014), *ABlawg* (blog), online: <[ablawg.ca/2014/07/07/tsilhqotin-what-happened-to-the-second-half-of-section-9124-of-the-constitution-act-1867](http://ablawg.ca/2014/07/07/tsilhqotin-what-happened-to-the-second-half-of-section-9124-of-the-constitution-act-1867)>; Nigel Bankes, “*Delgamuukw*, Division of Powers and Provincial Land and Resource Law: Some Implications for Provincial Resource Rights” (1998) 32:2 UBC L Rev 317; Kent McNeil, “Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction” (1998) 61:2 Sask L Rev 431.

<sup>165</sup> *Tsilhqot’in Nation*, *supra* note 7 at para 101.

<sup>166</sup> George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [*Royal Proclamation*].

<sup>167</sup> See *Chippewas of Sarnia Band v Canada* (2000), 51 OR (3d) 641 at paras 48–60, 195 DLR (4th) 135 (CA). For further information, see John Borrows, “Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation” (1994) 28:1 UBC L Rev 1; Alan Ojiiig Corbiere, “‘Their Own Forms of Which They Take the Most Notice’: Diplomatic Metaphors and Symbolism on Wampum Belts” in Alan Ojiiig Corbiere et al, eds, *Anishinaabewin Niiwin: Four Rising Winds* (M’Chigeeng, Ont: Ojibwe Cultural Foundation, 2014) 47 at 47–64.

<sup>168</sup> See Brian Slattery, “The Aboriginal Constitution” (2015) 67 SCLR (2d) 319.

governments from molesting or disturbing First Nations in their use and occupation of land.<sup>169</sup> Governments (like provinces) who are the closest to First Nations have the greatest incentive to benefit from Indigenous lands.<sup>170</sup> For example, British Columbia stands to gain the most from infringing on Aboriginal title; any diminishment of Aboriginal title accrues to their benefit.<sup>171</sup> Therefore, the law in North America developed to ensure that local governments had substantial obstacles placed in their path in dealing with First Nations.<sup>172</sup> The *Royal Proclamation* and 250 years of Canadian law, as affirmed in subsection 91(24) of the *Constitution Act, 1867*, interposed a more distant imperial or federal power between First Nations and colonial/state/local/provincial governments.<sup>173</sup> The exclusion of the provinces from dealing with First Nations was one of the few checks and

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<sup>169</sup> See Colin G Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford University Press, 2006) at 60–65; Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of their Territories* (D Phil Thesis, Wadham College at Oxford University, 1979) [*The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979)] at 261–82, 303–13, 315–28.

<sup>170</sup> See *United States v Kagama*, 118 US 375, 6 S Ct 1109 (1886) [cited to US] (noting that for Indigenous communities, “the people of the States where they are found are often their deadliest enemies” at 383).

<sup>171</sup> See *Tsilhqot'in Nation*, *supra* note 7 at paras 118–27.

<sup>172</sup> See Doug Sanders, “Native People in Areas of Internal National Expansion” (1974) 38:1 Sask L Rev 63 at 83. In the US context, this same principle applied in the leading cases of *Johnson v McIntosh*, *supra* note 4; *Cherokee Nation v State of Georgia*, 30 US (5 Pet) 1, 8 L Ed 25 (1831).

<sup>173</sup> See United Kingdom, *Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements.)* (London, UK: William Ball, Aldine Chambers, Paternoster Row, 1837) at 117:

The protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the executive government, as administered either in this country or by the governors of the respective colonies. This is not a trust which could conveniently be confided to the local legislatures. . . . [T]he settlers in almost every colony, having either disputes to adjust with the native tribes, or claims to urge against them, the representative body is virtually a party, and therefore ought not to be the judge in such controversies.

balances Indigenous peoples enjoyed under Canadian law throughout history. In fact, our country was partially formed on this basis.<sup>174</sup> While the 13 former American colonies rebelled against this principle in the American War of Independence,<sup>175</sup> governments north of the border have largely upheld the *Royal Proclamation* and Treaty of Niagara's principles—that is, until 26 June 2014, when the *Tsilhqot'in Nation* decision was released. With the *Tsilhqot'in Nation* decision, the Supreme Court of Canada has overturned the First Nations' *Magna Carta*.<sup>176</sup>

The time-tested principles of British and Canadian constitutional law were not followed in the *Tsilhqot'in Nation* decision because of a desire for administrative clarity and efficiency.<sup>177</sup> The *Royal Proclamation*, Treaty of Niagara, and subsection 91(24) of the *Constitution Act, 1867* purposely attempted to thwart provincial efficiencies in taking or developing Indigenous lands because of the potential they held for preying upon First Nations' vulnerabilities. While the Court has now substituted a justificatory process that provinces (and the federal government) must follow in infringing Aboriginal title, the provinces—with all their incentives to derive benefit from Indigenous lands—are now fully vested with infringement authority. The older check against provincial authority is diminished. First Nations would have been in a stronger position if provincial action in relation to their lands was prohibited, except through treaties or other agreements.<sup>178</sup>

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<sup>174</sup> See generally *Campbell v British Columbia (AG)*, 2000 BCSC 1123, 189 DLR (4th) 333. For commentary on this case, see Lisa Dufraimont, "Continuity and Modification of Aboriginal Rights in the Nisga'a Treaty" (2002) 35:2 UBC L Rev 455.

<sup>175</sup> See Calloway, *supra* note 169. For a broader historical context, see Alan Taylor, *The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution* (New York: Vintage, 2007).

<sup>176</sup> See *Calder*, *supra* note 56.

<sup>177</sup> *Tsilhqot'in Nation*, *supra* note 7 para 146.

<sup>178</sup> For a similar argument in the US context, see Michael C Blumm, "Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to

Section 35 infringement limits on provincial and federal governments are not likely to provide the same protections, for the reasons expressed herein. The erosion of a bedrock Canadian constitutional principle through the dilution of the *Royal Proclamation* and Treaty of Niagara does not represent a high-water mark in Canadian jurisprudence.<sup>179</sup>

#### 4. *TERRA NULLIUS* AND SO-CALLED LEGAL VACUUMS

There is a fourth way in which *terra nullius* reasoning permeates the *Tsilhqot'in Nation* case, which is also related to the Court's rejection of interjurisdictional immunity. This way involves the Court's failure to recognize that Indigenous peoples have jurisdictional and governmental authority in relation to their lands.<sup>180</sup> The Court concludes that "applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums".<sup>181</sup> This is a questionable proposition. A legal vacuum would not be created if the

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Treaty-Making and Modern Natural Resources Policy in Indian Country" (2004) 28:3 Vt L Rev 713.

<sup>179</sup> For an excellent discussion of the Royal Proclamation and Treaty of Niagara, see Nathan Tidridge, *The Queen at the Council Fire: The Treaty of Niagara, Reconciliation, and the Dignified Crown in Canada* (Toronto: Dundurn, 2015).

<sup>180</sup> In *R v Sioui*, [1990] 1 SCR 1025 at 1053, 70 DLR (4th) 427, Justice Lamer (as he then was) observed:

The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.

See also Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Supply and Services, 1993) [Royal Commission]. For a discussion of Indigenous constitutionalism and jurisdiction in a wider context, see Stephen Cornell, "Wolves Have a Constitution: Continuities in Indigenous Self-Government" (2015) 6:1 Intl Indigenous Policy J 8; Kristen A Carpenter & Angela R Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights" (2014) 102:1 Cal L Rev 173.

<sup>181</sup> *Tsilhqot'in Nation*, *supra* note 7 at para 147.

Court recognized the pre-existing and continuing nature of Indigenous jurisdiction along with Aboriginal title. Indigenous law exists in Canada.<sup>182</sup> The recognition of Aboriginal title is contingent on the recognition of Aboriginal social organization and its continuity down to the present day.<sup>183</sup> Thus, as noted, the very existence of Tsilhqot'in title recognizes that Aboriginal peoples effectively occupied land at the time sovereignty was asserted; it affirms that they have continuously retained such control, exclusive of other Aboriginal groups, down to the present day. The Court's own reasoning confirms a legal presence, rather than a vacuum, when it recognizes Aboriginal title.

Furthermore, Indigenous law and legal authority would be revitalized and become even more effective if the Court had taken broader steps to recognize this power.<sup>184</sup> Indigenous peoples could use their own laws to manage their lands, prevent environmental degradation, and address other misuses of what has wrongly been considered provincial Crown lands for so many years.<sup>185</sup> If there was a concern about interim transitional authority between the time when provincial laws would cease to apply and when First Nations laws would take effect, the Court could have created an order to this effect.<sup>186</sup>

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<sup>182</sup> See Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Ottawa: Supply and Services Canada, 2006).

<sup>183</sup> See *supra* notes 70–98.

<sup>184</sup> See Royal Commission, *supra* note 180.

<sup>185</sup> In fact, after the *Tsilhqot'in Nation* decision, the Nation immediately took steps to create conservation areas through a tribal park. See *supra* note 108. An emerging example of Indigenous peoples using their own laws to enhance sustainability is found in the Coastal Guardian Watchman Network, online: <coastalguardianwatchmen.ca>. This has also happened in the US context. See e.g. Great Lakes Indian Fish and Wildlife Commission, online: <www.glifwc.org>; Northwest Indian Fisheries Commission, online: <nwifc.org>.

<sup>186</sup> This was the position submitted to the Supreme Court of Canada by the Indigenous Bar Association. See *Tsilhqot'in Nation*, *supra* note 7 (Factum of the Intervener, the Indigenous Bar Association in Canada). By way of disclosure, I note I was involved in drafting this intervention as an advisor to the Indigenous Bar Association.

The Supreme Court's reasoning seems to imply that "lawlessness" would result if provincial laws of general application did not apply to regulate Aboriginal title lands. This approach utterly fails to recognize that Indigenous peoples have (and could further create) their own laws and procedures for dealing with these issues.<sup>187</sup> The Court's assumption of a legal vacuum is unfortunately consistent with a version of the *terra nullius* doctrine that discriminatorily denigrates Aboriginal peoples. It implies that legal vacuums exist wherever Indigenous rights exist, and that these vacuums must be filled by the Crown's overriding and undergirding interests.<sup>188</sup> This is a sad commentary on the state of the law in Canada. It fails to create space for Indigenous peoples to democratically generate relationships with their lands and others in a manner consistent with the country's highest values.<sup>189</sup>

## CONCLUSION

This brief essay has suggested that Indigenous peoples should not accept the Court's word at face value when it says that the doctrine of *terra nullius* does not apply in Canada. Despite the decision's many strengths, the *Tsilhqot'in Nation* case is implicitly saturated with the prejudice that marks the doctrine of discovery. While Indigenous peoples now have the possibility of owning and using lands in British Columbia for a wide variety of purposes, the Crown still retains underlying title and

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<sup>187</sup> For a broad discussion of Indigenous law's regenerative power, see Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: Roots to Renaissance" in Markus D Dubber & Tatjana Hörnle, eds, *Oxford Handbook of Criminal Law* (London, UK: Oxford University Press, 2014) 225 at 225.

<sup>188</sup> A similar critique is developed in Minnawaanagogiigook (Dawnis Kennedy), "Reconciliation Without Respect?: Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver, BC: UBC Press, 2007) 77.

<sup>189</sup> A discussion of Canadian constitutional law that develops higher values relative to Indigenous participation in the constitutional order is found in Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2015); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, UK: Cambridge University Press, 1995).

paramount sovereign authority over these lands. These propositions are the echo and remnants of *terra nullius*. Crown power can be directly traced to discriminatory assumptions rooted in European sovereign assertions when the Crown “discovered” Canada. These assumptions are repeated and applied in the *Tsilhqot'in Nation* case.

In making this assessment, I trust that readers will understand that the Supreme Court of Canada has taken a significant step in the road to decolonization by recognizing that Aboriginal title exists in Canada. Its conclusion is very positive for Indigenous peoples in the broader context of the dispossession they have encountered. As was stated at the outset of this paper, the *Tsilhqot'in Nation* case is one of the most important Indigenous rights cases the world has seen. This is cause for celebration and appreciation. Tsilhqot'in people now own and control their land in the claim area and can use it for a wide variety of purposes. If Aboriginal peoples claim title through some “official” process, they now have a broader array of remedies to enforce that interest. They can bring injunctions, claim damages, and secure orders for the Crown to engage in proper consultation and accommodation of Aboriginal title.<sup>190</sup> If Aboriginal peoples establish title, they can also bring legal suits to secure all the usual remedies for a breach of land rights, as long as they are adapted to the special nature of Aboriginal peoples' relationship to land. This is all very powerful stuff. The Court even suggested it might cancel provincial projects if governments did not properly discharge their duties to First Nations at earlier points in their dealings.<sup>191</sup> These are significant remedies that exist much more clearly as a result of the *Tsilhqot'in Nation* case.

At the same time, this brief comment highlights that one powerful step towards a better relationship does not a journey make.<sup>192</sup> The Crown and courts still have much baggage to jettison in constructing a

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<sup>190</sup> See *Tsilhqot'in Nation*, *supra* note 7 at paras 89–92.

<sup>191</sup> See *ibid* at para 92.

<sup>192</sup> See Jeffery G Hewitt, “Reconsidering Reconciliation: The Long Game” (2014) 67 SCLR (2d) 259.

jurisprudence that clearly rejects that Canada was *terra nullius* when Europeans arrived. The *Tsilhqot'in Nation* decision demonstrates that there is still a long distance to travel in this regard. Canadian law will remain problematic for Indigenous peoples as long as it continues to assume away the underlying title and overarching governance powers that First Nations possess. However, a powerful seed that could expand the Supreme Court's future vision has been planted; it now needs to be given room to grow much further.

If the assertion of European sovereignty did not extinguish Aboriginal title, neither did it extinguish Aboriginal jurisdiction and authority over such lands. The same continuity of social organization that enabled Aboriginal people to establish title should also undergird the recognition of Aboriginal governance in subsection 35(1) of the *Constitution Act, 1982*.

So-called underlying Crown title is a fiction.<sup>193</sup> It is a burden on Aboriginal title that must be removed. This comment has pointed out areas that need greater attention from the Supreme Court of Canada in order to extend its rejection of *terra nullius*. More work is necessary to expunge all discriminatory vestiges of underlying Crown title that have submerged Indigenous sovereignty. Until that day occurs, Canada remains a deeply colonial state built on the vilest of discriminatory tenets. Despite the cause for cheering, much work remains to be done.

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<sup>193</sup> See Nicholas Blomley, "Disentangling Law: The Practice of Bracketing" (2014) 10 Annual Rev L & Social Science 133 (noting that "[l]egal fictions such as the doctrine of discovery or Crown radical title entail a parsing of history and geography" at 138).