# *TSILHQOT'IN NATION* AND INTERJURISDICTIONAL IMMUNITY: WHEN ARE JUDICIAL DECISIONS INVOLVING INDIGENOUS CLAIMS RETROACTIVE?

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## I. INTRODUCTION

In one sense, judicial decisions are always retroactive because they apply law to factual circumstances that arose in the past.[1] In situations where common law judges need to articulate new law in relation to past circumstances, they still use this law to decide the case. They do not say, "because our courts haven't faced this legal issue before, it would be unfair to apply it retroactively to the facts of this case, but this will be the law from now on". On this approach, many just claims would simply be dismissed because judges would lack the legal tools necessary to decide them. Instead, judges declare what the law is and then apply it

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1 See *Kleinwort Benson Ltd v Lincoln City Council*, [1998] 4 All ER 513 at 535, Goff LJ; *Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 86 [*Hislop*]; *R v Albashir*, 2021 SCC 48 at para 38 [*Albashir*]; John Finnis, "Judicial Law-Making and the 'Living' Instrumentalisation of the ECHR" in NW Barber, Richard Ekins & Paul Yowell, eds, *Lord Sumption and the Limits of the Law* (Oxford: Hart Publishing, 2016) 73 at 74–79.

retroactively to the facts.[2] A classic example is the famous case of *Donoghue v Stevenson*,[3] in which the House of Lords extended the law of negligence and imposed tort liability on a manufacturer of ginger beer after a consumer got sick from the presence of a snail in a bottle of the beverage.

Unlike in most court cases, when Indigenous parties go to court the factual basis for their claims often precedes the litigation by decades, if not centuries. This is partly due to the tests the courts have created for proof of Aboriginal rights. In *R v Van der Peet*,[4] the Supreme Court of Canada decided that the Aboriginal rights (apart from Aboriginal title) of First Nations depend on proof of practices, customs, and traditions integral to distinctive Indigenous cultures prior to contact with Europeans.[5] As this was the first time the Court provided a test for Aboriginal rights, this was newly-articulated law, and yet the Court has not hesitated to apply it retroactively to cases that, in Eastern Canada, depend on proof of Indigenous practices, customs, and traditions up to 400 years in the past.[6] Once adequate evidence of this factual basis for these rights has been presented, the Court has used the law first articulated in *Van der Peet* in 1996 and found that the claimed rights existed prior to enactment of section 35 of the *Constitution Act, 1982*.[7] Given that the evidence and hence the basis for these

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2 See Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005) at 160–61, 262–66; Richard HS Tur, “Time and Law” (2002) 22:3 Oxford J Leg Stud 463.

3 [1932] AC 562, All ER Rep 1 [*Donoghue*]. See Rupert Cross & JW Harris, *Precedent in English Law*, 4th ed (Oxford: Clarendon Press, 1991) at 30–33.

4 [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].

5 See *R v Powley*, 2003 SCC 43 (for the Métis, the practices, customs, and traditions must have existed at the time of effective European control).

6 See *R v Adams*, [1996] 3 SCR 101, 138 DLR (4th) 657 [*Adams*]; *R v Côté*, [1996] 3 SCR 139, 138 DLR (4th) 385 [*Côté*]; *R v Sappier*; *R v Gray*, 2006 SCC 54 [*Sappier*; *Gray*] (the factual basis for the rights in these cases actually predated the British Crown’s assertion of sovereignty and the reception of the common law, as the cases arose in areas first explored and colonized by the French).

7 Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. For Aboriginal and treaty rights to be recognized and affirmed by section 35, they must have been in existence before that section

rights has to relate to the period prior to first contact with Europeans, they must have existed in some form and become cognizable by the common law at the time of British acquisition of sovereignty.

Where Aboriginal title is concerned in Canada, Indigenous claimants have to prove that they were in exclusive occupation of land—a factual matter[8]—at the time of the British Crown's assertion of sovereignty, which varies across the country. In British Columbia, the Supreme Court accepted 1846 for this purpose.[9] And yet the Court first articulated this test for Aboriginal title in 1997 in *Delgamuukw v British Columbia*.[10] In 2014, the Court applied this test retroactively to 1846 in *Tsilhqot'in Nation v British Columbia*.[11] Similarly, Native title in Australia depends on proof of Indigenous occupation of land in accordance with Indigenous law at the time the British Crown acquired sovereignty, which in the eastern half of the continent was in 1788, and yet this test for title was only established and applied in 1992 in *Mabo v Queensland [No 2]*.[12]

In this article, it will be argued that, while newly articulated law usually applies retroactively, as in the Indigenous rights cases just discussed, this is not always the case. In particular, while the application of Aboriginal title law in *Tsilhqot'in Nation* is retroactive, the Supreme Court's *obiter* comments on the non-application of the doctrine of interjurisdictional immunity to

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came into force on 17 April 1982: See *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*].

8 See Kent McNeil, "The Factual Basis for Indigenous Land Rights" (2020) 46:3 Monash UL Rev 169.

9 In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 145, 153 DLR (4th) 193 [*Delgamuukw*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, implicitly at paras 25, 60 [*Tsilhqot'in Nation*]. For critical commentary, see Kent McNeil, "Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest" in Alexandra Harmon, ed, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 35.

10 *Delgamuukw*, *supra* note 9.

11 *Tsilhqot'in Nation*, *supra* note 9.

12 175 CLR 1, 107 ALR 1 [*Mabo*].

Aboriginal rights are not.[13] Support for this argument will rely on distinguishing three classes of cases: (1) cases of first impression in which a legal issue arises for the first time; (2) cases in which a lower court decided a legal issue, which an appeal court later characterizes in a different case as bad law; and (3) cases in which a final court of appeal decided a legal issue and then changes its mind in a later case, overruling its own precedent, as happened regarding interjurisdictional immunity in *Tsilhqot'in Nation*.

## II. CASES OF FIRST IMPRESSION

Aboriginal title litigation in Canada provides an example of a legal issue coming before the judiciary for the first time. The first Aboriginal title case was *Calder v British Columbia (Attorney General)*,[14] decided by the Supreme Court in 1973. In a much earlier case, *St. Catherine's Milling and Lumber Company v The Queen*,[15] the Privy Council had dealt with the issue of Aboriginal title tangentially. That case involved a disagreement between Canada and the province of Ontario over which government was entitled to the benefit of lands in northwestern Ontario that were surrendered to the Crown in 1873 by Treaty 3. Lord Watson decided in favour of the province on the basis of his interpretation of the Royal Proclamation of 1763 and the *British North America Act, 1867* (now the *Constitution Act, 1867*).[16] The Anishinaabe people who entered into the treaty were not party to the action, nor was any evidence presented of their occupation and use of the lands or of their laws.[17] The Privy Council's comments on

13 See also *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 53 [*Grassy Narrows*], in which the Court expressed the *obiter* opinion that its analysis of interjurisdictional immunity in *Tsilhqot'in Nation* applies to treaty rights.

14 [1973] SCR 313, 34 DLR (3d) 145 [*Calder*]. See Hamar Foster, Heather Raven & Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007).

15 [1888] 14 App Cas 46, 12 WLUK 31 [*St. Catherine's*].

16 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, APP II, No 5.

17 See Kent McNeil, *Flawed Precedent: The* St. Catherine's *Case and Aboriginal Title* (Vancouver: UBC Press, 2019) [McNeil, *Flawed Precedent*].

Aboriginal title were therefore made in a factual vacuum and were not regarded as very helpful in *Calder*,[18] in which the issue of whether Aboriginal title exists in British Columbia was finally addressed.

In *Calder*, six of the seven judges who heard the appeal decided, for the first time in Canada, that Aboriginal title exists as a common law legal right. However, no declaration of the title of the Nisga'a Nation, on whose behalf the action was brought, was issued because a majority of the Court dismissed the case on a procedural technicality, namely Crown immunity from suit in the absence of permission.[19] Because Nisga'a possession of land was admitted by the Crown, the Court did not need to elaborate on what is required to prove Aboriginal title. And given the majority's dismissal of the case, the issue of the nature and content of Aboriginal title did not have to be addressed either.[20] These issues were therefore left for another day, finally to be dealt with 24 years later in the *Delgamuukw* case.

In *Delgamuukw*, the Gitxsan and Wet'suwet'en Nations claimed Aboriginal title and governance authority over their traditional territories in west-central British Columbia. The self-government claim was not dealt with by the Court, as Chief Justice of Canada Lamer said it had been advanced in overly broad terms and involved complex issues that had not been sufficiently argued before the Court.[21] Nor did the Court decide the Aboriginal title issue, as there were defects in the pleadings and the trial judge had not paid sufficient respect or given adequate weight to the

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[18] Judson J, referring to Lord Watson's description of Aboriginal title in *St. Catherine's*, said "it does not help one in the solution of this problem" to call it a "personal or usufructuary right": *Calder*, *supra* note 14 at 328.

[19] Judgment of Pigeon J, concurred in on this point by Judson, Martland, and Ritchie JJ who would also have dismissed the action on the basis that Aboriginal title had been extinguished by legislation before British Columbia joined Confederation in 1871. On the latter point, the Court split three/three, as Hall, Spence, and Laskin JJ expressed a contrary view.

[20] However, Hall J, for the dissenting minority, appears to have regarded it as ownership, as he applied the common law rule that possession is proof of ownership. See *Calder*, *supra* note 14 at 368, 375.

[21] See *Delgamuukw*, *supra* note 9 at paras 170–71.

plaintiffs' oral histories. The case was sent back to trial, but has never been retried.

In spite of avoiding any decision on the merits, Chief Justice Lamer chose to provide guidance for trial courts on a number of vital issues, including what is required to prove Aboriginal title, the nature and content of the title once established, the constitutional protection it enjoys, and how it can be infringed and by what legislative authority, federal or provincial.

The Court affirmed the decision in *Calder* that Aboriginal title is a legal right enforceable in Canadian courts. On proof, as mentioned earlier it held that title can be established by proof that the Indigenous claimants were in exclusive occupation of land at the time of Crown assertion of sovereignty in British Columbia in 1846. If that burden of proof is met, Aboriginal title would have "crystallized" (which I take to mean, vested at common law) at that time.[22] For this conclusion to have the force of law, the Court's articulation of the requirement for proof of Aboriginal title has to be retroactive to the time of Crown assertion of sovereignty; otherwise, Indigenous claimants would never be able to establish their Aboriginal title in a Canadian court. Likewise, the Court's description of Aboriginal title as a property right that "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures",[23] has to be retroactive to the time when the title crystalized as a legally enforceable Aboriginal right. Given the historical basis for Aboriginal title, the Court's articulation of the law regarding its proof and content would be simply unworkable if that law were not retroactive.

Seventeen years later in *Tsilhqot'in Nation*, the Supreme Court applied the law laid down in *Delgamuukw* in relation to the proof and content of Aboriginal title and issued a declaration of title in favour of the Tsilhqot'in Nation in British Columbia. The

22 *Ibid* at para 145.

23 *Ibid* at para 117.

declaration must relate back to 1846 because that is when the title would have "crystallized" and become a burden on the Crown's underlying title.[24]

Another example can be given. In *Guerin v The Queen*,[25] the Supreme Court decided that the Crown owes fiduciary obligations to First Nations (the Musqueam Nation in the Lower Mainland of British Columbia in this case) in the context of surrender of their reserve lands. This case broke new ground by applying fiduciary law in circumstances where it had never been applied before.[26] The events giving rise to the Crown's liability took place in the 1950s, several years before the case went to trial, but as in *Donoghue v Stevenson*,[27] the law articulated by the Court was applied retroactively. For that to happen, the Crown's action had to be legally wrong in the 1950s, even though the government officials who were involved may not have known this. This is how the common law works.[28]

In *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*,[29] the Supreme Court applied the law laid down in *Guerin* and, once again, held the Crown liable in the context of a surrender of reserve lands, this time for wrongdoing almost 50 years earlier in the 1940s. The Court accepted that the law articulated in *Guerin* was not only retroactive in its application to the facts of that case, but was also retroactive in that it applied to Crown actions in other cases, even preceding the events in *Guerin.* In other words, the law articulated

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24 See Kent McNeil, "The Source, Nature, and Content of the Crown's Underlying Title to Aboriginal Title Lands" (2018) 96:2 Can Bar Rev 273.

25 [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*].

26 See Jim Reynolds, *From Wardship to Rights: The* Guerin *Case and Aboriginal Law* (Vancouver: UBC Press 2020) at 155–78.

27 See *Donoghue*, *supra* note 3.

28 See *supra*, note 1 and accompanying text, *above*. See also Kent McNeil, "Indigenous Rights Litigation, Legal History, and the Role of Experts" (2014) 77 Sask L Rev 173 at 195–210.

29 [1995] 4 SCR 344, 130 DLR (4th) 193 [*Blueberry River*].

in *Guerin* was generally applicable and not time limited.[30] The same thing happened in *Southwind v Canada*,[31] a recent decision where the Supreme Court relied on *Guerin* to impose and assess liability on the Crown for breach of its fiduciary obligations when it authorized construction of a hydroelectric dam in the 1920s that flooded part of the Lac Seul First Nation's reserve.

These cases are all examples of the Supreme Court applying old law to circumstances where it had never been applied before. In *Delgamuukw* and *Tsilhqot'in Nation*, the Court relied on the ancient common law rule that physical occupation of land gives rise to title.[32] This is the same rule that Justice Hall said applied in *Calder*.[33] In *Guerin* and *Blueberry River*, the Court applied fiduciary law developed in the context of trusts to the Indigenous-Crown relationship. Quoting Ernest Weinrib, Justice Dickson noted that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."[34] Given that the Crown has discretionary authority over the surrender of reserve lands, the Court decided that it has fiduciary obligations in that context. This is an application of what Justice McLachlin (as she then was), writing in her dissent in *Van der Peet*, called

> the time-honoured methodology of the common law. Faced with a new legal problem, the court looks to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past

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30 Its application was, however, subject to statutory time limits, which in fact permitted the Crown to escape some, but not all, liability in *Blueberry River*, *ibid.*

31 2021 SCC 28.

32 *Delgamuukw*, *supra* note 9 at para 149. See Kent McNeil, *Common Law Aboriginal Title* (Oxford: Oxford University Press, 1989), ch 2.

33 See *supra* note 20, *above*.

34 Ernest J Weinrib, "The Fiduciary Obligation" (1975) 25:1 UTLJ 1 at 7, quoted in *Guerin*, *supra* note 25 at 384.

> and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis.[35]

This is exactly what the Supreme Court has been doing in these cases of first impression involving Indigenous peoples. The Court has not been making entirely new law; instead, it has been adapting old principles and rules and applying them in the unique circumstances of Indigenous peoples and their rights.[36] In so doing, the Court has been implicitly relying on the declaratory theory of the common law, whereby judges state the law, not just as it is, but as it was in the past.[37]

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[35] *Van der Peet*, *supra* note 4 at para 261. McLachlin J said much the same thing in her unanimous decision in *Watkins v Olafson*, [1989] 2 SCR 750 at 760, 61 DLR (4th) 577 [*Watkins*] quoted in text accompanying note 194, *below.* See also AWB Simpson, "The Common Law and Legal Theory" in AWB Simpson, ed, *Oxford Essays in Jurisprudence*, 2nd series (Oxford: Clarendon Press, 1973), 75.

[36] *Van der Peet*, *supra* note 4, does not follow this pattern. As far as I know, the "integral to the distinctive culture test" created by the majority of the Supreme Court in that case has no precedent in the common law. This helps us understand McLachlin J's dissent, as she preferred to follow the tried-and-true common law methodology. It also provides additional justification for the biting academic criticism of the *Van der Peet* test: see e.g. Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22:1 Am Indian L Rev 37; Chilwin Chienhan Cheng, "Touring the Museum: A Comment on *R. v. Van der Peet*" (1997) 55:2 UT Fac L Rev 419.

[37] See *Hislop*, *supra* note 1 at para 86, in which the Court distinguished between "instances where courts apply pre-existing legal doctrine to a new set of facts" and "situations in which judges are fashioning new legal rules or principles." See also H Patrick Glenn, "On Blackstone, California Divorces and the Retrospectivity of the Common and Civil Laws: *Edward v Edward*" (1987) 34:1 McGill LJ 186; John D McCamus, "The Common Law: Where is it Written Down?", in Ysolde Gendreau, ed, *Le lisible et l'illisible / The Legible and the Illegible* (Montreal: Les Editions Thémis, 2003), 20 at 43–48, online: <canlii.ca/t/ts59>; Allan Beever, "The Declaratory Theory of Law" (2013) 33 Oxford J Leg Stud 421; Samuel Beswick, "Prospective Overruling Unravelled" (2022) 41:1 CJQ 29, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id =3820990>.

## III. APPEAL CASES OVERRULING EARLIER LOWER COURT PRECEDENTS

The outstanding example of overruling a lower court precedent in the context of Indigenous rights is the 1992 decision of the High Court of Australia in *Mabo*.[38] In 1971, Justice Blackburn handed down his decision in *Milirrpum v Nabalco Pty*.[39] The action was brought by the plaintiffs on behalf of the Rirratjingu, Gumatj, and Djapu clans in the Northern Territory of Australia to prevent the defendant company from mining bauxite on lands on the Gove Peninsula to which they claimed exclusive rights. Justice Blackburn dismissed their claims, partly because their laws and customs, the existence of which he acknowledged, did not give them what he regarded as a proprietary interest in the lands. More importantly for our purposes, he also held that the common law does not contain a doctrine of communal Native title applicable in settled Australia. Instead, title to land depends on the common law doctrine of tenures, which he summarized as follows:

> [T]he Crown is the source of title to all land; . . . no subject can own land allodially, but only an estate or interest in it which he holds mediately or immediately of the Crown. On the foundation of New South Wales, therefore, and of South Australia, every square inch of territory in the colony became the property of the Crown. All titles, rights, and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown.[40]

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[38] See *Mabo*, *supra* note 12.

[39] (1971), [1972-73] ALR 65, (1971) 17 FLR 141 (NTSC) [*Milirrpum*]. For critical commentary, see also John Hookey, "The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?" (1972) 5 Federal L Rev 85; Geoffrey Lester & Graham Parker, "Land Rights: The Australian Aborigines Have Lost a Legal Battle, But…" (1973) 11 Alta L Rev 189; Barbara Hocking, "Does Aboriginal Law Now Run in Australia?" (1979) 10 Federal L Rev 161.

[40] See *Milirrpum*, *supra* note 39 at 245 (when British settlement of eastern Australia began in 1788, the Gove Peninsula was deemed to be part of the colony New South Wales).

Because the plaintiffs and their ancestors had never received grants of their lands from the Crown, Justice Blackburn decided that their claims had to be dismissed.

Because *Milirrpum* was not appealed, it retained precedential value for the denial of non-statutory Indigenous land rights in Australia for 20 years.[41] Earlier cases had implied that Indigenous Australians had no land rights,[42] but this was the first time the issue of the existence of these rights came squarely before an Australian court.[43]

Then came *Mabo*.[44] That case involved a claim by Eddie Mabo, David Passi, and James Rice, members of the Meriam people who occupy the Murray Islands in the Torres Strait off the northern tip of mainland Queensland, that acquisition of sovereignty by the Crown in 1879, which they did not challenge, did not impair the pre-existing land rights of the Murray Islanders under their traditional laws and customs. The High Court agreed with the

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41 Statutory land rights were created in some Australian states after the *Milirrpum* decision.

42 For discussion of these cases, see *Mabo*, *supra* note 12 at paras 42–47, Deane and Gaudron JJ; Kent McNeil, "A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?" (1990) 16 Monash UL Rev 91.

43 See *Mabo*, *supra* note 12 at para 41, Deane and Gaudron JJ.

44 The literature on the *Mabo* decision is extensive. See e.g. Richard Bartlett, "The Aboriginal Land Which May Be Claimed at Common Law: Implications of *Mabo*" (1992) 22 UWA L Rev 272; *Essays on the Mabo Decision* (Sydney: Law Book Co, 1993); MA Stephenson & Suri Ratnapala, eds, *Mabo: A Judicial Revolution. The Aboriginal Land Rights Decision and Its Impact on Australian Law* (St Lucia, Qld: University of Queensland Press, 1993); Murray Goot & Tim Rouse, eds, *Make Us a Better Offer: The Politics of Mabo* (Leichhardt, NSW: Pluto Press Australia, 1994); Jeremy Webber, "The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*" (1995) 17 Sydney L Rev 5 [Webber, "Jurisprudence of Regret"]; Peter H Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Toronto: University of Toronto Press, 2005); Bryan Keon-Cohen, *Mabo in the Courts, Islander Tradition to Native Title: A Memoir*, 2 vols (North Melbourne: Chancery Bold, 2011); Toni Bauman & Lydia Glick, eds, *The Limits of Change: Mabo and Native Title 20 Years On* (Canberra: Australian Institute of Aboriginal and Torres Strait Islanders Studies, 2012); Sean Brennan et al, eds, *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Leichhardt NSW: Federation Press, 2015).

plaintiffs and overruled Justice Blackburn's holding that the common law does not have a doctrine of communal Indigenous land rights that could be applied in settled Australia.[45] Justice Brennan, delivering the main judgment, wrote:

> The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land. (The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.) The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land.[46]

The High Court rejected the notion that, in contrast to conquered territories, settled territories were *terra nullius*, that is, devoid of pre-existing law and rights. On the contrary, if the Indigenous peoples in the settled territory of Australia had rights in relation to land under their own laws and customs, then, in the absence of extinguishment, those rights continued and became enforceable in common law courts.[47]

I think it is clear that the High Court regarded *Milirrpum* as having been wrongly decided.[48] Admittedly, the Court did say that this required a reassessment of the law. Justice Brennan, for example, said that "it is imperative in *today's world* that the common law should neither be nor be seen to be frozen in an age of racial discrimination."[49] Nonetheless, the Court applied its articulation of Native title law retroactively.[50] It ordered that, with the exception of a couple of islands and leased and validly

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[45] See *Mabo*, *supra* note 12 at paras 37–42, 53, 63, Brennan J, at paras 41–42, Deane and Gaudron JJ.

[46] *Ibid* at para 61, Brennan J.

[47] *Ibid* at paras 40–63, Brennan J.

[48] See Webber, "Jurisprudence of Regret", *supra* note 44 at 23–27.

[49] *Mabo, supra* note 12, at para 41, Brennan J [emphasis added].

[50] See Jeremy Webber, "The Past and Foreign Countries" (2006) 10 Leg History 1 at 5.

appropriated lands, "the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands".[51] This order was based on the fact that the Murray Islanders were in possession of those lands under their own laws and customs at the time the Crown acquired sovereignty in 1879. In other words, their land rights pre-dated Crown sovereignty and continued thereafter. This holding has since been applied to other Indigenous peoples in Australia whose occupation or use of lands under their own laws and customs pre-dated Crown sovereignty, whether in New South Wales in 1788 or Western Australia in 1829.[52] The law of Native title articulated by the High Court in *Mabo* therefore has retroactive effect back to the time of colonization.

In Canada, there are no such instances of a major overruling of an earlier precedent involving Indigenous peoples.[53] It is true that the Supreme Court has limited the application of the *St. Catherine's* case, but that has been in regard to the Privy Council's vague characterization of Aboriginal title as a "personal and usufructuary right."[54] The Court has never overruled the Privy Council's main holding that the provinces have the underlying title to Aboriginal title lands.[55]

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51 *Mabo*, *supra* note 12 (order at the end of the judgments).

52 See e.g. *Western Australia v Commonwealth*, [1995] HCA 47 at paras 1, 17; *Wik Peoples v Queensland*, [1996] HCA 40; *Yanner v Eaton*, [1999] HCA 53; *Commonwealth v Yarmirr*, [2001] HCA 56.

53 There are, of course, numerous cases where the Supreme Court has overturned decisions of lower courts on appeal, but I am referring to cases that were *not* appealed but were later overruled as precedents by the Court.

54 See *Delgamuukw*, *supra* note 9 , per Lamer CJ at para 112: "the Privy Council's choice of terminology is not particularly helpful to explain the various dimensions of aboriginal title. What the Privy Council sought to capture is that aboriginal title is a *sui generis* interest in land." See also McNeil, *Flawed Precedent*, *supra* note 17 at 160–64.

55 The three Prairie Provinces were exceptional, as title to public lands generally was transferred to them only in 1930 by the Natural Resources Transfer Agreements, given constitutional force by the *Constitution Act 1930* (UK), 20 & 21 Geo V, c 26. See generally *The Natural Resources Transfer Agreements at 75* (2007) 12:2 Rev Const Stud.

In *The Queen v Simon*,[56] the Supreme Court did overrule Acting Judge Patterson's decision in *R v Syliboy*[57] that a 1752 agreement of the British Crown with the Mi'kmaq of Nova Scotia was not a treaty. At the same time, Chief Justice Dickson disapproved of the following racist language that judge had used:

> [T]he Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.[58]

This language, Dickson CJC stated, "reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada."[59]

The Supreme Court's decision in *Simon* that the 1752 agreement is a treaty within the meaning of section 88 of the *Indian Act*,[60] which makes the application of provincial laws to Indians "[s]ubject to the terms of any treaty," had retroactive effect because, in addition to resulting in the acquittal of Mr. Simon, it recharacterized the agreement legally and acknowledged its status as a treaty at the time it was entered into. It did not just *become* a treaty in 1985 when *Simon* was decided.

In *Mabo* and *Simon*, the justices are saying that Justice Blackburn and Acting Judge Patterson got the law wrong: *Milirrpum* and *Syliboy* should have been decided differently. The correct law is the law articulated by the High Court and the Supreme Court in *Mabo* and *Simon*, and that is the law that should

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56 [1985] 2 SCR 387, 2 RCS 387 [*Simon*].

57 [1929] 1 DLR 307 at para 37, 4 CNLC 430 (Co Ct).

58 *Ibid* at 313, quoted in *Simon*, *supra* note 56 at para 20.

59 *Simon*, *supra* note 56 at para 22.

60 RSC 1985, c I-5, s 88.

have been applied in the earlier decisions.[61] These cases differ from those in which a court of final appeal overrules itself because lower court decisions are always subject to being overruled by a higher court, whereas decisions of the highest court in the land have more finality and are normally understood to be definitive statements of the law that individuals and their legal advisors are entitled to rely upon.

## IV. WHERE THE SUPREME COURT OVERRULES ITSELF: *CANADA (ATTORNEY GENERAL) V BEDFORD* AND *R V ALBASHIR*

In this part, our focus is on a significant and fairly recent decision in which the Supreme Court overruled itself.[62] I will rely on this decision in part 5 to argue that the Supreme Court's rejection of the application of the doctrine of interjurisdiction immunity to Aboriginal rights in *Tsilhqot'in Nation* should not be treated as retroactive.[63]

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61 See *In re Spectrum Plus Ltd (in liquidation)*, [2005] UKHL 41, 2 AC 680 (HL) at para 34, as quoted with approval in *Hislop*, *supra* note 1 at para 87, where Lord Nicholls said, in reference to William Blackstone's declaratory theory of the common law, that his

> theory is still valid when applied to cases where a previous decision is overruled as wrong when given. Most overruling occurs on this basis. These cases are to be contrasted with [those] where the later decision represents a response to changes in social conditions and expectations. Then, on any view, the declaratory approach is inapt. In this context [the declaratory] approach has long been discarded. It is at odds with reality.

62 See also *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*] (another important decision in which the Court recently overruled itself, in this case in relation to physician-assisted dying). While space does not permit discussion of *Carter* in this article, in my opinion it does support the argument made here that decisions in which the Court overrules itself should generally be regarded as prospective, unless the Court has indicated otherwise, either expressly or by necessary implication.

63 The extensive case law and commentary on the retroactive/prospective effect of judicial decisions in other common law jurisdictions is beyond the scope of this article: see e.g. Jim Harris, "Retrospective Overruling and the Declaratory Theory in the United Kingdom: Three Recent Decisions" (2002) 26 Rev Dr ULB 153; Mary Arden, "Prospective Overruling" (2004) 120 Law Q Rev 7; Philip Joseph, "Constitutional Law: Prospective Overruling" (2006) NZLR 138, critiqued by Samuel Beswick, "Prospective Overruling Offends the Rule of Law" [2021] NZLJ 261; Charles Sampford *et al*, *Retrospectivity and the Rule of*

In *Canada (Attorney General) v Bedford*,[64] the Supreme Court in 2013 overruled the *Prostitution Reference*[65] and held that certain provisions of the *Criminal Code*[66] relating to prostitution violated section 7 of the *Canadian Charter of Rights and Freedoms*, which provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[67] Then in *R v Albashir*,[68] the Court had to deal with the consequences of this decision. The accused in *Albashir* had been charged under one of the *Code* provisions found to be unconstitutional in *Bedford* for acts committed *after* that case was decided, but *before* expiry of the period of suspension the Court granted to give Parliament time to respond to the decision. *Albashir* therefore put the issue of whether the decision in *Bedford* was retroactive or prospective directly before the Court.

In the *Prostitution Reference*,[69] the Supreme Court in 1990 had upheld the constitutionality of two of the *Criminal Code* provisions challenged in *Bedford.* The Supreme Court in *Bedford* had to decide whether it was time to revisit the validity of these prostitution

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*Law* (Oxford: Oxford University Press, 2006); Aruna Nair, "'Mistakes of Law' and Legal Reasoning: Interpreting *Kleinwort Benson v Lincoln City Council*" in Robert Chambers, Charles Mitchell & James Penner, eds, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009), 373; Andrew Burrows, "Common Law Retrospectivity" in Andrew Burrows, David Johnston & Reinhart Zimmermann, eds, *Judge and Jurist: Essays in Memory of Lord Rodger* (Oxford: Oxford University Press, 2013), c 41; Eva Steiner, *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (Springer Cham, 2015); Stephen J Hammer, "Retroactivity and Restraint: An Anglo-American Comparison" (2018) 1:1 Harv JL & Pub Pol'y 409; Samuel Beswick, "Retroactive Adjudication" (2020) 130 Yale LJ 276.

64 [2013] 3 SCR 1101 [*Bedford*].

65 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123, 4 WWR 481 [*Prostitution Reference*].

66 RSC 1985, c C-46.

67 *Constitution Act, 1982*, *supra* note 7, s 7.

68 *Albashir*, *supra* note 1.

69 *Prostitution Reference*, *supra* note 65.

prohibitions. Delivering the unanimous judgment of the Court, Chief Justice McLachlin framed two of the issues in this way: "The first 'vertical' question is when, if ever, a lower court may depart from a precedent established by a higher court. The second 'horizontal' question is when a court such as the Supreme Court of Canada may depart from its own precedents."[70]

On the "vertical" question, the Chief Justice stated that:

> [A] trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.[71]

She found that these guidelines applied in *Bedford*. The challenge to the *Criminal Code* provisions in the *Prostitution Reference* had been based on the "liberty" guarantee in section 7 of the *Charter*, whereas in *Bedford* the challenge was based on "security of the person," specifically the need for prostitutes to be able to avoid dangerous and violent situations when engaging in their work.[72] The legal issue in *Bedford* was therefore new.[73] In addition, the trial court had been presented with fresh evidence and made new findings of social and legislative facts that were entitled to be treated with deference on appeal.[74]

On the "horizontal" question, the Supreme Court provided scant guidance. In addition to addressing section 7, the Court in the *Prostitution Reference* had decided that the *Criminal Code* prohibition against communication in public "for the purpose of

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[70] *Bedford*, *supra* note 64 at para 39.

[71] *Ibid* at para 42.

[72] See *ibid* at paras 58–60.

[73] *Ibid* at para 45. Additionally, the Supreme Court noted that the "principles raised in this case—arbitrariness, overbreadth, and gross disproportionality—have, to a large extent, developed only in the last 20 years", i.e. since the *Prostitution Reference*. The trial judge was entitled to take these more recent principles into account: *Bedford*, *supra* note 64 at para 45.

[74] *Bedford*, *supra* note 64 at paras 48–56.

engaging in prostitution"[75] did not violate the *Charter* guarantee of freedom of expression in section 2(b). On "whether this Court should depart from its previous decision on the s. 2(b) aspect of this case," Chief Justice McLachlin observed:

> At heart, this is a balancing exercise, in which the Court must weigh correctness against certainty . . . . In this case, however, it is not necessary to determine whether this Court can depart from its s. 2(b) conclusion in the *Prostitution Reference*, since it is possible to resolve the case entirely on s. 7 grounds.[76]

Nonetheless, by upholding the trial judge's use of "security of the person" in section 7 and her findings of new social and legislative facts to strike down the challenged *Criminal Code* provisions, the Supreme Court effectively overruled the *Prostitution Reference* and changed the law.

If the *Bedford* case had involved prosecutions, the striking down of the *Criminal Code's* prostitution provisions would have had to be retroactive to the time of the factual circumstances leading to the charges.[77] But the case did not arise from prosecutions; instead, the plaintiff sex workers had taken the initiative and applied to the Ontario Superior Court of Justice for declarations that the provisions were constitutionally invalid. Was the Supreme Court's decision declaring the provisions to be invalid retroactive? No, it cannot have been, because the Court suspended the declaration of invalidity for one year.[78] In other words, not only

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[75] *Criminal Code*, *supra* note 66, s 213(1)(c) since replaced by *Protection of Communities and Exploited Persons Act*, SC 2014, c 25, s 15.

[76] *Bedford*, *supra* note 64 at para 47.

[77] Dickson J (as he then was) explained that "no one can be convicted of an offence under an unconstitutional law" and "[a]ny accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid": *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at paras 38–39, 18 DLR (4th) 321.

[78] See *Bedford*, *supra* note 64 at para 169; *Ontario (Attorney General) v G*, 2020 SCC 38 (the Court provided guidelines on when declarations of constitutional invalidity should be suspended); *Albashir*, *supra* note 1 at para 44 (the Court said the suspension was necessary to uphold the rule of law, a fundamental constitutional principle); *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, 4 WWR 385 (this was an early instance of use of this technique,

was the decision not retroactive, but it had delayed prospective effect—it only took effect in the future. But would the decision become retroactive after one year? If so, could individuals who had been previously prosecuted and fined or imprisoned sue the Crown for recovery of fines paid or damages for wrongful imprisonment?[79] What about individuals who might be prosecuted for acts committed during the one-year period of suspension? The Court clearly envisaged such prosecutions, as the Chief Justice justified the suspension by observing:

> [I]mmediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it. . . . It is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.[80]

While it seems unjust for there to be no redress for punishments imposed under unconstitutional criminal laws, this appears to be one result of the *Bedford* decision. Apparently, the Court envisaged that the *Prostitution Reference* would remain the law until the suspension period expired or until Parliament repealed and replaced the relevant *Criminal Code* provisions.[81] I think the only way to explain this is by regarding the *Bedford* decision as having prospective effect from the end of the suspension period.

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where the Court suspended its declaration of the constitutional invalidity of Manitoba statutes enacted only in English since the creation of the province in 1870, to give the Manitoba government time to translate all the unilingual statutes into French and re-enact them in both languages).

79 See *Hislop*, *supra* note 1 ("If the law was invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past": *ibid* at para 83). *Cf R v Wigman*, [1987] 1 SCR 246 at para 21, 38 DLR (4th) 530; *R v Thomas*, [1990] 1 SCR 713, 1 RCS 713.

80 *Bedford*, *supra* note 64 at para 167.

81 In fact, Parliament did so a few weeks before the end of the suspension period. See *Protection of Communities and Exploited Persons Act*, SC 2014, c 25, in force as of 6 December 2014 (these amendments are not retroactive).

The Supreme Court does not seem to have given much thought to these issues at the time of the *Bedford* decision,[82] but it recently had to face them directly, in *Albashir*.[83] The accused were prosecuted for living on the avails of prostitution, one of the *Criminal Code* provisions[84] found to be unconstitutional in *Bedford.* As mentioned earlier, the acts on the basis of which they were charged occurred *after* the *Bedford* decision during the period of suspension of the provision. They argued that they could not be prosecuted under a provision the Supreme Court had found to be unconstitutional. Justice Rowe, dissenting for himself and Justice Brown, lamented that *Bedford* had not set "the terms of the suspension . . ., deliberately and explicitly, based on the state of the law that the declaration is intended to achieve, both during and following the expiry of the suspension," and consequently, the Court is "asked in these appeals to do a *post facto* patch up."[85] He relied on the conventional wisdom that court decisions stating the law are generally retroactive, unlike legislation that is prospective unless clearly intended to be retroactive.[86] Although the Court in *Bedford* could have issued "a prospective declaration of invalidity,"[87] it did not,[88] so the presumption in favour of retroactivity should apply.[89] Consequently, once the period of

82 If it had, surely it would have made the prospective nature and consequences of its decision clearer.

83 *Albashir*, *supra* note 1.

84 *Criminal Code*, *supra* note 66, s 212(1)(j).

85 *Albashir*, *supra* note 1 at para 75 (they also admitted that "[t]he law relating to the suspension of declarations of invalidity has been bedeviled by a lack of doctrinal clarity. This, in turn, has given rise to sustained ad hockery": *ibid* at para 74).

86 *Ibid* at paras 94–96. See also *ibid* at paras 34–35, Karakatsanis J for the majority.

87 As the Court did in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 18, 150 DLR (4th) 577 [*Remuneration of Judges*].

88 *Albashir*, *supra* note 1 at paras 77, 111.

suspension was over the declaration of invalidity was retroactive, and so the accused should not have been prosecuted and should have been acquitted.[90]

The majority viewed the matter differently and upheld the convictions of these abusive "parasitic, exploitative pimps".[91] Justice Karakatsanis, delivering the majority judgment, explained:

> The purpose animating the suspension in *Bedford* was to avoid the deregulation of sex work (thus maintaining the protection of vulnerable sex workers) while Parliament crafted replacement legislation. In light of that purpose, I conclude that the declaration of invalidity was purely prospective, effective at the end of the period of suspension. Thus, the appellants were liable under s. 212(1)(j) for their conduct during the suspension period, and could be charged and convicted under this provision even after the suspension expired.[92]

While acknowledging that "judicial declarations are presumptively retroactive," she said that this "presumption is rebutted when retroactivity would defeat the compelling public interests that required the suspension."[93] The compelling interests in *Bedford* were regulation of prostitution and protection of sex workers.

However, a ruling that *Bedford*'s declaration of invalidity was prospective, and that only from the end of the suspension period, could expose individuals such as drivers and bodyguards to prosecution for their involvement in the sex trade up to the expiry of that period, even though the decision in *Bedford* was intended in part to avoid this result by making the protection offered to sex workers by these individuals lawful. The majority got around this potential result by saying that persons who, unlike the accused, were providing sex workers with a safe working environment,

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89 *Ibid* at paras 91, 119. On the distinction between prospective and retroactive judicial decisions, see Sujit Choudhry & Kent Roach, "Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies" (2003) 21 SCLR (2d) 205, referred to frequently in *Albashir*.

90 *Albashir, supra* note 1 at paras 77, 120.

91 *Ibid* at paras 5, 9.

92 *Ibid* at para 6. See also *ibid* at paras 54–57.

93 *Ibid* at para 8.

instead of exploiting and abusing them, could rely on section 24(1) of the *Charter*, which provides that "[a]nyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[94] The majority were of the view that, "[u]nlike a formal declaration under s. 52(1) that renders the legislation invalid, s. 24(1) is an entirely personal remedy that can only be invoked by a claimant alleging a violation of their own constitutional rights."[95] So even though the declaration of constitutional invalidity in *Bedford* was prospective, apparently individuals who were providing protection and other legitimate services for sex workers before the end of the period of suspension could avoid conviction under the provisions of the *Criminal Code* that were still valid at the time.

The majority's explanation for this was that a section 52(1) declaration of invalidity does not bar an individual section 24(1) remedy for a *Charter* violation: "when a s. 52(1) declaration is prospective, a person whose *Charter* rights are breached by the law declared to be unconstitutional may still apply for a personal remedy under s. 24(1)."[96] Consequently, "s. 24(1) remedies may be available even during the period of suspension if the accused can demonstrate that conviction under the legislation found to be constitutionally infirm would be a breach of their own *Charter* rights, and if granting an individual remedy would not undermine the purpose of suspending the s. 52(1) declaration."[97] So, while the accused were not entitled to a section 24(1) remedy (given that prevention of their kind of abusive and exploitive conduct was one purpose for the suspension), other individuals who were not

94 *Ibid* at para 32.

95 *Ibid* at para 33. Section 52(1) of the *Constitution Act, 1982* provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

96 *Albashir, supra* note 1 at para 61.

97 *Ibid* at para 67.

engaging in the type of behavior the suspension was aimed at could be protected against conviction by section 24(1).[98]

In *Albashir*, Justice Karakatsanis advised courts to make clear whether their declarations of constitutional invalidity are prospective or retroactive.[99] If they do not, commentators and judges in future cases must analyze declaratory judgments carefully to discover which effect was intended. The Supreme Court provided guidance on this in 2007 in *Canada (Attorney General) v Hislop*,[100] summarized by Justice Rowe in *Albashir*:

> In *Hislop*, this Court set out a list of considerations that may justify a declaration that is prospective only. A substantial change in the law is required, but is not sufficient. Other factors that may, together with a substantial change in the law, justify a purely prospective remedy, include good faith reliance by governments, unfairness to the litigants, or interference with the constitutional role of legislatures . . . . In considering these factors, courts must have regard to the effect that a suspended or prospective declaration of invalidity will actually have in the particular case.[101]

Justice Karakatsanis, for the majority, said:

> [T]he court should look to the purpose of a suspension in determining whether the declaration must logically operate retroactively or purely prospectively. The purpose of a suspension is to protect a compelling public interest that would be endangered by an immediate declaration to such an extent that it outweighs the harms of continuing the violation of *Charter* rights for a limited period . . . . If retroactivity would undermine that purpose, the declaration must apply purely prospectively.[102]

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98 See *ibid* at paras 68–71.

99 *Ibid* at para 53. Rowe J, at paras 90–92, expressed the view that, in the absence of an express statement by the Court that the declaration was prospective, the presumption of retroactivity should apply.

100 *Hislop*, *supra* note 1.

101 *Albashir*, *supra* note 1 at paras 88–89, referring to *Hislop*, *supra* note 1 at paras 99–100. At para 40 of *Albashir*, Karakatsanis J described *Hislop*'s guidance in equivalent terms.

102 *Albashir*, *supra* note 1 at para 52.

She also took account of the fact that "*Bedford* represented a substantial change in the law" because the Court revisited its decision in the *Prostitution Reference*.[103]

However, neither Justice Karakatsanis nor Justice Rowe discussed the distinction made in this article between cases where the substantial change involves overruling a prior lower court precedent and cases where the Supreme Court overrules itself, as in *Bedford*. In my opinion, the argument that a decision is prospective rather than retroactive is much more compelling where the Court overrules itself, as that amounts to a clear change in the law instead of a statement of the law that a lower court should have applied.[104] Once the Supreme Court has pronounced the law, Canadians should be able to rely on that authority. They should not have their legitimate expectations and dealings in the interim upset if the Court changes its mind in a later decision and revises the law. Such revisionary decisions should be prospective rather than retroactive,[105] unless there are good reasons, articulated by the Court, why the subsequent decision should reach back into the past.

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103 *Ibid* at para 54. Rowe J's only reference to the *Prostitution Reference* is where he quoted Lamer J, concurring, at para 1152 of that case that "there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive": *Albashir*, *supra* note 1 at para 95.

104 Many of the Supreme Court cases referred to in *Albashir* are neither of these (an exception is *Carter*, *supra* note 62, where the Court clearly overruled itself). Rather, most of them are cases of first impression where the Court had to decide, for the first time, whether a particular law violated a *Charter* provision or other aspect of the Constitution. These cases only amount to "changes in the law" in the sense that they strike down legislative provisions that were previously in force and acted upon. Nonetheless, the effect of a few of these decisions has been prospective: see e.g. *R v Brydges*, [1990] 1 SCR 190, 1 RCS 190; *Remuneration of Judges*, *supra* note 87; *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick,* 2002 SCC 13, [2002] 1 SCR 405; *Hislop, supra* note 1. For discussion, see Choudhry & Roach, *supra* note 89 at 214–18.

105 Admittedly, when a decision on the rights of the parties before the Court is required, the decision, like most court decisions (see note 1 and accompanying text, *above*), has to be retroactive, at least to that extent.

In *Albashir*, the majority explained why the decision in *Bedford* was prospective, thereby providing us with fresh insight into the principles to be applied. We will now examine the Supreme Court's decision in *Tsilhqot'in Nation* on the issue of the application of the doctrine of interjurisdictional immunity to Aboriginal rights to see if it is consistent with the jurisprudential advances in these more recent decisions.

## V. INTERJURISDICTIONAL IMMUNITY: *TSILHQOT'IN NATION V BRITISH COLUMBIA*

The *Tsilhqot'in Nation*[106] case involved a claim by the Tsilhqot'in Nation to Aboriginal title over a portion of their traditional territory in the interior of British Columbia. In a very significant decision, the Supreme Court found in their favour and, for the first time in Canada, issued a judicial declaration of Aboriginal title. Our present concern is not with that aspect of the decision,[107] but instead with the comments made by Chief Justice of Canada McLachlin, in her unanimous judgment, on the constitutional doctrine of interjurisdictional immunity and its application to Aboriginal rights. These comments were clearly *obiter* because the Chief Justice prefaced her discussion of the constitutional division-of-powers issue by saying that she had already reached the conclusion that "the Province breached its duty to consult and accommodate the Tsilhqot'in interest in the land. This is sufficient to dispose of the appeal."[108] She also concluded that, as a matter of statutory interpretation, the BC *Forest Act*[109] did not apply to the Tsilhqot'in's Aboriginal title lands.[110] It was therefore unnecessary for her to go on to consider "the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal

[106] *Supra* note 9.

[107] For commentary on this aspect of the decision, see the articles in (2015) 48:3 UBC L Rev.

[108] *Tsilhqot'in Nation*, *supra* note 9 at para 98.

[109] RSBC 1996, c 157.

[110] *Tsilhqot'in Nation*, *supra* note 9 at paras 107–16.

title lands is ousted by the Constitution."[111] Moreover, later in her judgment she also stated that, "[w]hile unnecessary for the disposition of this appeal, the issue of whether British Columbia possessed a compelling and substantial legislative objective in issuing the cutting permits in this case was addressed by the courts below, and I offer the following comments for the benefit of all parties *going forward*."[112] The issue of whether the province had "a compelling and substantial legislative objective" would only arise if the *Forest Act* were amended so as to purport to authorize the issuance of cutting permits on Aboriginal title land,[113] which is a purely speculative question.

Nonetheless, Chief Justice McLachlin, because of the "pressing importance" of the issue and her desire to aid the parties "going forward,"[114] chose to address the question of whether the doctrine of interjurisdictional immunity provides division-of-powers protection to Aboriginal title. According to this doctrine, at least some federal heads of power in section 91 of the *Constitution Act, 1867* (and, in theory at least, provincial powers in section 92)[115] contain a core that cannot be impaired by provincial legislation, even if Parliament has not enacted laws in regard to the matter at hand that would be paramount over the provincial laws. Provincial laws that impair the core of federal powers, even if otherwise valid, have to be read down to avoid that effect.[116]

Section 91(24) of the *Constitution Act, 1867* gives Parliament exclusive authority to enact laws in relation to "Indians, and Lands reserved for the Indians."[117] Prior to *Tsilhqot'in Nation*, case law had held that section 91(24) contains a core that is off limits to

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111 *Ibid* at para 117.

112 *Ibid* at para 126 [emphasis added].

113 *Ibid* at paras 117–26.

114 *Ibid* at paras 99, 126.

115 See *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 34–35 [*Canadian Western Bank*]; *Carter*, *supra* note 62 at paras 49–53.

116 See Kerry Wilkins, "Exclusively Yours: Reconsidering Interjurisdictional Immunity" (2019) 52:2 UBC L Rev 697.

117 *Supra* note 16.

provincial laws.[118] Some of these cases involved reserve lands in which First Nations have an interest that is essentially the same as Aboriginal title.[119] As the rights of possession and use of these lands are within the core of Parliament's section 91(24) jurisdiction, provincial laws in relation to these matters are excluded.[120] Another case, *Dick v The Queen*,[121] involved a hunting right that would undoubtedly be classified as an Aboriginal right today under the *Van der Peet* test.[122] In *Dick*, Justice Beetz, for the Court, decided that, assuming hunting for food by the Shuswap people of central British Columbia is at "the core of Indianness" within section 91(24), the provincial *Wildlife Act*[123] could not apply of its own force to them and would have to be read down "to preserve its constitutionality."[124] Although Justice Beetz did not

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118 See Patricia Hughes, "Indians and Lands Reserved for the Indians: Off-Limits to the Provinces?" (1983) 21:1 Osgoode Hall LJ 82; Nigel Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 UBC L Rev 317; Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61:2 Sask L Rev 431 [McNeil, "Aboriginal Title"]; Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22:1 Dal LJ 185; Kerry Wilkins, "Negative Capability: Of Provinces and Lands Reserved for the Indians" (2002) 1 Indigenous LJ 57; Kerry Wilkins, "Dancing in the Dark: Of Provinces and Section 35 Rights After 2010" (2011) 54 SCLR (2d) 529 [Wilkins, "Dancing in the Dark"].

119 *Guerin*, *supra* note 25 at 379; *Osoyoos Indian Band v Oliver (Town)*, [2001] 3 SCR 746 at paras 41–42, 278 NR 201.

120 See e.g. *Corporation of Surrey v Peace Arch* (1970), 74 WWR 380, BCJ No 538 (BCCA) (provincial laws do not apply to use of reserve lands), cited with apparent approval in *Cardinal v Alberta (Attorney General)*, [1974] SCR 695 at 704–05, Martland J, 718–19, Laskin J, dissenting, 40 DLR (3d) 553; *Derrickson v Derrickson*, [1986] 1 SCR 285 at paras 41–43, 65 NR 278 [*Derrickson*], and *Paul v Paul*, [1986] 1 SCR 306, 26 DLR (4th) 196 [*Paul*] (provincial matrimonial property legislation cannot apply of its own force to affect ownership and possession of reserve lands).

121 [1985] 2 SCR 309, 62 NR 1 [*Dick*].

122 *Van der Peet*, *supra* note 4; *Delgamuukw*, *supra* note 9 at para 181.

123 RSBC 1979, c 433.

124 *Dick*, *supra* note 121 at paras 24 (Beetz J nonetheless went on to hold that the *Wildlife Act* applied because it had been referentially incorporated into federal law by s 88 of the *Indian Act*, RSC 1970, c I-6).

mention the doctrine of interjurisdictional immunity expressly, it was clearly the reason for the non-application of the provincial statute, as acknowledged in the *Delgamuukw* case, where Chief Justice Lamer stated: "s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described as matters touching on 'Indianness' or the 'core of Indianness' (*Dick*, *supra* at pp 326 and 315)".[125] The Chief Justice concluded that "aboriginal rights are part of the core of Indianness at the heart of s. 91(24). Prior to 1982, as a result, they could not be extinguished by provincial laws of general application."[126] He evidently meant to include Aboriginal title within this core, as it was the Aboriginal right at issue in *Delgamuukw*.[127]

And yet, elsewhere in his judgment in *Delgamuukw*, Chief Justice Lamer envisaged provincial infringement of Aboriginal rights. He stated: "The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments. However, s. 35(1) requires that those infringements satisfy the test of justification."[128] For him to conclude that provincial infringement is constitutionally possible, he may have regarded the doctrine of interjurisdictional immunity to be applicable to *extinguishment*, but not *infringement*, of Aboriginal rights. However, that conclusion is inconsistent with his reliance on the *Dick* case, which involved infringement, not extinguishment, of the Shuswap people's hunting rights by the provincial *Wildlife Act.*

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125 *Delgamuukw*, *supra* note 9 at para 181, where Lamer CJC also relied on *Four B Manufacturing Ltd v United Garment Workers of America*, [1980] 1 SCR 1031 at 1047, 30 NR 421 [*Four B Manufacturing*]; *R v Francis*, [1988] 1 SCR 1025 at 1028–29, 85 NBR (2d) 243.

126 *Delgamuukw*, *supra* note 9 at para 181.

127 See *ibid* at paras 174–78.

128 *Ibid* at para 160. The reference is to s 35(1) of the *Constitution Act, 1982*, which provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The justification test was created by *Sparrow*, *supra* note 7.

Lamer CJC provided no justification for the non-application of interjurisdictional immunity to infringements of Aboriginal rights. He simply stated that the provinces may infringe those rights, citing *R v Côté*[129] as authority. *Côté* involved Aboriginal and treaty fishing rights of the Algonquin people in Quebec. On whether those rights were infringed by a provision of Quebec's *Regulation respecting controlled zones*[130] that required payment of a fee to gain vehicle access to a lake, the Supreme Court held that they were not infringed because the fee facilitated the exercise of the rights, as it was used to maintain the access road.[131] Given that there was no provincial infringement, it was not necessary for the Court to decide whether infringement of Aboriginal and treaty rights by provincial laws can be justified.[132] Consequently, Chief Justice of Canada Lamer's discussion of that issue in *Côté* is clearly *obiter.*[133] It is also deeply problematic.[134]

In considering whether provincial laws can infringe Aboriginal and treaty rights in *Côté*, Lamer CJC did not even mention the division-of-powers issue, even though that issue logically precedes consideration of justifiable infringement.[135] If the province lacks

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129 *Côté*, *supra* note 6.

130 RRQ 1981, 370 (supp), s 5. The case also involved infringement by the federal *Quebec Fishery Regulations*, CRC, c 852, s 4(1), which the Supreme Court decided could not be justified under the *Sparrow* test, but we can leave this issue aside because our concern is with provincial infringement.

131 *Côté*, *supra* note 6 at para 80.

132 See also *Sappier*; *Gray*, *supra* note 6 at para 55, where the Court found it unnecessary to consider provincial infringement because the Crown had not attempted to justify it.

133 *Obiter dicta* are not always binding, even on lower courts. See *R v Henry*, [2005] 3 SCR 609 at para 57, 342 NR 259, interpreted and applied in *R v Prokofiew*, 2010 ONCA 423, 100 OR (3d) 401. See also *R v Puddicombe*, 2013 ONCA 506 at paras 67–68.

134 For more detailed discussion, see McNeil, "Aboriginal Title", *supra* note 118 at 449–53.

135 See *R v Morris*, 2006 SCC 59, [2006] 2 SCR 915 [*Morris*], discussed at 192–96, *below*, and Kerry Wilkins, "Life among the Ruins: Section 91(24) after *Tsilhqot'in* and *Grassy Narrows*" (2017) 55:1 Alta L Rev 91 at 109 [Wilkins, "Life among the Ruins"].

constitutional authority to infringe treaty and Aboriginal rights because they are within the core of federal section 91(24) jurisdiction and thus protected by the doctrine of interjurisdictional immunity (as was apparent in *Dick*), once an Aboriginal or treaty right is found to exist the analysis should stop: the province cannot infringe the right for division-of-powers reasons, so it is unnecessary to move on to the section 35(1) analysis and consider justifiable infringement. But the Chief Justice simply skipped over the division-of-powers issue as though it did not exist. He stated that "it is quite clear that the *Sparrow* test applies where a *provincial law* is alleged to have infringed an aboriginal or treaty right in a manner which cannot be justified: *Badger*, *supra*, at para. 85 (application of *Sparrow* test to provincial statute which violated a treaty right)."[136] He justified this on the basis that the "text and purpose of s. 35(1) do not distinguish between federal and provincial laws which restrict aboriginal or treaty rights, and they should both be subject to the same standard of constitutional scrutiny,"[137] without explaining how one even gets to section 35(1) if the provinces cannot infringe Aboriginal and treaty rights for division-of-powers reasons.

Chief Justice Lamer apparently thought that the issue of whether provincial laws generally can justifiably infringe Aboriginal and treaty rights had been settled by *R v Badger*,[138] a case involving treaty hunting rights in Alberta. It had not. What the *Badger* case decided in relation to provincial infringement was specific to the Alberta Natural Resources Transfer Agreement (NRTA) that had transferred the administration and benefit of public lands and natural resources from the federal government to the province. That Agreement was made constitutional by the *Constitution Act, 1930.*[139] By paragraph 12, Canada agreed

> that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof,

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[136] *Côté*, *supra* note 6 at para 74 [emphasis added].

[137] *Ibid.*

[138] [1996] 1 SCR 771, 195 NR 1 [*Badger*].

[139] See *Constitution Act, 1930*, *supra* note 55, sch 2 para 12.

> provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.[140]

This provision gave the province constitutional authority to apply its game laws to "Indians", irrespective of federal jurisdiction over "Indians, and Lands reserved for the Indians."[141] In *Badger*, Justice Cory explained:

> In my view justification of provincial regulations enacted pursuant to the *NRTA* should meet the same test for justification of treaty rights that was set out in *Sparrow*. The reason for this is obvious. *The effect of para. 12 of the NRTA is to place the Provincial government in exactly the same position which the Federal Crown formerly occupied.* Thus the Provincial government has the same duty not to infringe unjustifiably the hunting right provided by Treaty No. 8 as modified by the *NRTA*.[142]

The Court's application of the *Sparrow* justifiable infringement test in *Badger* was thus specific to and depended on the province's constitutional authority in relation to hunting provided by the NRTA.[143] And yet, in *Côté*, Chief Justice Lamer took Justice Cory's

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140 *Ibid*.

141 *Constitution Act, 1867*, *supra* note 16, s 91(24). Section 1 of the *Constitution Act, 1930*, *supra* note 55 provides: "The Agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law *notwithstanding anything in the British North America Act, 1867* [now the *Constitution Act 1867*] or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid" [emphasis added]. I am grateful to Kerry Wilkins for bringing this section to my attention.

142 *Badger*, *supra* note 138 at para 96 [emphasis added]. See also *R v Horseman*, [1990] 1 SCR 901 at para 59, where Cory J stated that "the Transfer Agreements were meant to modify the division of powers originally set out in the *Constitution Act, 1867* . . . . Section 1 of the *Constitution Act, 1930* is unambiguous in this regard: 'The agreements . . . . shall have the force of law notwithstanding anything in the *Constitution Act, 1867*'."

143 Accord HW Roger Townshend, "What Changes did *Grassy Narrows First Nation* Make to Federalism and Other Doctrines?" (2017) 95:2 Can Bar Rev 459 at 484.

application of that test out of the context of the NRTA and wrongly applied it to a situation where Parliament still had exclusive jurisdiction over Aboriginal and treaty rights.[144] Then, in *Delgamuukw*, he compounded this error by relying on his own misapplication of *Badger* in *Côté* and asserting that the provinces can justifiably infringe Aboriginal and treaty rights. In so doing, he not only misinterpreted pre-existing case law, but also contradicted his own reliance on *Dick* in his discussion of interjurisdictional immunity later in his judgment.[145]

The Supreme Court cleared up the doctrinal mess created by Chief Justice Lamer in *Côté* and affirmed the application of the doctrine of interjurisdiction immunity to treaty rights in its 2007 decision in *R v Morris*.[146] That case involved the hunting rights of the Tsartlip Band of the Saanich Nation on Vancouver Island. The accused members of that Band were charged with hunting with lights at night, contrary to section 27(1) of the British Columbia *Wildlife Act*.[147] Their defence was based on a provision in their nation's Vancouver Island Treaty from the 1850s, providing that they would be "at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly."[148] Because they had used torches to hunt at night "formerly," a majority of the Court, in a

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144 After deciding that the provinces can justifiably infringe Aboriginal and treaty rights, Lamer CJC pondered over the fact that treaty rights enjoy more protection under section 88 of the *Indian Act*, *supra* note 60, than under section 35(1) of the *Constitution Act, 1982* (under section 88, the application of provincial laws to "Indians" is "[s]ubject to the terms of any treaty," with no justifiable infringement possible). But instead of this alerting him to the flaw in his analysis identified above, he suggested that, to remove this apparent anomaly, "Parliament will no doubt feel compelled to re-examine the existence and scope of this statutory protection in light of these uncertainties and in light of the parallel constitutionalization of treaty rights under s. 35(1)": *Côté, supra* note 6 at para 87. Parliament has not followed his advice.

145 See *Delgamuukw*, *supra* note 9 at paras 160, 181.

146 *Morris*, *supra* note 135. This case was decided after Lamer CJC retired. For commentary, see Kerry Wilkins, "*R. v. Morris*; A Shot in the Dark and Its Repercussions" (2008) 7:1 Indigenous LJ 1 [Wilkins, "Shot in the Dark"]; Wilkins, "Dancing in the Dark", *supra* note 118 at 534–40.

147 SBC 1982, c 57.

148 *Morris*, *supra* note 135 at para 17.

judgment written by Justices Deschamps and Abella, held that the blanket prohibition on hunting at night was overly broad and impaired their treaty right. While there could never be a treaty right to hunt dangerously, night hunting with lights is not always dangerous.[149]

After finding that the accused have a treaty right to hunt with lights at night, as long as done safely, Justices Deschamps and Abella turned to the division-of-powers issue. They found that the provincial *Wildlife Act* was a law of general application within the constitutional authority of the provincial legislature, but:

> [W]here a valid provincial law impairs "an integral part of primary federal jurisdiction over Indians and Lands reserved for the Indians" . . ., it will be inapplicable to the extent of the impairment. Thus, provincial laws of general application are precluded from impairing "Indianness".[150]

They cited *Dick* as authority, and then went on to say that "[t]reaty rights to hunt lie squarely within federal jurisdiction over 'Indians, and Lands reserved for the Indians'"; accordingly, "'[i]t has been held to be within the exclusive power of Parliament under s. 91(24) of the *Constitution Act, 1867*, to derogate from rights recognized in a treaty agreement made with the Indians.'"[151] Consequently, the provincial *Wildlife Act* could not apply of its own force to the accused who were exercising their treaty hunting rights.[152] Nor was it incorporated into federal law by section 88 of

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149 *Ibid* at paras 35–40. It was on this point that McLachlin CJ, Bastarache and Fish JJ concurring, dissented, as they regarded night hunting as inherently dangerous.

150 *Ibid* at para 42, citing *Four B Manufacturing*, *supra* note 125 at 1047.

151 *Ibid* at para 43, quoting *Simon*, *supra* note 56 at 411. See also *Moosehunter v The Queen*, [1981] 1 SCR 282 (noting that "The Government of Canada can alter the rights of Indians granted under treaties. Provinces cannot", at 293, Dickson J), 123 DLR (3d) 95. Recently, the Supreme Court affirmed that the provinces lack jurisdiction over Aboriginal and treaty rights, stating that "the provinces have no *legislative* jurisdiction over s. 35 rights": *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 65 [emphasis in original].

152 *Cf R v Marshall [No 2]*, [1999] 3 SCR 533 at para 24, 179 DLR (4th) 193 [*Marshall [No 2]*], where it was noted that, in *R v Marshall [No 1]*, [1999] 3

the *Indian Act*[153] because that section makes the application of provincial laws to "Indians" subject to the term of any treaty. Although provincial laws that have only an insignificant impact on treaty rights can still apply, provincial laws that infringe treaty rights by meaningfully diminishing them cannot.[154] As the provisions of the *Wildlife Act* at issue in the case would infringe the treaty right to hunt, the majority held that they are constitutionally inapplicable.[155] Moreover, they affirmed that the justification analysis does not apply in the division-of-powers context of section 88:

> Where a *prima facie* infringement of a treaty right is found, a province cannot rely on s. 88 by using the justification test from *Sparrow* and *Badger* in the context of s. 35(1) of the *Constitution Act, 1982*, as alluded to by Lamer C.J. in *Côté*, at para. 87.The purpose of the *Sparrow/Badger* analysis is to determine whether an infringement by a government *acting within its constitutionally mandated powers* can be justified. This justification analysis does not alter the division of powers, which is dealt with in s. 88.[156]

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SCR 456, 177 DLR (4th) 513, the Court had been "explicit in confirming the regulatory authority of the federal and provincial governments within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives." In *Morris*, *supra* note 135 at para 46, Deschamps and Abella JJ distinguished the *Marshall* case because it dealt with commercial treaty rights, whereas the case before them involved a right to hunt for food. But more importantly, *Marshall* involved the application of *federal* legislation (the *Fisheries Act*, RSC 1985, F-14, and Regulations thereunder). Given that *Marshall* had nothing to do with the application of *provincial* law to treaty rights, that point would not even have been argued. For criticism of how the Court in *Marshall [No 2]* dealt with issues that legal counsel had no opportunity to address, see Bruce H Wildsmith, "Vindicating Mi'Kmaq Rights: The Struggle before, during and after *Marshall*" (2001) 19 Windsor YB Access Just 203.

153 See *supra* note 60.

154 See *Morris*, *supra* note 135 at paras 44–55.

155 See *ibid* at para 60.

156 *Ibid* at para 55 [emphasis added]. For Lamer CJ's view on this in *Côté*, see *supra* note 144.

Because the non-application of the provincial *Wildlife Act* was determined by the division of powers and section 88, it was unnecessary for the Court to proceed to a section 35(1) analysis.

Chief Justice McLachlin, for the minority, not only agreed with Justices Deschamps and Abella on the division-of-powers issue, but also discussed the application of the doctrine of interjurisdictional immunity explicitly. She stated:

> Under the doctrine of interjurisdictional immunity, valid provincial legislation is constitutionally inapplicable to the extent that it intrudes or touches upon core federal legislative competence over a particular matter. Thus, exclusive federal jurisdiction under s. 91(24) protects "core Indianness" from provincial intrusion: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 177. Valid provincial legislation which does not touch on "core Indianness" applies *ex proprio vigore*. If a law does go to "core Indianness" the impugned provincial legislation will not apply unless it is incorporated into federal law by s. 88 of the *Indian Act*.
>
> Indian treaty rights and aboriginal rights have been held to fall within the protected core of federal jurisdiction: *Simon v. The Queen*, [1985] 2 S.C.R. 387, at p. 411; *Delgamuukw*, at para. 178. It follows that provincial laws of general application do not apply *ex proprio vigore* to the hunting activities of Indians that are protected by a treaty.[157]

This passage accurately summarizes the law on the application of interjurisdictional immunity in the context of Aboriginal and treaty rights. It is inconsistent with Chief Justice Lamer's *obiter* assumption in *Côté*, based on his misapplication of *Badger*, that the provinces can infringe Aboriginal and treaty rights as long as they can justify it on the *Sparrow* test. As the division-of-powers analysis was sufficient to deal with the constitutional question, Chief Justice McLachlin, like the majority, evidently did not think it necessary to discuss the application of section 35(1) of the *Constitution Act, 1982*.[158] But in spite of the division-of-powers

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[157] *Morris*, *supra* note 135 at paras 90–91.

[158] She did mention that the agreement between the Crown and the Saanich Nation is a "treaty" within the meaning of s 35(1) as well as within the

protection for the accused's treaty right to hunt, she nonetheless concluded that the relevant provisions of the *Wildlife Act* applied because she thought hunting at night with a rifle is inherently dangerous and therefore not part of the treaty right.[159]

So, in *Morris*, the Court unanimously affirmed the application of the doctrine of interjurisdictional immunity to treaty rights.[160] The Court's reliance on *Dick* and Chief Justice Lamer's discussion of the doctrine in *Delgamuukw* reveals that it applies equally to Aboriginal rights, including title. The confusion created by Chief Justice Lamer's misapplication of *Badger* in *Côté* was resolved in a doctrinally coherent way.

Then came *Tsilhqot'in Nation*. As discussed earlier, the Court in this case decided that the Tsilhqot'in Nation had proven their Aboriginal title and that the provincial *Forest Act*, on its own terms, could not apply to their title lands.[161] Given these findings, it was unnecessary for the Court to discuss the application of the doctrine of interjurisdictional immunity.[162] Moreover, in his oral

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meaning of section 88 of the *Indian Act*. See *ibid* at para 69. Her only other reference to s 35(1) was in comparing the meaning of infringement for the purposes of that section to what might amount to a constitutionally invalid infringement of the section 88 treaty protection. See *ibid* at para 98.

159 See *ibid* at para 132.

160 Accord Wilkins, "Shot in the Dark", *supra* note 146 at 10–17; Bruce McIvor & Kate Gunn, "Stepping into Canada's Shoes: *Tsilhqot'in*, *Grassy Narrows* and the Division of Powers" (2016) 67 UNBLJ 146 at 154–55.

161 McLachlin CJC noted in *Tsilhqot'in Nation*, *supra* note 9 at para 109:

> Under the *Forest Act*, the Crown can only issue timber licences with respect to "Crown timber". "Crown timber" is defined as timber that is on "Crown land", and "Crown land" is defined as "land, whether or not it is covered by water, or an interest in land, vested in the Crown" (s. 1). The Crown is not empowered to issue timber licences on "private land", which is defined as anything that is not Crown land.

She then went on to hold that Aboriginal title land is not Crown land and so the *Forestry Act* does not apply to that land. See *Tsilhqot'in Nation*, *supra* note 9 at para 116.

162 See Wilkins, "Life Among the Ruins", *supra* note 135 at 92. McLachlin CJC did opine that, before Aboriginal title is established, Aboriginal title would not have vested, and so the *Forest Act* would have applied (for criticism, see Kent McNeil, "Aboriginal Title and the Provinces after *Tsilhqot'in Nation*" (2015) 71 SCLR (2d) 67 at 71-78 [McNeil, "Aboriginal Title and the Provinces"]). However, given that Aboriginal title had been previously claimed, the

submissions to the Court, David Rosenberg, counsel for the Tsilhqot'in, did not even mention the division-of-powers issue.[163] The whole focus of his hour-long presentation was instead on the test for proof of Aboriginal title and the evidence of sufficient occupation that had been accepted by Justice Vickers at trial. Division of powers was argued mainly by provincial interveners, especially the attorneys general of Quebec and Saskatchewan, who wanted the application of the doctrine of interjurisdictional immunity to Aboriginal and treaty rights to be limited or discarded altogether.[164]

Despite the fact that the division-of-powers issue was not addressed by the Tsilhqot'in in their oral submissions, Chief Justice McLachlin said it was appropriate to deal with it, as "the parties made extensive submissions on the application of the *Forest Act* to Aboriginal title land. This issue was dealt with by the courts below and is of pressing importance to the Tsilhqot'in people and other Aboriginal groups in British Columbia and elsewhere."[165]

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province owed a duty to consult and accommodate, which had not been met. As a result, she said it was unnecessary to consider whether it would be constitutional for the *Forest Act* to apply to Aboriginal title land. See *Tsilhqot'in Nation*, *supra* note 9 at paras 98–100.

163 Rosenberg may have thought there was no need to address the division-of-powers issue, as it was clear from *Morris*, *supra* note 135, that provincial laws could not impair treaty (and, by implication, Aboriginal) rights. However, two interveners did refer to this issue. Robert Janes, counsel for the Te'mexw Treaty Association, addressed it briefly at the end of his submissions, mainly in response to questions from the bench. Louise Mandell, for the Coalition of the Union of British Columbia Indian Chiefs, the Okanagan Nation Alliance and the Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands, hoped that the Court would leave it for a case when it was directly in issue. See "Webcast of the Hearing on 2013-11-07" (last modified 22-01-2018), online (video): *Supreme Court of Canada* <scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=34986&id=2013/2013-11-07--34986&date=2013-11-07&fp=n&audio=n>.

164 See especially Mitch McAdam's argument for the Attorney General of Saskatchewan, *ibid.*

165 *Tsilhqot'in Nation*, *supra* note 9 at para 99.

She prefaced her discussion of the doctrine of interjurisdictional immunity by stating:

> The jurisprudence on whether s. 35 rights fall at the core of the federal power to legislate with respect to "Indians" under s. 91(24) is somewhat mixed. While no case has held that Aboriginal rights, such as Aboriginal title to land, fall at the core of the federal power under s. 91(24), this has been stated in *obiter dicta*. However, this Court has also stated in *obiter dicta* that provincial governments are constitutionally permitted to infringe Aboriginal rights where such infringement is justified pursuant to s. 35 of the *Constitution Act, 1982*.[166]

She went on to discuss *Morris*, where the Court held that "interjurisdictional immunity prohibited any provincial infringement of the non-commercial treaty right . . . , whether or not such an infringement could be justified under s. 35 of the *Constitution Act, 1982*."[167] Despite that ruling (which was unanimous on this issue), in which she had clearly articulated the application of interjurisdictional immunity to treaty rights, she opined that "[t]he ambiguous state of the jurisprudence has created unpredictability."[168] She continued: "[i]t is clear that where valid *federal* law interferes with an Aboriginal or treaty right, the s. 35 *Sparrow* framework governs the law's applicability. It is less clear, however, that it is so where valid *provincial* law interferes with an Aboriginal or treaty right."[169] And yet that was the very issue decided in *Morris* just eight years before. Moreover, despite the Chief Justice's doubts, it was clear from *Simon*, *Dick* and *Delgamuukw*, all relied upon in *Morris*, that Aboriginal and treaty rights enjoy equal division-of powers protection, as those cases decided that they are both within the core of federal section

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166 *Ibid* at para 135. Reference was made to *R v Marshall [No 2]*, *supra* note 152 at para 24.

167 *Tsilhqot'in Nation*, *supra* note 9 at para 137.

168 *Ibid* at para 138. McLachlin CJC did not say how the state of the law became ambiguous. As explained above, any ambiguity stemmed from Lamer CJC's misapplication of *Badger* in *Côté*, after which the Court removed the ambiguity by its decision in *Morris.*

169 *Tsilhqot'in Nation, supra* note 9 at para 138 [emphasis in original].

91(24) jurisdiction.[170] Chief Justice McLachlin herself stated in *Morris* that "Indian treaty rights and aboriginal rights have been held to fall within the protected core of federal jurisdiction," citing *Simon* and *Delgamuukw*.[171] In light of *Morris*, her view in *Tsilhqot'in Nation* that these issues remained unresolved therefore lacks credibility.[172]

And yet, Chief Justice McLachlin went on to say this:

> As discussed, s. 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.
>
> What role then is left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*? The answer is none.[173]

With all due respect, like the *Charter*,[174] section 35(1) did not purport to alter the division of powers, and yet that would be the

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170 See text accompanying notes 147–55.

171 *Morris*, *supra* note 135 at para 91.

172 She also noted that there was ambiguity, arising from *Marshall [No 2]*, *supra* note 152, and the majority decision in *Morris*, *supra* note 135, over whether "commercial Aboriginal rights [are] treated differently than non-commercial Aboriginal rights": *Tsilhqot'in Nation*, *supra* note 9 at para 138. However, given that *Marshall* involved a treaty right to fish and the impact of *federal* legislation, the application of *provincial* legislation to treaty rights was not in issue: see *supra* note 152 and accompanying text.

173 *Tsilhqot'in Nation*, *supra* note 9 at paras 139–40.

174 S 31 of the *Act*, *supra* note 7, provides: "Nothing in this *Charter* extends the legislative powers of any body or authority." Although s 35 is not in the *Charter*, by recognizing and affirming Aboriginal and treaty rights it was clearly intended, as do the *Charter* provisions, to limit, not expand, governmental authority. See *Tsilhqot'in Nation*, *supra* note 9 at para 142.

effect if it removed the protection that interjurisdictional immunity provides to Aboriginal and treaty rights.[175] Prior to *Tsilhqot'in Nation*, the provinces could not impair these rights because they were within the core of federal section 91(24) jurisdiction, as held in *Morris* and the cases it relied upon. The Chief Justice's decision would alter the division of powers by expanding provincial jurisdiction over these rights. She saw this as a consequence of section 35(1). But that would mean that section 35(1) actually removed some of the protection Aboriginal and treaty rights previously enjoyed, subjecting them to potential provincial infringement that would not be possible if interjurisdictional immunity applied.[176] This cannot be right, as it flies in the face of the intention behind section 35(1), which was to provide these rights with more—not less—constitutional protection.[177]

As my primary focus is on whether Chief Justice McLachlin's rejection of the application of interjurisdictional immunity is retroactive, I will not address all her reasons for rejecting the

175 See Wilkins, "Life among the Ruins", *supra* note 135 at 117–19.

176 Where interjurisdictional immunity applies, there is no justification test permitting provincial laws to impair core areas of federal jurisdiction. McLachlin CJC acknowledged this , but used it as a reason for rejecting interjurisdictional immunity's application to Aboriginal rights because "[t]he result would be dueling tests directed at answering the same question: How far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?": *Tsilhqot'in Nation*, *supra* note 9 at para 146. With respect, this is incorrect. As revealed in *Morris*, *supra* note 132, the first question is whether a provincial law impairs the core of federal jurisdiction. If it does, it cannot apply, period. There is no need to consider s 35(1), so no duel between tests arises. The Court takes the same approach when the constitutionality of a law is challenged on both division-of-powers and *Charter* grounds; it typically decides the division-of-powers issue first, and if the law is invalid for that reason the *Charter* issue does not need to be addressed. See Wilkins, "Life among the Ruins", *supra* note 135 at 109 (see the cases cited there).

177 See *Sparrow*, *supra* note 7; *Van der Peet*, *supra* note 4, especially paras 27–28; *Marshall [No 1]*, *supra* note 152 at para 48; *Mitchell v MNR*, [2001] 1 SCR 911 at para 11, 1 RCS 911.

application of interjurisdictional immunity to Aboriginal rights.[178] However, one deserves mention. She expressed the opinion that:

> [I]n this case, applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests—some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all.[179]

This concern assumes that the Tsilhqot'in Nation does not have laws governing protection and use of forests on their Aboriginal title lands, which appears contrary to the extensive factual findings of Justice Vickers at trial on Tsilhqot'in customs and traditions in relation to land use.[180]

Chief Justice McLachlin noted that "[t]his Court has recently stressed the limits of interjurisdictional immunity", preferring

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[178] For discussion of these reasons and why they are inadequate, see Wilkins, "Life among the Ruins", *supra* note 135 at 102–12. At 112, Wilkins summarized his criticisms as follows:

> They ignore or dismiss a substantial body of previous jurisprudence that had explicated the scope and impact of section 91(24); they overlook potentially important differences between Aboriginal rights and *Charter* rights; they load the dice by comparing section 35 rights to *Charter* rights that we already knew were subject to both federal and provincial legislative authority; they fail to acknowledge section 31 of the *Charter* or the Supreme Court's practice of considering division of powers issues before and apart from *Charter* issues that arise in the same proceeding; and they give what appears to be disproportionate weight to issues of practical inconvenience. In brief, they more closely resemble rationalization than rationale [footnote omitted].

[179] *Tsilhqot'in Nation, supra* note 9 at para 147. But as pointed out by Wilkins, "Life among the Ruins", *supra* note 135 at 111:

> A substantial legal vacuum looms whenever a court declares a statute invalid on any constitutional grounds—division of powers, the *Charter*, section 35, section 96, or language of enactment—in the absence of valid compensating legislation from the other order of government, yet no one considers this sufficient reason not to declare invalidity. What is it about IJI [interjurisdictional immunity] that gives this concern such special exigency? And we need to recall that discretion to close legal vacuums resides, where it belongs, with the order of government constitutionally empowered to do so.

[180] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 (Vickers J stated that the Tsilhqot'in "were a rule ordered society" at para 346).

instead a "co-operative federalism" approach that permits, "where possible, the ordinary operation of statutes enacted by both levels of government".[181] Referring expressly to *Morris*, she said it

> was decided prior to this Court's articulation of the modern approach to interjurisdictional immunity in *Canadian Western Bank* and *Canadian Owners and Pilots Association*, and so is of limited precedential value on this subject as a result . . . . To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should *no longer* be followed.[182]

None of the cases she relied upon had anything to do with section 91(24) of the *Constitution Act, 1867* or with Aboriginal and treaty rights. The section 91(24) jurisprudence was not referred to at all in the *Marine Services* case.[183] In *Canadian Western Bank*, the Court reviewed some of the leading cases on the application of

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181 *Tsilhqot'in Nation*, *supra* note 9 at para 149, quoting *Canadian Western Bank*, *supra* note 115 at paras 24, 37 [emphasis omitted]. *Cf Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at para 39 [*Rogers Communications*]:

> although co-operative federalism has become a principle that the courts have invoked to provide flexibility for the interpretation and application of the constitutional doctrines relating to the division of powers, such as federal paramountcy and interjurisdictional immunity, it can neither override nor modify the division of powers itself.

182 *Tsilhqot'in Nation*, *supra* note 9 at para 150 [emphasis added]. For perceptive criticism of the Court's treatment of *Morris*, see Wilkins, "Life among the Ruins", *supra* note 135 at 105–06. Earlier, in Wilkins, "Dancing in the Dark", *supra* note 118 at 540, he pointed out that, given that *Morris* and *Canadian Western Bank* were under reserve by the Court at the same time, "[i]f the Court's intention in *Canadian Western Bank* had been to overrule, or even to undercut the authority, of a decision it had released just five months earlier [*Morris*], one would have expected it to say so very clearly."

183 *Marine Services International Ltd v Ryan Estate*, [2013] 3 SCR 53 [*Marine Services*], relied on by McLachlin CJC, dealt with a shift in the case law, whereby intrusion by a provincial law into a core of federal jurisdiction has to "impair", not just "affect", it. Unlike what the Court in *Tsilhqot'in Nation* did to section 91(24), the Court in *Marine Services* did not *reduce the core* of federal jurisdiction over "Navigation and Shipping", *Constitution Act*, 1867, s 91(10); instead, it held that the provincial law in question did not intrude sufficiently into navigation and shipping to *impair* federal jurisdiction and so interjurisdictional immunity did not apply to that law.

interjurisdictional immunity in the context of section 91(24), without questioning the correctness of any of them.[184] In *Canadian Owners and Pilots Association*,[185] the Court referred to *Dick*,[186] one of the leading cases on the application of interjurisdictional immunity in relation to section 91(24), but only on the issue of whether a provincial law had to "sterilize", "impair", or "affect" the core of a federal head of power for the doctrine of interjurisdictional immunity to apply. "The move away from the 'affects' test [to the 'impairs' test]," the Court said, "reflects growing resistance to the broad application of interjurisdictional immunity based on modern conceptions of cooperative federalism and a perceived need to promote efficacy over formalism."[187]

The division-of-power cases relied upon by Chief Justice McLachlin in *Tsilhqot'in Nation* limited the application of interjurisdictional immunity to situations where a provincial law "impairs" the core of a federal head of power, and in that way these decisions helped facilitate cooperative federalism. None of them suggested that matters previously held to be within a core of federal power should be removed from the core. On the contrary, in *Canadian Western Bank*, containing one of the Court's most in-depth discussions of interjurisdictional immunity,[188] Justices Binnie and LeBel concluded:

> [I]nterjurisdictional immunity is of limited application and *should in general be reserved for situations already covered by precedent*. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been

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184 *Derrickson*, *supra* note 120, and *Paul*, *supra* note 120, were discussed, along with *Natural Parents v Superintendent of Child Welfare*, [1976] 2 SCR 751 [*Natural Parents*]: *Canadian Western Bank*, *supra* note 115 at paras 40–41, 60–61. *Morris* was not mentioned.

185 *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 43 [*Canadian Owners and Pilots Association*].

186 *Dick, supra* note 121.

187 *Canadian Owners and Pilots Association*, *supra* note 185 at para 44.

188 See also *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749 at paras 248–71, SCJ No 41.

> considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred.[189]

The application of the doctrine to section 91(24) is one of those areas "covered by precedent," as Justices Binnie and LeBel acknowledged.[190] Its application in that context should not have been pared down in *Tsilhqot'in Nation*.

The Court's rejection of the application of interjurisdictional immunity in *Tsilhqot'in Nation* was a major change in the law,[191] as it altered the division of powers and exposed Aboriginal and treaty rights to provincial laws that could not have applied to them before.[192] It amounted to a constitutional amendment by *obiter* judicial decree, thereby overstepping long-standing jurisprudence on the limits to judicial law making. In *Watkins v Olafson*,[193] the Court refused to modify the law to permit judges in personal injury cases to award periodic payments instead of lump sums for the cost of future care. Delivering the unanimous judgment in *Watkins*, Justice McLachlin, as she then was, observed that the case raised

> starkly the question of the limits on the power of the judiciary to change the law. Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce *major*

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189 *Canadian Western Bank*, *supra* note 115 at para 77 [emphasis added].

190 *Ibid* at paras 40–41, 60–61.

191 This is clear from McLachlin CJC's direction that the *Morris* ruling on interjurisdictional immunity "should no longer be followed": *Tsilhqot'in Nation*, *supra* note 9 at para 150.

192 On the impermissibility of such a change, see the quotation from *Rogers Communications* in note 181, above.

193 *Watkins*, *supra* note 35.

> *and far-reaching changes* in the rules hitherto accepted as governing the situation before them.[194]

She explained:

> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. . . . Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.[195]

Kerry Wilkins has pointed out that nothing in *Tsilhqot'in Nation* "suggests that the Supreme Court took notice of the doctrinal risks it was courting" when it rejected the application of interjurisdictional immunity to Aboriginal rights.[196] After discussing these risks, he concluded that the "tragedy, or the travesty," is that the Court "so thoroughly underestimated" the difficulty involved in the division-of-powers issue:

> The reasoning it offers in *Tsilhqot'in* for denying IJI [interjurisdictional immunity] protection to section 35 rights

[194] *Ibid* at 760 [emphasis added]. Just three years before *Tsilhqot'in Nation*, McLachlin CJC and LeBel J stated that "overturning a precedent of this Court is a step not to be lightly undertaken," especially when the precedent is recent: *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at paras 56–57. See also *R v Salituro*, [1991] 3 SCR 654 at 670, SCJ No 97; *R v Chaulk*, [1990] 3 SCR 1303 at 1353, 2 WWR 385; *R v B (KG)*, [1993] 1 SCR 740 at 777–83, SCJ No 22; *R v Robinson*, [1996] 1 SCR 683 at paras 16–46, 4 WWR 609. Moreover, the Court has held that "the evolution of society cannot serve as a pretext for changing the nature of the division of powers, which is a fundamental component of the Canadian federal system": *Confederation des syndicats nationaux v Canada (Attorney General)*, 2008 SCC 68 at para 30.

[195] *Watkins*, *supra* note 35 at 760–61.

[196] Wilkins, "Life Among the Ruins", *supra* note 135 at 93–94.

> privileges expediency over cogency. It ignores, when it does not mischaracterize, a great deal of previous authority, leaving behind a farrago of confusion about the extent, if any, of provincial legislative authority over treaty and Aboriginal rights before 1982, the relationship between the division of powers and the *Constitution Act, 1982*, the status of whatever remains at the core of exclusive federal authority under section 91(24), the relevance, if any, of section 88 of the *Indian Act*, and even the currency of the notion that at least some federal and provincial powers are still exclusive. It is hard to believe the Supreme Court even noticed how thoroughly it was disrupting accepted constitutional doctrine. Such argumentation taints its conclusion with arbitrariness.[197]

If there was ever a situation where the Court was not "in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make," as Justice McLachlin stated in *Watkins*,[198] *Tsilhqot'in Nation* was it. As alluded to earlier, counsel for the Tsilhqot'in did not even mention the issue in his oral submissions.[199]

I have been arguing that the Supreme Court was wrong to change the law by rejecting the application of the doctrine of interjurisdictional immunity to Aboriginal rights. Because this part of the Chief Justice's judgment is *obiter* and deeply flawed, one might have hoped it would not be followed in future cases. This optimistic hope was dashed barely two weeks after *Tsilhqot'in Nation* when the Court handed down its judgment in *Grassy Narrows First Nation v Ontario (Natural Resources)*,[200] which must

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197 *Ibid* at 122–23. See also Townshend, *supra* note 143 at 479–82; McIvor & Gunn, *supra* note 160 at 158–66.

198 *Watkins*, *supra* note 35 at 760.

199 *Cf Delgamuukw*, *supra* note 9 at paras 170–71, where Lamer CJC declined to address the issue of self-government because the parties had placed less emphasis on it in the appeal and had not addressed "many of the difficult conceptual issues which surround the recognition of aboriginal self-government."

200 *Grassy Narrows*, *supra* note 13. For critical commentary, see Wilkins, "Life among the Ruins", *supra* note 135; Townshend, *supra* note 143; Kent McNeil, "The Obsolete Theory of Crown Unity in Canada and Its Relevance to

have been at least partially written when *Tsilhqot'in Nation* was released.

In *Grassy Narrows*, the plaintiffs argued that, without federal government supervision or approval, Ontario could not take up lands for "settlement, mining, lumbering or other purposes" because Treaty 3 (1873) gave this taking-up authority to "Her [Majesty's] said Government of the Dominion of Canada" or "any of the subjects thereof duly authorized therefor by the said Government,"[201] not to the province. In a unanimous judgment delivered by Chief Justice McLachlin, the Court decided that, because the treaty was with the Crown rather that the federal government, Ontario as well as Canada has rights and obligations under it. Ontario has constitutional ownership and control of public lands in the province, including the lands surrendered by Treaty 3, and so it has the authority to take up lands for settlement, mining, lumbering, etc.[202] The Court got around the express words of the treaty because, at the time it was entered into, the western and northern boundaries of Ontario were undetermined, though "the possibility of provincial acquisition of the lands was patent"; accordingly, the "reference to Canada [in the treaty] reflects the fact that the lands at the time were in Canada, not Ontario. Canada and Canada alone had beneficial ownership of the lands and therefore jurisdiction to take up the lands."[203] Once

Indigenous Claims" (2015) 20 Rev Const Stud 1; McIvor & Gunn, *supra* note 160.

[201] *Grassy Narrows*, *supra* note 13 (quoted Treaty 3 at para 11).

[202] *Grassy Narrows*, *supra* note 13 at paras 31, 35. The Court relied upon sections 109, 92(5), and 92A of the *Constitution Act, 1867.*

[203] *Grassy Narrows*, *supra* note 13 at para 39. The northern Treaty 3 lands in question in the case were transferred from Canada to Ontario in 1912 by the *Ontario Boundaries Extension Act*, SC 1912, c 40. However, the southern Treaty 3 lands were already in Ontario when the treaty was entered into in 1873, as decided by the *Ontario Boundaries Case* (1884), unreported, implemented by an Imperial Order in Council, 11 August 1884, printed in *The proceedings before the Judicial Committee of Her Majesty's Imperial Privy Council on the special case respecting the westerly boundary of Ontario, argued 15th, 16th, 17th, 19th, 21st and 22nd July, 1884: with notes of explanation and correction* (Toronto: Warwick, 1889) at 416–18. See also *St. Catherine's*, *supra* note 15, and discussion in Kent McNeil, *Native Rights and the Boundaries of*

the lands became provincial lands, the taking-up power passed to Ontario because the province then had constitutional control over public lands. However, in taking up lands for forestry and other purposes, the province is bound by the honour and fiduciary obligations of the Crown and so has to respect the treaty rights to hunt and fish by engaging in meaningful consultation with the First Nation beneficiaries of the treaty and accommodating their rights where appropriate.[204]

Because Ontario has authority under the treaty to take up lands, no infringement of treaty rights will occur when it does so, as long as the duties of consultation and accommodation are met, unless "the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped".[205]

The Chief Justice dealt with interjurisdictional immunity in two short sentences, stating that it "does not preclude the Province from justifiably infringing treaty rights . . . . While it is unnecessary to consider this issue, this Court's decision in *Tsilhqot'in Nation* is a full answer."[206] She therefore regarded *Tsilhqot'in Nation* as having settled the issue in regard to both Aboriginal and treaty rights.[207] But as in *Tsilhqot'in Nation*, this was *obiter*, as it was

*Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Centre, 1982) at 26–33 (the Order in Council is reproduced at 54–57).

204 *Grassy Narrows*, *supra* note 13 at paras 50–52, applying *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

205 *Grassy Narrows*, *supra* note 13 at paras 52–53. There has been a recent decision involving Treaty 8 (1899) where British Columbia was found to have unjustifiably infringed treaty rights to hunt, trap, and fish by taking up so much land that those rights could no longer be exercised meaningfully. *Grassy Narrows* was cited at several places in support of the court's conclusions. The province did not appeal. See *Yahey v British Columbia*, 2021 BCSC 1287 [*Yahey*].

206 *Grassy Narrows*, *supra* note 13 at para 53.

207 This does not mean the core of s 91(24) disappeared entirely. Other aspects of "Indianness", such as Indian status and lands expressly reserved for First Nations, appear to remain in the core. See *Natural Parents*, *supra* note 184; *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 at paras 70–73, McLachlin CJC, commented on

"unnecessary to consider this issue."[208] It could be revisited by the Court at a future time.

Failing that, one way to limit the impact of the Court's rejection of the application of interjurisdictional immunity to Aboriginal and treaty rights is to interpret this aspect of *Tsilhqot'in Nation* as having only prospective, not retroactive, effect.[209] In this way, provincial infringement of Aboriginal and treaty rights *before Tsilhqot'in Nation* was handed down would not be justifiable because these rights would still have been within the core of exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians" and so would be protected by interjurisdictional immunity, as decided in *Morris*. This is important because many

by Wilkins, "Dancing in the Dark", *supra* note 118 at 544–54; *Sechelt Indian Band v British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, 2013 BCCA 262, 9 WWR 274 (leave to appeal dismissed, 2014 CanLII 62242 (SCC), four months after *Tsilhqot'in Nation* (due to interjurisdictional immunity and federal paramountcy, provincial legislation is inapplicable to a mobile home park on Sechelt lands that are "Lands reserved for the Indians")); *Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12 ("federal authority under s. 91(24) does not bar valid provincial schemes that do not impair the core of the 'Indian' power", at para 51); Nigel Bankes & Jennifer Koshan, "The Uncertain Status of the Doctrine of Interjurisdictional Immunity on Reserve Lands" (28 October 2014), online (blog): *ABlawg*: <ablawg.ca/2014/10/28/the-uncertain-status-of-the-doctrine-of-interjurisdictional-immunity-on-reserve-lands/>; Wilkins, "Life among the Ruins", *supra* note 135 at 119–21; Townshend, *supra* note 143 at 479.

208 *Grassy Narrows*, *supra* note 13 at para 53.

209 Another way is to limit the provinces' authority over Aboriginal rights to laws that govern their exercise. Provincial laws purporting to authorize the diminishment of those rights (e.g. laws permitting the harvesting of timber on Aboriginal title lands) could cross the line into federal exclusive jurisdiction because they might require singling out and could amount to extinguishment of Aboriginal rights to the resources taken, which *Delgamuukw*, *supra* note 9 at paras 180–81, held to be beyond provincial power (*Tsilhqot'in Nation* did not alter this, as McLachlin CJC's *obiter* comments on the division of powers relate only to infringement, not extinguishment). See McNeil, "Aboriginal Title and the Provinces", *supra* note 162 at 78–85, 88.

provincial infringements predating *Tsilhqot'in Nation* in 2014 end up being the subject of litigation.[210]

As mentioned earlier, the Supreme Court provided guidance on when its changes to the law are prospective in *Hislop*,[211] a decision handed down in 2007 that involved the constitutionality of certain provisions of the *Canada Pension Plan.*[212] Justices LeBel and Rothstein explained:

> The determination of whether to limit the retroactive effect of a s. 52(1) [of the *Constitution Act, 1982*[213]] remedy and grant a purely prospective remedy will be largely determined by whether the Court is operating inside or outside the Blackstonian paradigm [the declaratory approach]. When the Court is declaring the law as it has existed, then the Blackstonian approach is appropriate and retroactive relief should be granted. On the other hand, when a court is *developing new law within the broad confines of the Constitution*, it may be appropriate to limit the retroactive effect of its judgment.[214]

Relying on Lord Sankey's description of the Canadian Constitution as a "living tree,"[215] they noted that the Supreme Court has often stated that it "should not be viewed as a static document but as an instrument capable of adapting with the times by way of a process of evolutionary interpretation, within the natural limits of the text, which 'accommodates and addresses the realities of modern life'."[216] They continued:

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210 See e.g. *Peter Ballantyne Cree Nation v Canada (Attorney General), the Government of Saskatchewan and Saskatchewan Power Corporation*, 2016 SKCA 124, [2017] 1 WWR 685, [*Peter Ballantyne*]; *Restoule v Canada (Attorney General), the Attorney General of Ontario and Her Majesty the Queen in Right of Ontario*, 2021 ONCA 779; *Yahey*, *supra* note 205.

211 *Supra* note 1.

212 RSC 1985, c C-8.

213 See *supra* note 95 and accompanying text.

214 *Hislop*, *supra* note 1 at para 93 [emphasis added].

215 *Edwards v Attorney-General for Canada*, [1929] UKPC 86 at para 54, [1930] AC 124 (PC) at 136.

216 *Hislop*, *supra* note 1 at para 94, quoting *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22, and citing *Attorney General of Quebec v Blaikie*, [1979] 2 SCR 1016 at 1029, 101 DLR (3d) 394; *Re Residential Tenancies Act, 1979*,

> It is true that the "living tree" doctrine is not wedded to a particular model of the judicial function. At times, its application may reflect the fact that, in a case, the Court is merely declaring the law of the country as it has stood and that a retroactive remedy is then generally appropriate. In other circumstances, its use recognizes that the law has changed, that the change must be acknowledged and that, *from a given point in time*, the new law or the new understanding of some legal principle will prevail.[217]

Accepting that prospective rulings are legitimate and sometimes appropriate, Justices LeBel and Rothstein said the question to be posed is "when, why and how judges may rule prospectively or restrict the retroactive effect of their decisions in constitutional matters."[218] One situation is where there is a "[c]lear break with the past," which "can be best identified with those situations where, in Canadian law, *the Supreme Court departs from its own jurisprudence by expressly overruling or implicitly repudiating a prior decision*. Such clear situations would justify recourse to prospective remedies in a proper context."[219] However, a "substantial change in the law is necessary, not sufficient, to justify purely prospective remedies."[220] Other factors to be considered "may include reasonable or in good faith reliance by governments . . ., the fairness of the limitation of the retroactivity of the remedy to the litigants . . . . [and] whether a retroactive remedy would unduly interfere with the constitutional role of legislatures and democratic governments in the allocation of public resources."[221] Not mentioned, but surely an important consideration, is whether the substantial change in the law is part

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[1981] 1 SCR 714 at 723, SCJ No 57; *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357 at 365, SCJ No 18; *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155, 6 WWR 577.

217 *Hislop*, *supra* note 1 at para 95 [emphasis added].

218 *Ibid* at para 96.

219 *Ibid* at para 99 [emphasis added].

220 *Ibid*.

221 *Ibid* at para 100 [references omitted].

of the *ratio decidendi* in the judgment, or merely *obiter dicta.*[222] One would expect an *obiter* statement to be treated as a direction to lower court judges to take account of the Supreme Court's revision of the law from now on, not as a change having retroactive effect.[223]

Turning to Chief Justice McLachlin's comments on interjurisdictional immunity in *Tsilhqot'in Nation*, it is clear that, as demonstrated in this article, they amount to a substantial change in the law.[224] Referring to *Morris*, she said that, to the extent it "stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed."[225] In other words, it is time to change the law, but not retroactively. *Morris* was not overruled;[226] instead, it "should no longer be followed."[227] This is a direction to judges going forward. As an *obiter* statement of the

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222 Where the rights and obligations of the parties are concerned, the *ratio* has to be retroactive, at least to the time when the events giving rise to the litigation took place. See *supra* note 1 and accompanying text, *above*. There is no such need for *obiter dicta* to be retroactive.

223 Note that in *R v Henry*, 2005 SCC 76 at para 57, the Court provided these observations on whether its own *obiter* statements are binding:

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not 'binding' in the sense the *Sellars* principle in its most exaggerated form would have it [in *Sellars v The Queen*, [1980] 1 SCR 527 at 529, Chouinard J opined that the Supreme Court's *obiter dicta* are binding]. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.

I am grateful to Kerry Wilkins for bringing the *Henry* decision to my attention.

224 Accord Wilkins, "Life among the Ruins", *supra* note 135.

225 *Tsilhqot'in Nation*, *supra* note 9 at para 150.

226 See Townshend, *supra* note 143 at 479–81. McLachlin CJC did not say *Morris* was wrong when decided, as would be expected when the Court retroactively overrules one of its prior decisions.

227 *Tsilhqot'in Nation*, *supra* note 9 at para 150.

new law, it cannot relate back and apply to factual situations arising when *Morris* and the other interjurisdictional immunity cases relating to Aboriginal and treaty rights were still good law.

There is also the matter of reliance. Prior to *Tsilhqot'in Nation*, governments and First Nations would have been entitled to rely on *Simon, Dick, Delgamuukw* and *Morris*, in which the Supreme Court had held that Aboriginal and treaty rights are within the core of exclusive federal jurisdiction. In *Hislop*, Justices LeBel and Rothstein said this:

> People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass or administrative action they take must be performed with an eye to what the Constitution requires . . . . But where a judicial ruling changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable. An approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate reliance interests of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on one hand and the need to allow constitutional jurisprudence to evolve over time on the other.[228]

I have argued that, if accepted at all, the change in the law in relation to interjurisdictional immunity envisaged by the Chief Justice in *Tsilhqot'in Nation* is prospective, not retroactive. But if I am wrong and it was meant to be retroactive, then retroactive to when? One possibility would be back to 1867, when section 91(24), the constitutional provision in question, was first enacted. That would hardly be in keeping with the conception of the Constitution as a "living tree", accepted in *Hislop* in relation to the retroactive/prospective reach of judicial decisions. It would also mean that the earlier cases that decided that interjurisdictional immunity applies in the context of Aboriginal and treaty rights

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[228] *Hislop*, *supra* note 1 at para 103.

were wrongly decided, and would create serious doctrinal problems, as outlined by Kerry Wilkins.[229]

Another possibility is that Chief Justice McLachlin intended the change to operate from the time of the enactment of section 35(1) of the *Constitution Act, 1982.* There are *obiter dicta* in *Tsilhqot'in Nation* supporting this interpretation. As seen earlier, she said that there was no role left for interjurisdictional immunity because, since 1982, Aboriginal and treaty rights have been protected against provincial as well as against federal laws by section 35(1).[230] At the end of her discussion of this issue, she said that section 35(1)

> provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is … how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act, 1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling

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229 See Wilkins, "Life among the Ruins", *supra* note 135. *Cf Peter Ballantyne*, *supra* note 210 at paras 231–61, in which the Saskatchewan CA applied *Tsilhqot'in Nation* and *Grassy Narrows* to decide that claims by a First Nation arising from construction of a hydroelectric dam in the 1940s were barred by a provincial limitations statute. The Supreme Court refused leave to appeal without reasons: *Chief Ronald Michel, et al v Attorney General of Canada, et al*, 2017 CanLII 38581 (SCC). For criticism of that case, see Townshend, *supra* note 143 at 482; Senwung Luk & Brooke Barrett, "Time Is on Our Side: Colonialism Through Laches and Limitations of Actions in the Age of Reconciliation" in *Law Society of Upper Canada Special Lectures 2017: Canada at 150, the Charter and the Constitution* (Toronto: Irwin Law, 2017), 394 at 410–12, 417; Kent McNeil & Thomas Enns, "Procedural Injustice: Indigenous Claims, Limitation Periods, and Laches" (February 2022), Osgoode Hall Law School at York University Working Paper No 336 at 29–31, online: <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1343&context=all_papers>.

230 See *supra* note 173 and accompanying text.

> purpose and in conformity with its fiduciary duty to affected Aboriginal groups.[231]

But for interjurisdictional immunity to have ceased to apply to Aboriginal and treaty rights in 1982, one has to accept that the enactment of section 35(1) altered the division of powers to the detriment of Indigenous peoples. As argued earlier, this cannot be right.

Given the problems with applying the Court's substantive change in the law in relation to interjurisdictional immunity retroactively, it cannot have that effect. As the Supreme Court instructed in *Albashir*, when the Court fails to specify whether a decision that alters constitutional law is retroactive or prospective, one has to analyze the decision carefully and consider the consequences of deciding one way or the other.[232] In my opinion, the factors discussed in this article weigh heavily in favour of viewing this aspect of the *Tsilhqot'in Nation* decision as having purely prospective effect.

## VI. CONCLUSIONS

Judicial decisions can be either retroactive or prospective. When they decide rights and obligations as between the parties to the litigation, they obviously have to relate back to the time when the events or transactions giving rise to those inter-party rights and obligations took place. But they do not necessarily lay down the law prior to that time. This article has distinguished three kinds of court decisions. Decisions of first impression that involve declarations of the law in relation to a particular matter for the first time are usually not time limited in their retroactivity. Likewise, decisions that involve the overruling of a previous lower court decision typically are not time limited. In both of these contexts, the presumption of retroactivity applies. However, the third kind of decision, involving an overruling by the highest court of one of its own decisions—that is, a decision that amounts to a clear *change* in the law—is not necessarily retroactive.

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231 *Tsilhqot'in Nation*, *supra* note 9 at para 152.

232 *Albashir*, *supra* note 1 at paras 44–53.

The Supreme Court grappled with the issue of substantial judicial changes to the law in the *Hislop* and *Albashir* cases. In the absence of a clear indication of whether a decision is intended to be retroactive or prospective, the Court said judges should consider all the relevant factors, including reliance, fairness, and allocation of public resources. What they seem to have had in mind are changes resulting from the *ratio decidendi* of the overruling judgment. When the changes proposed are contained in *obiter* comments, one would not expect them to have retroactive effect. Instead, they would normally be regarded as instructions to lower courts on how cases should be decided going forward.

In this article, I have argued that Chief Justice McLachlin's *obiter* comments in *Tsilhqot'in Nation* and *Grassy Narrows* on the application of interjurisdictional immunity to Aboriginal and treaty rights are deeply problematic and should be revisited. In the meantime, no doubt lower courts will feel obliged to follow them.[233] However, the substantial change in the law envisaged by the Chief Justice could be limited in its application by regarding it as prospective only. This would mean that Aboriginal and treaty rights claims arising *before* but tried *after* the Court's decision in *Tsilhqot'in Nation* would still be governed by interjurisdictional immunity.

Chief Justice McLachlin did not provide a clear indication of when the change in the law she envisaged would take effect, as the judges in *Albashir* said the Court should do when it overrules one of its earlier decisions. There are indications in her judgment that the change occurred when section 35(1) of the *Constitution Act, 1982* became law, but for that to have happened the section would have had to amend the Constitution by removing the division-of-powers protection section 91(24) of the *Constitution Act, 1867* had previously provided to Aboriginal and treaty rights. That cannot be right, as the purpose of section 35(1) was to provide those rights with *more*, not *less*, constitutional protection. Nor is it reasonable to think that her revision of the law is retroactive to 1867 when section 91(24) was included in the

233 See e.g. *Peter Ballantyne*, *supra* note 210; *Corporation Makivik c Québec (Procureure générale)*, 2014 QCCA 1455.

Constitution. Part of her explanation of why *Morris* "should no longer be followed" was that the Court's approach to interjurisdictional immunity has changed since *Morris* was decided in 2006.[234] This too points to a prospective interpretation of her *obiter* comments on the application of interjurisdictional immunity to Aboriginal and treaty rights.

[234] *Tsilhqot'in Nation*, *supra* note 9 at para 150.