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Aboriginal Title After *Tsilhqot'in*: What We Know, What We Think We Know, and What We Still Need to Know More About

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Article abstract

With the ten-year anniversary of Tsilhqot'in on the horizon, the time is ripe to consider the impact of this monumental decision as well as some key questions that remain in its wake. This article surveys the legal situation following Tsilhqot'in and identifies some major issues likely to require attention in the future. This is done by examining what we know about Aboriginal title following Tsilhqot'in, in the sense of what seems clear following the decision, what we think we know about Aboriginal title, in the sense of what we put forward as reasonable interpretations flowing from the decision and, finally, what we need to know more about following Tsilhqot'in. In this last section, the article examines Aboriginal title and private land interests as well as Aboriginal title to submerged lands.

Aboriginal Title After *Tsilhqot'in*: What We Know, What We Think We Know, and What We Still Need to Know More About

Jared Porter* and Paula Quig**

With the ten-year anniversary of Tsilhqot'in on the horizon, the time is ripe to consider the impact of this monumental decision as well as some key questions that remain in its wake. This article surveys the legal situation following Tsilhqot'in and identifies some major issues likely to require attention in the future. This is done by examining what we know about Aboriginal title following Tsilhqot'in, in the sense of what seems clear following the decision, what we think we know about Aboriginal title, in the sense of what we put forward as reasonable interpretations flowing from the decision and, finally, what we need to know more about following Tsilhqot'in. In this last section, the article examines Aboriginal title and private land interests as well as Aboriginal title to submerged lands.

À l'approche du dixième anniversaire de l'arrêt Tsilhqot'in*, le moment est venu d'examiner l'incidence de cette importante décision ainsi que certaines questions qui demeurent dans son sillage. Cet article examine la situation juridique à la suite de* Tsilhqot'in *et répertorie certaines questions d'importance susceptibles*

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** Lawyer, Department of Justice Canada. The views expressed in this article solely reflect those of the authors in their personal capacity, and the reader should not attribute these views to the Department of Justice Canada or the Government of Canada. Any errors or omissions in this article are likewise solely those of the authors. We thank Monique Dull, Martin Kreuser, and the anonymous reviewers for their comments on previous versions of the article.
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In accordance with the journal's language rules, the use of the masculine form alone is intended to make the text easier to read and, depending on the circumstances, it is inclusive of both women and men.

de nécessiter une attention particulière allant de l'avant. Cela se fait par un examen de ce que nous savons du titre ancestral à la suite de Tsilhqot'in*, dans le sens de ce qui semble clair à la suite de la décision, de ce que nous pensons savoir du titre ancestral, soit ce que nous proposons comme interprétations raisonnables découlant de la décision et, enfin, de ce que nous devons savoir davantage à la suite de Tsilhqot'in. Dans cette dernière section, l'article examine le titre ancestral et les intérêts fonciers privés ainsi que le titre ancestral sur des terres submergées.*

En el décimo aniversario del asunto Tsilhqot'in que se vislumbra en el horizonte resulta ser el momento oportuno para examinar el impacto de esta decisión monumental, así como de algunas preguntas clave que han quedado pendientes. En este artículo se aborda la situación legal del asunto Tsilhqot'in y se identifican algunas cuestiones que probablemente requieran que se preste atención en el futuro. Esto se ha efectuado a través de un análisis de lo que sabemos acerca del título aborigen del Tsilhqot'in, en el sentido de lo que parece claro tras la decisión, y de lo que creemos saber acerca del título aborigen, en el sentido de lo que hemos propuesto como interpretaciones razonables resultantes de la decisión; finalmente, sobre lo que necesitamos saber más acerca del asunto Tsilhqot'in. En esta última sección, el artículo examina los títulos aborígenes y los intereses privados de las tierras, así como los títulos aborígenes de tierras sumergidas.

Several years have now passed since the Supreme Court of Canada (hereafter the "SCC") issued its landmark decision in *Tsilhqot'in Nation* v. *British Columbia*.[1] In *Tsilhqot'in*, the SCC granted a declaration of Aboriginal title over a large area of Crown land in central British Columbia.[2] In making this historic declaration, the SCC provided important guidance about the nature of Aboriginal title and its incidents, the test for proof of Aboriginal title, and the limitations associated with—and placed on—Aboriginal title.

The *Tsilhqot'in* decision was rightly recognized as a monumental decision.[3] However, even at the time, certain academics and legal practitioners had made the observation that the decision left many questions unanswered while raising several new ones.[4] This is perhaps not surprising given the manner in which the issues in the case had been framed by the time it reached Canada's highest court. While the claim as originally filed raised issues in terms of Aboriginal title to submerged lands, as well as the intersections (and potentially, tensions) between Aboriginal title and private land and reserve land interests, by the time the case reached the SCC, these issues were no longer before the Court for consideration.[5]

In the years following the release of the decision, lower courts have had to grapple with how to apply it to new contexts and factual scenarios. While the SCC has provided additional guidance on Aboriginal title issues more generally,[6] and while such guidance has provided some clarity, much uncertainty remains.

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1. *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44 (hereafter "*Tsilhqot'in*").
2. *Id*., para. 153. The area is described as being approximately 1,900 square kilometres (para. 59).
3. See e.g. Senwung Luk, "The Law of the Land: New Jurisprudence on Aboriginal Title", (2014) 67 *S.C.L.R.* (2d) 289, 306; Kent McNeil, "Aboriginal Title and the Provinces after Tsilhqot'in Nation", (2015) 71 *S.C.L.R.* (2d) 67, 67; John Borrows, "Aboriginal Title and Private Property", (2015) 71 *S.C.L.R.* (2d) 91, 91.
4. David M. Rosenberg & Jack Woodward, "The *Tsilhqot'in* Case: The Recognition and Affirmation of Aboriginal Title in Canada", (2015) 48-3 *U.B.C. L. Rev.* 943, 951-968; K. McNeil, *supra*, note 3, 85-86.
5. *Tsilhqot'in*, *supra*, note 1, para. 9. It may sometimes be forgotten that at the trial level, Aboriginal rights were also at issue, in addition to Aboriginal title.
6. *Newfoundland and Labrador (Attorney General)* v. *Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 (hereafter "*Uashaunnuat*").

It is thus timely to take stock of the current state of the law in respect of Aboriginal title. Although this article does not purport to address all of the unresolved questions in this area, it does take the pulse of the current legal situation, survey the landscape, and identify some of the major issues that are likely to require specific attention in the months and years ahead.[7] It also provides suggestions for possible answers to these challenging issues.

This article is divided into three sections. Firstly, we examine what we know about Aboriginal title in light of the *Tsilhqot'in* decision. We discuss the nature of Aboriginal title and its incidents, the basic test or framework affirmed in *Tsilhqot'in* for proof of Aboriginal title, and the decision's guidance with respect to how the *Sparrow*[8] framework interacts with issues arising from the division of powers.

Secondly, we look at what we think we know about Aboriginal title, i.e., what we, the authors, put forward as reasonable interpretations flowing from the decision. We, however, understand that these views may not be shared universally by others. This section includes our view that declarations of Aboriginal title operate prospectively and that continuity in some form is always required as part of the test for establishing Aboriginal title.

Thirdly, and lastly, we examine what we need to know more about in light of *Tsilhqot'in*. This section deals with critical questions that remain following the decision, questions that we believe the courts will likely need to address in the near future. This discussion also examines how Aboriginal title interacts with private land interests as well as some of the complex issues associated with Aboriginal title claims to submerged lands.[9]

7. This article does not attempt to address many of the theoretical criticisms of the underlying doctrine of Aboriginal title and the doctrine's articulation in *Tsilhqot'in*, such as the criticism that Aboriginal title (and the underlying assumption of Crown radical title) is ultimately based on the doctrine of discovery. While we recognize that these are significant considerations, addressing these theoretical criticisms is beyond the scope of this article. For academic consideration of this issue, the reader may wish to refer to John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation* v. *British Columbia*", (2015) 48-3 *U.B.C. L. Rev.* 701; Felix Hoehn, "Back to the Future – Reconciliation and Indigenous Sovereignty after *Tsilhqot'in*", (2016) 67 *U.N.B. L.J.* 109.
8. *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 (hereafter "*Sparrow*").
9. The term "submerged lands" is used throughout this article to generally refer to lands submerged by water, including but not limited to lakebeds, riverbeds, and the seabed. Different considerations apply in respect of different categories of submerged lands, and more particularly in respect of Aboriginal title claims to different types of submerged lands. This reality should always be kept in mind in considering these types of claims.

1 What We Know About Aboriginal Title After *Tsilhqot'in*

1.1 A Brief Summary of *Tsilhqot'in*

Years of litigation culminated in the *Tsilhqot'in* decision. Everything began in 1983, when the province of British Columbia granted a commercial logging license on land that the Tsilhqot'in Nation, a group of six bands sharing common culture and history, considered to be part of their traditional territory.[10] In objecting to the logging license, the Xeni Gwet'in First Nations Government (one of the six bands making up the Tsilhqot'in Nation) sought a declaration prohibiting commercial logging on the land.[11] The original claim was amended in 1998 to include a claim to Aboriginal title on behalf of the broader Tsilhqot'in Nation.[12]

By the time the case reached the SCC, the claim area no longer included the privately owned lands, reserve lands and submerged lands that had been included within the original Aboriginal title claim area.[13] The claim before the SCC was confined to approximately five percent of what the Tsilhqot'in Nation consider as its traditional territory.[14] The area in question was sparsely populated, with only approximately 200 Tsilhqot'in people (out of the approximately 3,000 people forming the Tsilhqot'in Nation) living there, along with a small number of non-Indigenous people who supported the Tsilhqot'in claim. Significantly, there were no adverse claims to the Aboriginal title claim area stemming from other Indigenous groups.[15]

The trial commenced before the British Columbia Supreme Court (BCSC) in 2002 and continued over a five-year period. Ultimately, the trial judge found that the Tsilhqot'in people were entitled in principle to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside of the claim area. However, for procedural reasons (later abandoned on appeal by the Province of British Columbia), the trial judge refused to make a declaration of Aboriginal title.[16] In 2012, the British Columbia Court of Appeal (BCCA) concluded that the Tsilhqot'in Nation's Aboriginal title claim had not been established. However, it was left open for the Tsilhqot'in Nation to prove Aboriginal title to specific sites within the claim area.[17]

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10. *Tsilhqot'in, supra*, note 1, para. 3-5.
11. *Id*., para. 5.
12. *Id*.
13. *Id.,* para. 9.
14. *Id*., para. 6.
15. *Id*.
16. *Tsilhqot'in Nation* v. *British Columbia*, 2007 BCSC 1700, para. 129, 957, 961 and 962 (hereafter "*Tsilhqot'in Trial Decision*"); *Tsilhqot'in*, *supra*, note 1, para. 7.
17. *William* v. *British Columbia*, 2012 BCCA 285, para. 240 and 241; *Tsilhqot'in, supra*, note 1, para. 8.

When the claim reached the SCC, the Tsilhqot'in Nation asked the Court for a declaration of Aboriginal title over the area designated by the trial judge, with the exception of a small portion of the area consisting of privately owned or underwater (submerged) lands.[18] Reserve land interests were also not included within the more confined claim area. Ultimately, the Court declared that the Tsilhqot'in Nation held Aboriginal title to the area at issue.[19] The Court also declared that British Columbia had breached the duty to consult owed to the Tsilhqot'in Nation through its land use planning and forestry authorizations.[20] In reaching these conclusions, the SCC confirmed and expanded upon much of what we already knew of the common law doctrine of Aboriginal title.

1.2 The Nature of Aboriginal Title and Its Incidents

The SCC had previously explained in *Delgamuukw*[21] that Aboriginal title represents a right to the land itself.[22] This encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes that need not represent aspects of those practices, customs, and traditions that are integral to distinctive Indigenous cultures.[23]

At the same time, while describing Aboriginal title as a right to the land itself, the SCC also once again explained that it is a right that is s*ui generis* in nature, and, accordingly, should not be seen as merely identical in nature to a common law fee simple interest in land. The SCC went on to explain that Aboriginal title has been described as *sui generis* to distinguish it from "normal" proprietary interests, such as fee simple. It then noted that it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in Aboriginal legal systems.[24] The SCC also stated that, as with other Aboriginal rights, Aboriginal title must be understood by reference to both common law and Indigenous perspectives.[25]

18. *Tsilhqot'in, supra*, note 1, para. 9.
19. *Id.*, para. 153.
20. *Id.*
21. *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 (hereafter "*Delgamuukw*").
22. *Id.*, para. 138.
23. *Id.*, para. 117. We have generally made use of the term "Aboriginal" when referring to s. 35 protected rights but have otherwise used "Indigenous" to reflect the more accepted current usage. We have at times used the word "Indigenous" when summarizing or discussing decisions that originally used the term "Aboriginal." We have made this choice when doing so did not conflict with what we understood to be the intention underlying the usage in these decisions.
24. *Id.*, para. 112.
25. *Id.*

These general principles in respect of the nature of Aboriginal title remain following the *Tsilhqot'in* decision. In *Tsilhqot'in,* the SCC explained that the characteristics unique to Aboriginal title flow from the special relationship between the Crown and the Indigenous group in question.[26] This special relationship is what makes Aboriginal title *sui generis* or unique.[27]

The SCC recently reaffirmed the *sui generis* nature of Aboriginal title in *Uashaunnuat*. In that case, the Court also noted that even before *Tsilhqot'in,* the SCC had frequently warned against "conflating Aboriginal title with traditional civil or common law property concepts, or even describing [Aboriginal] title using the classical language of property law".[28]

To be clear, the SCC has maintained that Aboriginal title fundamentally concerns land.[29] Yet, it has explained that one should not conclude that Aboriginal title is a strictly "real right" as this would ignore the fact that Aboriginal title is firmly grounded in the relationships formed by the confluence of prior occupation and the Crown's assertion of sovereignty.[30]

We also know, as was made clear in *Marshall; Bernard*,[31] that Aboriginal title, like all Aboriginal rights, is a modern legal right.[32] The SCC has told us that its task in evaluating a claim for an Aboriginal right is to examine the pre-sovereignty Indigenous practice and translate that practice into a modern legal right[33], as faithfully and objectively as it can.[34] The question is whether the Indigenous practice at the time of asserting sovereignty translates into a modern legal right, and if so, what right.[35] The SCC noted that this exercise involves considering both the Indigenous and European perspectives in the sense that the SCC must consider the pre-sovereignty practice from the perspective

26. *Tsilhqot'in, supra*, note 1, para. 72.
27. Indeed, at para. 72 of *Tsilhqot'in*, it is stated: "Aboriginal title is what it is – the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership – for example, fee simple – may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As LaForest J. put it in *Delgamuukw*, para. 190, Aboriginal title "is not equated with fee simple ownership, nor can it be described with reference to traditional property law concepts."
28. *Uashaunnuat, supra*, note 6, para. 29. At para. 36 of *Uashaunnuat* the Court explains that s. 35 rights are not merely an amalgam of real rights and personal rights connected to Indigenous peoples. Rather, as the term *sui generis* makes clear, s. 35 rights are "legally distinct [and] [TRANSLATION] 'impossible to fit into any recognized category': Reid, at p. 607. They are neither real rights nor personal rights as defined in the civil law, but *sui generis* rights."
29. See most recently *Uashaunnuat, supra*, note 6, para. 35.
30. *Id*.
31. *R.* v. *Marshall*; *R.* v. *Bernard*, 2005 SCC 43 (hereafter "*Marshall*; *Bernard*").
32. *Id.,* para. 48.
33. *Id*.
34. *Id*.
35. *Id*.

of the Indigenous people. However, in translating it to a common law right, the SCC must also consider the European perspective.[36] The nature of the common law right must be examined to determine whether a particular Indigenous practice "fits it."[37]

Importantly, in explaining its task, the SCC stressed that the exercise of translating Indigenous practices into modern rights must not be conducted in a formalistic or narrow way.[38] Emphasis was placed on the need for a generous view of the Indigenous practice and on avoiding an insistence on exact conformity to the precise legal parameters of the common law right, the question being whether the practice corresponds to the "core concepts" of the legal right claimed.[39]

Tsilhqot'in reinforced that Aboriginal title is a modern right and that Indigenous perspectives continue to play a pivotal role in Aboriginal title determinations. In that case, the SCC spoke of the task as being one of identifying "how pre-sovereignty rights and interests can properly find expression in modern common law terms."[40] It explained that in considering the core concepts relevant to establishing Aboriginal title, the courts must avoid losing or distorting the "Aboriginal perspective" by forcing ancestral practices into the "square boxes of common law concepts." To do so would be to "frustrat[e] the goal of faithfully translating pre-sovereignty [Indigenous] interests into equivalent modern legal rights."[41]

The jurisprudence also indicates that the exact form that Aboriginal title may take on in a practical sense will vary somewhat from one case to the next or, put differently, from one Aboriginal title-holding group to the next. If ever there was a doubt with respect to that, such doubt has been dispelled by the majority in *Uashauunnuat*.[42] In that case, the majority specifically explained that Indigenous perspectives shape the very concept of Aboriginal title, the content of which may vary from one group to another.[43]

Finally, the case law to date teaches us that the modern concept of Aboriginal title encompasses a number of rights or "incidents of title," including: a) the right to exclusive use and occupation of the land; b) the right to possession, enjoyment and occupation of the land; c) the exclusive right to decide how the land

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Tsilhqot'in, supra*, note 1, para. 50.
41. *Id.*, para. 32.
42. There may have been doubt at one point about whether Aboriginal title may vary as between title-holding groups because of C.J. McLachlin's statement in *Tsilhqot'in*, *id.*, para. 72, that "Aboriginal title is what it is".
43. *Uashaunnuat, supra*, note 6, para. 31.

is used; d) the right to determine the uses to which the land is put; e) the right to proactively use and manage the land; and f) the right to enjoy the economic fruits of the land.[44]

It bears noting that, in listing the incidents of Aboriginal title, the SCC stated that these incidents "include" those listed above. In other words, the SCC arguably did not provide an exhaustive list of incidents of title, which in turn implies that the case law may set out more incidents of title in the years ahead. Additionally, to the extent the SCC appears to have envisaged the incidents of Aboriginal title as comprising a series of rights, there is some question as to whether Aboriginal title could be declared in a circumstance where only some of these rights could actually be exercised, as is discussed further below.

1.3 The Test

The *Tsilhqot'in* decision reaffirmed the test for Aboriginal title that had been previously laid out in *Delgamuukw*. McLachlin C.J. wrote at para. 25-26:

> As we have seen, the *Delgamuukw* test for establishing Aboriginal title to land is based on "occupation" prior to the assertion of European sovereignty. To ground Aboriginal title, this occupation must possess three characteristics. It must be *sufficient,* it must be *continuous* (where present occupation is relied on), and it must be *exclusive*.
>
> The test was set out in Delgamuukw, per Lamer C.J., at para. 143:
>
> > In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[45]
>
> (Emphasis in original)

Accordingly, following *Tsilhqot'in,* we know that the test remains essentially the same as it was expressed by Lamer C.J. in 1997, i.e., three criteria apply to establish Aboriginal title: sufficient occupation, continuity, and exclusive occupation. More specifically, the SCC explained in *Tsilhqot'in* that evidence of Aboriginal title will focus on the occupation of the land prior to the assertion of European sovereignty and further explained that, to ground title, the occupation must present the following characteristics: i) it must be sufficient; ii) where present occupation is relied on, it must be continuous; and iii) it must be exclusive. However, in so doing, the SCC also explained that these elements should be considered together as part of the Aboriginal title inquiry, describing them as "useful lenses through which to view the question of Aboriginal title."[46]

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44. *Tsilhqot'in, supra*, note 1, para. 73-76, 88 and 121.
45. *Id*., para. 25 and 26.
46. *Id*., para. 32.

In affirming the test from *Delgamuukw,* in *Tsilhqot'in,* the Court left unaddressed certain issues in terms of its application and operation. As well, the reference to the concepts of sufficiency of occupation, exclusivity, and continuity as "useful lenses through which to view the question of Aboriginal title" raises some questions as to whether the Court was signalling a less formulaic application of the test moving forward. In the least, the Court may have been alive to the difficulties associated with applying a rigid common law test to an ever-evolving area of the law that is, of necessity, shaped by Indigenous perspectives.

1.4 Infringement Justification and the Provinces

Tsilhqot'in is a groundbreaking decision as it represents the first time the SCC made a declaration of Aboriginal title. Given this precedent-setting aspect of *Tsilhqot'in*, it is easy to overlook another extremely important aspect of the decision: the clarity it provided with respect to the provinces' ability to justifiably infringe Aboriginal title (as well as other Aboriginal and treaty rights protected under s. 35). This was a very significant legal development.

At trial, the BCSC concluded that, because of the doctrine of interjurisdictional immunity, combined with the SCC's decision in *R.* v. *Morris*,[47] the Province of British Columbia lacked constitutional authority to justify infringements of Aboriginal rights protected under s. 35.[48]

The SCC overruled the trial judge on this point. McLachlin C.J., writing for the Court, instead found that the provinces could indeed justify infringements of Aboriginal rights so long as they satisfied the requirements laid out in *Sparrow.*[49] The thrust of the reasoning was that the infringement and justification framework for resolving conflicts involving incursions by provincial and federal government on Aboriginal rights was a better framework for resolving such matters than relying on the principles underlying the division of powers.[50]

The SCC's dicta on this point have been the subject of some academic criticism, in part because they can be seen as a shift in direction from previous cases such as *Morris* that insulated s. 35 rights from provincial interference.[51]

Our own view is that the SCC's reasoning on this point is sensible and consistent with the development of the law with respect to issues involving the division of powers. Canadian jurisprudence has long been moving away from the "watertight compartments" approach to the division of powers, and it is logical

47. *R.* v. *Morris*, 2006 SCC 59.
48. *Tsilhqot'in Trial Decision*, *supra*, note 16, para. 1021-1022.
49. *Sparrow*, *supra*, note 8.
50. *Tsilhqot'in, supra*, note 1, para. 128-152.
51. Kerry Wilkins, "Life Among the Ruins: Section 91(24) After *Tsilhqot'in* and *Grassy Narrows*", (2017) 55-1 *Alta. L. Rev.* 91, 106; J. Borrows, *supra*, note 7, 736-738.

that this approach has been extended to Aboriginal law. Affirming that provincial governments can seek to justify infringements of Aboriginal and treaty rights also serves to advance a balancing of rights approach that is already evident in other areas of constitutional law, such as constitutional law involving *Charter* rights, which are subject to justified infringement under s. 1 of the *Charter*[52] and the application of the *Oakes* test.

2 What We Think We Know After *Tsilhqot'in*

The previous section of this article discussed what we know about Aboriginal title following the *Tsilhqot'in* decision. This section shifts gears and examines what we *think* we know about Aboriginal title in the wake of this important case.

2.1 Aboriginal Title Declarations Operate Prospectively

With the issuance of a declaration of Aboriginal title in *Tsilhqot'in*, we moved from the theoretical possibility of a judicial finding of Aboriginal title to the reality of a declaration of Aboriginal title over land in Canada. The move from theoretical possibility to practical reality introduced a new set of questions around how declarations of Aboriginal title operate and around the implications of such declarations.

One major question that persists in the wake of the decision is whether a declaration of Aboriginal title only works prospectively. In other words, does a declaration of Aboriginal title signify that an Indigenous group can seek and obtain legal remedies based on interferences with their Aboriginal title right that occurred *prior* to the date of the court's declaration (i.e., retrospectively)? Or, alternatively, does a declaration of Aboriginal title create legal consequences only as of the day the court makes its declaration (i.e., prospectively)? The jurisprudence in this area seemingly points us in the direction of two possible answers to the question of precisely how declarations of Aboriginal title operate.

The first answer is essentially that a declaration of Aboriginal title reaches back in time so as to operate from the date sovereignty was asserted. This approach aligns with longstanding case law to the effect that Aboriginal rights, including Aboriginal title, are not dependent on any act, agreement, or constitutional provision for their existence but rather arise by virtue of the prior existence of Aboriginal peoples in North America before the arrival of the Europeans.[53] Further support for this approach can arguably be found in *Delgamuukw*, where

52. *Canadian Charter of Rights and Freedoms*, s. 1, Part I of the *Constitution Act, 1982*, [being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11] (hereafter "*Constitution Act, 1982*"); *R.* v. *Oakes*, [1986] 1 S.C.R. 103.
53. *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335, p. 379 (per Dickson J.); *Tsilhqot'in*, *supra*, note 1, para. 69; *Uashaunnuat*, *supra*, note 6, para. 35.

Lamer C.J. wrote: "aboriginal title crystallized at the time sovereignty was asserted."[54] Pursuant to this line of argument, one might expect an Indigenous collective granted a declaration of Aboriginal title to argue that both pre- and post-declaration Crown grants in respect of those lands, for example, are (and always have been) encroachments on their land. As part of this line of argument, it would likely be asserted that, because of the operation of the declaratory theory of the law, a declaration of Aboriginal title obtained in the present day nevertheless operates as a statement of what the parties' rights and interests have always been.[55]

A second answer to the above question, however, is that any declaration of Aboriginal title only operates from the exact date the court makes its declaration. Pursuant to this approach, where a court makes a declaration of Aboriginal title, the declaration only serves as a basis for legal remedies as of the date of the declaration. For example, an Indigenous nation with a declaration of Aboriginal title made on January 1, 2023 could use the declaration as the basis for an action against parties trespassing on their lands where the trespass occurs after the date of the declaration. However, the declaration would not serve as the basis for legal remedies where the trespass occurred prior to the court's declaration.

It is this second answer that we, the authors, suggest is more in line with the jurisprudence and is accordingly more persuasive and compelling. In our view, this approach is also more consistent with the purpose of s. 35 of the *Constitution Act, 1982*, which is to protect modern day Aboriginal rights, even though these rights flow from the use and occupation of the land from before the assertion of Crown sovereignty.[56]

To understand this second answer, it is necessary to consider the findings in *Tsilhqot'in* itself. In the claim area that was ultimately found to be subject to Aboriginal title, there were no lands subject to fee simple interests. However, there were forestry licenses granted by the Crown to commercial entities within this claim area. These forestry licenses were not voided by the SCC's declaration of Aboriginal title. If it were true that a declaration of Aboriginal title would have always had legal effect (pursuant to a prospective view of Aboriginal title), it then seems the SCC would have had to consider if and how the forestry licenses granted by British Columbia would have been affected. For example, one more extreme outcome might have been that those forestry tenures would have been found to be null and void, as was suggested by some academics

54. *Delgamuukw*, *supra*, note 21, para. 145.

55. For a discussion of the declaratory approach, see *Canada (Attorney General)* v. *Hislop*, 2007 SCC 10, para. 81-86.

56. *Marshall*; *Bernard*, *supra*, note 31, para. 48.

should have been the outcome.[57] Had the SCC found that the declaration worked backwards in time, another potential outcome may have been that the forestry licenses should be subject to the infringement/justification analysis.

Of course, this is not what happened in *Tsilhqot'in*. Instead, the SCC accepted that "*[o]nce* Aboriginal title is confirmed […] the lands are "vested" in the Aboriginal group and the lands are no longer Crown lands" (emphasis added).[58] We suggest that the word "once" is very important, and provides important insight into how the SCC dealt with this issue.

In *Tsilhqot'in*, Chief Justice McLachlin refers to the "vesting" of interests in lands as part of her analysis as to whether the British Columbia *Forest Act*[59] was intended to apply to lands subject to Aboriginal title. As part of her exercise in statutory interpretation seeking to answer this question, she notes that if Aboriginal title land is "vested in the Crown," then it would fall within the definition of "Crown land," and so the *Forest Act* would apply, and the British Columbia Crown could issue timber licenses with respect to timber on the land.[60] She wrote:

> If Aboriginal title land is "vested in the Crown", then it falls within the definition of "Crown land" and the timber on it is "Crown timber".
>
> What does it mean for a person or entity to be 'vested' with property? In property law, an interest is vested when no condition or limitation stands in the way of enjoyment. Property can be vested in possession or in interest. Property is vested in possession where there is a present entitlement to enjoyment of the property. An example of this is a life estate. Property is vested in interest where there is a fixed right to taking possession in the future. A remainder interest is vested in interest but not in possession: B. Ziff, *Principles of Property Law* (5th ed. 2010), at p. 245; *Black's Law Dictionary* (9th ed. 2009), *sub verbo* "vested".
>
> Aboriginal title confers a right to the land itself and the Crown is obligated to justify any incursions on title. As explained above, the content of the Crown's underlying title is limited to the fiduciary duty owed and the right to encroach subject to justification. It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.[61]

57. K. McNeil, *supra*, note 3, 71, 72 and 76-78.
58. *Tsilhqot'in*, *supra*, note 1, para. 115.
59. *Forest Act*, R.S.B.C. 1996, c. 157.
60. *Tsilhqot'in*, *supra*, note 1, para. 108-110.
61. *Id.*, para. 110-112.

The concept of "vesting" has a temporal element, i.e., there is a period of time before the land is vested, and a period of time after the land is vested. This temporal dynamic is reflected in the following passage from *Tsilhqot'in*:

> And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land's use: *Haida*. At this stage, the Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims.[62]

A similar point was identified by Professor McNeil in 2015, commenting on para. 92 of *Tsilhqot'in*.[63] According to McNeil, "by including the words "going forward" [Chief Justice McLachlin] evidently meant to preserve the legality of what had been done previously."[64] This same recognition of the prospective approach has also been made by other legal commentators (some of whom criticize the approach, but nevertheless acknowledge the direction apparently taken by the SCC).[65]

To summarize, by using the language of "vesting" and describing a before period as well as an after period in relation to when the Aboriginal title vested (i.e., " … [o]nce Aboriginal title is confirmed […]"), in *Tsilhqot'in,* the SCC provided the answer to the question of how a declaration of Aboriginal title will operate: *it doesn't operate backwards, but only forwards.*

If we accept that Aboriginal title operates prospectively, how do we reconcile this conclusion with the SCC's dicta that Aboriginal title crystallizes at the time sovereignty is asserted?[66] In our view, the answer lies in the distinction between the crystallization of a right and the actual vesting of a right. We suggest that the best way to reconcile the case law is that, while the necessary elements of an inchoate Aboriginal title right crystallize at the time sovereignty is asserted,

62. *Id*., para. 113.
63. *Id*., para. 92 of *Tsilhqot'in* states:

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

64. K. McNeil, *supra*, note 3, 77.
65. Craig Empson, "Historical Infringements of Aboriginal Title: *Sui Generis* as a Tool to Ignore the Past", (2019) 24 Appeal 101, 104-107. For a more supportive view, see Malcolm Lavoie, "Aboriginal Title Claims to Private Land and the Legal Relevance of Disruptive Effects", (2018) 83 *S.C.L.R.* (2d) 129, 146-147.
66. *Delgamuukw*, *supra*, note 21, para. 145.

Aboriginal title and its associated incidents will ultimately only vest in a particular Indigenous group following recognition of this s. 35 right pursuant to a court declaration or agreement.[67]

In other words, the reference to crystallization in *Delgamuukw* should be understood in the sense of the process through which Aboriginal title became capable of recognition as a common law right. For this recognition to occur, sovereignty must have been asserted and with it the common law must have been introduced. However, this crystallization at sovereignty did not make the Aboriginal title an actionable, modern, s. 35 right. Rather, the modern-day common law concept of Aboriginal title would only actually vest in the Aboriginal title holding group at the time of the court declaration (or agreement, as the case may be).

This reading of the case law fits with the broader body of Aboriginal law, and specifically that case law dealing with the duty to consult and the infringement/justification framework—a reality which the Court in *Tsilhqot'in* seemed to recognize. Specifically, in *Tsilhqot'in,* the SCC drew a clear line between the duties that apply to the Crown in the pre-establishment of s. 35 rights context, as opposed to those that apply post-establishment of s. 35 rights.[68]

More particularly, the Court explained that a spectrum of duties applies to the Crown throughout the lifespan of a s. 35 claim. The requirement to ensure that the Crown's conduct meets the justificatory standard set out in the *Sparrow* decision applies only where an Aboriginal title right has been proven or established.[69] Prior to that, the Crown only owes the procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the "unproven Aboriginal interest."[70]

In other words, in *Tsilhqot'in,* the SCC did not contemplate that unproven s. 35 rights would have protections relating to the need for the Crown to justify any infringements of these rights, but rather that only the *Haida* framework (i.e., the duty to consult and accommodate) would have application in the pre-establishment of rights context.[71]

We might add that the application of the justification analysis to assert yet unestablished rights is arguably not practicable. In the absence of knowledge of the precise nature and contours of such rights, it is difficult to contemplate how a court would be able to engage in such an analysis. This difficulty was arguably

67. See *Tsilhqot'in, supra*, note 1, para. 89, 90, 114 and 115.
68. *Id*., para. 113.
69. *Id*., para. 80.
70. *Id*.
71. *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73.

recognized by the SCC in *Lax Kw'alaams*, where the Court explicitly stated that the *Sparrow* justification requirement only applies once a s. 35 right has actually been established.[72]

Finally, we would suggest that the view that a declaration of Aboriginal title only operates prospectively (as of the date of the declaration), and that the s. 35 Aboriginal title right only vests as of the date of the court declaration, is broadly consistent with the approach adopted in other areas of the law. For instance, in the context of family law, it has been accepted that, before a court makes a determination as to the division of family assets, it cannot be said that specific property has "vested" as the property of a particular spouse. For example, in *Maroukis* v. *Maroukis*, the SCC rejected a lower court's conclusion that a court order made with respect to the division of assets worked retroactively to protect a wife's assets from execution creditors.[73] Lower courts have since described the "pre-vested" right to seek a division of assets as an inchoate right. For instance, in *Hews Aucoin* v. *Aucoin Estate,* Ferguson J. wrote:

> Courts in this province have described this inchoate right as a personal right until such time as an order issues declaring the respective rights of parties. It has been said that is not until that latter declaration is made that the personal right, inchoate until declared to be vested, morphs into a property right.[74]

In summary, while the temporal operation of a declaration of Aboriginal title remains an unsettled issue following *Tsilhqot'in*, we suggest that the better view is to consider that such declaration does not void all legal interests to the land that came before it. To find otherwise would be to reach a conclusion that is inconsistent with the approach adopted in other areas of the law and that is inconsistent with what actually happened in *Tsilhqot'in* itself with respect to forestry licenses. This is not to say that there should never be remedies aimed at redressing the impacts of historic interferences with Aboriginal title. In our view, remedies sourced in the honour of the Crown or based in causes of action such as a breach of fiduciary duty could be fashioned to allow Aboriginal title holders a manner of seeking redress for historic interferences with their rights while balancing those rights with the interests of private parties. However, the automatic voiding of private interests based on a retrospective or retroactive view of the operation of a declaration of Aboriginal title would not represent a balanced approach to this difficult issue and would not be helpful to courts, governments, and Indigenous nations seeking to arrive at fair outcomes for all parties.

72. *Lax Kw'alaams Indian Band* v. *Canada (Attorney General),* [2011] 3 S.C.R. 535, para. 66.
73. *Maroukis* v. *Maroukis*, [1984] 2 S.C.R. 137.
74. *Hews Aucoin* v. *Aucoin Estate*, 2017 NBQB 224, para. 36.

2.2 Continuity in Some Form Is Always Required

The second thing that we think we know following *Tsilhqot'in* is that continuity is always required in some form to prove a claim for Aboriginal title. It is important to pause here and acknowledge that this view of continuity is certainly not universally held. It is nonetheless our contention that when the issue is considered having regard to both the Aboriginal title case law and the broader body of Aboriginal law jurisprudence, there is a strong case to be made that continuity is *always* relevant to Aboriginal title determinations. However, we also perceive room for the courts to adopt a flexible approach to the question of the indicia of continuity—one that does not confine this concept to a pattern of physical occupation and factors in realities such as historic, forced dislocation and displacement caused by Crown actions and policies.

It is perhaps not surprising that there exists room for differing opinions in this area when one acknowledges that, by the time the *Tsilhqot'in* case reached the SCC, the issues had been narrowed such that continuity was not a central focus. At para. 57 of the decision, the SCC briefly reviewed the reasoning of the trial judge with respect to continuity and concluded that there was no reason to disturb his finding that the Tsilhqot'in people continuously occupied the claim area before and after sovereignty assertion. As a result, the SCC simply had no need to opine deeply on this question and speak to how this part of the test operates in practice. The passages in the decision that actually address continuity are accordingly sparse. In *Tsilhqot'in*, the Court reiterated the test for Aboriginal title that had been previously laid out in *Delgamuukw*:

> In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[75]

It then touched on the concept of continuity as follows*:*

> As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on "occupation" prior to the assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.[76]
>
> (Underlining added, italics in original.)

75. *Delgamuukw*, *supra*, note 21, para. 143.
76. *Tsilhqot'in, supra*, note 1, para. 25.

In our view, the choice of wording in *Delgamuukw*, as it relates to continuity, left significant room for debating on its meaning. Specifically, following the decision, it remained unclear whether continuity is truly only relevant in situations where present occupation is relied on by the claimant group as proof of its pre-sovereignty occupation or whether it is required in all instances where Aboriginal title is sought to be established.

Indeed, despite the specific reference to reliance on present occupation at para. 143 of *Delgamuukw*, it cannot be forgotten that, elsewhere in the decision, Lamer C.J. explained that a claim to Aboriginal title can only be established when a group can demonstrate that its connection with a piece of land was of central significance to its distinctive culture—a point he had made earlier in *Adams*.[77] In *Delgamuukw,* he wrote that any land occupied pre-sovereignty and with which the Aboriginal title claimants have since maintained a substantial connection is sufficiently important to be of central significance to the claimants' culture and, thus, there is simply no need to explicitly add the element of "maintaining a substantial connection with the land since sovereignty" to the test for establishing Aboriginal title:

> As I said in *Adams*, a claim to title is made out when a group can demonstrate "that their connection with the piece of land […] was of a central significance to their distinctive culture" (at para. 26).
>
> Although this remains a crucial part of the test for [A]boriginal rights […] in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for [A]boriginal title.[78] (Emphasis added.)

He continued:

> In *Mabo*, *supra*, the High Court of Australia set down the requirement that there must be "substantial maintenance of the connection" between the people and the land. In my view, this test should be equally applicable to proof of title in Canada.[79]
>
> (Emphasis added.)

The foregoing passages leave one to wonder what Lamer C.J. truly meant when he referred to reliance on present occupation. Where an Indigenous group does not seek to rely on present occupation as proof of its pre-sovereignty occupation, would it have fully discharged its evidentiary burden if it solely brought forward evidence of sufficient *pre-sovereignty* occupation and exclusivity?

77. *R.* v. *Adams*, [1996] 3 S.C.R. 101.
78. *Delgamuukw*, *supra*, note 21, para. 150 and 151.
79. *Id.*, para. 153.

In our view, this could not have been what Lamer C.J. intended. Having regard to other passages from the *Delgamuukw* decision, as well as the broader body of Aboriginal rights and title jurisprudence, we suggest that the better reading is that proof of continuity is indeed always relevant to the Aboriginal title inquiry, but this continuity requirement can be satisfied by more than just physical occupation. We make this statement because the Court has signalled the need for a flexible approach to the concept of continuity, and one that is highly sensitive to Indigenous perspectives and historical realities and avoids an unreasonable and overly technical approach to evidence of physical occupation of the claim area over time. We also make this statement because Aboriginal title represents a subcategory of Aboriginal rights and thus shares the characteristics common to all Aboriginal rights.[80] To the extent that a concept of continuity is common to all Aboriginal rights, it would logically follow that proof of continuity is likewise necessarily applicable in all Aboriginal title claims.

Additionally, the above-noted passages from *Delgamuukw* must be read within the larger body of Aboriginal law in which they are found. In *Marshall; Bernard*, McLachlin C.J. interpreted Lamer C.J.'s comments as indicating that continuity, in the sense of maintaining a substantial connection that demonstrates the land remained of central significance, is required in every case. She stated that continuity can be understood in two senses: firstly, in the sense that Aboriginal title claimants can establish that they are rights holders insofar as they have a connection with the pre-sovereignty group upon whose practices they rely to assert Aboriginal title[81], and secondly, in the sense that the claimants must demonstrate how the land was of central significance to the group over time:

> Continuity may also be raised in this sense. To claim title, the group's connection with the land must be shown to have been "of central significance to their distinctive culture": *Adams*, at para. 26. If the group has "maintained a substantial connection" with the land since sovereignty, this establishes the required "central significance": *Delgamuukw*, *per* Lamer C.J. at paras. 150–151.[82]
>
> (Emphasis added.)

Since both *Delgamuukw* and *Marshall; Bernard* remain good law, there would seem to be a strong case to be made that continuity in *both* senses referred to by McLachlin C.J. must be made out to establish Aboriginal title. Put differently, Aboriginal title claimants must establish that i) they are connected with the pre-sovereignty group whose use and occupation of certain lands they rely upon to assert title (i.e., they are the proper rights holder); and ii) they have "maintained a substantial connection" with the land since sovereignty and the land is thus of

80. Reaffirmed most recently by the SCC in *Uashaunnuat*, *supra*, note 6, para. 27.
81. *Marshall*; *Bernard*, *supra*, note 31, para. 67.
82. *Id.*

continued "central significance" to their distinctive culture. To repeat, in our view it is not necessary that this second requirement be a substantial connection in the form of *physical* occupation. We think that it is reasonable to predict that other forms of substantial connection could well suffice.

Delgamuukw was released in 1997, and Lamer C.J.'s comments about the need for the substantial maintenance of the connection between the people and the land as part of the test were not explicitly repeated when the Court reaffirmed the test for Aboriginal title in *Tsilhqot'in* in 2014. Does this mean that what Lamer C.J. said in 1997 has been left by the wayside, and is no longer the law? In other words, was there a doctrinal shift between 1997 and 2014, in which the Court moved away from its view (expressed at para. 153 of *Delgamuukw*) that a substantial connection is always required?

In our view, the fact that the Court did not explicitly affirm in *Tsilhqot'in* what was said in *Delgamuukw* with respect to maintenance of a substantial connection does not mean that the law changed in the intervening years. On this, it is essential to once again recall that, in the 2005 *Marshall; Bernard* decision, McLachlin C.J. did indeed explicitly speak of continuity at paragraph 67 of that decision as being linked with both the issue of the proper rights holders and the requirement to demonstrate that the Indigenous claimant group's connection with the land was and remains of central significance. In stating this requirement, McLachlin explicitly adopted Lamer C.J.'s conclusion at para. 153 of *Delgamuukw* and made clear that it was the view of the majority of the Court that proof of central significance through evidence of substantial maintenance of a connection applies in all cases.[83]

In view of this, it is the authors' opinion that the better view is that the lack of discussion in *Tsilhqot'in* on the issue of maintenance of substantial connection simply cannot be read as a departure from Lamer C.J.'s earlier conclusion on this matter. Rather, the *Tsilhqot'in* decision most likely did not explicitly speak to the issue of maintaining a substantial connection seeing as, by the time the Aboriginal title claim of the Tsilhqot'in Nation was before the SCC for consideration, there was no real issue before the Court as to the continuity branch of the test for establishing Aboriginal title. We also stress the reality that it was McLachlin C.J. herself who rendered the majority decision in *Tsilhqot'in*. Presumably, if she had wished to depart from her reasons in *Marshall; Bernard* in respect of the continuity branch of the test for establishing Aboriginal title and the need to demonstrate central significance in all cases, she would have made a specific point of doing so.

83. *Id.*

It is interesting to consider whether the Court, in *Tsilhqot'in,* would have brought more clarity to this concept had they been squarely faced with the issue. If the Court had been presented with a scenario that called into question whether the Aboriginal title claimants had in fact maintained a substantial connection over time with the claimed land, perhaps *Tsilhqot'in* would have provided greater guidance on the continuity requirement.

One can expect that such issues will make their way to the Court in the near future as new scenarios arise, including those involving lands which do not easily lend themselves to more physical forms of occupation or those involving lands long occupied by private, third-party fee simple owners. Such cases will presumably push the courts to provide further clarity with respect to both the precise role of continuity in the test for establishing Aboriginal title and the indicia of use and occupation which it would be prepared to accept as demonstrating the maintenance of a substantial connection with the land over time.

The case law highlighting the crucial role played by Indigenous perspective in Aboriginal title determinations provides support for the proposition that the maintenance of a substantial connection with the land over time may be established through evidence of a more spiritual or non-physical nature. The SCC has long emphasized the importance of the sufficiency analysis being culturally sensitive and approached from both common law and Indigenous perspectives.[84] As a continuation of this trend, it is quite possible to imagine our courts relying on Indigenous laws relating to land use and occupation as part of their consideration of the issue of continuity. While Indigenous perspectives are, of course, not homogenous, many Indigenous cultures may hold a more holistic concept of territoriality that includes an emphasis on the protection of the environment and its resources.[85] Ultimately, the growing comfort on the part of the courts to rely on Indigenous perspectives and laws may serve as an avenue for Indigenous nations to demonstrate continuity even where it is difficult to show physical occupation.

We also find support for a more flexible approach to the indicia of continuity in case law pointing to the context-specific nature of the Aboriginal title inquiry itself. The SCC has consistently spoken of the highly contextual nature of Aboriginal title determinations, noting that the intensity and frequency of the use of land needed to establish Aboriginal title may vary with the characteristics of the Indigenous group asserting its title and the character of the land over which title is asserted.[86]

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84. *Tsilhqot'in, supra*, note 1, para. 34.
85. See C. Rebecca Brown, Starboard or Port Tack? Navigating a Course to Recognition and Reconciliation of Aboriginal Title to Ocean Spaces, Master's thesis, British Columbia, University of British Columbia, 1999, p. 111 and 112, where the author notes as follows: ""Land" for First Nations is a broad term incorporating the whole biosphere which includes the earth, rivers, lakes, winter ice, shorelines, the marine environment and the air."
86. *Tsilhqot'in, supra*, note 1, para. 37.

For instance, in stressing that sufficiency of occupation is a context-specific inquiry, the SCC explained that the land in question in *Tsilhqot'in*, although extensive, was difficult to occupy in a physical sense and was only capable of supporting from 100 to 1000 individuals. According to the SCC, the fact that only about 400 individuals formed the claimant Indigenous group had to be considered in the context of the land's "carrying capacity" in determining if the regular use of definite tracts of land was made out.[87] In considering the issue of continuity, it is thus reasonable to suppose that rigid adherence to proof of physical occupation of an area over time is unlikely to be sought where the land itself was simply not amenable to such intensive physical occupation.

Additionally, it seems significant that, in *Tsilhqot'in,* the SCC clarified that *Delgamuukw* affirmed a "territorial use-based approach" to Aboriginal title as opposed to an approach that required regular presence on, or intensive occupation of, particular tracts of land.[88] While the SCC clearly did not go so far as to hold that a modern Aboriginal title right under s. 35 will equate to an Indigenous group's claimed traditional territory, the stress placed on a territorial use-based approach to Aboriginal title would seem to point in the direction of the need to consider how an Indigenous group used its land over time. Presumably, this could encompass both physical and non-physical uses of land, such as efforts to maintain certain areas of land in more pristine condition out of a profound respect for the spiritual significance of these areas. This might encompass sacred spaces which perhaps have not been physically occupied in a consistent manner over time, but in respect of which a substantial connection has nonetheless been maintained over time.

Although the case dealt with Aboriginal rights, the decision rendered in *Desautel*[89] may also shed some additional light on the role of continuity in the context of Aboriginal title. Specifically, it would seem significant that, in this case, the SCC noted that the trial judge had made the following determination: despite the relevant Indigenous group's departure from its traditional territory, its members were still connected to that geographic area.

The central question that went before the SCC in *Desautel* was whether members of an Indigenous community now in the United States (the Lakes Tribe of the Colville Confederated Tribes, which the trial judge accepted was a successor to the Sinixt, a group whose traditional territory was situated in British

87. *Id.*, paras. 37 and 54-56.
88. *Id.*, at para 56.
89. *R.* v. *Desautel*, 2021 SCC 17 (hereafter "*Desautel SCC*").

Columbia)[90] could be considered "Aboriginal peoples of Canada," and exercise a right protected under s. 35 to hunt on their traditional territory in Canada. The SCC ultimately concluded that Mr. Desautel and his group could and did fit within the scope of these words and were an "Aboriginal people of Canada."[91]

To understand the potential relevance of the decision to the issue of continuity in the context of Aboriginal title, it is helpful to look at the findings made by the trial judge. She determined that, even though the claimant group had left its traditional area in Canada, its members were still connected to these lands. In so doing, she considered and relied on evidence demonstrating that the group's lands had not been forgotten and that the group's connection to the land was still present in the minds of its members[92] and, thus, the continuity element of the Aboriginal rights test was established notwithstanding a 42-year period of absence.[93] The SCC was careful to note that, as a regulatory prosecution, this case was not well suited to deal with broader issues, which should be dealt with in an action.[94] Despite this caution, the fact remains that the SCC ultimately affirmed the outcome reached by the trial judge and, in doing so, deferred to her finding that the Lakes Tribes was a modern successor group to the Sinixt.[95]

Despite these cautions, and the reality that *Desautel* was a case dealing with Aboriginal rights, it would nevertheless seem reasonable to anticipate that a similar type of analysis could equally apply to the question of indicia of continuity in the context of Aboriginal title. A court may likewise be open to indicia other than evidence of physical occupation[96] when making a determination as to whether a particular claimant group has maintained a substantial connection with the land subject to its claim over time, such as testimony tending to show that the group had not forgotten its land and had taken steps demonstrative of the continued central significance of that land to its culture.

A flexible approach to the indicia of continuity also allows for an approach that does not penalize Indigenous groups for historical injustices committed against them or for their need to adapt to circumstances beyond their control. This approach would be in line with the clear statements from the SCC that Indigenous perspectives have a key role to play in Aboriginal title determinations, as well as the principle that Aboriginal rights and title cases are to be approached

90. *Id.,* para. 48.
91. *Id*., para. 1.
92. *R.* v. *DeSautel*, 2017 BCPC 84, para. 84-88 and 123-134 (hereafter "*Desautel BCPC*").
93. *Desautel SCC*, *supra*, note 89, para. 8; *Desautel BCPC*, *supra*, note 92, para. 133 and 134.
94. *Desautel SCC*, *supra*, note 89, para. 2 and 90.
95. *Id*., para. 48.
96. *Desautel BCPC*, *supra*, note 92, para. 129.

in a manner that takes into account their case and fact specific nature.[97] It would also respect the principle of reconciliation, which is the fundamental purpose of s. 35(1) of the *Constitution Act, 1982*. For instance, in some cases, Indigenous groups may have been forced by settlers or by order of the Crown to leave their lands. Imposing the requirement of continuous physical use and occupation in such cases would undermine the purpose of s. 35(1) by giving effect to post-sovereignty indifference to Aboriginal rights.[98] However, placing an onus on the Indigenous group to instead adduce evidence that they had always substantially maintained some connection with their land (physical, spiritual or otherwise) would avoid this result.

To conclude, when considering the case law in its entirety, the best and most principled approach is that the SCC has preserved a role for continuity in *all* Aboriginal title determinations, not simply those where proof of present occupation is relied on for proof of pre-sovereignty occupation.[99] In our view, Aboriginal title claimants must always demonstrate the three components of the test for establishing Aboriginal title. As for the continuity component, this requirement can be met in at least two ways: a) by evidence of continuity between present and pre-sovereignty occupation in the sense of evidence of physical occupation over time; or b) by evidence of the maintenance of a substantial connection with the land since sovereignty, which establishes that the land remains of central significance to the Indigenous claimant group. We believe that the courts are likely to take a flexible approach to the indicia of continuity which recognizes the central role of Indigenous perspectives, and which allows for evidence of non-physical ways of maintaining a substantial connection with the land over time.

3 What We Need to Know More About After *Tsilhqot'in*

Having examined what we know, and what we think we know, following *Tsilhqot'in*, in this third section of this paper, we focus on what we do not know—but what is nevertheless important and will likely need to be dealt with in the future.

We now focus on two important unresolved issues regarding Aboriginal title, namely the interactions of Aboriginal title with private lands and with submerged lands. We pause to note, however, that these are far from the only unresolved

97. *R.* v. *Van der Peet,* [1996] 2 S.C.R. 507, para. 69.

98. See Cromwell J.A. (as he was then) in *R.* v. *Marshall*, 2003 NSCA 105, para. 181.

99. However, we note that a different view is taken in *The Nuchatlaht* v. *British Columbia*, 2023 BCSC 804, para. 407-414. As of the time of writing, it is not evident whether an appeal has been filed in this matter.

questions in the wake of *Tsilhqot'in*. Other important questions include, but are not limited to, the following:

- the scope of the "inherent limit" on Aboriginal title;[100]
- how precisely to determine which Indigenous collective holds Aboriginal title where that issue is in dispute;[101]
- how to deal with competing claims to Aboriginal title where there is more than one successor group to a historic Indigenous group;[102]
- the intersection between the Aboriginal right to hunt and the rights flowing from Aboriginal title;[103]
- the current state of the law with respect to the doctrine of extinguishment;[104]
- whether the assertion of sovereignty operates in the same way in areas of land that are historically subject to the French Crown, and which sovereignty (British or French sovereignty) would be determinative of the question of when Aboriginal title would have crystallized in these areas;[105] and
- the availability and operation of Aboriginal title with respect to Métis Indigenous nations.[106]

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100. *Tsilhqot'in*, *supra*, note 1, para. 74; see further Brian Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015), 71-1 *S.C.L.R.* 45, 58-63; Sébastien Grammond, "La contribution du juge Lamer à l'évolution du droit des autochtones", (2009) 88-1 *Can. Bar. Rev.* 21, 32 and 33; Ghislain Otis, "La revendication d'un titre ancestral sur le domaine privé au Québec", (2021) 62-1 *C. de D.* 277, 305 and 315.
101. *Delgamuukw*, *supra*, note 21, para. 158; Kent McNeil, "Exclusive Occupation and Joint Aboriginal Title", (2015) 48-3 *U.B.C. L. Rev.* 821; Karen Drake & Adam Gaudry," 'The Lands… Belonged to them, Once by the Indian Title, Twice for Having Defended them…and Thrice for Having Built and Lived on them': The Law and Politics of Métis Title", (2017) 54-1 *Osgoode Hall L.J.* 1, 32-39; Gordon Christie, "Potential Aboriginal Rights-Holders: Canada and Cultural Communities versus Indigenous Peoples and Socio-Political Bodies", (2021) 57-1 *Osgoode Hall L.J.* 1.
102. *Desautel SCC*, *supra*, note 89, para. 47-49; Brent Olthuis, "The Constitution's Peoples: Approaching Community in the Context of Section 35 of the Constitution Act, 1982", (2009) 54-1 *McGill L.J.* 1.
103. G. Christie, *supra*, note 101, 11.
104. Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion", (2002) 33-2 *Ottawa L. Rev.* 301; G. Otis, *supra*, note 100, 285-297.
105. *R.* v. *Côté*, [1996] 3 S.C.R. 139, para. 44-54; Kent McNeil, "The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies, by Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, and Reconciling Sovereignties: Aboriginal Nations and Canada, by Felix Hoehn", (2016) 53-2 *Osgoode Hall L.J.* 699, 715-717.
106. K. Drake & A. Gaudry, *supra*, note 101.

We focus, however, on just two unresolved issues left in the wake of *Tsilhqot'in* because seeking to address all such questions would be overambitious. Additionally, we have chosen two issues which are becoming increasingly predominant in litigation currently before the courts. As a result, the reader should be aware that our aims are much more modest in that we do not purport to address all of the unresolved issues from *Tsilhqot'in*. We have nonetheless provided citations above to a selection of decisions and academic treatments of some of these other issues to which the reader may refer.

3.1 How Aboriginal Title Interacts with Private Lands

We have already touched upon the issue of Aboriginal title and private lands in our discussions on continuity and temporal issues. However, the interaction between Aboriginal title and private lands has increasingly become an urgent and extremely significant issue in Aboriginal title litigation and, accordingly, deserves particular attention.

The SCC did not grapple with the relationship between Aboriginal title and private land interests in *Tsilhqot'in*, with the Court noting that it did not need to address the issue of private lands in the case before it.[107] In an article by counsel for the Tsilhqot'in published after the decision was released, the authors noted that the issue of whether fee simple land is subject to Aboriginal title remains one of the main outstanding issues after the decision.[108] Indeed, the relationship between Aboriginal title and private lands had been an issue for a long time before *Tsilhqot'in*—as it was put by Southin J.A. in *Skeetchestn*:

> Sooner or later, the question of whether those who hold certificates of indefeasible title, whether to ranch lands on Kamloops Lake or to a small lot with a house on it on Railway Avenue in the Village of Ashcroft or an office tower on Georgia Street in the City of Vancouver, are subject to claims of aboriginal right must be decided.[109]

So what do we know now, several years after *Tsilhqot'in*, on this important question? The short answer is that considerable uncertainty continues to surround this issue. As stated by the dissent in *Uashaunnuat*, "[t]he interaction between Aboriginal title claims and third parties' property rights remains unsettled".[110] Therefore, even several years after the release of *Tsilhqot'in*, we still do not have an answer to the important question of what happens when a declaration of Aboriginal title covers lands that include private lands—or whether a court could even issue a declaration over such lands in the first place.

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107. *Tsilhqot'in, supra*, note 1, para. 9.
108. D. M. Rosenberg & J. Woodward, *supra*, note 4, 961 and 965.
109. *Skeetchestn Indian Band and Secwepemc Aboriginal Nation* v. *Registrar of Land Titles, Kamloops)*, 2000 BCCA 525, para. 5.
110. *Uashaunnuat, supra*, note 6, para. 293 (per Brown & Rowe J.J., dissenting).

This is not to say that no progress has been made on this question over the last several years. Indeed, there has been some important academic literature on this question, as well as some judicial commentary from lower courts. Reviewing these materials is worthwhile, as such a review might well serve as the foundation for future decisions.

Before doing so however, it may be useful to briefly restate just what we are talking about when we are referring to the issue of Aboriginal title and private lands. At its core, the issue of Aboriginal title and private lands arises because there would seem to be a conflict between these two interests in land. We know from *Delgamuukw* and *Tsilhqot'in* that a declaration of Aboriginal title confers the right to "exclusive use and occupation of the land."[111] Put differently, an Indigenous group that obtains a declaration of Aboriginal title has the right to exclude all others from the land, unless a Court were perhaps to specify otherwise. Likewise, fee simple land ownership also generally brings the right to exclusive possession as well as the right to exclude others.[112] The question is then to determine what happens when there is a declaration of Aboriginal title over lands held privately, in fee simple ownership or other comparable forms of ownership? A related question is whether such a situation can arise at all, i.e., whether fee simple ownership would prevent a declaration of Aboriginal title from being made.[113]

Academics writing on the issue of the relationship between declared Aboriginal title and private lands have put forward suggestions as to how this tension might be resolved. Professor John Borrows suggests that private land interests subject to Aboriginal title might presumptively be void or voidable, because private land interests would be derived from "faulty" Crown grants.[114] However, Borrows suggests that private land interests would likely be protected under

111. *Tsilhqot'in, supra*, note 1, para. 67, citing *Delgamuukw*, para. 166.

112. *Tsilhqot'in, supra*, note 1, para. 73; *Fejo (on Behalf of Larrakia People)* v. *Northern Territory*, [1998] H.C.A. 58, 195 C.L.R. 96, para. 42 and 43 (hereafter "*Fejo*").

113. In Australia, the courts have concluded that where there is a fee simple Crown grant, Aboriginal title has been extinguished: *Fejo*, *supra*, note 112, para. 42 and 43. Gonthier J. in dissent in *Osoyoos Indian Band* v. *Oliver (Town)*, 2001 SCC 85 (writing also for L'Heureux-Dubé, Major and Bastarache J.J.) suggested something similar, when he wrote (para. 171) that, "[i]n the context of aboriginal title, it is clear that holding a fee simple prevents occupancy and destroys the relationship of the band with the land such that aboriginal title is extinguished."

114. J. Borrows, *supra*, note 3, 111-112. See also Kent McNeil, "Co-Existence of Indigenous Rights and Other Interests in Land in Australia and Canada", (1997) 3 *C.N.L.R.* 1, 17-18. In this older article, Professor McNeil noted that the Court of Appeal decision in *Delgamuukw* was of the opinion that Aboriginal rights could still be exercised until a private interest holder actually used the land in a manner that conflicted with the exercise of the Aboriginal right. Even then, Lambert J.A. was of the view that the Aboriginal right would be suspended as opposed to extinguished.

Indigenous legal systems[115] and could exist in the context of innovative forms of property relationships.[116] Professor Malcolm Lavoie points to monetary damages against the Crown as the most obvious way to vindicate Aboriginal title claims while also protecting third-party reliance interests.[117] Further yet, Professor McNeil has suggested that, in addition to financial compensation, in certain circumstances, providing replacement lands to Aboriginal titleholders may be an option.[118] McNeil suggests that an approach that would confirm the legal validity of private lands interests in urban and densely populated areas may be preferable, but that, in other areas, privately held interests should be subject to the governmental authority of Aboriginal titleholders.[119] Professor Ghislain Otis has identified remedies available within the context of Québec's civil system and in light of article 6 of Québec's *Charter of Human Rights and Freedoms*,[120] which could include (among other things) full restitution of lands, or providing Indigenous groups entry to lands in order to exercise rights-based activities.[121]

It is also worth noting that, partly in reaction to decision rendered in 2000 by the Ontario Court of Appeal (ONCA) in *Chippewas of Sarnia Band* v. *Canada (AG)*, there has been significant academic consideration regarding the reliance on equitable principles in situations involving Aboriginal title and private interests. In *Chippewas of Sarnia*, the ONCA concluded that because a declaration of Aboriginal title was a discretionary equitable remedy, these claims were subject to equitable defences including the doctrine of innocent/good faith purchaser for value.[122] This holding has been criticized by Professor McNeil as constituting a misapplication of the law and a finding that amounts to a form of extinguishment by judicial pronouncement.[123] This issue was not considered in *Tsilhqot'in*, but this is not surprising insofar as there were no significant private party interests in the claim area by the time the case was before the SCC. In many future Aboriginal title cases, however, it can be expected that the issues of third-party reliance and equitable defences will be of central importance.

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115. J. Borrows, *supra*, note 3, 112 and 116.
116. *Id.*, 131.
117. M. Lavoie, *supra*, note 65, 133 and 156. Professor Lavoie also notes other remedies, including land exchanges and the use of expropriation powers (p. 156).
118. Kent McNeil, "Reconciliation and Third-Party Interests: *Tsilhqot'in Nation* v. *British Columbia*", (2010) 8 *Indigenous L.J.* 7, 23.
119. *Id.*, 23-24.
120. *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 6.
121. G. Otis, *supra*, note 100, 316 and 323.
122. *Chippewas of Sarnia Band* v. *Canada (Attorney General)*, 51 O.R. (3d) 641, 2000 CanLII 16991, para. 284-291, 306 and 310 (ON CA) (leave to appeal refused, S.C.C., 2001-11-08, 28365).
123. K. McNeil, *supra*, note 104, 333-344. See also Robert Hamilton, "Private Property and Aboriginal Title: What is the Role of Equity in Mediating Conflicting Claims?", (2018) 51-2 *U.B.C. L. Rev.* 347.

Since the *Tsilhqot'in* decision in 2014, there have been no additional court decisions recognizing Aboriginal title. As a result, we still do not know with certainty how the court will resolve the issue of the potential conflict between Aboriginal title and private land interests. There have been, however, a few additional court decisions that potentially provide some guidance on how courts may ultimately address this issue.

In *Cowichan Tribes*, the BCSC considered an application by Canada seeking an order that the plaintiffs deliver formal notice of the claim to private landowners implicated in the Aboriginal title claim.[124] Canada had argued that if the Cowichan Tribes sought to proceed with the Aboriginal title claim over those portions of the territory that included private land interests (some 200 privately held titles), the plaintiffs should then be required to provide notice.[125] Canada had also argued that, because the Cowichan Tribes were seeking declarations that might adversely impact these private landowners (the remedies sought by the Cowichan Tribes included declarations that the Crown grants were invalid), the landowners were then also entitled to notice. The court dismissed Canada's application, relying in part on the plaintiffs' submission that they did not seek any remedy against the private landowners.[126] The court also relied on the premise that private landowners would have the opportunity to make arguments should any remedies be sought against them in the future:

> As the plaintiffs do not seek, at this stage, to invalidate fee simple interests held by private landowners, I conclude that the defendant Canada's application should be dismissed. Private landowners will have an opportunity to make all arguments, including that they were not given formal notice, in any subsequent proceedings against them if any such proceedings are brought.[127]

It is noteworthy that, even though the court recognized that remedies against private landowners may yet be sought in the future, the plaintiffs' submission that the current proceedings would not impact them was given significant weight.

Fisher J. (as she was then) came to a similar conclusion in *Council of the Haida Nation* v. *British Columbia*.[128] In that matter, British Columbia had sought an order to stay the proceedings until the Haida Nation either made clear that

124. *Cowichan Tribes* v. *Canada (Attorney General)*, 2017 BCSC 1575 (hereafter "*Cowichan Tribes*").
125. British Columbia supported Canada's application, except with respect to alternative relief sought by Canada in which the province would be required to deliver notice to landowners: *id*., para. 4.
126. *Id*., para. 15.
127. *Id*., para. 24.
128. *The Council of the Haida Nation* v. *British Columbia*, 2017 BCSC 1665.

it was not seeking remedies against private landowners or joined the landowners in the claim. Canada sought an order requiring that the plaintiffs provide notice to the landowners (i.e., the same application as that made in *Cowichan Tribes*).[129]

As with *Cowichan Tribes*, the First Nations plaintiffs stated that they were not seeking any relief against private landowners in the proceedings.[130] In dismissing the applications, Fisher J acknowledged concerns about fairness to private landowners, but concluded that they could be addressed in future proceedings. She wrote:

> I share the concerns expressed by both Canada and British Columbia about the potential for multiple proceedings and the unfairness to private landowners of allowing the plaintiffs to retain the right - at some time in the future - to eject them from their land. However, whether the plaintiffs have that right has yet to be determined. The inter-relationship between aboriginal title and fee simple title is complex, and will not be solved by expanding the scope of this litigation beyond the reasonable means of the parties. As I indicated above, there are other ways for this Court to ensure that any potential effects of a declaration of aboriginal title on privately held lands are fairy and properly considered, one of which may be to seek the assistance of *amicus curiae* to represent private interests. This is an issue that may be pursued through the case management process.[131]

One conclusion that can be drawn from these decisions is that courts are hesitant to potentially invite public controversy by requiring that notice be given to private landowners before a determination has been made that such notice is even necessary. In *Cowichan Tribes*, it was specifically pointed out that whether or not the plaintiffs actually had a right to eject private landowners from their land had yet to be determined and, in turn, it was decided that it was not necessary or appropriate to bring private landowners into the litigation prior to making such a determination. It is understandable that the courts are reluctant to wade into this controversy absent it being strictly necessary. As noted by Professor Borrows, "[o]ne can only imagine the public's response if Aboriginal title ousted private ownership within the claim area."[132]

Another interesting takeaway from these decisions is the judicial restatement of the plaintiffs' positions. In both *Cowichan Tribes* and *Council of the Haida*, the plaintiffs submitted that they were not seeking remedies against private landowners, at least not "in these proceedings." Obviously, the caveat "in these proceedings" remains, and the plaintiffs would likely state that it remains open to them to seek remedies against private landowners in the future. Nevertheless, it is interesting that Aboriginal title claimants appear to be taking pains to shy

129. *Id.*, para. 3.
130. *Id.*, para. 4.
131. *Id.*, para. 52.
132. J. Borrows, *supra*, note 3, 92.

away from a more direct confrontation between Aboriginal title and private land interests. Such a position suggests, at the very least, that the plaintiffs appear to believe that it is conceptually possible for Aboriginal title and private land interests to coexist.

In *Uashaunnuat*, the SCC's most recent discussion of Aboriginal title, the majority noted that "Aboriginal perspectives shape the very concept of Aboriginal title, the content of which may vary from one group to another" and that "disputes involving title should not be resolved "by strict reference to intractable real property rules," but rather must also be understood with reference to Aboriginal perspectives".[133] Although the *Uashaunnuat* decision did not address the issue of private interests directly, the majority's reasons could be interpreted as presaging one possible solution to the issue of Aboriginal title and private interests—a case-by-case approach that emphasizes the Indigenous perspective.

More particularly, it might be said that perhaps the SCC's statement in *Uashaunnuat* that the concept of Aboriginal title can vary from one group to another suggests that there is flexibility to modify the incidents associated with Aboriginal title in certain cases to reflect the realities of competing interests, as well as the needs and perspectives of different Indigenous communities. This links back to the earlier discussion regarding the manner in which the SCC described the incidents of Aboriginal title as a series of rights that *could* be exercised by Aboriginal title holders. By explaining the nature of Aboriginal title in such terms, the Court arguably left a door open for a future finding that there may be specific contexts in which the test for proof of Aboriginal title has been made out, yet contemporary recognition of an Aboriginal title right would not allow for the full range of incidents to be exercised by the group holding the Aboriginal title.

Put differently, there may be room for our courts to recognize Aboriginal title in contexts not previously before the courts, and to do so in a manner that would reconcile competing interests outside of the *Sparrow* infringement-justification framework by finding that not all incidents of Aboriginal title will apply in all cases. Such a possibility aligns with our earlier conclusion as regards the prospective operation of Aboriginal title declarations. It will be recalled that we suggest that Aboriginal title declarations do not render all legal interests to the land that came before them void. Rather, such declarations would operate prospectively, from the date they were issued. If one accepts that such declarations would not render void pre-existing fee simple interests, it follows that those pre-existing interests would need to be reconciled with modern day recognition

133. *Uashaunnuat, supra*, note 6, para. 31, citing *St. Mary's Indian Band* v. *Cranbrook (City)*, [1997] 2 S.C.R. 657, para. 15; and referring also to *Delgamuukw*, *supra* note 22, para. 112; *Marshall; Bernard*, *supra*, note 31, para. 129 and 130 (per LeBel J., concurring).

of s. 35 Aboriginal title to those fee simple lands. One way of doing so would be by modifying the incidents of this Aboriginal title. An Indigenous group may, for instance, be found to have a right to derive economic benefits from its Aboriginal title land or have stewardship rights in respect of that land, but may not be able to exclusively use and occupy the land or compel fee simple title owners to vacate the land.

With the Tsilhqot'in Nation, the land that was claimed was expansive, but not hospitable to intensive human habitation. Arguably, a large area was needed to meet the needs of the Tsilhqot'in Nation. Also, there were no private land interests in the final claim area, meaning that the presence of such interests did not complicate the Aboriginal title claim of the Tsilhqot'in Nation.

With other Indigenous communities, the context is different. The Cowichan Tribes' claim area, for example, covers a comparatively densely populated region of southern British Columbia, and there are numerous private interests which, if nothing else, complicate the crafting by a judge of a potential remedy that is fair to all of the parties. Should the Cowichan Tribes conclude that a form of Aboriginal title which can coexist with private interests is in keeping with their needs and perspective, there is some force to the argument that such a position should be accommodated.

In our view, this approach could be criticized as leading to a 'watering down' of Aboriginal title.[134] To put it directly, if the courts begin to make declarations of Aboriginal title that do not bring the full scope of incidents and remedies that accompanied the declaration granted to the Tsilhqot'in Nation, this could then be seen as diminishing the effectiveness of the right. It clearly remains to be seen whether the courts will pursue this approach and vary the incidents of Aboriginal title in different contexts going forward.

3.2 How Aboriginal Title Interacts with Submerged Lands

Another key question that remains following *Tsilhqot'in* is whether Aboriginal title can attach to submerged lands as well as to water spaces more generally. Arguably, recognizing the possibility of Aboriginal title to submerged lands and water spaces goes some way towards recognizing and respecting Indigenous perspectives on the stewardship of water and submerged land resources on their

134. Professor Brian Slattery has described the tendency of judges to try to seek remedies that minimize conflicts between Aboriginal title holders and modern societal and third-party interests. He criticized this tendency as being artificially restrictive, and as representing an approach that, if left unchecked, would diminish the possibility of reconciliation. See Brian Slattery, "The Metamorphosis of Aboriginal Title", (2006) 85-2 *Can. Bar. Rev.* 255, 282.

traditional territories, in line with passages from key SCC judgments stressing the crucial role that Indigenous perspectives play in Aboriginal title determinations.[135] However, questions arise as to the limits of such recognition.

Could Aboriginal title, as that concept has been cast in Canadian common law, truly be found in a navigable waterway? Would such title only attach to the actual beds of navigable waterways or could it equally attach to water spaces, such as the water column? What could be said of claims to Aboriginal title to the natural resources (living and non-living) in these areas?

Clarity is needed on these challenging issues. Aboriginal title claims to submerged lands and water spaces are making their way through the courts, and these claims include not only claims to small, discrete inland water areas, but also claims to water spaces and submerged lands far into the offshore and to significant portions of the Great Lakes.[136]

In July 2021, the Ontario Superior Court of Justice had the opportunity to consider the latter type of claim in *Chippewas of Saugeen First Nation*.[137] The case was a trial of two actions that were heard together—one pertaining to a treaty surrender and the other relating to a claim for Aboriginal title to significant portions of Lake Huron and Georgian Bay as well as Chantry and Barrier/Rabbit Island. Both actions were brought by the same two First Nations, namely the Chippewas of Nawash Unceded First Nation and the Saugeen First Nation, who occupy reserves on the Saugeen/Bruce Peninsula. Ultimately, Justice Matheson declined to make a declaration of Aboriginal title, finding that there was insufficient evidence of Aboriginal title in the area in question.

In considering the Aboriginal title claim, Justice Matheson required evidence that the Aboriginal title to the area claimed related to a fundamental aspect of the plaintiffs' cultural identity. The notion that Aboriginal title must be linked to the cultural distinctiveness of the plaintiffs independently of the test for Aboriginal title was novel.

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135. *Delgamuukw*, *supra*, note 21, para. 112; *Marshall; Bernard*, *supra*, note 31, para. 129 and 130 (per LeBel J., concurring); *Tsilhqot'in*, *supra*, note 1, para. 14 and 32.
136. As one example, the Council of the Haida Nation seeks a declaration of Aboriginal title to Haida Gwaii, including the land, inland waters, seabed, archipelagic waters, air space and everything contained thereon. This title claim extends far into the offshore to the end of both Canada's 12 nautical mile territorial sea off the coast of Haida Gwaii and the 200 nautical mile exclusive economic zone: See *The Council of the Haida Nation and Peter Lantin, suing on his own behalf and on behalf of all citizens of the Haida Nation* v. *Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada*, Notice of Civil Claim, 2017 April 7, Action nº L020662, Vancouver Registry, Supreme Court of British Columbia.
137. *Saugeen First Nation* v. *Canada (Attorney General)*, 2021 ONSC 4181 (hereafter "*Chippewas of Saugeen ONSC*").

In terms of indicia of occupation for the claim to the portions of the Great Lakes, Justice Matheson noted that submerged lands could allow for a presence to be established through regular use of vessels in the area.[138] In response to the plaintiffs' submissions that sufficient occupation could be shown by their perspective and relationship with the Aboriginal title claim area, however, Justice Matheson pointed to test for proof of Aboriginal title as most recently set out in *Tsilhqot'in* as requiring physical occupation, and she appeared to limit consideration of the spiritual connection of the plaintiffs to the submerged land areas to instances where this connection was demonstrated by physical activity in the claim area.[139] Ultimately, in respect of the test's exclusivity component, it was found that the plaintiffs' ancestors did not occupy the part of the Great Lakes that was the object of their claim, nor did they have the needed control over it to show exclusivity.[140] As regards continuity, it was held that the lens of continuity did not significantly improve the plaintiffs' Aboriginal title claim to the areas of the Great Lakes as their modern activities did not show occupation of the claim area now or continuity back to the relevant historical period.[141]

Interestingly, Justice Matheson emphasized that her conclusion with respect to the Aboriginal title claim to the Great Lakes area did not rule out the possibility of Aboriginal title to submerged lands in another case. She stressed that her conclusion was limited to the claim area at issue, namely a large part of a Great Lake on an international boundary. She went on to note that the outcome could be different for other submerged lands in other contexts and with different geographic characteristics.[142] Ultimately, it is difficult to know what to draw from the decision and indeed how far one can extrapolate, if at all, from the statement to the effect that the outcome of the case could have been different had a different set of circumstances been before her for consideration.

The ONCA upheld Justice Matheson's decision on August 30, 2023.[143] It found that the *Tsilhqot'in* test for Aboriginal title was sufficiently flexible to be applied in the context of submerged lands[144] and upheld Justice Matheson's conclusion that the test had not been satisfied.[145] The ONCA declined to decide whether it was possible for Aboriginal title to be declared over submerged lands subject to a public right of navigation, because Aboriginal title had not been made out in the case before it. It also found that it would be inappropriate to express an

138. *Id*., para. 565.
139. *Id*., para. 567-569.
140. *Id*., para. 586.
141. *Id*., para. 584.
142. *Id*., para. 587.
143. *Chippewas of Nawash Unceded First Nation* v. *Canada (Attorney General)*, 2023 ONCA 565.
144. *Id*., para. 26.
145. *Id*., para. 73.

opinion on the issue of whether such title is incompatible with the right of public navigation since absent proof of Aboriginal title that issue was a hypothetical one.[146] The ONCA agreed that the plaintiff First Nations should be allowed to put forward evidence and arguments seeking to make out a more limited claim area, over submerged lands to which they have a strong spiritual connection.[147] As of the time of writing, an application for leave to appeal has now been filed with the Supreme Court of Canada in this matter.

In another recent decision, *Thomas and Saik'uz First Nation* v. *Rio Tinto Alcan Inc,*[148] Justice Kent of the BCSC considered the issue of Aboriginal title to a portion of the Nechako River. In this decision, which is under appeal as of the time of writing, the Saik'uz First Nation alleged interference with its Aboriginal rights and title stemming from the construction of the Kenney Dam by Rio Tinto Alcan Inc.

Ultimately, Justice Kent declined to make any formal finding of title on procedural grounds, due to the lack of evidence about overlapping claims for neighbouring First Nations. He nonetheless commented *in obiter* that the evidentiary record before him was insufficient to find Aboriginal title and that, even with a more complete record, claims for Aboriginal title to submerged lands in navigable water areas face several obstacles—most notably as concerns their compatibility with the public right of navigation.[149] He noted that altering the definition of Aboriginal title, perhaps by burdening it with the public right of navigation (presumably in an effort to reconcile the tension between the public right of navigation and the incident of exclusivity said to come with Aboriginal title) would constitute a significant development in the law that he declined to make *in obiter,* particularly given the lack of evidence respecting the exclusive control of the waters in the case before him.[150] He clearly stated that he was not dismissing the plaintiffs' alternative claim for Aboriginal title to the waterbed on the merits, but was simply deferring determination of that issue to a case where the question could be decided on a more complete evidentiary record.[151] In fact, in his reasons, he seemingly contemplated the theoretical possibility of a finding of Aboriginal title in a landlocked lake, fully bounded by land to which Aboriginal title has been found.[152]

146. *Id*., para. 98-100.
147. *Id*., para. 104-107.
148. *Thomas and Saik'uz First Nation* v. *Rio Tinto Alcan Inc*., 2022 BCSC 15 (hereafter "*Saik'uz*") (on appeal to the British Columbia Court of Appeal).
149. *Id*., para. 331-333.
150. *Id*., para. 333.
151. *Id*., para. 334.
152. *Id*., para. 332.

As the above case law demonstrates, from a conceptual standpoint, whether Aboriginal title can be recognized in navigable waterways, including offshore, is a complex determination, due at least in some part to the myriad of competing interests at play in such areas as well as the scarcity of specific judicial guidance on this particular issue. While we currently do have some indication from existing common law sources that the mere fact that land is submerged by water does not mean that it is no longer capable of ownership,[153] it is less clear whether land submerged by water—and indeed water itself—can be found to be subject to Aboriginal title. It is also unclear how competing rights and interests present in navigable water areas, such as the seemingly exclusive nature of Aboriginal title, on the one hand, and the public right of navigation, on the other, could be reconciled. In addition to this, it is simply not yet clear whether the SCC would ultimately find, as did the ONCA in *Chippewas of Saugeen First Nation*, that the test for Aboriginal title as set out in *Delgamuukw*, and elaborated upon in subsequent jurisprudence, would apply where Aboriginal title is claimed to submerged lands and water spaces.

Starting first with the test for proof of this type of Aboriginal title, even if one were to assume that the test for establishing Aboriginal title as set out by the SCC to date would apply to Aboriginal title claims to submerged lands, such claims would seem to present some interesting evidentiary challenges. For instance, given the highly contextual nature of the Aboriginal title inquiry, what would amount to sufficient evidence of exclusive use, occupation and continuity for purposes of establishing Aboriginal title?

As specifically concerns the exclusivity component of the test for establishing Aboriginal title, how could Indigenous groups possibly establish exclusive control of areas such as the coastlines and the gulfs of the Atlantic and Pacific Oceans at the time of the assertion of sovereignty when, historically, European anglers and navigators would have frequented these waters without hindrance long before the assertion of sovereignty? Indeed, there is certainly evidence of the use of these offshore areas by Europeans, who arrived along the coastline in large ocean-going vessels that, in many cases, would have likely overshadowed the smaller vessels used by coastal Indigenous groups. One wonders as well what level of evidence would be required to demonstrate exclusivity over vast offshore areas, such as large areas of the territorial sea. Could the courts simply accept that the

153. For instance, there is a common law presumption of *ad medium filum aquae* (title shared in equal halves by riparian land owners to middle stream), though this principle does not apply uniformly across Canada and is generally limited to non-navigable waters (see for instance *R.* v. *Nikal*, [1996] 1 S.C.R. 1013, para. 65-74; *R.* v. *Lewis*, [1996] 1 S.C.R. 921, para. 56-65).

existence of common law rights of navigation and fishing and the international right of innocent passage in these areas forecloses the possibility of a claimant group demonstrating exclusive occupation?[154]

As alluded to earlier, the body of jurisprudence in this area tells us that in considering evidence of sufficient occupation, exclusivity, and continuity, courts are to give equal weight to common law and Indigenous perspectives[155] and approach such claims with cultural sensitivity. According to the SCC, the task is to identify how pre-sovereignty rights and interests can find expression in modern common law terms.[156] In so doing, the courts must also be careful not to lose or distort Indigenous perspectives by forcing ancestral practices into the "square boxes" of common law concepts, as this would frustrate the goal of faithfully translating pre-sovereignty Indigenous interests into equivalent modern legal rights.[157]

So what of this common law perspective? How might it operate in the context of Aboriginal title claims to submerged lands and water spaces? While unanswered questions remain in this regard, we do know that at common law, flowing water is incapable of ownership, and property in the context of water refers to a bundle of rights comprising the right to control the use and flow, diversion, extraction, and sale of water rather than the water itself. [158] We also know that the notion that ownership interests can attach to some lands under water is not foreign to common law.[159] In the context of navigable waters, the common law takes a more restrictive view and generally only the Crown can grant private interests in these areas, though interests have also been recognized as arising by way of

154. For a more in-depth examination of some of the evidentiary issues that arise in Aboriginal title claims to submerged lands see Paula Quig, "Testing the Waters: Aboriginal Title Claims to Water Spaces and Submerged Lands – An Overview", (2004) 45-4 *C. de D.* 659; C. Rebecca Brown & James I. Reynolds, "Aboriginal Title to Sea Spaces: A Comparative Study", (2004) 37-1 *U.B.C. L. Rev.* 449; Benjamin Ralston, "Aboriginal Title to Submerged Lands in Canada: Will Tsilhqot'in Sink or Swim?", (2016) 8-27 *Indigenous L. Bulletin* 22.

155. *Delgamuukw*, *supra*, note 21, para. 147 and 156; *Tsilhqot'in, supra*, note 1, para. 34.

156. *Tsilhqot'in, supra*, note 1, para. 50.

157. *Id*., para. 32.

158. The common law rejects the idea of title in water as contrary to *jus natural,* and instead simply speaks to a bundle of rights in relation to waters (see *Halsbury's Laws of England*, 4th ed., vol. 49(2), London, LexisNexis, 2004, *s.v.* "water", para. 47).

159. See generally, *Doe Dem Fry* v. *Hill* (1853), 7 N.B.R. 587, 1858 CanLII 8 (NBKB); *Brown* v. *Reed* (1874), 15 N.B.R. 206, 1874 CanLII 50 (NBKB) (hereafter "*Brown*"); *The Queen* v. *Lord* (1864), 1 P.E.I. 245 (hereafter "*Lord*"). See also *The Direct United States Cable Company* v. *The Anglo-American Telegraph Co.*, [1877] UKPC 5, 2 App. Cas. 394 (JCPC on appeal from the Newfoundland Supreme Court) respecting a grant of certain seabed rights, and to the beds of certain navigable water areas: *British Columbia (Attorney General)* v. *Canada (Attorney General)*, [1913] UKPC 63, [1914] A.C. 153 (JCPC).

adverse possession.[160] We also know that there exists a common law presumption in respect of the foreshore and the beds of tidal rivers and coastal waters that provides that these areas are presumed to be owned by the Crown by prerogative right. These lands were presumed at common law to have remained in the original occupation of the Crown and, given the important public rights in these areas, such ownership on the part of the Crown was seen as being for the subjects' benefit. Normally, then, subjects who laid claim to the foreshore or seabed had to allege a Crown grant,[161] though prescriptive title has been recognized in some instances.[162] The common law has recognized the validity of such Crown grants in foreshore and nearshore tidal areas and of prescriptive title rights below the high water mark, though such interests have generally been limited to foreshore and nearshore areas.

As concerns Indigenous perspectives, while caution must certainly be taken not to make overgeneralizations, the compartmentalization of interests relating to lands and waters is not generally characteristic of many Indigenous understandings of land tenure. Many Indigenous groups define their relationship to their traditional territories as one of stewardship based on an understanding of responsibility flowing from their special relationship with these territories as opposed to rights arising from this relationship.[163] A more holistic concept of territoriality figures prominently in many Indigenous cultures that often view traditional territories as including elements of water, air, land, and resources, andincorporate principles of ownership, control and jurisdiction based on the need to protect and sustain the environment and its resources.[164] For instance,

160. Prescriptive ownership rights have also been recognized, albeit less frequently, in the foreshore (*Tweedie* v. *The King* (1915), 52 S.C.R. 197 (hereafter "*Tweedie*"); *Lord Advocate* v. *Young* (1887), 12 App. Cas. 544 (HL (SC)) and in tidal areas and/or navigable water areas: *Canada (Attorney General)* v. *Acadia Forest Products Ltd.* (1987), 41 D.L.R. (4th) 338 (FCA). See also *Nickerson* v. *Canada (Attorney General)* (2000), 185 N.S.R. (2d) 36 (NSSC) (hereafter "*Nickerson*"); *Creighton* v. *Nova Scotia (Attorney General)*, 2011 NSSC 131; *Corkum* v. *Nash*, 71 D.L.R. (4th) 390, 1990 CanLII 4127 (NSSC) where acts of possession required to establish adverse possession have been found, for instance, in relation to water lots. As an example, in *Nickerson*, title to land covered by water in a harbour was obtained by adverse possession as against the Crown by reason of 60 years adverse possession transpiring before the enactment of the 1950 *Public Land Grants Act* – an act which precluded prescriptive titles against the federal Crown.

161. *Gann* v. *Free Fishers of Whitstable* (1865), 11 H.L.C. 192, 207 and 208. See also Kent McNeil, *Common Law Aboriginal* Title, Oxford, Clarendon Press, 1989, p. 104 and 105; Lord Hale, "De Jure Maris", in Stuart A. Moore (ed.), *A History of the Foreshore and the Law Relating Thereto*, London, Stevens & Haynes, 1888, p. 370, p. 399.

162. For instance, to a water lot in a harbour by way of sixty years of occupancy prior to the federal government enacting legislation which had the effect of prohibiting prescriptive title against the federal Crown: *Nickerson*, *supra*, note 160.

163. See C.R. Brown, *supra*, note 85, p. 112-114.

164. *Id.*, p. 111 and 112.

in *Chippewas of Saugeen First Nation,* it was noted that "[a]ll Anishinaabek have a spiritual connection with water and a spiritual responsibility to care for the Earth, including the Great Lakes," and that "[t]hey regard the land and water as one."[165]

Many existing Aboriginal title claims in navigable areas tend to be broad and encompassing, including the land under water, the water column, the air above, and all plants, animals and resources in these areas.[166] These claims are based on historic use and occupation for food, social and ceremonial purposes, and include situations where there was active management of a resource, and where use was more seasonal. Generally, it is hard to contemplate how some aspects of Aboriginal title claims in navigable areas might ever be translated into, or be capable of finding expression in, modern common law terms. For instance, where Indigenous groups claim Aboriginal title to flowing water and the entirety of the water column itself, it may be difficult to reconcile such a concept with the reality that, in Canada, flowing water is incapable of ownership under the common law. However, given how the common law has treated interests in the beds of navigable waters to date, it does seem possible for a court to recognize Aboriginal title to the submerged lands themselves.

This brings us to the question of how to reconcile Aboriginal title to submerged lands with other competing rights operating in water spaces – and notably the common law public rights operating in navigable waters as well as the international rights and obligations which exist in certain offshore areas. With respect to the former, it is important to note that the domestic common law public right of navigation has long been recognized as a paramount right and as an important limitation on all forms of title that may exist in the beds of navigable waters, including fee simple and Crown underlying title. However, importantly, the courts have not recognized it as a right that precludes recognizing Crown grants and prescriptive titles to the beds of navigable waters. Rather, the common law has recognized the validity of Crown grants and prescriptive titles to the beds of inland navigable waters, and has found that such interests are qualified by common law public rights such as the public right of navigation[167] and the common law public right of fishing, the latter operating in tidal waters.

Ultimately, whether Aboriginal title might be recognized in any given case may well depend on the specific context at hand, the strength of the evidence, and the manner in which the courts seek to reconcile the compartmentalization, under

165. *Chippewas of Saugeen ONSC, supra*, note 137, para. 567.
166. See e.g. the declaration of Aboriginal title sought with respect to Haida Gwaii, *supra*, note 136.
167. See *Tweedie*, *supra*, note 160; *Brown*, *supra*, note 159; *Lord*, *supra* note 159; *Wood* v. *Esson* (1884), 9 S.C.R. 239; *Nickerson*, *supra*, note 160. See also *Friends of the Oldman River Society* v. *Canada (Minister of Transport),* [1992] 1 S.C.R. 3, p. 53.

common law, of certain principles in relation to land and water and with the more holistic approach adopted by many Indigenous groups in Canada. Various options could be available to the courts. One way forward would start with the proposal that the rights protected under s. 35 must be defined in light of the purpose of reconciliation of the pre-existence of Indigenous societies with the assertion of Crown sovereignty, as well as the interests of non-Indigenous Canadians. Starting from this vantage point, the *sui generis* nature of Aboriginal title could be recognized as demanding a unique approach to both the law and the evidence that is culturally sensitive and grants equal weight to both common law and Indigenous perspectives. The approach is grounded in SCC authority, to the effect that the task in the Aboriginal title context is to faithfully translate pre-sovereignty Indigenous interests into equivalent modern legal rights and to properly express these interests in modern common law terms.[168] It also recognizes that this task supports a move away from seeking to bar or reject Aboriginal title claims at the definitional stage based on sovereign incompatibility or fundamental inconsistency arguments, and towards recognizing Indigenous perspectives, rights, and interests in a culturally sensitive manner true to the evidence and the realities of the current legal and constitutional structure.

Such an approach would seemingly result in a qualified form of Aboriginal title which would allow for the continued operation of common law public rights and international interests, by recognizing that any Aboriginal title in a navigable water area would necessarily be qualified by or need to coexist with common law public rights, as well as the international right of innocent passage where the same applies. Such an approach would not preclude arguments to justify infringements of any possible or established Aboriginal title to the beds of navigable waters in certain circumstances involving the pursuit of a compelling public interest, as well as jurisdiction to pass legislation to safeguard key federal and public interests in these areas.

From a practical perspective, such a finding may mean that the right to exclude others from the land and/or the water column above the land may in fact not be an incident of Aboriginal title to submerged lands where doing so would impede the domestic public right of navigation or, where applicable, the domestic and international public rights of fishing or international right of innocent passage. This would be in recognition of the fact that, in listing the incidents of Aboriginal title, the SCC did not seem to provide an exhaustive list of incidents of title nor explicitly say whether there actually might be instances where an Aboriginal group has met all the proof elements of Aboriginal title, yet may not be recognized as having the ability to exercise all of the incidents of Aboriginal title set out by the Court to date.

168. *Marshall; Bernard*, *supra*, note 31, para. 48.

Alternatively, our courts may simply decide that, given the challenges associated with reconciling the public and international rights in navigable water areas with the exclusive nature of Aboriginal title and given the notion that such exclusivity is a necessary component of Aboriginal title, the only s. 35 Aboriginal rights that could be found in these areas would be s. 35 Aboriginal rights short of Aboriginal title. Presumably, this could encompass findings of Aboriginal rights not recognized by the courts to date, such as rights to access the area for religious and spiritual purposes. In this regard, it is interesting to note that Australian courts have, in certain instances, recognized non-exclusive bundles of native title rights to water spaces, with these rights yielding to the public's rights and interests arising under common law or the application of international law.[169] Such rights were even found to extend to the Exclusive Economic Zone (EEZ)[170] in the *Akiba*[171] case, in which native title rights, albeit rights that did not confer possession, occupation or use of waters to the *exclusion* of all others, have actually been recognized in Australia's EEZ.[172] However, it is important to note that the Australian and Canadian law on Aboriginal title is very different and the Australian conception of "native title", and notably the type of native title which has been found to exist in Australia's sea and seabed, is arguably closer to the Canadian concept of Aboriginal rights than to the Canadian concept of Aboriginal title.[173]

We now at least have some important guidance from one court on some of these challenging issues. In the ONCA's recent decision in *Chippewas of Saugeen First Nation,* in declining to assess whether the public right of navigation is incompatible with Aboriginal title, the Court suggested that this question must instead be assessed *after* a determination has been made as to the extent of Aboriginal title in the water space in question (in that case, portions of the Great

169. See for instance *Commonwealth of Australia* v. *Yarmirr*, [2001] HCA 56; *The Lardil Peoples* v. *State of Queensland*, [2004] FCA 298.

170. Generally, a state's *exclusive economic zone* is an area beyond and adjacent to the territorial sea, extending seaward to a distance of no more than 200 nautical miles.

171. See *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* v. *State of Queensland (No. 2)*, [2010] FCA 643; *Akiba on behalf of the Torres Strait Regional Seas Claim Group* v. *Commonwealth of Australia*, [2013] HCA 33.

172. An important caveat to this, however, is that it was highly significant that the possibility that native title might exist in the EEZ was contemplated by the Australian Parliament in s. 6 of the *Native Title Act* (Cth), 1993/110.

173. This paper does not aim to provide a comparative analysis on the subject of Aboriginal title to submerged lands but the reader may wish to consult the following resources: P. Quig, *supra*, note 154; David J. Bloch, "Colonizing the Last Frontier", (2004) 29-1 *Am. Indian. L. Rev.* 1; C. R. Brown & J. I. Reynolds, *supra*, note 154; Alexandra Grey, "Offshore Native Title: Currents in Sea Claims Jurisprudence", (2007) 11-2 *A.I.L.R.* 55; Stuart B. Kaye, "Jurisdictional Patchwork: Law of the Sea and Native Title Issues in the Torres Strait", (2001) 2-2 *M.J.I.L.* 381.

Lakes). According to the Court, at para. 97 of the decision, if an Indigenous group were able to satisfy the *Tsilhqot'in* Aboriginal title test and establish Aboriginal title to the claim area, or to a discrete portion or portions of the claim area, a court would then be able to assess whether such Aboriginal title was not cognizable due to common law public rights, or whether such Aboriginal title would have such a substantial effect on public navigation that it would actually create an incompatibility between Aboriginal and the public right. In so doing, the ONCA seems to have signalled that, in its view, Aboriginal title to submerged lands could be a legal possibility in at least some cases, and that the question as to its modern-day recognition would hinge on determining the extent of the Aboriginal title and evidence brought forward as to how such title would impact the public's right of navigation. In this sense, the ONCA seems to endorse a rights recognition model while recognizing that such recognition of rights needs to be respectful of the current legal and constitutional structure, including the realities posed by longstanding and competing modern-day interests. Of course, we will only truly know which line of argument will resonate the most with the Supreme Court of Canada when these types of claims come before it for determination.

Conclusion

Tsilhqot'in was, by any measure, an extremely significant decision. However, as there has not yet been another Aboriginal title declaration since *Tsilhqot'in*, there remain many unanswered questions in its wake. Not only are such questions interesting from an academic and theoretical standpoint, but they also raise profoundly important issues relating to land management, control of resources, and reconciliation. How our courts will choose to deal with these matters will impact all Canadians—Indigenous and non-Indigenous alike.

In this article, we have attempted to take stock of what we know, what we think we know, and what we need to know more about following *Tsilhqot'in*. To this end, we have suggested that Aboriginal title likely operates prospectively, and that continuity always has a role in the test for Aboriginal title. We have also noted that there remain complex unanswered questions about how Aboriginal title interacts with private lands as well as with submerged lands.

It is likely that the courts will have to address some or all of these issues in the years to come and that clarity on these matters will be forthcoming. Our intention here was to identify and give contour to some of these issues, in the hopes that doing so will help advance the conversation and provide greater clarity to the challenges and opportunities that lie ahead, now that *Tsilhqot'in* is behind us.