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THE *TSILHQOT'IN* DECISION: LOCK, STOCK AND BARREL, PLUS SELF-GOVERNMENT

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I. INTRODUCTION

"Lock, stock and barrel" is a good way to describe the meaning of Aboriginal title in Canada following the 26 June 2014 decision of the Supreme Court of Canada (SCC) in the *Tsilhqot'in*[1] case. British Columbia's First Nations[2] have long asserted that they own their traditional territories lock, stock and barrel, and they now appear to have been vindicated. Their assertions have been upheld for those lands where they can establish Aboriginal title. This unanimous decision is a clear success for First Nations, and for the Tsilhqot'in people in particular. It clarifies a number of ambiguities in Canadian law regarding the legal nature and scope of Aboriginal title that had arisen since the 1973 *Calder*[3] decision, and it does much of the hard work needed to recalibrate the relationship between First Nations and the Crown for the 21st century.

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[1] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*].

[2] The term "First Nations" is used here in reference to Indigenous societies and nations who, at the time of the assertion of Crown sovereignty, occupied the area now known as "Canada" and were self-governing. It does not equate with the political or legal units known as "Indian bands", as that term is defined by the *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. In the *Tsilhqot'in* case, the First Nation comprised "a grouping of six bands sharing common culture and history": *supra* note 1 at para 3.

[3] *Calder v Attorney-General of British Columbia*, [1973] SCR 313, [1973] 4 WWR 1.

The *Tsilhqot'in* decision is also important in the development of the law on the inherent right of self-government. Although it does not address self-government per se, there are important elements of this decision that are supportive of a significant range of First Nations governance powers. The Court's findings about the nature and scope of Aboriginal title, and the associated right to make decisions collectively regarding Aboriginal title lands and resources,[4] additionally offer a solid legal basis for the re-establishment of governance structures, decision-making processes, and laws that better reflect the First Nation's traditions and values.

The focus and purpose of this paper is to examine how this Court's definition of "Aboriginal title" relates to self-government, and to demonstrate how the constitutionally protected right of collective decision making to manage communally owned lands and resources creates space for robust forms of Indigenous governance. The reconfirmation that this right is not limited to traditional activities means that this space can accommodate a meaningful range of subject matters that are very relevant to 21st century governance, albeit perhaps not the "full box" to which many First Nations aspire. First Nations governments (as distinct from Band Councils) could deal with a broad range of issues that are aspects of contemporary governance related to the management and use of lands and resources, including conservation and for-profit commercial activities. This has implications throughout Canada, given that a First Nation's interests in its reserve lands are most often of the same nature as those in unceded Aboriginal title lands.[5]

An important assumption of this paper is that the right of a distinct people to make decisions collectively, about how they live and how they use their communally owned lands and resources, is essentially a right of

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4 See *Tsilhqot'in*, *supra* note 1 at paras 15, 67, following *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 117, 153 DLR (4th) 193 [*Delgamuukw*].

5 See *Guerin v R*, [1984] 2 SCR 335 at 379, 13 DLR (4th) 321 [*Guerin*]. There may be rare cases where the First Nation community was located on a reserve outside of its traditional territories.

self-governance.[6] When unpacked, this exclusive right to make decisions regarding the use and management of Aboriginal title lands[7] will be found to include a broad range of specific subject matters rationally linked to aspects of Aboriginal title. This specificity can avoid the concern expressed by the Court in the *Pamajewon* decision about self-government claims that may be "overly broad".[8] Constitutional protection of Aboriginal rights, which are now understood to include the right of collective decision making associated with communally held rights and property, substantially constrains federal and provincial laws and actions that would adversely interfere with a First Nation's preferred way of exercising its rights. Given that Aboriginal title includes the exclusive right to decide collectively how to use and manage its Aboriginal title lands and resources, the constitutional protection

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6 Kent McNeil, in a number of scholarly articles, argues that the nature of Aboriginal title necessarily gives rise to a right of self-government that is jurisdictional—in the nature of public governance—as well as proprietary, and that this right probably underlies all Aboriginal rights given their collective nature. See e.g. Kent McNeil, "Aboriginal Rights in Transition: Reassessing Aboriginal Title and Governance" (2001) 31:1-2 American Rev Can Studies 317; "Self-Government and the Inalienability of Aboriginal Title" (2002) 47:3 McGill LJ 473. There are many other scholarly, legal and public policy analyses discussing the sources and continuing existence of the Aboriginal right of self-determination and self-government. See e.g. Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: The Commission, 1996) [RCAP, *Restructuring the Relationship*]; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) ch 4, 5 [Borrows, *Indigenous Constitution*]; John Borrows, "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38:2 UBC L Rev 285 [Borrows, "Tracking Trajectories"].

7 See *Tsilhqot'in*, *supra* note 1 at para 88.

8 *R v Pamajewon*, [1996] 2 SCR 821 at 837, 138 DLR (4th) 204 [*Pamajewon*]. It is the author's view that the *Pamajewon* Court missed an opportunity to enhance the coherence of the law related to Aboriginal rights when it relied on the analysis in *R v Van der Peet* [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*, cited to SCR], rather than the justification test in *R v Sparrow* [1990] 1 SCR 1075 at 1112–13, 70 DLR (4th) 385 [*Sparrow*, cited to SCR], when it analyzed the self-government claims in that case. This is elaborated on later in this paper.

offered by section 35 of the *Constitution Act, 1982* clears and protects space for substantial Indigenous governance.[9] Furthermore, the Crown's fiduciary duty constrains it from interfering with the First Nation's preferred way of exercising that right.

II. CANADIAN LAW ON THE NATURE OF ABORIGINAL TITLE

The *Tsilhqot'in* decision consolidates and updates Canadian law on Aboriginal title and the constitutional protection offered by section 35 of the *Constitution Act, 1982*. It removes many of the ambiguities and inconsistencies that had arisen from *obiter* and dissenting views and, by virtue of its unanimity, it reduces the potential for future misinterpretation. This paper argues that the *Tsilhqot'in* decision presents a more robust form of Aboriginal title than was articulated by Lamer CJC for the majority in *Delgamuukw*,[10] and a more stringent test for justification of infringements than was applied in that earlier case (referred to as the *Gladstone* modified test).[11]

A. NATURE, SCOPE AND PROOF OF ABORIGINAL TITLE

Aboriginal title can cover substantial tracts of land. It is not limited to small, intensively used plots of land used for village sites or fishing stands.[12] Where a First Nation establishes that it had continuous, exclusive occupation of defined territory prior to the Crown's assertion of sovereignty, and where that occupation was sufficient to equate with common law requirements to establish title by occupation—taking into account the First Nation's perspective—Aboriginal title can be established.[13]

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9 See *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.

10 See *Delgamuukw*, *supra* note 4, at paras 111, 117, 119, 166.

11 See *ibid* at paras 164–67.

12 See *Tsilhqot'in*, *supra* note 1 at para 50.

13 See *ibid* at paras 33–50.

Aboriginal title is now understood to confer the following rights: exclusive use and occupancy of the land; control of the land and its resources, including the exclusive right to decide how to use, manage, and control the lands and resources;[14] the right to benefit from those uses, acquire profits and other forms of economic benefits subject to the uses being consistent with the group nature of Aboriginal title and the interests of future generations of the First Nation;[15] and the right to deny others the use or benefits of the land.[16] This right to decide how to use the land was not described as "exclusive" in *Delgamuukw* thus, by implication, it was shared with others (e.g., the Crown). The right to exclude others is only implied by the term "right to exclusive use and occupation of land"[17] in *Delgamuukw*, but this is stated expressly in *Tsilhqot'in*. It is an important piece in analyzing the extent of Tsilhqot'in control over their title lands. The Court reiterated that the use of the land is not limited to practices, customs, and traditions integral to the distinctive culture of the First Nation.[18] As with Aboriginal rights generally, the beneficial interest is held by the First Nation collectively, and the right to make decisions collectively about the use of those lands is a necessary incident of the communal aspect of Aboriginal title.

The Court expressly rejected the notion that Aboriginal title provides nothing more than a right of first refusal for resource exploitation,[19] and held that "the Crown does not retain a beneficial interest in Aboriginal title land".[20] On the contrary, Aboriginal title

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14 See *ibid* at para 88.

15 See *ibid* at para 67.

16 See *Tsilhqot'in*, *supra* note 1 at paras 2, 67–76.

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

18 *Tsilhqot'in*, *supra* note 1 at paras 73, 75, 88, citing *Delgamuukw*, *supra* note 4 at paras 111, 117, 119, 166.

19 See *Tsilhqot'in*, *supra* note 1 at para 94.

20 *Ibid* at para 70 [emphasis added]. This means that the Crown has no beneficial interest in subsurface resources, such as minerals, oil, and gas—an important distinction between Aboriginal title lands and lands held in fee simple.

confers all of the benefits of privately held land owned collectively, with the additional feature that it is constitutionally protected.[21] This is an implicit rejection of Lamer CJC's version of Aboriginal title, where the Crown could issue permits to third parties to exploit the resources on Aboriginal title lands provided that it accommodates the Aboriginal peoples' participation in developing these resources, and that the prior occupation of Aboriginal title lands is reflected in agricultural fee simple grants, as well as in the leases and licenses for forestry and mining projects.[22]

Lamer CJC's version of Aboriginal title conceives of the right—at most—as being first in line to exploit the resources, with the Crown holding the power to then offer it to others if the Aboriginal titleholders choose not to do so. The *Tsilhqot'in* formulation makes it clear that the rights are held exclusively by the First Nation, and the Crown has no beneficial interest to convey to third parties if the Aboriginal title holders choose not to embrace the Crown's development plans. It has no power or authority as an owner of the lands or resources—only a qualified ancillary power to interfere with Aboriginal title as a government acting in the public interest (a public that includes, and may be required to give priority to, the Aboriginal title holders). This means that the power of federal and provincial governments to interfere with those lands and uses is significantly constrained, to ensure that the Crown deals fairly and honourably with the current generation of Tsilhqot'in people and does not undermine the interests of future generations.[23]

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21 *Ibid* at para 73–74, 76.

22 *Delgamuukw*, *supra* note 4 at para 167. See also *ibid* at paras 167–69.

23 See *Tsilhqot'in*, *supra* note 1 at paras 86, 88. As the Court expressly states, Aboriginal title—as with other Aboriginal rights—is not absolute and can be infringed by the Crown, but this is subject to the Crown meeting a stringent justification test and only in the event it can demonstrate a substantial and compelling public interest to be served by infringing Aboriginal title. See *ibid* at 88.

B. THE ASSOCIATED RIGHT TO MAKE DECISIONS COLLECTIVELY

Canadian courts have long recognized First Nations as traditionally self-governing, with legal systems that include laws related to a range of matters including land tenure. This is to say that recognition of First Nations as traditionally self-governing, with their own legal systems and governing structures, is not a 21st century invention. For example, in 1867, the Court recognized the existence of Cree law in the Athabaskan region in the early period of French and English colonization, and gave effect to the indigenous law in determining the validity of a marriage and the legitimacy of the children of that marriage.[24] More recently, in *Delgamuukw*, the Gitksan *adaakw* and the Wet'suwet'en *kungax* were recognized as the sacred oral traditions (songs, dance, and stories) of their ancestors that tie them to their lands and territories.[25] Accepted as "a sacred 'official' litany, or history, or recital of the most important laws, history, traditions, and traditional territory of a House",[26] they were entered into evidence and relied on as a component of—and as proof of—the existence of a system of land tenure law internal to the Gitskan and Wet'suwet'en, which covered the whole territory claimed.[27]

In the *Tsilhqot'in* decision, the Court took note of the comments of the BC Court of Appeal in the *Delgamuukw* case, where Lambert JA, in

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[24] See *Connolly v Woolrich* (1867), 17 RJRQ 75 at 77–78, 11 LC Jur 197 (QCCS) [*Connolly*]. In this case, Monk J stated that "the principle of public law applied, viz., that in the case of a colony . . . the law of the parent states then in being was immediately and *ipso facto* in force in these new settlements": *ibid* at 78. Canadian courts have also recognized the relationship between First Nations and the British Crown as nation-to-nation. See e.g. *R v Sioui*, [1990] 1 SCR 1025 at 1063, 70 DLR (4th) 427 (Lamer J, as he then was).

[25] See *Delgamuukw*, *supra* note 4 at para 13.

[26] *Delgamuukw v British Columbia*, [1991] 3 WWR 97 at 261, 79 DLR (4th) 185 (BCSC).

[27] See *Delgamuukw*, *supra* note 4 at paras 93–95. It goes without saying that Canadian courts have not uniformly recognized First Nations laws and systems of governance, particularly since the enactment of the first *Indian Act*. For a review of some of the ebb and flow in Canadian jurisprudence in this area, see Borrows, "Tracking Trajectories", *supra* note 6.

dissent, concluded that at the time the Crown claimed sovereignty, the Gitksan and Wet'suwet'en people had rights of self-government and self-regulation.[28] Lambert JA opined that while those rights may have been diminished by the assertion of British sovereignty, the rights that continue are protected by section 35 of the *Constitution Act, 1982*.[29] Justice Lambert would have declared that the Gitksan and Wet'suwet'en had a continuing right of self-government and self-regulation, that this right existed in modern form, and was recognized by and incorporated into the common law after 1846, to the extent that it was not inconsistent with British sovereignty or "any rights that are repugnant to natural justice, equity and good conscience".[30] Furthermore, Justices Lambert and Hutcheson shared the view that the present aboriginal rights of self-government and self-regulation would include rights "exercisable through their own institutions to preserve and enhance their social, political, cultural, linguistic and spiritual identity."[31]

There are numerous references in the *Tsilhqot'in* decision to the "aboriginal perspective": When determining the nature of a First Nation's interest in its traditional territories and the contemporary meaning of Aboriginal title, these concepts *must* be understood by reference to both common law and aboriginal perspectives.[32] This reference to Aboriginal perspectives is a direct reference to the reasoning of Lamer CJC (as he then was) in *Delgamuukw*:

> [T]he aboriginal perspective on the occupation of their lands can be gleaned from their traditional laws . . . . [I]f, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be

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28 *Delgamuukw*, *supra* note 4 at para 58–60

29 See *ibid* at para 59.

30 *Ibid* at para 63.

31 *Delgamuukw*, *supra* note 4 at para 71. See also *ibid* at para 65. The dissenting views of the BCCA were not applied in the *Delgamuukw* case, but neither were they rejected or criticized by the SCC. That Court decided that the self-government claim had been stated too broadly, and counsel withdrew the claim at that level in the face of the contemporaneous *Pamajewon* decision.

32 See *Tsilhqot'in*, *supra* note 1 at para 14.

> relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.[33]

The admission of Indigenous laws and the application of First Nations land tenure systems by the SCC in the 2014 *Tsilhqot'in* decision was not a novel event. It has been part of the common law of Canada since at least the late 20th century.[34] The notion that Aboriginal title is derived from both Indigenous systems of law and the common law is seen as a key element of its *sui generis* character, as is the fact that Aboriginal title arises prior to the assertion of Crown sovereignty, while other forms of title arise *ex post facto* from the Crown's assertion of sovereignty.[35] The SCC has also acknowledged that the "aboriginal perspective" is a product of Indigenous systems of governance.[36]

Indigenous laws and legal systems can and must be admitted and taken into account by Canadian courts when determining claims of Aboriginal title, and they must be given equal weight to the common law.[37] This is another element of the *Tsilhqot'in* decision that moves Canadian law on Aboriginal title well beyond the Court's 1997 *Delgamuukw* formulation. The task, the Court stated, is to identify how rights and interests possessed under Indigenous law and custom can properly find expression in common law terms.[38] This must be done with care, to ensure that the Aboriginal perspective is not lost or distorted by "forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully

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33 *Delgamuukw*, *supra* note 4 at para 148, citing *Van der Peet*, *supra* note 8 at 546.

34 See *Delgamuukw*, *supra* note 4 at para 94, 148, citing *Van der Peet*, *supra* note 8 at 551.

35 See *Delgamuukw*, *supra* note 4 at paras 112, 114.

36 See *ibid* at paras 59, 84, 148.

37 See *Tsilhqot'in*, *supra* note 1 at para 14.

38 See *ibid* para 31, citing *Western Australia v Ward* [2002] HCA 28 at para 28, 213 CLR 1.

translating pre-sovereignty Aboriginal interests into equivalent modern legal rights."[39]

Another key element of the *sui generis* nature of Aboriginal rights and title is their collective ownership, which gives rise to collective decision making.[40] This collective decision making is an essential element and an expression of Indigenous governance.

Although the Court steadfastly avoided the language of self-government or First Nations jurisdiction in the *Tsilhqot'in* decision, it affirmed First Nations' rights to make decisions collectively for the purpose of controlling and managing title lands and resources. The right of collective decision making has been affirmed by a number of Canadian courts as a necessary incident of communally held Aboriginal rights and title.[41] As an Aboriginal right, it is protected by section 35.

Canadian courts have repeatedly demonstrated their acceptance of the historical fact of First Nations self-government.[42] Nevertheless, other than encouraging First Nations and the Crown to negotiate the details among themselves, the SCC has yet to directly acknowledge it as an

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

40 See *Delgamuukw*, *supra* note 4 at para 115.

41 See e.g. *Tsilhqot'in*, *supra* note 1; *Delgamuukw*, *supra* note 4 at para 115; *Campbell v BC (AG)* 2000 BCSC 1123 at para 86, 189 DLR (4th) 333.

42 See e.g. *Connolly*, *supra* note 24 (the Court accepted the fact that the Indigenous society was capable of making laws, lived by those laws to govern their affairs, and then gave priority to those laws in the case of solemnization of marriage); *Mitchell v MNR* 2001 SCC 33 at para 9, [2001] 1 SCR 911 [*Mitchell*] (acknowledges that Aboriginal peoples lived in organized, distinct societies with their own social and political structures); *Baker Lake (Hamlet) v Minister of Indian Affairs and Northern Development*, [1980] 1 FC 518 at para 83, 107 DLR (3d) 513 (held that the Inuit people comprised an "organized" (i.e., self-governing) society). See also *Pamajewon*, *supra* note 8 at 839–40, citing *R v Pamajewon* (1994), 21 OR (3d) 385, 120 DLR (4th) 475 (ONCA) (Osborne J in the Ontario Court of Appeal decision assumed that the Shawanaga First Nation and Eagle Lake Band had some rights of self-government that existed in 1982). For more detailed scholarly discussion of judicial treatment of claims to Aboriginal self-government, see Borrows, "Tracking Trajectories", *supra* note 6.

existing right and to opine on the nature and scope of that right, other than to encourage First Nations and the Crown to negotiate the details among themselves.

The language used in the *Delgamuukw* and *Tsilhqot'in* decisions, regarding the existence of Indigenous laws and systems of governance, suggests judicial openness to finding an existing right of self-government.[43] The fly in the Canadian legal ointment is the *Pamajewon* decision, particularly, its assertion that claims to self-government are no different from other claims to aboriginal rights and "must, as such, be measured against the same standard."[44] The standard that was applied in that case was drawn from the *Van der Peet* decision on Aboriginal fishing rights, expressed as follows: "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[45]The *Pamajewon* Court held that a claim to "a broad right to manage the use of their reserve lands" would cast the Court's inquiry at a level of excessive generality.[46] As will be discussed later in this paper, this test is highly problematic for a right such as

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[43] See also comments of Binnie J in his minority decision in *Mitchell*, *supra* note 42 at paras 128–36. Binnie J expressed a willingness to consider the RCAP conception of shared sovereignty within the Canadian constitution, although, he ultimately held that Aboriginal sovereignty could not extend to matters essential to Canadian sovereignty internationally. See *ibid.* In light of the limitations expressed in this decision, Gordon Christie advises First Nations to focus their efforts, in the short to medium term, on achieving internal sovereignty. See Gordon Christie, "Aboriginal Nationhood and the Inherent Right to Self-Government" (Research Paper for the National Centre for First Nations Governance) (Vancouver, BC: National Centre for First Nations Governance, 2007). Borrows points out that contemporary treaty-making demonstrates the Crown's implicit acceptance of First Nations' jurisdiction over external matters (external to the First Nations, given that they would not be able to represent or bind Canada in its external relations). See Borrows, "Tracking Trajectories", *supra* note 6 at 297.

[44] *Supra* note 8 at para 24.

[45] *Van der Peet*, *supra* note 8 at 549 [emphasis added].

[46] *Pamajewon*, *supra* note 8 at 834.

governance that must be fluid enough to enable a society to address new challenges as they arise over time. It is at odds with the reasoning in *Delgamuukw* that rights to use and manage Aboriginal title lands are not limited to those practices integral to the distinctive culture of the First Nation, and it is inconsistent with the reasoning in *Tsilhqot'in* that section 35 protects First Nations' preferred ways of exercising their rights.

The unanimous Court in *Tsilhqot'in* preferred and adopted the reasoning in *Delgamuukw* that the scope of rights associated with Aboriginal title, and the corresponding right to make decisions collectively with respect to the exercise of those rights, is not limited to "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[47] It now appears to be settled Canadian law that Aboriginal title gives the First Nation a broad right to use their Aboriginal title lands and to decide collectively on how to manage those lands, resources, and activities (and, arguably, other Aboriginal rights that are by their nature communally held).

C. CONSTRAINTS ON CROWN ENCROACHMENT ON ABORIGINAL TITLE LANDS AND RESOURCES

The legal framework for Aboriginal title lands articulated in the *Tsilhqot'in* decision takes a 180 degree turn away from the reasoning set out by the SCC in 1887 in the *St Catherines Milling* case, where the Aboriginal interest was described merely as a "usufructuary" right and a burden on the Crown's interest.[48] Aboriginal title in contemporary

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[47] *Van der Peet*, *supra* note 8 at 834.

[48] *St Catharines Milling and Lumber Co v R* (1887), 13 SCR 577 at 601, 616, 1887 CanLII 3 [*St Catharine's Milling*]. The SCC decision was then appealed to the Judicial Committee of the Privy Council (UK) in *St Catharines Milling & Lumber Co v The Queen*, [1888] UKPC 70, 14 App Cas 46. Borrows describes this process as selective invocation of previous decisions to allow for a broader reading of Aboriginal rights. See John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701 at 709–11 [Borrows, "Durability of Terra Nullius"]. This is one of the techniques courts use to shift the

Canada is now understood to provide to First Nations a range of exclusive, constitutionally protected proprietary interests more comprehensive than those attaching to fee simple title, in which the Crown has no beneficial interest. The Court, however, clearly states that Aboriginal title lands are not immune from federal or provincial jurisdiction.[49] Pursuant to subsection 92(13) and section 92A of the *Constitution Act, 1867*, the province has jurisdiction to regulate lands and land use throughout the province.[50] Notwithstanding exclusive federal jurisdiction for "Indians and Lands reserved for the Indians" pursuant to subsection 91(24), provincial laws of general application will apply to Aboriginal title lands. The Court unambiguously rejected the argument that provincial jurisdiction was constrained by the doctrine of interjurisdictional immunity, whereby Aboriginal lands, being a matter within exclusive federal jurisdiction, would be immune from provincial laws. In this case, the contest was not between the application of valid federal and provincial laws, it was a question of the extent to which valid provincial laws could encroach upon Aboriginal title lands and associated Aboriginal rights.[51]

One must begin the analysis of the provincial authority to encroach by determining if the provincial laws in question are valid. The *vires* of provincial law is determined by two elements of the constitutional law of Canada: the division of powers (between federal and provincial governments), and the effect of section 35 of the *Constitution Act, 1982*. The *Tsilhqot'in* decision does not reinterpret the division of powers and does not expand provincial jurisdiction to make "Indians and lands

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direction of the law. It is essential to the evolution of the common law and can improve the law by discarding what no longer works, fails to achieve justice, or is out of date. For example, bylaws that prohibit the baring of belly buttons in public have fallen into disuse. Legal institutions stop applying out-of-date laws that are no longer consistent with contemporary notions of justice or morality.

[49] See e.g. *Tsilhqot'in*, *supra* note 1 at paras 151–52.

[50] See *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

[51] See *Tsilhqot'in*, *supra* note 1 at paras 141, 144.

reserved for Indians" a matter of shared jurisdiction. To the extent that provincial laws single out Indians or lands reserved for Indians, they will be *ultra vires* and invalid.

The key legal constraint on valid provincial legislation—*vis-à-vis* Aboriginal rights—is the protection offered by section 35 of the *Constitution Act, 1982*. The essence of that protection is found in the justification test to be met by the Crown. Applying the justification test,[52] the Court determined that valid provincial forestry legislation had infringed Tsilhqot'in Aboriginal title and the Crown had failed to justify that infringement.

The burden is on the First Nation to establish that provincial legislation or action has infringed an Aboriginal right. Infringement occurs when there is a "meaningful diminution of the right", determined by considering the following factors:

1. whether an unreasonable limitation is imposed;
2. whether undue hardship is imposed; or
3. whether the right holders are denied "their preferred means of exercising the right".[53]

All three factors must be considered: for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that Aboriginal title has not been infringed.[54] If the First Nation is denied its preferred way of exercising its right, infringement will have occurred. As will be discussed later, this will provide protected space for First Nations to choose how to use and manage their Aboriginal title lands, including if and when to develop their lands and resources. This will also provide protected space for the associated First Nations laws, to the extent that such laws or rules are the product of the exercise of their right to decide collectively. It is further argued that this will protect First Nations structures, procedures, and

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52 That test was first articulated in *Sparrow*, *supra* note 8 at 1112–13.

53 *Tsilhqot'in*, *supra* note 1 at para 104 [emphasis added].

54 *Ibid*, citing *R v Gladstone*, [1996] 2 SCR 723 at para 43, 137 DLR (4th) 648 [*Gladstone*].

institutions of governance as the manifestation of their preferred way of exercising their exclusive right of collective decision making.

Once an infringement has been established, the Crown must meet the justification test and demonstrate compliance with its fiduciary duty to the title-holders.[55] Valid federal or provincial legislation can infringe rights protected by section 35, including the rights flowing from Aboriginal title, only if it furthers a "compelling and substantial" public purpose and is consistent with the Crown's fiduciary relationship with the title-holders.[56] To be substantial and compelling, the public purpose must "further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective."[57]

The unanimous Court in *Tsilhqot'in* did not follow the reasoning of Lamer CJC in *Delgamuukw* regarding the means by which the Crown could justify infringement of Aboriginal title. For example, while both Courts upheld the requirement that infringement be in pursuit of a substantial and compelling public interest, they differ markedly with regard to the scope for Crown action where the Aboriginal title holders do not agree. Lamer CJC in *Delgamuukw* held that:

> [i]f the Crown's fiduciary duty requires that aboriginal title be given priority, then . . . [w]hat is required is that the government demonstrate 'both that the process by which it allocated the resource and the actual allocation of the resource that results from that process reflect the prior interest' of the holders of aboriginal title in the land. . . . [T]his might entail, for example, that governments accommodate the participation of aboriginal peoples in the development of the resources . . . that the conferral of fee simples for agriculture, and of leases and licenses for forestry and mining reflect the prior occupation of aboriginal title lands,

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55 See *Tsilhqot'in*, *supra* note 1 at para 119, citing *Sparrow*, *supra* note 8 at 1109.

56 See *ibid* at para 88.

57 *Ibid* at para 82. See also *ibid* at para 13.

> that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced.[58]

The suggestion that Aboriginal title would leave space for the provincial government to impose licensing requirements and levy fees on Aboriginal title holders for the use of their own lands and resources, and merely include them in the allocation of their resources to others, indicates that Lamer CJC's notion of exclusive use and occupation of Aboriginal title lands varies considerably from how one might conceive of an exclusive right to use and occupy privately owned lands in fee simple. It is, arguably, this aspect of the *Delgamuukw* formulation of Aboriginal title that is rejected in the clear statements in *Tsilhqot'in* that the Crown has no beneficial interest in Aboriginal title lands and that Aboriginal title involves more than a mere right of first refusal.

The *Tsilhqot'in* formulation of the justification test is also more robust than that set out in *Delgamuukw*. Justification, per *Tsilhqot'in*, imposes the following constraints on the Crown:

> [T]he Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve [its purpose] (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). . . .
>
> . . . [T]he Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the

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[58] *Delgamuukw*, *supra* note 4 at para 167, citing *Gladstone*, *supra* note 54 at para 62 [emphasis added] (referred to as the "altered approach to priority laid down in *Gladstone*": *ibid*).

> special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title. . . .
>
> . . . [I]f legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.[59]

In assessing BC's impugned forestry legislation, the Court noted that the legislation purported to authorize provincial grants of property interests to third parties in portions of Tsilhqot'in Aboriginal title lands and resources.[60] It held that a direct transfer of Aboriginal property rights to a third party is a serious infringement that must be justified in the absence of the First Nation's consent; such an infringement would not be lightly justified.[61] This warning suggests that the list of justifiable legislative objectives adopted from *Delgamuukw*[62] is highly qualified. If the grant of timber permits cannot be lightly justified, it can reasonably be assumed that the taking of land without consent for hydroelectric projects and the settlement of foreign populations will also be difficult to justify—particularly when there are reasonable alternatives available. Failure to justify infringements can give rise to a full suite of remedies that include compensation, injunctive relief, and cancellation of the Crown's project.[63]

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59 *Supra* note 1 at paras 87–92. This proportionality test sets a high bar for the Crown to justify major development projects, such as BC's proposed Site C Dam, notwithstanding the purported public benefits. In that case, benefits flow to non-Aboriginal populations a considerable distance from the site of the dam, while the Aboriginal rights holders bear the adverse consequences. The panel challenged the necessity of that project and identified feasible lower impact alternatives—all of which indicate a lack of proportionality. See Review Panel Established by the Federal Minister of the Environment and the British Columbia Minister of Environment, *Report of the Joint Review Panel: Site C Clean Energy Project* (2014), online: <www.ceaa-acee.gc.ca/050/documents/p63919/99173E.pdf>.

60 See *Tsilhqot'in*, *supra* note 1 at paras 124–27.

61 See *ibid* at paras 124–27.

62 See *Delgamuukw*, *supra* note 4 at para 165.

63 The Court in *Tsilhqot'in* stated that injunction relief is one of the remedies for failure to discharge its duty to consult. It does not limit such relief to interim

The SCC decision in *Gladstone* provides a helpful demonstration of how to assess whether the public purpose is consistent with the Crown's fiduciary duty. In that case, the Court used conservation as an example of a public goal that could be sufficiently compelling and substantial to be consistent with the Crown's fiduciary duty. It said:

> Given the integral role the fishery has played in the distinctive cultures of many aboriginal peoples, conservation can be said to be something the pursuit of which can be linked to the recognition of the existence of such distinctive cultures. Moreover, because conservation is of such overwhelming importance to Canadian society as a whole, including aboriginal members of that society, it is a goal the pursuit of which is consistent with the reconciliation of aboriginal societies with the larger Canadian society of which they are a part. In this way, conservation can be said to be a compelling and substantial objective which, provided the rest of the *Sparrow* justification standard is met, will justify governmental infringement of aboriginal rights.[64]

Given that Aboriginal title gives the benefits to the First Nation exclusively, there is no question of balancing competing First Nations and non-Aboriginal interests in the lands and resources, as the Court discussed in *Gladstone*.[65] In other words, an analysis of how to apportion access to the resources on Aboriginal title lands, to ensure the Aboriginal title holder's "priority", would be irrelevant because the First Nation owns the whole of the beneficial interest to the exclusion of all others, including the Crown. The clarifications in *Tsilhqot'in* regarding the nature of the exclusive right to use and benefit from Aboriginal title

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injunctions, and a permanent injunction could lead to the cancellation of the project. See *Tsilhqot'in*, *supra* note 1 at para 89, citing *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 37, [2010] 2 SCR 650.

64 *Gladstone*, *supra* note 54 at para 74 [emphasis added].

65 See discussion about Crown's duty to give "priority" to Aboriginal rights, in *Gladstone*, *supra* note 54 at paras 54–58. That case dealt with fishery resources where the Aboriginal interest was seen as one of a set of competing interests. The issue of "priority", and the need to find the appropriate balance among competing interests, does not arise when the Aboriginal interest in the resource is exclusive.

lands is another important way in which it strengthens Canadian law on Aboriginal title.

It is noteworthy that where the Aboriginal rights are not exclusive and there is a contest between Aboriginal rights holders and other users of a resource, the Crown's fiduciary duty may nevertheless give rise to a priority for the Aboriginal right against other rights or interests (per *Sparrow* and *Gladstone*). It is reasonable to assume that the exclusive nature of Aboriginal title and its associated benefits gives rise to equal or greater constraints on Crown infringements, and greater protection for the holders of the beneficial interest. Furthermore, provincial legislation could never have the effect of extinguishing Aboriginal rights or title because the only laws with sufficiently clear and plain intention to do so would be laws in relation to Indians and lands reserved for Indians. As a result, "a provincial law could never, *proprio vigore,* extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction."[66] This puts into question provincial grants of fee simple title throughout the province.

The goal of conservation has the potential to benefit First Nations as much as non-Aboriginal Canadians by protecting and preserving a resource that is critical to First Nations interests. Provincial actions to contain forest fires, or prevent disasters or the spread of pests, might also be justifiable where there is an equal and important benefit to the First Nation.[67] If the First Nation does not consent to the provincial action, or agree to act collaboratively, one might wonder whether the provincial action provides a material benefit to the First Nation.

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[66] *Delgamuukw*, *supra* note 4 at para 180.

[67] This raises the question of provincial authority to regulate to prevent harm to third parties where activities on Aboriginal title lands are the source of the harm. An examination of the implications of the justification test in circumstances where the Crown has chosen to regulate rather than rely on civil law remedies for tort would be a worthy inquiry.

III. ANALYSIS

A. THE COLLECTIVE NATURE OF ABORIGINAL RIGHTS

Control and management of large tracts of communally owned lands and resources give rise to a broad spectrum of issues of interest to the owners. In addition to subject-specific issues such as forestry conservation and development, protection of spiritual places, land use planning within community urban areas, or control of the types of businesses for which the lands may be used, collective decision making necessarily gives rise to issues related to the process of decision making.

Effective control and management of communally held lands and resources in the 21st century can involve a complex set of institutions, structures, processes, rules and policies. Collective decision making requires attention not only to the content of subject matter-specific rules, but rules for how the decisions are made.[68] By unpacking these issues even superficially, one can produce an indicative list of types of rules that have a direct rational connection with contemporary collective decision making, whether it is in relation to the control and management of Aboriginal title lands and resources or any other collectively held right.[69] For example:

The identity of the First Nation, including:

- Member communities and individual members;
- Rights and responsibilities associated with membership/citizenship;
- Means of becoming, or ceasing to be, a member;

The decision makers:

- Who may seek a decision;
- Who may participate in decision making;

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[68] See HLA Hart, *The Concept of Law*, 2nd ed (Oxford University Press, 1994) ch V, for a discussion of the relationship between "primary" and "secondary" rules.

[69] It is this author's view that other communally held Aboriginal rights, such as hunting, trapping, fishing, spiritual practices, or preservation of language and culture, also fall within the Aboriginal right of collective decision making, whether or not the right is *exercisable* individually or communally.

- Who has authority to decide
- Decision-making processes:
- The steps in the process;
- Determining finality or validity of decisions;
- Overturning decisions;
- Who and how many decision makers must be included;

Decision-making institutions:

- Mandates (e.g., community versus individual land uses, resource development, conservation, fire suppression);
- Physical location;
- Position in decision-making hierarchy;
- Means of communicating decisions;
- Implementing decisions;
- Determining to whom and how to distribute benefits and share responsibilities;

Interpreting decisions and resolving disputes, including:

- Dispute resolution bodies/institutions;
- Criteria for determining disputes; and
- Enforcement of decisions and penalties for failure to comply with decisions.

These types of rules are among the building blocks of collective decision making and are commonly found in the array of rules and laws of contemporary governments and public institutions. The existence of these functions, the relationships among them, and the ways of perceiving and expressing them may vary among First Nations and others. Nevertheless, non-Indigenous institutions, including courts, should be able to recognize these various functions as directly related to the exercise of the Aboriginal right to decide collectively how to manage and use Aboriginal title lands and resources.

B. COLLECTIVE DECISION MAKING AND GOVERNANCE:

The *Tsilhqot'in* decision reaffirms that the right to make decisions collectively regarding the exercise of the rights associated with Aboriginal title is a necessary incident of collective ownership. The power to make collectively binding decisions is the essence of

governance,[70] particularly where those decisions relate to the management of communally held economic and social resources.[71] It is for the First Nation itself, and not federal or provincial legislatures, to determine if the First Nation's rules are collectively binding on the community, as a general principle or in a specific case. Given the disruptive effects that colonialism has had on traditional Indigenous governance and legal systems, a key challenge for a number of First Nations pursuing the re-emergence of self-government is the achievement of community support for the principle that its own governing bodies can create collectively binding rules, plus the internalized sense of moral and legal obligation to comply with these rules[72] in a critical mass of its members. First Nations are not alone in this; maintaining political legitimacy and social adherence to its rules is a continuing challenge for any government.[73]

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[70] See Kristof van Assche, Raoul Beunen & Martijn Duineveld, *Evolutionary Governance Theory: An Introduction* (Springer, 2014), at 3, DOI: <10.1007/978-3-319-00984>.

[71] See World Bank, *Governance and Development* (Washington, DC: World Bank, 1992).

[72] Referred to as "fidelity to law" by Ronald Dworkin: *Law's Empire* (Cambridge, Mass: Harvard University Press, 1986) at 208.

[73] The *Dictionary of the Social Sciences* defines legitimacy as "[t]he acceptability or appropriateness of a ruler or political regime to its members": Craig Calhoun, ed, *Dictionary of the Social Sciences* (New York: Oxford University Press: 2002) *sub verbo* "legitimacy". It is also defined in terms of the acceptability of a regime's procedures for making and enforcing laws. The legitimacy of a regime, and its laws and procedures, will be of concern to those who are not members, but who may have an interest in "a political order's worthiness to be recognized": Joel Kriegar, ed, *The Oxford Companion to Politics of the World*, 2nd ed (New York: Oxford University Press, 2001) *sub verbo* "legitimacy". There is a growing body of Indigenous scholarship discussing the role and significance of legitimacy for Indigenous governance, including: Taiaiake Alfred & Jeff Corntassel, "Being Indigenous: Resurgences Against Contemporary Colonialism" (2005) 40:4 Government & Opposition 597; Chris Andersen, "Governing Aboriginal Justice in Canada: Constructing Responsible Individuals and Communities Through 'Tradition'" (1999) 31:4 Crime L & Soc Change 303; Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of

Collective decision making would likely have to be exercised by the First Nation as a whole, or by subunits in accordance with "secondary rules"[74] established by the whole.[75] Notwithstanding the non-Indigenous governments' preference that First Nations adopt municipal-style democratic governments based on European models, constitutional protection for First Nations' preferred ways of exercising their rights should create protected space to reflect their traditions and values in their governance structures and rules for collective decision making, while addressing contemporary demands of governance. Crown interference in the preferred ways of exercising collective decision making would have to be justified.[76]

Governance is a fluid function, and structures and methods evolve over time. The presence of rules of self-transformation—rules to change the rules and to configure its formal and informal institutions—is an aspect of a political community that controls its own transformation and evolution.[77] A shift away from the structures and processes dictated by the *Indian Act*, and the resurgence of traditional systems of governance in contemporary form, would reflect such an evolution.

Indigenous Legal Traditions" (2007) 6:1 Indigenous LJ 13; Val Napoleon, "Extinction by Number: Colonialism Made Easy" (2001) 16:1 CJLS 113.

74 *Hart*, *supra* note 68 at ch V. Secondary rules, or rules of recognition and legal validity, function as authoritative criteria for identifying rules of obligation/laws. See *ibid.*

75 The traditional decision-making structures and procedures of the Gitksan and Wet'suwet'en, as described in *Delgamuukw*, offer an example. The Nisga'a Constitution describes a traditional governance system that functions in a contemporary context. See Nisga'a Lisims Government, "The Constitution of the Nisga'a Nation" (October 1998), online: <www.nisgaanation.ca>.

76 Kent McNeil persuasively argues that the imposition of the *Indian Act*—as a mandatory framework for governance for all Indian Bands—is an ongoing infringement that has constrained, but not extinguished the Aboriginal right of self-government. See Kent McNeil, "Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government" (2003) 22:1 Windsor YB Access Just 329 [McNeil, "Challenging Legislative Infringements"].

77 See Van Assche, Buenen & Duineveld, *supra* note 70 at 5.

A First Nation's decisions regarding the use and management of its Aboriginal title lands and resources would express its preferred means of exercising the rights associated with Aboriginal title, and would be protected by section 35 from unjustified encroachment by federal or provincial governments. To the extent that the First Nation's traditional structures, institutions, and procedures of governance express its preferred means of exercising its right of collective decision making, in contemporary form or otherwise, they would also be protected by section 35.

C. ARE THESE DECISIONS "LAWS"? COLLECTIVE DECISION MAKING AS A FORM OF LAW MAKING

There has been a longstanding debate, engaging many disciplines, about what is "law", and how to distinguish "law" from other types of social norms or rules. There are those who adhere to the notion of legal centrism, where the nation-state is the sole source of law and all other rules—regardless of their binding nature—are non-legal social norms.[78] However, a survey of the literature on legal pluralism identifies many reasons not to be persuaded.[79] Law did not emerge as a phenomenon of the nation-state, it pre-existed that relatively modern form of political organization, and many of the laws still in effect have their source in societies that predate the nation-state. This is certainly true for Canada, where much of its constitutional law is derived from imperial precedents

[78] See e.g. HW Arthurs, 'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England (Toronto: University of Toronto Press, 1985) at 17, 24, 89–131.

[79] See e.g. *ibid*; Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge, UK: Cambridge University Press, 2002) at ch 1; Charles Tilly, "War Making and State Making as Organized Crime" in Peter B Evans, Dietrich Rueschemeyer & Theda Skocpol, eds, *Bringing the State Back In* (Cambridge, UK: Cambridge University Press, 1985) 169.

and legislation that applied to colonial governments and continued into the law of the new nation-state.[80]

According to Tamanaha, law is a "folk concept": it comprises the rules that are accepted as binding by members of the community and that people believe to be law.[81] Law is socially constructed, contingent, and socially determined: what is "law" for one society will not necessarily be law for another. It is for the society in question to determine what is "law", according to their legal tradition.[82] Assertions in support of exclusive state power to declare "law" are not explanatory or convincing, particularly given the lived realities of distinct societies who live within long-established legal traditions, whose legitimacy predates the ascendance of the state, whose members believe that their practices are "law", and who have effective means to create, interpret, adjudicate and enforce their own laws. There are many recognized legal traditions operating around the world, some profoundly different from others, yet they are legitimate within their societies and, to some extent, enjoy intersocietal recognition.[83]

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80 See Bruce Clark, Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada (Montreal: McGill-Queen's University Press, 1990) at 107–22.

81 See Brian Z Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30:3 Sydney L Rev 375 [Tamanaha, "Understanding Legal Pluralism"]. See also Brian Z Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism" (1993) 20:2 JL & Soc'y 192 at 199–202.

82 See Borrows, *Indigenous Constitution*, *supra* note 6; Val Napoleon, "Thinking About Indigenous Legal Orders" in René Provost & Colleen Sheppard, eds, *Ium Gentium: Comparative Perspectives on Law and Justice: Dialogues on Human Rights and Legal Pluralism* (Springer, 2013) 229; GCJJ van den Bergh, "Legal Pluralism in Roman Law", in Csaba Varga, ed, *Comparative Legal Cultures* (England: University of Cambridge Press, 1992) 451.

83 See H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 4th ed (New York: Oxford University Press, 2010). The Chthonic tradition is one of the world's major legal traditions. It is common to many Indigenous societies and survives as a living tradition. It is the oldest legal tradition and all other traditions have emerged from and in contrast to it. See *ibid* at 63.

First Nation's structures, procedures, and rules for governance of its Aboriginal title lands may not resemble those for other communities within BC or Canada. Nevertheless, there are persuasive arguments to support the assertion that the resulting rules and decisions are laws where they are made in a manner consistent with their long traditions and practices, conform to their own rules of recognition, and are considered by the members to be laws.

It is a key issue whether a rule or norm, recognized by the First Nation's legal order as law, is also recognized as law by other legal orders, including the state legal system. The practical value in having the Canadian state recognize First Nation legal orders is that Canadian officials will treat First Nations laws as legitimate. This has broad implications for intergovernmental relations, including the reciprocal enforcement of laws. The most common form of legitimacy is the belief in legality,[84] so it is important for Indigenous sources of law to be seen as law. Legitimacy is worth fighting for: "it is a measure of the extent to which various institutions and systems can command obedience, elicit participation or cooperation, and manage social behaviour without coercion."[85] As discussed above, Canadian courts have long been willing to recognize the historical existence of Indigenous legal systems and laws. The current challenge is to achieve recognition of contemporary Indigenous legal systems with plenary jurisdiction[86] that are the

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84 See Arthurs, *supra* note 79 at 150.

85 See *ibid* at 151.

86 A starting point in Crown–First Nations negotiations that acknowledges plenary governing jurisdiction, constrained only by federal or provincial laws that can be justified pursuant to the *Sparrow* test (as that test is elucidated in *Tsilhqot'in*), would be more consistent with the inherent nature of the right of self-government than the piecemeal approach represented in the case law. The application of the justification test would address the concerns expressed by Binnie J in *Mitchell* (see *supra* note 43), and by Lambert J in *Delgamuukw* (see *supra* note 4). In addition, negotiated arrangements regarding relationship of laws could address the circumstances in which valid federal or provincial laws would prevail over First Nations laws in areas of shared jurisdiction.

expression of an inherent Aboriginal right of self-government, rather than derived from a treaty or Crown legislation.

D. IS THIS "JURISDICTION"?

Jurisdiction can be defined as "[t]he territory or sphere of activity over which the legal authority of a court or other institution extends".[87] It can also be defined in terms of the people who fall within the institution's authority. Jurisdiction can be exclusive or shared, as is demonstrated by the division of federal and provincial powers in the *Constitution Act, 1867*.[88]

Jurisdiction encompasses the legal authority to make decisions regarding particular subject matters, whether or not those decisions are considered to be laws. Setting aside the question of whether First Nations decisions can be laws, a First Nation's legal authority to make decisions regarding the use and management of its Aboriginal title lands and resources has been held to be exclusive.[89] This authority is inherent and, unlike federal and provincial jurisdiction, it is not derived from a grant from the Crown or the Canadian constitution. Therefore, its exercise is not subject to the permission or approval of federal or provincial governments at first instance. The extent to which the exercise of this authority can be constrained by federal or provincial laws is a separate question.

Aboriginal title lands are not "Indian reserves", so the federal *Indian Act* will not apply,[90] but they do fall within the meaning of "Lands Reserved for the Indians" in subsection 91(24) of the *Constitution Act,*

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87 *The Oxford English Dictionary, sub verbo* "jurisdiction", online: <www.oxforddictionaries.com>.

88 *Supra* note 50, ss 91–92.

89 See *Tsilhqot'in, supra* note 1 at para 88.

90 Per La Forest J, "it by no means follows, that specific statutory provisions governing reserve lands should automatically apply to traditional tribal lands": *Delgamuukw, supra* note 4 at para 192. The term Indian "reserve" is precisely defined in the *Indian Act, supra* note 2, s 2.

1867.[91] Although Parliament has not legislated for Aboriginal title lands, and may never do so, they nevertheless remain within federal jurisdiction. The mere fact that the federal government has chosen to exercise its jurisdiction narrowly in this field does not define the scope of its jurisdiction. Similarly, although BC's *Forest Act* excludes private lands from its application,[92] the Legislature nevertheless retains jurisdiction over private lands and could amend the *Act* to include them.

In view of the Crown's power to encroach, one might think that First Nations jurisdiction will necessarily be shared, either with the federal government through its jurisdiction under subsection 91(24), or the provincial government under sections 92 and 92A. However, the constitutional law doctrines of paramountcy and interjurisdictional immunity arose to address questions of the relationship of laws where valid federal and provincial laws were in conflict. Such conflicts arise even when these two orders of government exercise their exclusive jurisdiction because some of their various aspects may overlap and conflict. The existence of such overlaps and conflicts does not render the exclusive federal or provincial jurisdiction a "shared" jurisdiction.[93]

As seen above, in any resulting conflict between valid federal or provincial laws and Aboriginal rights, the federal or provincial government would have to justify its encroachment. This would include any attempt to limit the exercise of the First Nation's decision-making authority. Given the scope of the rights attaching to Aboriginal title, and the test to be met to justify encroachment of this body of Aboriginal rights, federal and provincial jurisdiction will be exercised in a much smaller box in future, leaving room for the exercise of First Nations jurisdiction. The justification test may be the modern constitutional law doctrine that gives rise to a new set of rules for the relationship of laws as between First Nations and the Crown.

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91 *Constitution Act, 1867*, *supra* note 50, ss 91(24).

92 *Forest Act*, RSBC 1995, c 157 [*Forest Act*].

93 For a discussion of shared jurisdictions and the potential means to resolve conflicts of laws, see RCAP, *Restructuring the Relationship*, *supra* note 6.

The practical reality is that the effective exercise of jurisdiction requires the agreement of those being governed, as well as those whose cooperation is required to enable the implementation of the decisions made in the exercise of jurisdiction. This is why recognition of self-government is important, particularly recognition of the nature and scope of self-government authority. The operational arms of federal and provincial governments—their bureaucracies and agencies—need permission and direction to act in ways that are consistent with recognition of self-government, at a meaningful level of specificity. In an increasingly complex and interdependent world, interjurisdictional cooperation is critical to effective governance.

E. IMPLICATIONS OF ABORIGINAL TITLE FOR FEDERAL AND PROVINCIAL GOVERNMENT ACTIONS

Constitutional protection of the rights associated with Aboriginal title limits federal and provincial authority to interfere with the First Nation's use and governance of the lands and resources. Whether the interference is in the form of regulation or other intrusions, if it amounts to infringement of an Aboriginal right, it must meet the stringent justification test. Justification must be established in court to the satisfaction of the judge. Additionally, First Nations could seek interim injunctions to suspend provincial or federal action, pending the conclusion of the litigation. Among the remedies for unjustified infringement, a court could order damages and the removal of any encroaching works or structures. The risk of increased court challenges and the nature of the available remedies should be significant deterrents to opportunistic and non-essential Crown intrusions.

It is unlikely that the provincial Crown could easily justify regulating Aboriginal title lands in ways that differ from the treatment of other privately held lands in BC. In the case of forestry management, BC's *Forest Act*[94] does not apply to privately owned lands and so, by virtue of it being a law of general application, it should not apply to Aboriginal title

[94] *Supra* note 92.

lands. A provincial law that singles out Aboriginal title lands for distinct treatment would not be a provincial law of general application and would not be valid, particularly if it affects Aboriginal title lands in ways that go to the core of federal jurisdiction. Given that Aboriginal title lands and resources are the property of the First Nation to the exclusion of everyone else, provincial laws, management regimes, or policies that purport to manage the allocation of resources among multiple users on those lands would not be justifiable. Per *Sparrow*, even where there are competing Aboriginal and non-Aboriginal interests in a resource, as mentioned above, Aboriginal rights may be given priority.[95]

There will likely be very few circumstances that could give rise to a compelling and substantial public purpose that would justify the Crown issuing permits to third parties for resource exploitation or other uses of Aboriginal title lands without the First Nation's consent, even if the third party offered to share in the profits—particularly where the First Nation has decided against development. Furthermore, provincial regulations that purport to authorize the granting of resource rights on Aboriginal title lands to benefit third parties, even with the First Nation's consent, are inappropriate in the 21st century. Given that the First Nation's consent is required, the First Nation would likely expect to be compensated and could impose conditions of use, and the Crown has no beneficial interest in any event, the utility of the Crown's involvement is questionable. To impose itself as an agent or interlocutor would be paternalistic. If the provincial government wants to play a role in the management of Aboriginal title lands or resources, even in the interim, it will most likely have to persuasively demonstrate that it can deliver value to the First Nation.

F. IS THERE A CONTINUING ROLE FOR THE PAMAJEWON DECISION?

The *Pamajewon* approach to First Nations self-government is out of sync with the SCC's recognition that the rights associated with Aboriginal title can be expressed in modern ways and are not limited to traditional

[95] *Supra* note 8 at 1119 (per Dickson CJC).

practices integral to the distinct culture of the First Nation. The timing of *Pamajewon*, just prior to the *Delgamuukw* decision, suggests that there was something about the proposed activity that led to the excessively restricted interpretation of the right of self-government. The facts in these two cases were very different: *Pamejewon* dealt with a broad claim by an Indian band to self-government that included the right to regulate high stakes gambling on the reserve; *Delgamuukw* dealt with a claim of Aboriginal title by the First Nation. Perhaps the Court in *Pamajewan* was concerned about the risk of organized crime moving into small First Nations communities and taking hold of their gaming activities in the absence of effective on-reserve policing.[96] In *Delgamuukw*, the associated claim to self-government was abandoned at the SCC, given the preceding *Pamejewon* decision. That Court nevertheless opined on the scope of the First Nation's right to make decisions collectively regarding the use of Aboriginal title lands.

It is the view of this author that the justification test would have provided a better analytical approach than the *Van der Peet* test, given the necessarily fluid and potentially comprehensive nature of self-government. To limit self-government to traditional practices that were integral to the distinct culture of the First Nation would produce a very stilted—and certainly ineffective—form of governance.[97] It would not be unfair to suggest that such a limited view of this Aboriginal right

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[96] Bradford W Morse opines that the provincial Crown was motivated to eliminate the competition for the rich revenues from high stakes gambling and monster bingos. See "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R v Pamajewon*" (1997) 42:4 McGill LJ 1011 at 1021. The case *CAW-Canada, Local 444 v Great Blue Heron Gaming Co*, 2007 ONCA 814, 88 OR (3d) 583 [*Mississaugas of Scugog Island*], also demonstrates that bad facts do not produce the best law. In that case, the Band Council purported to pass a law that interfered with the collective bargaining rights of employees of a casino located on the reserve. See *ibid* at para 10.

[97] See Morse, *supra* note 96, for a detailed and compelling critique of the Court's reasoning in *Pamajewon*, as well as arguments that this decision is an aberration in the development of the law on the nature of Aboriginal rights since *Delgamuukw*.

fails to recognize the important role that self-government plays in the human flourishing of distinct communities.

The application of the justification test would have allowed the SCC to support a healthier evolution of the law related to this Aboriginal right. Recognition of a general right to manage activities on Aboriginal title lands, which would include most reserve lands,[98] would have necessitated consideration of the next steps in the analysis: Was there infringement, and could the infringement be justified? The federal criminal law, and the provincial regulation of gaming, might both have been found to infringe the right of self-government to the extent they denied the First Nation its preferred way of managing its lands for economic development purposes. Nevertheless, maintenance of public order, protection of the public, and other public purposes served by federal and provincial regulation of high-stakes gambling, should have been assessed as justification for constraints on that aspect of self-government. Rather than disabling self-government generally, a more sophisticated cooperative and proportional tripartite approach to managing this activity might have emerged, to the benefit of the First Nation and to the ongoing relationships among the federal, provincial and First Nations governments more generally.

The SCC implicitly rejected the *Pamajewon* approach when determining, in *Delgamuukw* and *Tsilhqot'in*, the scope of uses to which Aboriginal title lands may be put and that would be the subject of the First Nation's right to make decisions collectively. This is helpful when the claim to self-government can be linked to the use and management of lands. This paper has attempted to demonstrate that, even limited in this way, there is now a clearer basis in Canadian law for a relatively broad scope for self-government, including establishment of structures and procedures for collective decision making. This creates room for the resurgence of traditional forms of governance.

In its 2007 *Mississaugas of Scugog Island* decision, the Ontario Court of Appeal (ONCA) distinguished "activity-based" self-government

[98] The nature of the First Nation's interest in reserve lands is the same as in its Aboriginal title lands, per *Guerin*, *supra* note 5 at 379.

claims from claims of self-government associated with Aboriginal title.[99] That Court interpreted a passage in the *Delgamuukw* decision to mean that future activity-based self-government claims were to be determined by applying the test in *Van der Peet*, in accordance with *Pamajewon*.[100] (Note that the nature of the Aboriginal interest in reserve lands was not addressed in that decision.) With respect, this is a misreading of *Delgamuukw*. Lamer CJC stated at paragraph 170 that the errors of the trial judge in the *Delgamuukw* case made it "impossible . . . to determine whether the claim to self-government [had] been made out."[101] He then noted that the appellants had given the claim to self-government much less weight on appeal due to the Court's decision in *Pamajewon*, In referring to his prior reasoning in *Pamajewon*, Lamer CJC adopts only the statement that rights of self-government cannot be framed in "excessively general terms".[102] He does not also adopt the *Van der Peet* test that would limit the right of self-government to those practices that were integral to the distinctive culture of the claimant group—perhaps in recognition of the fundamental inconsistency between the *Van der Peet* test and the Court's decision about the scope of activities associated with Aboriginal title. Nor does he state that the claim of self-government must be determined, in a new trial, in accordance with *Pamajewon*. Unless the ONCA's interpretation is affirmed by the SCC in a future case, the *Mississaugas of Scugog Island* case is binding law only in Ontario, and would be limited to claims that cannot be linked to the right to manage Aboriginal title lands and resources (which would include most reserve lands).

To the extent that future courts require a degree of specificity beyond a claim for a broad right to manage the use of their (Aboriginal title)

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99 See *Mississaugas of Scugog Island*, *supra* note 96 at paras 23–24.

100 *Mississaugas of Scugog Island*, *supra* note 96 at para 23, citing *Delgamuukw*, *supra* note 4 at para 170.

101 *Mississaugas of Scugog Island*, *supra* note 96 at para 23, citing *Delgamuukw*, *supra* note 4 at para 170.

102 *Ibid.*

lands, greater specificity could be found by linking the subject activity to the aspects of Aboriginal title identified in the *Tsilhqot'in* decision.[103] Nevertheless, it would be unfortunate if discussions about self-government had to be fettered by the contrivance of referring to it as a right to make decisions collectively about the use and management of Aboriginal title lands.

G. First Nations Self-Government within the Canadian Federation

It has been argued here that the law expressed in the *Tsilhqot'in* decision protects space for First Nations laws for the management of their Aboriginal title lands and resources, and for all collectively held rights and interests. By logical inference, it includes structures and institutions for collective decision making (governance) and the decisions/laws that set out preferred ways of exercising these rights. The SCC has also identified a strong rationale for First Nations to exercise their governance rights and to declare their decisions and laws, so as to put the Crown on notice as to their preferred ways of exercising their rights.

It will be argued here that First Nations governments should be recognized as the *sui generis* third order of government that they are. There is resistance to recognizing this third order of government. A common concern raised is the large number of small reserve-based communities governed by band councils under the *Indian Act*. This is a straw man argument, for *Indian Act* bands are not the appropriate unit for such recognition. Just as the Court determined that the Tsilhqot'in First Nation comprised a group of communities who shared common history and culture, so should the federal and provincial governments look to the proper aggregation of communities as the appropriate entity

[103] Claims to self-government by "Indian Bands" and First Nations regarding activities on reserve lands would be strengthened by establishing that the nature of their interest in the lands is essentially the same as in Aboriginal title lands (per *Guerin*, *supra* note 4 at 379).

for their recognition.[104] It is for First Nations to define their identity (and the federal government understands this). However, it is for the federal and provincial governments to decide whom they will recognize as a First Nation, provided that such decisions are fair, made in good faith, and not capricious. Practical realities are already leading to the emergence of pan-First Nations governance structures for shared decision making. This may further evolve into a form of federated First Nations governance as a formal order of government within the Canadian federation.

As argued by others, the imposition of the *Indian Act* is a continuing infringement of First Nations' rights,[105] including the right to manage reserves, treaty lands, and resources. The transformation of the Canadian legal and political landscape, from *Indian Act* reserves and band councils to recognized Aboriginal title lands and First Nations governments, is long overdue. The SCC has provided considerable assistance for the parties who need to engage in that transformation: the First Nations who must identify their constituent communities and their preferred forms of governance, and the federal and provincial governments who must establish practical and effective processes for recognition and plan for the transition. The real value in recognizing First Nations governments is not to grant to First Nations what is already theirs, but to enable federal and provincial governments to act in a manner consistent with that recognition: to legislate, establish policies and structures, and to instruct their employees and agents to conduct their business in ways that are respectful of this order of government within the Canadian federation.

Canadian law recognizes the fact that First Nations were historically self-governing and had systems of law. It is time to take the next step, and give practical recognition to this right in a contemporary context. This

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[104] This issue was addressed in RCAP, *Restructuring the Relationship*, *supra* note 6 at 158, 992. They note that there are 60 to 80 historically based Indigenous nations in the territory now referred to as Canada, compared to over 600 *Indian Act* bands. See *ibid.*

[105] See e.g. McNeil, "Challenging Legislative Infringements", *supra* note 76.

includes recognizing contemporary First Nations laws and legal systems as determined by First Nations themselves. This does not mean accepting everything that a First Nation may declare to be law; federal and provincial governments (and their courts) should apply reasonable criteria for determining when and how they will recognize those laws, as they do when asked to admit or give effect to the laws of other domestic jurisdictions.

This would not be a novel thing for Canada. Canada's pluralistic nature, accommodated within its constitution and its bijuridical legal system, is one of the defining features of Canadian society. This pluralism was designed to accommodate the francophone minority in New France following the 1763 Treaty of Paris, and those arrangements have continuously been maintained and strengthened.[106] North America's legal traditions—both European and indigenous—reflected the reality of longstanding legal pluralism. Within the same geographic and political space, there were multiple sources of law, multiple processes for the creation of law, and multiple tribunals for the interpretation of law and adjudication of disputes. In some European societies, even as the concept of the nation-state was emerging, a single tribunal might apply different types of law to different groups of people in similar situations, none of which were derived from or dependent on the authority of a sovereign or central power.[107]

Intersocietal recognition of law is key to the contemporary manifestation of genuine Indigenous self-government. Agreement by one state to recognize the laws of another jurisdiction—national or subnational—engages the most formal aspects of the machinery of government. Just as legal systems are socially constructed, so are intergovernmental arrangements for recognition of the validity, legitimacy, and enforcement of the others' laws. The protocols and practices of historically pluralistic societies, found in medieval Europe and among Indigenous societies across the Americas, provide insights

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[106] See Borrows, *Indigenous Constitution*, *supra* note 6 at 110–35.

[107] See Arthurs, *supra* note 79; Benton, *supra* note 79; Tamanaha, "Understanding Legal Pluralism", *supra* note 81 at 377; van den Bergh, *supra* note 82.

into the methods for recognizing and accommodating distinct legal orders in areas of overlap.[108] The 20th century recognition of the laws of newly emerged states may provide other models, if one can see beyond the requirement of state status—as one does when recognizing subnational jurisdictions. Canada, the EU, and various international bodies including the UN, offer contemporary examples of the types of constructed arrangements that are possible. During its relatively short existence, Canada has implemented a number of constitutional and machinery of government innovations,[109] understands that governance arrangements are not static, and has experience with the associated processes and outcomes. Canadian courts and government institutions have considerable experience accommodating domestic differences across ten provinces and territories and two legal traditions, and are sufficiently resilient to embrace the evolution of international institutions and sources of law. This capacity for accommodation is capable of extension to First Nations governments.

An improved understanding of the legitimacy of Indigenous governance as an extension of Canada's pluralist tradition should ease the way to genuine and long overdue recognition and accommodation of this Aboriginal right.

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[108] See Borrows, *Indigenous Constitution*, *supra* note 6 at 130–32.

[109] For example, the creation of the Canada Pension Plan and associated constitutional arrangements, the creation of Nunavut as a new territorial jurisdiction to allow for public government by an Indigenous majority, establishment of various administrative and quasi-judicial tribunals, forums for federal–provincial consultations in support of decision-making, arrangements for Quebec to exercise authority over certain matters falling within federal jurisdiction (e.g., immigration), legislation and multi-year fiscal transfers to provinces to influence program development in areas of exclusive provincial jurisdiction (e.g., health, education, training), replacement of *Criminal Code* sanctions against gambling with federal–provincial arrangements to regulate lotteries.

H. SUPPORT FOR THE INDIGENOUS RIGHT OF SELF-GOVERNMENT IN INTERNATIONAL LAW

Recognition of the inherent right of self-government in Canada is supported by the evolving international law on Indigenous rights. It has developed and evolved within the legal framework for human rights. Indigenous governance, as discussed in this paper, is an important element of the more comprehensive right of self-determination articulated in the *United Nations Declaration on the Rights of Indigenous Peoples.*[110] Recognition, in international human rights law, that human rights can be collective as well as individual rights has led to recognition of the indigenous right of self-determination as such a collective right.

Self-determination is a right that benefits all human beings "*as human beings*"[111] and not as sovereign states; as a human right, it is "presumptively universal in scope"[112] and, as determined by international juridical bodies, is of such import that it is *jus cogens*—a peremptory norm. Accordingly, where there is a conflict between the right of self-determination and other rights recognized in international law, the right of self-determination should prevail, or be given equal weight when balancing other *jus cogens* norms.[113] Self-determination is a framework principle for human rights that in their totality enjoin the governing institutional order.[114] It is not a derivative right granted by a source external to the indigenous peoples claiming the right; its source is in the history of autonomy and self-determination of the Indigenous peoples as a distinct society. This principle is well established in Canadian law.

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[110] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007), adopted by the United Nations General Assembly by Resolution A/61/L.67 and Add.1 on 13 September 2007, and ratified by Canada on 12 November 2010.

[111] S James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 76.

[112] *Ibid* [emphasis in original].

[113] See *ibid* at 75.

[114] See Anaya, supra note 111 at 77.

Self-determination for Indigenous peoples was never necessarily about statehood and secession, these being the primary reasons for Canada's reluctance to become a signatory to the *UN Declaration on the Rights of Indigenous Peoples*. Indigenous self-determination is about freedom to choose one's way of life and to determine collective political destiny.[115] A number of Canadian Indigenous leaders, within both international forums and Canada, have stated that their objective is not to secede but to remain as an independent, self-determining society within the state.[116] Their struggle is often about securing the integrity of the group, while rearranging the terms of its integration into an interconnected world.[117]

IV. CONCLUSIONS

This analysis is, admittedly, based on a positive reading of the *Tsilhqot'in* decision—intentionally so.[118] There are many important advances in Canadian law related to Aboriginal rights flowing from this decision and

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[115] See Lars-Anders Baer, "The Rights of Indigenous Peoples—A Brief Introduction in the Context of the Sámi" (2005) 12:2–3 Int'l J Minority & Group Rights 245; Indian and Northern Affairs Canada, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa, Canada Communication Group, 1996) at 158, 922.

[116] See Jeremie Gilbert, "Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples" (2007) 14 Int'l J Minority & Group Rights 207 at 220; RCAP, *Restructuring the Relationship*, *supra* note 6 at 214.

[117] See Anaya, *supra* note 111 at 79–83.

[118] A number of scholars have interpreted the decision negatively, even going so far as to deny the expressly positive aspects of the decision and interpreting the ambiguities negatively. See e.g. Gordon Christie, "Who Makes Decisions Over Aboriginal Title Lands?" (2015) 48:3 UBC L Rev 743 at 770 (where he denies what is clearly stated in *Delgamuukw* and *Tsilqhot'in*: recognition of First Nations' legitimate legal systems, to the extent that they have equal weight to the common law, so as to determine the nature and scope of Aboriginal title). My preference is to interpret the ambiguities in the decision in ways that are consistent with the expressly positive aspects of the Court's analysis, which arguably leads to a more coherent reading of the decision overall. See also Borrows, "Durability of Terra Nullius", *supra* note 48, where he notes that this decision makes Canadian law a world leader in recognition of Aboriginal title. See *ibid* at 741.

it is not in the interests of future First Nations litigants to downplay those positive developments.

Significant challenges remain, however, for all orders of government. Federal and provincial governments need to establish fair and efficient processes and criteria for the recognition of First Nations governments, including recognition of their collective decisions as laws, and the admission and application of these laws in federal and provincial courts. Most importantly, First Nations must meet the challenge of building support within their communities to achieve the legitimacy for their decisions, laws, and institutions that is so important for effective governance.

While there will likely be debates about the scope and limits of First Nations jurisdiction, the right of First Nations to determine their own governance structures, institutions and decision-making procedures should be much less controversial. At the time of writing, only one First Nation has had its Aboriginal title recognized by a Canadian court, but this will expand over time. Given that the *Indian Act* only applies to "reserve" lands, the band council and bylaw making authorities do not apply to interfere with First Nations' preferred ways of governing with respect to Aboriginal title lands and the related rights, nor does it apply to First Nations as traditionally constituted. This means there is space for First Nations to transform their ways of governing: if they choose to re-establish their traditional governance structures in contemporary form, to revitalize their legal systems and, when they choose, to shift away from the *Indian Act*.

It is acknowledged that a major obstacle to significant progress on First Nations governance is the persistent attachment to the notion that the Crown's claim of sovereignty swept aside the pre-existing rights of occupying sovereign First Nations. Until Canadian courts scrutinize these assumptions more critically, it is unlikely that the Crown will be motivated to shift to shared jurisdictions based on joint sovereignties, let

alone recognizing First Nations as independent sovereign nations outside of the Canadian federation.[119]

In the short to medium term, the *Indian Act* will continue to determine the framework for governance for the majority of First Nations communities, but First Nations may wish to consider how they might transform their ways of governing their reserve lands, given that their rights and interests in these lands are the same as for Aboriginal title lands. Although the *Indian Act* constitutes an ongoing infringement of the right of self-government and collective decision making—and is therefore vulnerable to constitutional challenges—it must be remembered that it has an important practical function for the federal Crown. It provides the legal framework for the federal government's policies and programmes for these communities, and cannot be abandoned by the Crown without thoughtful development of a more appropriate legal framework for its engagement with First Nations. Considerable effort will be required by all parties to develop the detailed arrangements that will support and enable the evolving relationships, systems, and structures.

First Nations self-government is a major piece of unfinished business in the development of Canadian society and its constitutional arrangements. Resolving these issues is an important part of the maturing process for a post-colonial nation-state, and it is necessary that Canada take up this challenge in order to achieve genuine reconciliation.

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[119] There are many sources for detailed discussions of these issues and the various models and paradigms to acknowledge First Nations as a third order of government within the Canadian federation, including: RCAP, *Restructuring the Relationship*, *supra* note 6; Borrows, "Durability of Terra Nullius", *supra* note 48; Borrows, *Indigenous Constitution*, *supra* note 6.