ABORIGINAL TITLE, SELF-GOVERNMENT, AND INDIGENOUS JURISDICTION IN CANADIAN LAW

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0. Introduction

This article considers inherent Indigenous jurisdiction in the Canadian constitution in light of recent developments in Aboriginal law. Particular attention is paid to the doctrine of Aboriginal title and the relationship between title and Indigenous self-government or jurisdiction. From *Calder* (1973)[1] through *Guerin* (1984),[2] *Delgamuukw* (1997),[3] *Haida Nation* (2004),[4] and *Tsilhqot'in* (2014),[5] the Supreme Court of Canada has steadily built a foundation for recognizing Indigenous sovereignty and jurisdiction as a component of Canadian federalism. However, the Court has yet to clear up confusion surrounding the legal effect of the doctrine of discovery in Canadian law, to state unambiguously that Indigenous jurisdiction is a feature of Aboriginal title, to comment substantively on the right of self-government as a section 35 right, or to offer a clear constitutional vision of the place of Indigenous jurisdiction within Canadian federalism. Drawing on recent trends in the case law, including the Quebec Court of Appeal's recent recognition of an inherent right of self-government,[6] this article explains how Canadian law can develop a clearer framework for the relationship between Indigenous and state legal authority through post-*Tsilhqot'in* doctrines of self-government and Aboriginal title.

The doctrine of Aboriginal title, and its relationship to the right of self-government, is central to the development of Canadian Aboriginal law. It will determine, to an extent, whether that law can meaningfully respond to Indigenous claims to jurisdiction and facilitate the development of a constitutional order that

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

[2] *Guerin v The Queen*, [1984] 2 SCR 335, [1984] 6 WWR 481 [*Guerin*].

[3] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] ACS no 108 [*Delgamuukw*].

[4] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].

[5] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*].

[6] See *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 [*Quebec Reference*].

enjoys broad legitimacy. Since the *Pamajewon*[7] decision, Indigenous peoples have rarely asserted rights of self-government in the courts. The reason is plain enough: the test established in *Pamajewon* for establishing a right of self-government is so restrictive that it cannot be met.[8] As a result, what are in effect jurisdictional claims – that is, claims to authority to control the use and allocation of lands and resources – have been dealt with through a limited rights-framework that provides for use of resources but not meaningful decision-making authority in relation to them. This, as discussed in section two, has exposed several fault lines and limitations in the doctrine. It has also given rise to an untenable discrepancy in which Canadian governments recognize the inherent right of self-government (such recognition has been federal policy since 1995), while judicial doctrine effectively precludes recognition of such a right in specific instances.[9] The Quebec Court of Appeal's recent decision in *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*[10] is a notable development that may introduce an era in which the doctrine can more ably meditate Crown-Indigenous conflicts. The QCCA recognized that section 35 protects an inherent right of self-government in relation to the provision and regulation of child and family services.[11]

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[7] *R v Pamajewon*, [1996] 2 SCR 821, [1996] 4 CNLR 164.

[8] The challenge with *Pamajeown* is the relationship between the characterization and proof stages of the test. The SCC held that self-government claims must be framed or characterized narrowly (not, that is, as a right of self-government, but as a right to regulate a specific subject matter) *and* that the *Van der Peet* test for proving and Aboriginal right applies to self-government. As a result, the claimants in *Pamajewon* had to prove not that they were a self-governing political community prior to the imposition of European law, but that the regulation of high stakes gaming was integral to their culture at the time of European contact. This legal test effectively precludes Indigenous claims from succeeding. Indeed, in the few instances self-government claims have been brought forward, the results have been predictable: courts have followed *Pamajewon* in narrowly characterizing the claims and the claims have failed at the proof stage. See for example *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814; *Conseil des Innus de Pessamit v Association des policiers et policières de Pessamit*, 2010 FCA 306 ; *Kátlodééche First Nation v HMTQ et al*, 2003 NWTSC 70. For critiques see Bradford W Morse, ''Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*'' (1997) 42 McGill LJ l011; John Borrows, ''Frozen Rights in Canada: Constitutional Interpretation and the Trickster'' (1997) 22 Am Indian L Rev 37.

[9] See e.g. "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Self-Government" (15 September 2010), online: *Government of Canada*, <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136> ("The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the Constitution Act, 1982").

[10] *Quebec Reference*, *supra* note 6.

[11] See Kerry Wilkins, "With a Little Help from the Feds: Incorporation by Reference and Bill C-92" (17 May 2022), online (blog): *ABlawg* <http://ablawg.ca/wp-content/uploads/2022/05/Blog_KW_Quebec_Reference_Comment .pdf>; Naiomi W Metallic, "Extending Paramountcy to Indigenous Child Welfare Laws Does Not Offend our Constitutional Architecture or Jordan's Principle" (29 August 2022), online (blog): *ABlawg* <http://ablawg.ca/wp-content/uploads/2022/08/Blog_NWM_Paramountcy_Indigenous_Child_Law.pdf>; Robert Hamilton, "Is the Act respecting First Nations, Inuit and Métis children, youth and families Constitutional?" (28 April 2022), online (blog): *ABlawg* <http://ablawg.ca/wp-content/uploads/2022/04/Blog_RH_Reference_Child_Family_Services.pdf>.

In doing so, the QCCA stepped around *Pamajewon*, eschewing its restrictive test and emphasizing "cultural continuity and survival."[12] The reasoning, should it be upheld by the Supreme Court, could make similar self-government claims possible.

But the limits of the decision show why a jurisdictional conception of Aboriginal title—or recognition of Indigenous territorial jurisdiction—remains central to the development of a section 35 doctrine that seeks to meaningfully "recognize the prior occupation of Canada by Aboriginal *societies*."[13] The QCCA decision applies only to the regulation of child and family services. The Court understood such regulation as central to Indigenous cultural continuity and survival. We can imagine this analysis being extended on a case-by-case basis to other issues that trigger this key cultural component such as language, education, and health. Divorced from a broader base of territorial jurisdiction, however, two issues arise. First, governance over some of these subject matters may be dependent on access to lands and resources. Language, for example, can be tied to specific locations and resources. Spiritual practices, in particular, may be associated with specific places.[14] Perhaps more importantly, "cultural" issues are, in relative terms, easy and uncontroversial to deal with. Most Crown-Indigenous litigation is about control of lands and resources. Thus, while the QCCA decision is meaningful, even if upheld there remains a need to articulate a coherent account of territorial jurisdiction under section 35 and how such jurisdiction impacts the constitutional framework. A jurisdictional conception of Aboriginal title can help develop the doctrine along these lines.

Section one explores the issue of Indigenous jurisdiction in light of the ambiguity that has developed at the heart of Canadian Aboriginal law and that rose clearly to the surface in *Tsilhqot'in:* the Court's explicit rejection of the doctrine of *terra nullius* yet simultaneous affirmation of the Crown's acquisition of sovereignty and underlying title to Canadian territory through the simple assertion of sovereignty.[15] As we discuss, this ambiguity—what we call the *Marshall ambiguity*—can be traced to the common law's earliest considerations of Aboriginal rights. The Marshall ambiguity produces a related tension in *Tsilhqot'in*: the Court's uncertain recognition of Indigenous jurisdiction as a component of Aboriginal title (what the Court labels

[12] *Quebec Reference*, *supra* note 6 at para 59. For comment on this aspect of the decision, see Kent McNeil, "The Inherent Indigenous Right of Self-Government" (4 May 2022), online (blog): *ABlawg* <http://ablawg.ca/wp-content/uploads/2022/05/Blog_KM_Quebec_Reference.pdf> [McNeil, "Inherent Right of Self-Government"].

[13] *R v Desautel*, 2021 SCC 17 at para 31.

[14] This is the issue that arose in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, which illustrated the challenges of dealing with such issues and the importance of title as a means of protecting not only "ownership" of land, but of protecting place-based practices crucial to cultural continuity. See Howard Kislowicz & Senwung Luk, "Recontextualizing *Ktunaxa Nation v. British Columbia*: Crown Land, History and Indigenous Religious Freedom" (2019) 88:2 SCLR 205.

[15] *Tsilhqot'in*, *supra* note 5 at para 69.

the Aboriginal title-holders' "right to pro-actively use and manage the land"[16]) alongside the Court's worry that "legislative vacuums" might arise if provincial laws do not apply to Aboriginal title land.[17] This worry, in part, led the Court to recognize provincial power to infringe section 35 rights and minimize the role of the doctrine of interjurisdictional immunity where Aboriginal title is concerned. The rules of federalism, in other words, were adapted in light of jurisdictional concerns, though without explicit consideration of Indigenous jurisdiction or the coordination of that jurisdiction with that of the federal and provincial governments. The reticence to engage these issues explicitly relates to the court's interpretation of Crown sovereignty and their own role in relation to Crown power.

Section two argues that the Marshall ambiguity, though it takes a particular form in the Aboriginal title context, ripples across all major issues of Aboriginal law. In essence, the ambiguity springs from a disconnect between the boldness of the Court in stating broad principles and its caution or indecision in drawing doctrinal conclusions in line with those principles. The Court has spoken, for instance, of the need "to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty"[18]—a task that cries out for a doctrinal framework to structure the negotiated coordination of Indigenous, federal, and provincial jurisdictions. Yet the Court has said almost nothing about Indigenous jurisdiction and its relation to federal and provincial jurisdictions. Again, this stems in part from judicial deference to Crown sovereign claims and an unwillingness to discuss s.35 rights in jurisdictional language. As exemplified in *Tsilhqot'in*, however, the Court's reticence has contributed to a vacuum of (or confusion about the source of) legal authority. The absence of any doctrinal framework for assessing the interrelation of Indigenous with federal and provincial jurisdictions is thus one cause of the extensive litigation surrounding many economic development projects, e.g. pipeline expansion projects like Enbridge's Northern Gateway and TransMountain. Similarly, treaty rights have been interpreted as devoid of jurisdictional content (aside from internal allocation) and the meaning of the "Indigenous perspective" in treaty interpretation has only begun to be imagined as having *legal* content. Developments in each of these areas are considered in section two as examples of the importance of judicial consideration of the jurisdictional character of Indigenous claims.

Section three considers paths forward, returning our focus to Aboriginal title while also highlighting the broader relevance of addressing the core ambiguity of Canadian Aboriginal law. We underscore the value of clearly recognizing Indigenous jurisdiction and acknowledging that the Crown assertion of sovereignty is, on its own, an insufficient legal basis for entirely subsuming pre-existing Indigenous jurisdiction under federal and provincial jurisdictions. Such acknowledgment does not require Canadian courts to reject Crown assertions of sovereignty; rather, it requires them to

[16] *Ibid* at para 73.

[17] *Ibid* at para 147.

[18] *Haida*, *supra* note 4 at para 20.

treat assertions of Crown sovereignty over Indigenous territory as raising questions of coordinating jurisdictions. In addressing questions of coordination, the courts will have to evaluate the scope and source of the Crown's assertions, whether made on the basis of treaty relationships, sovereign incompatibility, or some other ground raised by the Crown. Such an approach would, we argue, provide a much-needed shifting of burdens of proof and justification in Aboriginal title cases. Doing so would also align Aboriginal title doctrine with the QCCA's reference decision on self-government, acknowledging title as a generic right with jurisdictional aspects that are central to particular Indigenous peoples' social, cultural, and political integrity and, indeed, their existence and survival as a *people*. This section identifies five specific clarifications of Aboriginal title doctrine that could facilitate this process. In closing section three, we provide a concrete example of how courts might navigate Aboriginal title issues where Indigenous jurisdiction is explicitly recognized and argue that Canada's commitment to implementing UNDRIP[19] also supports the proposals we make here and may prove valuable in developing the institutional basis for effective coordination of Indigenous and state law-making authorities.[20]

Finally, section four returns to the question of legitimacy and outlines how the proposals advanced in this article can strengthen the legitimacy of Canada's constitutional order.

1. Tsilhqot'in Nation: A new lens on old ambiguities surrounding Aboriginal title, Indigenous jurisdiction, and Crown sovereignty

a) The Marshall trilogy and the foundations of domestic court authority

There is a seductively simple picture of domestic courts that portrays their lawful authority as a currency flowing from state assertions of sovereignty. This picture foregrounds a basic political reality: the *de facto* success of a state's assertions of sovereignty lays the foundation for the establishment of the state's domestic courts and for the regular enforcement of their judgments. Is it not natural, then, to view the lawful authority of domestic court judgements as resting ultimately on the state's successful assertion of sovereignty? Surely, the thinking goes, domestic courts cannot reason about the foundations of the state's claims to sovereignty. To raise such questions would cut the legs out from under their own lawful authority.[21]

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[19] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007) [UNDRIP].

[20] The Parliament of Canada recently adopted a bill intended to help implement UNDRIP into Canadian law: *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, SC 2021, c 14 [*UNDRIP Act*]. A similar bill at the provincial level was adopted by British Columbia in 2019: *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*UNDRIP Act BC*].

[21] The Supreme Court of British Columbia recently considered this issue much more explicitly than Canadian courts have in the past. As the Court wrote: "… regardless of any legal frailties underlying the Crown's assertion of sovereignty over British Columbia in 1846, the plaintiffs' claims confront certain harsh realities, unpalatable though they may be to many. First and foremost is the fact that the system of law and government imported by settlers into British Columbia and superimposed upon Indigenous peoples has become firmly and intractably entrenched. It is the foundation for Canadian society as it exists

In one of the most cited common law cases on Indigenous-state relations, United States Chief Justice John Marshall painted such a picture of domestic courts somewhat ruefully, though perhaps more compellingly for that reason. In a pithy encapsulation, Chief Justice Marshall explained that "[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."[22] He explained his use of "conquest" in a fuller statement that is revealing for the opposition it draws between the successfully asserted and sustained foundations of the US legal system, on the one hand, and principles of natural right, on the other:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; *if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned*. So, too, with respect to the concomitant principle that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. *However this restriction may be opposed to natural right, and to the usages of civilized nations, yet if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps be supported by reason, and certainly cannot be rejected by courts of justice*.[23]

As this passage suggests, the presence of Indigenous peoples governing the land under their own legal orders threatens to turn our simple picture of the state's domestic courts into a puzzle. How is it that the authority of domestic courts to proclaim "the law of the land" flows solely from state assertions of sovereignty if those assertions were made in the face of pre-existing legal orders that were never conquered, on the normal use of that term? The strategy adopted in *M'Intosh* is to focus on the institutional role of the state's domestic courts: yes, it may be an extravagant pretension to convert "discovery" into "conquest" so as to displace prior legal orders; and, yes, to do so may be opposed to natural right and to the usages of civilized nations; but if that pretension is indispensable to the legal system that has taken *de facto* control of the land, then *the courts of that legal system* must accept it. In a word, the *M'Intosh* solution is to place the relevance of pre-existing Indigenous legal orders outside the frame of our picture of domestic court authority, in a realm of "private and speculative opinions of individuals."[24]

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today. The laws relating to ownership of land are the basis for this country's wealth and the very foundation for its economy. It is these same laws which provide legitimacy to this Court": *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc,* 2022 BCSC 15 at paras 201–02 [*Thomas and Saik'uz*].

[22] *Johnson v M'Intosh*, 21 US 543 (1823) at 588 [*M'Intosh*].

[23] *Ibid* at 591–92 [emphasis added].

[24] *Ibid.*

Chief Justice Marshall was himself clearly dissatisfied with this solution. There are striking passages in *M'Intosh* in which the Chief Justice upholds the pretense of conquest while nonetheless highlighting that it is extravagant and contrary to natural right. Given the opportunity to revise *M'Intosh* almost a decade later, in *Cherokee Nation* and *Worcester*,[25] Chief Justice Marshall was even more forceful in his condemnation of the pretense that US assertions of sovereignty had somehow wiped clear pre-existing Indigenous legal orders. In *Cherokee Nation*, he introduced the concept of "domestic dependent nation" in an attempt to craft a legal doctrine to adequately capture the relationships between Indigenous nations and the state.[26] In *Cherokee Nation* and *Worcester*, these relationships are characterized as diminishing the sovereignty of Indigenous nations in the conduct of foreign affairs, but otherwise leaving internal Indigenous law-making authority largely intact.[27] Thus, the "first principle" of American Indian law is that Indigenous nations possess "inherent powers of a limited sovereignty that has never been extinguished."[28]

The point here is not to review the doctrine of the Marshall trilogy in detail. We simply wish to highlight that the very foundations of common law doctrine on Indigenous-state relations in the US, subsequently also adopted in Canada, begin with a profound ambiguity that both (1) affirms a picture of domestic court authority flowing from state sovereignty and (2) acknowledges that this picture is complicated if the courts accept the domestic legal relevance of pre-existing Indigenous legal orders. We refer to this as *the Marshall ambiguity*.

2. The Marshall Ambiguity in Canadian Aboriginal Law

The core issue of Canadian Aboriginal law today is the development of a framework for the coordination of Indigenous, federal, and provincial jurisdictions. There is now broad recognition and acceptance of Indigenous peoples' inherent right of self-government and of the need to create space for Indigenous legal orders within the Canadian constitutional landscape. The dominant pre-*Calder* judicial approach, in which domestic courts largely disregarded such traditions as a source of lawful authority, is no longer sustainable. The Marshall ambiguity, however, has shaped Canadian legal doctrine on section 35 of the *Constitution Act, 1982* and continues to

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[25] *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) [*Cherokee Nation*]; *Worcester v the State of Georgia*, 31 US (6 Pet) 515 (1832) [*Worcester*].

[26] *Cherokee Nation*, *supra* note 25 at 17.

[27] For more on the legacy of the Marshall trilogy in the United States, see Nell Jessup Newton, "Federal Power over Indians: Its Sources, Scope, and Limitations" (1984) 132:2 U Pa L Rev 195–288; Philip P Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993) 107:2 Harv L Rev 381–440; Robert Williams Jr, "'The People of the States Where They Are Found Are Often Their Deadliest Enemies': The Indian Side of the Story of Indian Rights and Federalism" (1996) 38 Ariz L Rev 981–98; Robert N Clinton, "There is no Federal Supremacy Clause for Indian Tribes" (2002) 34:1 Ariz St LJ 113-260; Philp P Frickey, "(Native) American Exceptionalism in Federal Public Law" (2005) 119:2 Harv L Rev 431–90; and Maggie Blackhawk, "Federal Indian Law as Paradigm within Public Law" (2019) 132 Harv L Rev 1787–1877.

[28] *Brackeen v Haaland*, No 18-11479 (5th Cir. 2021).

constrain its development in important ways.[29] Exhibit A is the foundational section 35 decision of the Supreme Court in *Sparrow*.[30] The unanimous *Sparrow* Court endorsed the following statement: "Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."[31] Yet, the Court relied on *M'Intosh* for the following conclusion:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, *there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown*.[32]

That is, while the new "rules" of the game may permit courts to "question sovereign claims made by the Crown", a range of foundational sovereign claims are unquestionable. *Sparrow* is not a case of temporary incongruity. This seeming contradiction runs throughout the case law on section 35. In *Tsilhqot'in*, the contrasting positions are condensed into a single paragraph, with the Court stating both that "[t]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada" and that "[a]t the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province [of British Columbia]."[33] That one might find a technical way to read these statements as internally consistent resolves little, as doing so requires minimizing the nature of Indigenous interests from the outset.

Thus, we are left with seemingly incongruous ideas flowing from the same decisions. On the one hand, there is the notion, traced above to *M'Intosh*, that state assertions of sovereignty preclude domestic courts from considering apparently

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[29] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[30] *R v Sparrow*, [1990] 1 SCR 1075, [1990] 4 WWR 410 [*Sparrow*].

[31] *Ibid* at 1106, quoting Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26:1 Osgoode Hall LJ 95 at 100.

[32] *Ibid* at 1103 [emphasis added]. For critique, see Mark D Walters, "'Looking for a Knot in the Bulrush': Reflections on Law, Sovereignty, and Aboriginal Rights" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 35; Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases" (1992) 21:3 Man LJ 343; Robert Hamilton & Joshua Nichols, "Reconciliation and the Straitjacket: A Comparative Analysis of the *Secession Reference* and *R v Sparrow*" (2021) 52:2 Ottawa L Rev 205.

[33] *Tsilhqot'in*, *supra* note 5 at para 69. The Ontario Superior Court recognized this tension in the terms of the *Royal Proclamation, 1763* and Canadian Aboriginal title cases. See e.g. *Restoule v Canada (Attorney General)*, 2018 ONSC 7701 at para 76 [*Restoule*] ("the Supreme Court of Canada has considered the imposition of a colonial legal order throughout a series of decisions, from *St. Catharines Milling & Lumber Co. v. R.* to *Tsilhqot'in Nation v. British Columbia*, and has attempted to reconcile the two fundamentally contrary concepts found in the *Royal Proclamation*, namely the assertion of Crown sovereignty (the right to acquire title and the right to govern) and the pre-existence of Indigenous societies").

competing assertions of Indigenous sovereignty or inherent lawful authority. This is a positivist picture of judicial interpretation in domestic courts.[34] On the other hand, there is the growing acknowledgment that we cannot sensibly describe the legal and historical relations between Indigenous peoples and the state without a clear recognition of the inherent lawful authority of Indigenous political communities. What sense, for instance, would treaty relationships have if they were not agreements between representatives exercising lawful authority on behalf of their respective orders of self-government? This is a more pragmatic vision of judicial interpretation in domestic courts, one already found to some extent in the Marshall trilogy, particularly in *Cherokee Nation* and *Worcester*. Such a profound and long-standing tension in the legal doctrine is not the product of judicial carelessness. Entrenched interpretations of the legal history and a judicial imagination of Indigenous-state relations tied to particular legal and historical constructs push the courts to continue reaffirming sharply contrasting positions alongside each other or minimizing Indigenous claims in order to fit the model they have crafted.[35] That said, recognizing inherent Indigenous law-making authority raises, but does not answer, difficult questions about how to relate such authority to the state's own law-making powers, in particular how domestic courts should (or should not) speak to the relationship between Indigenous law and state law.

In a recent discussion of positivist and pragmatic approaches in judicial interpretation and legal philosophy, David Dyzenhaus argues for "a reconstructed legal positivism."[36] This "reconstruction" would see legal positivism incorporating the "deeply pragmatic"[37] requirement that *de facto* successful state assertions of

[34] The High Court of Australia has defended this picture in modern legal terms. In *Coe v Commonwealth of Australia*, [1979] HCA 68, Justice Jacobs stated that a challenge to a nation's sovereignty was "not cognisable in a court exercising jurisdiction under that sovereignty which is sought to be challenged" (para 3 of his reasons). Justice Jacobs was dissenting in the outcome (the appeal before the Court dealing with an application to amend pleadings), though this substantive point was not in dispute between members of the Court. The principal reasons of the Court were written by Justice Gibbs, who similarly stated, at para 12 of his reasons: "The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged". In *Mabo v Queensland (No 2)*, [1992] HCA 23 at para 31 of the reasons of Justice Brennan, the High Court upheld the proposition that "[t]he acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state." Note that in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 28, a majority of the SCC insisted that the act of state doctrine, on which the High Court of Australia is drawing, forms no part of Canadian law: "The act of state doctrine is a known (and heavily criticized) doctrine in England and Australia. It has, by contrast, played no role in Canadian law."

[35] We do not mean that rejecting *terra nullius* while simultaneously affirming the acquisition of Crown sovereignty through assertion is necessarily conceptually incoherent or that no legal doctrine could conceivably reconcile these two contrasting moments. Indeed, the Canadian doctrine of Aboriginal title proposes to do just this by giving effect to pre-existing legal orders. For present purposes, the point is simply that the very fact the SCC feels repeatedly compelled to attempt this reconciliation is a symptom of the tension between different strands of the legal and political history the Court must interpret. For a critique of the Court's supposed rejection of *terra nullius*, see Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v. British Columbia*" (2015) 48:3 UBC L Rev 701 [Borrows, "Durability"].

[36] David Dyzenhaus, "The Inevitable Social Contract" (2021) 27 Res Publica 187.

[37] *Ibid* at 196.

sovereignty must be legitimated through a legal order capable of answering the question "but, how can that be law for me?", asked by anyone whom the state considers a legal subject. The state's legal order must develop answers that are at least adequate from the perspective of those whom the state asks or expects to recognize the legitimacy of its sovereign claims. Though we do not pursue these philosophical points in detail in this paper, Dyzenhaus's reconstructed legal positivism provides a framework for understanding the SCC's struggles with the ongoing tension between positivism and pragmatism in its Aboriginal law doctrines. The Court is arguably working itself towards a synthesis—or, at least, an interweaving, unsteady balance—of positivism and pragmatism in roughly Dyzenhaus's sense.[38]

Historical examples of the tension between positivism and pragmatism in the legal imagination of Indigenous-state relations make these issue more concrete. The tension could once be managed by ignoring or minimizing the legal capacity of Indigenous peoples as self-governing political communities with their own legal orders (in effect suppressing the pragmatic vision in favour of a narrow positivist one tied to state law-making authority). An infamous example is found in *Syliboy*, a 1928 decision of the Nova Scotia County Court that considered the potentially binding nature of Indigenous-Crown treaties and concluded that the Mi'kmaq did not have the capacity to enter treaties because "the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized."[39]

In *Simon*, the SCC repudiated this interpretive strategy, stating that this language "reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada."[40] The SCC recognized the legal character of the treaties and the Mi'kmaq capacity to enter such agreements. This repudiation brought the tension between positivism and pragmatism back to the surface of judicial interpretation in Aboriginal law cases.

Following *Simon*, the positivist impulse or sensibility has continued to evolve, shedding explicit ideologies of civilizational hierarchy while reasserting its core vision of lawful authority flowing ultimately from sovereign intent. In *Bear*

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[38] On how the court may see the duty to consult and accommodate as a path to the legitimation of Crown sovereignty, see Ryan Beaton, "*De Facto* and *de Jure* Crown Sovereignty: Reconcilation and Legitimation at the Supreme Court of Canada" (2018) 27:1 Constitutional Forum 25; Richard Stacey, "Honour in Sovereignty: Can Crown consultation with Indigenous peoples erase Canada's sovereignty deficit?" (2018) 68 UTLJ 405.

[39] *Simon v The Queen*, [1985] 2 SCR 387 at 399, 24 DLR (4th) 390 [*Simon*], citing *R v Syliboy*, [1929] 1 DLR 307 at 313–14, 1928 CanLII 352 (NS SC) [*Syliboy*].

[40] *Simon, supra* note 39 at 399. See also C*ampbell et al v AG BC/AG Cda & Nisga'a Nation et al,* 2000 BCSC 1123 at paras 94–95 [*Campbell*], relying on *R v Sioui*, [1990] 1 SCR 1025, [1990] 3 CNLR 127.

Island Foundation, for instance, the courts heard from representatives of the Temagami, an Anishinaabe people, who argued that they had never signed or adhered to the Robinson Huron Treaty, despite the fact that the Treaty purported to cover Temagami territory. The Superior Court of Ontario (ONSC), upheld by the Court of Appeal for Ontario (ONCA), concluded that the Temagami had in fact adhered to the Treaty.[41] Both courts added, however, that *even if they had not* been parties to the Treaty or subsequently adhered to it, the Treaty nonetheless extinguished (at least from the perspective of Canadian courts) any rights the Temagami might have had to land covered by the Treaty. In the view of the ONSC and the ONCA, the Treaty expressed the intent of the British sovereign to extinguish Aboriginal title to any lands covered by the Treaty and that was sufficient (at least for purposes of the domestic courts) to extinguish Temagami claims, *even if the Temagami had never joined the Treaty*. As the ONCA put it, "a sovereign may express the intent to extinguish aboriginal rights through a treaty even though the treaty itself may be imperfect in the sense that not all of the Indian bands or tribes whose lands are involved are signatories."[42]

In 2018, the ONSC again had occasion to interpret the Robinson Huron Treaty in *Restoule*.[43] The Court found that the proper interpretive approach was to consider the terms of the Treaty from the perspectives of both the Anishinaabe and British negotiators. Crucially, the perspective of Anishinaabe negotiators was understood as tied to Anishinaabe political and legal systems. The Court recognized the sovereign legal capacity of Anishinaabe peoples to enter binding agreements with the Crown and determined that the Treaty could not be interpreted, even by a domestic court, solely in terms of the intent of the sovereign. Rather, the interpretive task for the Court was to determine what the parties *agreed to*. The judgment in *Restoule* made no mention of *Bear Island Foundation*.

As in *Simon*, the move in *Restoule* away from a simple positivist picture of domestic courts raises several doctrinal questions, for instance whether Canadian courts should *interpret* Indigenous law as they do domestic law or rather *take expert evidence* on Indigenous law and draw factual conclusions, as they would with foreign law.[44] Given the general lack of expertise by Canadian judges in Indigenous law, the Court in *Restoule* sensibly opted to take expert evidence on Anishinaabe law, without deciding whether this was generally the correct approach for Canadian courts.[45]

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[41] *Ontario (Attorney General) v Bear Island Foundation* (1984), 49 OR (2d) 353, 1984 CanLII 2136 (ONSC) at 9; *Ontario (Attorney General) v Bear Island Foundation* (1989), 68 OR (2d) 394, 1989 CanLII 4403 (ONCA).

[42] *Ibid* at para 25.

[43] *Ibid*.

[44] See Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev 1 [Grammond, "Conceptual Framework"].

[45] The plaintiffs in *Restoule* asked the Court to accept expert evidence on Anishinaabe law and to draw factual conclusions, not to provide legal interpretation. Canada, one of the defendants, supported this approach and Ontario, the other defendant, does not seem to have objected: *Restoule, supra* note 33 at para 13.

These two pairs of cases—*Syliboy* and *Simon*, *Bear Island* and *Restoule*—highlight some of the ways the tension between more positivist and more pragmatic judicial approaches has evolved in light of the increasing recognition, by Canadian governments and courts, of Indigenous legal orders and the inherent lawful authority of Indigenous peoples. To paraphrase *Simon*, it is no longer acceptable in Canadian law to place the existence of Indigenous legal orders and inherent law-making authority beyond the frame of domestic judicial interpretation. We could point to many significant developments underscoring this reality, including stated government commitments to implement UNDRIP,[46] federal legislation that affirms the principle of Indigenous self-government,[47] a growing body of case law that explicitly affirms Indigenous sovereignty and inherent jurisdiction or law-making authority.[48]

Yet, this shift has been incomplete, and the Marshall ambiguity has forestalled judicial consideration of Indigenous jurisdiction and its relationship to federal and provincial jurisdiction. The consequences of this are not only doctrinal, but practical. Several recent conflicts and judicial decisions show how a failure to deal with jurisdiction is limiting the courts' ability to mediate conflict and articulate effective legal rules. They also show why the Quebec Court of Appeal's recognition of the right of self-government in relation to child and family services, while significant, will not have an immediate impact on the coordination of Crown-Indigenous jurisdiction in other areas.

This can be seen in considering (a) tensions between the possibility of commercial rights and the meaning of moderate livelihood in *Marshall* and *Ahousaht*; (b) the role of consent and the judicial concern with "vetoes" in *Tsleil-Waututh* and *Coldwater*; and, finally, (c) the need to legally engage with Indigenous perspectives on treaties and Indigenous law in cases like *Grassy Narrows* and *Coastal GasLink*. These examples illustrate the practical consequences of the failure to meaningfully engage with Indigenous jurisdiction.

a) *Marshall* and *Ahousaht*: Regulation in the fisheries

The *Marshall* and *Ahousaht* cases each involved multiple court judgments. In both instances, the courts initially attempted to encourage negotiation by declaring the

[46] UNDRIP, *supra* note 19, articles 3 and 4 (affirming the rights of Indigenous peoples to self-determination, autonomy, and self-government).

[47] See e.g. *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24. The Preamble states that "Parliament affirms the right to self-determination of Indigenous peoples, including the inherent right of self-government, which includes jurisdiction in relation to child and family services". Sections 18–24 provide for coordination of applicable Indigenous, provincial, and federal laws. See also *Quebec Reference*, *supra* note 6 at para 191.

[48] See e.g. *Haida*, *supra* note 4 at para 20, which speaks of reconciling "pre-existing Aboriginal sovereignty with assumed Crown sovereignty". This language is taken up, slightly modified, in *Restoule*, *supra* note 33 at para 337 ("the reconciliation of the pre-existence of Indigenous sovereignty with assumed Crown sovereignty"). See also *Pastion v Dene Tha' First Nation*, 2018 FC 648, at paras 7-14 [*Pastion*]; *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 at paras 145, 206.

existence of a broadly framed right. When negotiations failed, they presented a considerably narrowed version of the right. In *Marshall I* the Court found that the "surviving substance" of the Peace and Friendship Treaties of 1760-61 was "a treaty right to continue to obtain necessaries through hunting and fishing by trading the products of those traditional activities."[49] This right was subject to three forms of limitation: permissible regulations, justified infringement under the *Badger* test, and the more open-textured limitations imposed by the concept of "moderate livelihood."[50] The Court explained that "[c]atch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right."[51] This left the open the question of precisely who determines the meaning of "moderate livelihood" and how regulatory conflicts would be managed.

In *Marshall II*, which the Court considered only after significant conflict and violence arose following Mi'kmaw attempts to exercise the rights recognized in *Marshall I*, the Court attempted to resolve that question by providing a more detailed interpretation of the regulatory authority of Parliament. The Court placed significant emphasis on the limited nature of treaty rights, explaining:

> regulations that do no more than reasonably define the Mi'kmaq treaty right in terms that can be administered by the regulator and understood by the Mi'kmaq community that holds the treaty rights do not impair the exercise of the treaty right and therefore do not have to meet the *Badger* standard of justification.[52]

The Court was careful to stress that this merely elaborates the principles of justified infringement in *Marshall I*.[53] Yet, there is a noticeable, if subtle, shift from *reasonable expectations* to *reasonable definition*. This is a shift away from an emphasis on the substantive character of rights and towards the process of their regulatory limitation. At a minimum, reference to reasonable expectations of producing a moderate livelihood seems to suggest a process of negotiation with those whose livelihoods are at issue. A focus on reasonable regulatory definition is less suggestive of a process of negotiation or collaborative management of fisheries.

Yet negotiation and collaborative management of resources are precisely the kinds of processes that can begin the work of coordinating Indigenous and state regulatory approaches. Hewing instead to a doctrine of unilateral state regulation means holding to property-like rights conceptions of Aboriginal and treaty rights under which internal allocation is the only role for Indigenous law and jurisdiction. This

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[49] *R v Marshall*, [1999] 3 SCR 456 at para 56, 177 DLR (4th) 513 [*Marshall 1*].

[50] *Ibid* at paras 56, 59.

[51] *Ibid* at para 61.

[52] *R v Marshall*, [1999] 3 SCR 533 at para 37, 179 DLR (4th) 193 [*"Marshall 2"*].

[53] *Ibid* at para 6.

default setting is a recipe for extended litigation and for shifting focus away from efforts at recognizing and coordinating Indigenous law with federal and provincial law. Indeed, the conflicts in Nova Scotia in the fall of 2020, themselves a replay of the conflicts that followed *Marshall I* 20 years earlier, illustrate the consequences that can result when negotiations fail to resolve jurisdictional issues.

The *Ahousaht* litigation is a case in point: from 2006 to today this litigation has resulted in thirteen decisions of the BCSC, seven from the BCCA, four from the FC, two from the FCA and two applications for leave to the SCC.[54] The results thus far have been muddled. In the first trial the judge characterized the right as "simply the right to fish and sell fish."[55] Almost a decade later, a second trial judge determined that what the first judge had meant was "a right to a small-scale, artisanal, local, multi-species fishery, to be conducted in a nine-mile strip from shore, using small, low-cost boats with limited technology and restricted catching power, and aimed at wide community participation."[56] Justice Humphries explicitly stated that she cannot "recharacterize the right" that was declared by Justice Garson, but she maintained that she "can interpret her reasons to determine what she meant in order to apply some precision to her broad declaration."[57] The BCCA disagreed. Justice Groberman explained that Justice Humphries was "required to assess the case on the basis of the plaintiffs' established commercial fishing rights" and she "did not have jurisdiction to place new limits" on that right.[58]

Yet, the level of precision she applied suggests that "broad declaration" is properly the province of the courts, while exacting precision ought to be the work of legislation and regulation. Unfortunately, the courts are drawn into the role of regulators because Aboriginal and treaty rights are defined as property rights subject to unilateral state regulation, in turn subject to judicial review with "some precision."

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[54] This case was bifurcated at trial. The first stage of the trial was focused on proving the right and this resulted in Justice Garson's decision in *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2009 BCSC 1494 [*Ahousaht* BCSC 2009]. The justification stage of the trial was then adjourned for two years to enable the parties to negotiate the accommodation of the right. These negotiations proved unfruitful and so the parties proceeded to the justification stage of the trial before Justice Humphries, which resulted in her decision in *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2018 BCSC 633 [*Ahousaht* BCSC 2018]. The highlights of this extensive history of litigation before the British Columbia courts can be found summarized in *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2018 BCCA 413 at paras 1–5. In the Federal Courts there have been two duty to consult cases, which preceded the trial: *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2007 FC 567; *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2008 FCA 212. At the federal level there has also been a series of injunctive relief decisions following the trial: *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2014 FC 197; *Canada (Fisheries and Oceans) v Ahousaht First Nation*, 2014 FCA 211; *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2015 FC 253; *Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116.

[55] *Ahousaht* BCSC 2009, *supra* note 54 at para 487.

[56] *Ahousaht* BCSC 2018, *supra* note 54 at para 441.

[57] *Ibid* at para 301.

[58] *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2021 BCCA 155 at paras 148–49.

As Justice Groberman noted, the justification phase of the posed a "herculean, and perhaps even impossible task" on the court.

> …it is not the task of a court to "design a fishery". At best, a court can provide legal guidance that will assist the parties (and particularly the regulators) to craft fisheries regulations that respect the plaintiffs' rights. Specific areas of disagreement may have to be resolved in judicial review applications or in more narrowly focussed civil claims.[59]

What we can say for certain is that whatever the failures here are not for lack of judicial effort. The reasons for decision in both of the *Ahousaht* trials are Herculean in length (the former was 910 paragraphs plus appendices and the later nearly doubles that at 1783 paragraphs). *Marshall* and *Ahousaht* illustrate the practical and doctrinal problems that arise when jurisdictional disputes are dealt with through a legal doctrine that cannot use jurisdictional language.

b) *Tsleil-Waututh* and *Coldwater*: Limitations of the duty to consult

Tsleil-Waututh and *Coldwater* involved the judicial review of federal cabinet approvals for the Transmountain Pipeline Expansion project ("TMX"), which was opposed by several First Nations and Indigenous and environmental organizations, among others. In its judgment in these two cases, the Federal Court of Appeal moved from a version of the duty to consult emphasizing the need for "meaningful two-way dialogue" (in *Tsleil-Waututh*) to one more centered on the decision of the Governor in Council (in *Coldwater*).[60] In order to get a sense of the significance of the doctrinal contrast between these two cases it is helpful to remember that in *Haida Nation* the SCC built a framework whose express purpose was to provide an alternative remedy to interlocutory injunctions.[61] In constructing this framework the Court drew from the "special relationship" between the Crown and the Haida.[62] As the Court explained, the process of reconciliation mandated from this special relationship "arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."[63] Thus, in crafting the duty to consult and accommodate, the Court's aim was to "go further" than interlocutory relief, so as to ensure that reconciliation would not be limited to the "post-proof sphere" and thereby become "a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title."[64]

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[59] *Ibid* at paras 156, 158.

[60] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*]; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 [*Coldwater*].

[61] *Haida*, *supra* note 4 at paras 12–15.

[62] *Ibid* at para 15.

[63] *Ibid* at para 32.

[64] *Ibid* at paras 15, 33.

In *Tsleil-Waututh* the Federal Court of Appeal focused on determining what constitutes a "meaningful process of consultation."[65] The Court insisted that meaningful consultation is not merely a process for "exchanging and discussing information" or "to allow Indigenous peoples 'to blow off steam' before the Crown proceeds to do what it always intended to do."[66] Rather, "[t]here must be a substantive dimension to the duty", for consultation is a two-way dialogue that "must focus on rights" and be geared towards achieving "mutual understanding".[67] The Court found that Canada had failed to fulfill this duty and quashed cabinet approval for TMX. Notably, the Court held that Canada had failed to meaningfully respond to co-management and Indigenous governance proposals by First Nations. The Court summarized the experience of the Stó:lō in submitting detailed co-management proposals to Canada in relation to TMX, without receiving any meaningful response from Canadian representatives.[68] Similarly, the Court explained that the "Upper Nicola [Band] had proposed numerous potential mitigation measures and had requested accommodation related to stewardship, use and governance of the water. No response was given as to why Canada rejected this request. This was not meaningful, two-way dialogue or reasonable consultation."[69]

In *Coldwater*, however, the Court upheld cabinet's decision to re-approve TMX as reasonable, following "focused consultation to address the shortcomings" identified in *Tsleil-Waututh*.[70] The "Opening observations" in the *Coldwater* reasons convey the frustration of First Nations and other applicants with the narrow focus of the Court in reviewing this additional round of consultation. The Court explained that "[t]he applicants have argued their case very much as if this was the first time that their case was adjudicated. In fact our task is more limited."[71] Moreover, "all the applicants contend that Canada did not engage in the consultation process with an open mind. The suggestion in each case is that the outcome was pre-determined because Canada owned Trans Mountain."[72] Again, however, the Court explained that its limited task was to determine whether Canada had reasonably addressed "the precise issues within the overall consultation process" identified as shortcomings in *Tsleil-Waututh*.[73]

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[65] *Ibid* at para 42; *Tsleil-Waututh*, *supra* note 60 at paras 494, 496.

[66] *Ibid* at paras 499–500, citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 54.

[67] *Tsleil-Waututh*, *supra* note 60 at paras 500, 504.

[68] *Ibid* at paras 681–727.

[69] *Ibid* at para 736.

[70] *Coldwater*, *supra* note 60 at para 14.

[71] *Ibid* at para 12.

[72] *Ibid* at para 21.

[73] *Ibid* at para 14.

The frustration of the *Coldwater* applicants is understandable, insofar as they may have hoped for the courts to develop a framework to support negotiations centered on recognition and coordination of Indigenous law and co-management proposals with federal and provincial law. *Tsleil-Waututh* can be read as holding out some promise that the Crown duty to consult and accommodate might develop in that direction. *Coldwater*, however, did not perceive the judicial task or the issues before it as inviting the development of the duty to consult and accommodate along those lines. The narrow approach of *Coldwater* provides context for the statement of a spokesperson for the Tsleil-Waututh Nation, in response to the Court's judgment, that "reconciliation stopped today."[74]

c) *Grassy Narrows* and *Coastal GasLink*: What to make of the Indigenous perspective?

Grassy Narrows and *Coastal GasLink* address the legal significance of the Indigenous perspective and Indigenous law. These concepts are related, but distinct in important ways. The former is particularly relevant to treaty interpretation and the need for courts to determine the nature of the agreement between parties to a treaty. As noted above, Canadian law has at times disregarded the very legal capacity of Indigenous peoples to enter binding treaties with the Crown. In modern Canadian law, however, the concept of the Indigenous perspective is rooted in the principle of liberal construction that was affirmed in *Nowegijick* and the *sui generis* nature of the fiduciary relationship set out in *Guerin*.[75] Applied to s. 35 interpretation, this requires that when defining rights it is "crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[76]

The concept of Indigenous law appears in cases where the court is dealing with problems that involve claims about the role of Indigenous law that lead courts to draw interpretive principles from judicial comity or conflicts of law.[77] For example, in *Connolly v. Woolrich* Monk J. held that "in not abolishing or altering the Indian law"

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[74]Judith Sayers, "Federal Court's Trans Mountain Ruling Betrays Principles of Reconciliation", *The Tyee* (5 February 2020), online: <https://thetyee.ca/Opinion/2020/02/05/Federal-Court-Trans-Mountain-Ruling-Betrays-Reconciliation/>.

[75] *Nowegijick v The Queen*, [1983] 1 SCR 29, 144 DLR (3d) 193; *Guerin*, *supra* note 2. See also *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 108, [1990] 5 WWR 97 (where the Court explicitly acknowledges the connection between *Nowegijick* and *Guerin).*

[76] *Sparrow*, *supra* note 30.

[77] The examples of judicial comity we have in mind relate to the decisions of tribal courts in the United States. The decisions of tribal courts also have the potential for Indigenous law in conflict of law cases. In fact, it is possible to read *M'Intosh*, *supra* note 22 as a conflicts case given that Chief Justice Marshall holds that the purchase agreement is not enforceable in US courts, but that leaves open the possibility of it being a legal agreement under Piankeshaw law. Philip P Frickey interprets the case as a narrow decision that holds that the plaintiff is seeking the remedy in the wrong court as his contract is only subject to the law of the Piankeshaw: Philp P Frickey, "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law" (1993) 107 Harv L Rev 381.

the Crown had, by implication, sanctioned it.[78] more recently, in *Pastion v Dene Tha' First Nation* Grammond J held that "Indigenous legal traditions are among Canada's legal traditions" and so "[t]hey form part of the law of the land."[79] This helps us to see how questions of Indigenous law and the Aboriginal perspective are constitutively entangled. As Lamer C.J. notes in *Delgamuukw* "pre-existing systems of aboriginal law" serves as one of the sources for Aboriginal title, but this does not strictly confine Indigenous law to the rules of evidence.[80] The connection between the concepts of Aboriginal perspective and Indigenous law is that both acknowledge the legal capacity of Indigenous peoples. This acknowledgment of full legal capacity is necessary to both the honour of the Crown and reconciliation. As the Court acknowledged in *Van der Peet* "true reconciliation" requires the courts to place equal weight on the Aboriginal perspective and the common law.[81]

The process of finding the "fair and just" balance between perspectives has been an uneven one, often shifting on a case-by-case basis.[82] This struggle is exemplified in *Grassy Narrows.* At trial Sanderson J found that while the Ojibway understood that "they were dealing with the Queen's Government of Canada, and were relying only on the Government of Canada to implement and enforce the Treaty", they did "not agree to unlimited uses by the Euro-Canadians in a manner that would significantly interfere with their Harvesting Rights.[83] Thus, "[i]n Keewatin, Ontario does not have the right to limit Treaty Rights by "taking up lands under the Treaty."[84]

Yet, the Supreme Court came to precisely the opposite conclusion. In their view, the Ontario Court of Appeal was correct in finding that s. 109 of the *Constitution Act, 1867* gave Ontario beneficial ownership of Keewatin. This, combined with provincial jurisdiction under s. 92, gives Ontario the exclusive legislative authority to manage and sell lands in accordance with Treaty 3 and s. 35 of the *Constitution Act, 1982*.[85] Neither the Ontario Court of Appeal nor the Supreme Court mentioned the

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[78] *Connolly v Woolrich et al* (1867), 17 RJRQ 75 at 143. See Mark D Walters, "The Judicial Recognition of Indigenous Legal Traditions: *Connolly v Woolrich* at 150" (2017) 22:3 Rev Const Stud 347.

[79] *Pastion, supra* note 48.

[80] *Delgamuukw, supra* note 3 at paras 114, 126, 145–47. Justice Williamson provides an instructive analysis of the continuing legislative power of Indigenous peoples in *Campbell, supra* note 40 at para 86 ("the most salient fact, for the purposes of the question of whether a power to make and rely upon aboriginal law survived Canadian Confederation, is that since 1867 courts in Canada have enforced laws made by aboriginal societies. This demonstrates not only that at least a limited right to self-government, or a limited degree of legislative power, remained with aboriginal peoples after the assertion of sovereignty and after Confederation, but also that such rules, whether they result from custom, tradition, agreement, or some other decision making process, are "laws" in the Dicey constitutional sense").

[81] *R v Van der Peet*, [1996] 2 SCR 507 at 50, [1996] 9 WWR 1.

[82] *Ibid*.

[83] *Keewatin v Minister of Natural Resources*, 2011 ONSC 4801 at paras 1292–93.

[84] *Ibid* at para 1452.

[85] *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [*Grassy Narrows*].

Aboriginal perspective.[86] The only part of the Supreme Court decision that mentions the Aboriginal perspective is the claim that "Ontario has exercised the power to take up lands for a period of over 100 years, without any objection by the Ojibway".[87] This statement is puzzling as it implies that laches or adverse possession applies without any analysis of such.[88] In *Grassy Narrows* the Court seems to take the position that its understanding of cooperative federalism overrides its commitments to prior case law on treaty interpretation and its own quest for "true reconciliation".

Coastal GasLink exhibits a similar reliance on narrow and legalistic reasoning to by-pass the need to consider the Aboriginal perspective.[89] The case itself concerned an application by the plaintiff (Coastal GasLink Pipeline Ltd.) for an interlocutory injunction to restrain the defendants (Freda Huson and Warner Naziel) from preventing access to the area. The defendants maintained that they have a legal right for their actions based on traditional Wet'suwet'en law. In response, Church J. found that:

> As a general rule, Indigenous customary laws do not become an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the Indigenous customary law is recognized as being part of Canadian domestic law, either through incorporation into treaties, court declarations, such as Aboriginal title or rights jurisprudence or statutory provisions.[90]

If this were indeed a general rule, we would have difficulty explaining much of our own jurisprudence from pre-confederation cases like *Connolly v Woolrich*, through to *Calder* and *Delgamuukw* and, beyond that, the very nature of customary law itself. As Lord Denning held in *R v Secretary of State For Foreign and Commonwealth Affairs*, like custom in the common law, Indigenous law is "handed down by tradition" but it is "beyond doubt that they are well established and have the force of law within the

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[86] *Keewatin v Ontario (Natural Resources)*, 2013 ONCA 158; *Grassy Narrows*, *supra* note 85. By not engaging with the Aboriginal perspective the notion of common intention is lost to a one-sided interpretive approach. For a recent example of a court finding a more balanced approach, see *Restoule*, *supra* note 33 ("The role of Anishinaabe law and legal principles presented at trial was part of the fact evidence into the Indigenous perspective. The Plaintiffs did not ask the court to apply Anishinaabe law. Rather, the Plaintiffs and Canada submit that the court should take respectful consideration of Anishinaabe law as part of the Anishinaabe perspective that informs the common intention analysis" at para 13). For an engagement with the principles of treaty interpretation see Joshua Nichols, "A Narrowing Field of View: An Investigation into the Relationship between the Principles of Treaty Interpretation and the Conceptual Framework of Canadian Federalism" (2019) 56:2 Osgoode Hall LJ 350.

[87] *Grassy Narrows*, *supra* note 85 at para 40.

[88] On laches and limitations periods applied to Aboriginal rights claims, see Senwung Luk & Brooke Barrett, "Time is on Our Side: Colonialism Through Laches and Limitations of Actions in the Age of Reconciliation" in *The Law Society of Upper Canada Special Lectures 2017* (Irwin, 2021) at 394; Kent McNeil & Thomas Enns, "Procedural Injustice: Indigenous Claims, Limitation Periods, and Laches" (2022), online: *Osgoode Digital Commons* <https://digitalcommons.osgoode.yorku.ca/all_papers/336/>.

[89] *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264.

[90] *Ibid* at para 127.

community."[91] This is why the Ontario Court of Appeal has maintained that "[f]or the purpose of applying s. 35 of the *Constitution Act, 1982*, Aboriginal rights or Indigenous law do not constitute "foreign law", even conceptually."[92] Read more generously, however, Church J's statement makes an important point: Canadian law needs a clearer doctrinal framework for recognizing and coordinating Indigenous law with federal and provincial law. That much is clear, we hope, from the review provided here of current issues vexing the courts in Aboriginal law cases.

Ultimately, the doctrinal difficulties radiate from the lack of a principled explanation for the acquisition of Crown sovereignty through unilateral assertion or for the resulting disregard for the inherent law-making authority of Indigenous peoples. The path to doctrinal remediation of these difficulties lies in clearer recognition of inherent Indigenous jurisdiction and so that fundamental issues in Aboriginal law can be reframed around the coordination of Indigenous with federal and provincial jurisdictions. The aim of the discussion above has been to provide some context on the Marshall ambiguity in Canadian law, so that we can better understand the evolution of that ambiguity in response to the growing recognition of inherent Indigenous law-making authority. This, in turn, helps us to diagnose the tension found in *Tsilhqot'in* and to get a clearer view of the available paths for legal doctrine moving forward. The following section looks at the Marshall ambiguity in the SCC doctrine on Aboriginal title in particular.

3. Resolving the Marshall Ambiguity in Aboriginal Title Doctrine

a) The failure to clearly recognize Indigenous jurisdiction as a component of Aboriginal title

The path towards recognition of inherent Indigenous jurisdiction, or law-making authority, as a component of Aboriginal title has been slow but steady since *Calder*.[93] The Court had an opportunity to take the next step in *Tsilhqot'in* and state unambiguously that Indigenous jurisdiction must now be recognized as an incident of Aboriginal title. That would have been a natural progression in the Court's doctrine, though the Court stopped short.

Calder established that Aboriginal title survived the assertion of Crown sovereignty over territory in what is now British Columbia, with six of seven justices affirming that conclusion.[94] Those six justices split evenly on the question whether Aboriginal title had been extinguished in the province, though all accepted that

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[91] *R v Secretary of State for Foreign and Commonwealth Affairs*, [1981] 4 CNLR 86 at 123.

[92] *Beaver v Hill*, 2018 ONCA 816 at para 17 [*Beaver* ONCA].

[93] As discussed in the introduction, the approach of the QCCA represents a possible alternative to self-government through jurisdictional title. In our view, however, jurisdictional title is compatible with that decision.

[94] *Calder*, *supra* note 1.

Aboriginal title was grounded in prior Aboriginal occupation of the land in political communities, not solely in the *Royal Proclamation, 1763* or other Crown acts or legislation. A majority of the Court thus found that Aboriginal land rights had their ultimate source outside the British and Canadian legal systems in the Indigenous occupation of land prior to the arrival of Europeans but concluded nonetheless that the Crown had legislative power to extinguish those rights.[95]

The SCC reiterated the unique character of Aboriginal title, as an estate whose sources pre-date Crown assertions of sovereignty, in *Guerin* a decade later. Justice Dickson explained that the Crown had, through the *Royal Proclamation of 1763*[96] regime allowing surrender of Indigenous territories to the Crown alone, taken on a fiduciary responsibility towards Indigenous peoples with respect to any territories surrendered: "[t]he surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians."[97] While the Crown fiduciary duty thus has its source in the *Royal Proclamation*, Justice Dickson made clear, after reviewing the reasons in *Calder*, *St. Catharines Milling*, and the Marshall trilogy, that Indigenous peoples' "interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision."[98]

In *Delgamuukw*, Chief Justice Lamer consolidated these points with an added emphasis on pre-existing systems of Indigenous law: "aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law."[99] He also highlighted the uniqueness of Aboriginal title in Canadian law: "What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward."[100] With this recognition that Aboriginal title has its source, at least in part, in the existence

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[95] A majority of the Court in *Calder* ultimately denied the Nisga'a claims for recognition of legal rights to their land on the grounds that British Columbia had not yet waived sovereign immunity and had not consented to the courts' jurisdiction to hear the case. On this procedural issue, see *Calder*, *supra* note 1 at 422–27, Pigeon J.

[96] George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [*Royal Proclamation*]. The SCC has repeatedly referred to the *Royal Proclamation* as the "Indian Bill of Rights": see e.g. *R v Marshall; R v Bernard*, 2005 SCC 43 at para 86 ("the *Royal Proclamation* must be interpreted in light of its status as the 'Magna Carta' of Indian rights in North America and Indian 'Bill of Rights'"). The term can be traced back at least as far as *St Catharines Milling and Lumber Co v R* (1887), 13 SCR 577 at 652, 887 CanLII 3 (SCC) (Justice Gwynne wrote that the *Royal Proclamation*, "together with the Royal instructions given to the Governors as to its strict enforcement, may, not in aptly be termed the Indian Bill of Rights").

[97] *Guerin*, *supra* note 2 at 376.

[98] *Ibid* at 379.

[99] *Delgamuukw*, *supra* note 3 at para 126.

[100] *Ibid* at para 114, citing Kent McNeil, "The Meaning of Aboriginal Title", in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (1997) at 144 [emphasis in original].

of Indigenous legal orders pre-dating the Crown assertion of sovereignty, the tension of the Marshall ambiguity rises to the doctrinal surface. The most obvious and pressing question becomes: how does the Crown assertion of sovereignty displace or subordinate Indigenous sovereignty, particularly in territories not subject to treaty?[101]

The SCC addressed this question squarely in its paired judgments in *Haida* and *Taku River Tlingit*. Chief Justice McLachlin emphasized the role of treaties in reconciling "pre-existing Aboriginal sovereignty with assumed Crown sovereignty"[102] and described Crown sovereignty as "*de facto*" where such reconciliation is lacking.[103] The Chief Justice also elaborated the Crown's duty to consult and accommodate Aboriginal interests where credible *prima facie* claims of Aboriginal rights and title are asserted and may be adversely impacted by proposed Crown action. In other words, the Court acknowledged that the prior existence of Indigenous sovereignty raised issues for the legitimacy of Crown sovereignty and, in response, developed doctrine to restrain acts of *de facto* Crown sovereignty.[104]

There is thus a line of landmark SCC cases, one for each decade from the 1970s to the 2000s, that recognize a source of Aboriginal title in Indigenous legal systems pre-dating Crown assertion of sovereignty and that affirm the need to coordinate (or otherwise "reconcile") pre-existing Indigenous sovereignty with assumed Crown sovereignty. These developments would seem to set the stage for a recognition of Indigenous jurisdiction (or sovereignty or self-government or law-making authority by another name) as a component of Aboriginal title. *Tsilhqot'in*, the SCC's landmark Aboriginal title case of the 2010s, presented a clear opportunity.

In *Tsilhqot'in*, however, the Chief Justice preferred a carefully ambiguous characterization of the governance dimension that attaches to Aboriginal title, writing that "Aboriginal title confers ownership rights similar to those associated with fee simple, including: *the right to decide how the land will be used*; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic

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[101] For more commentary on the doctrinal confusion surrounding the relationship between Crown and Indigenous sovereignty see John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37 Osgoode Hall LJ 537; Paul Chartrand, "Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy in Canada" (2011) 19:2 Waikato L Rev 14; Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, 2012); Brian Slattery, "The Aboriginal Constitution" (2014) 67 SCLR (2d) 319; Borrows, "Durability", *supra* note 35; Richard Stacey, "Honour in Sovereignty: Can Crown consultation with Indigenous peoples erase Canada's sovereignty deficit?" (2018) 68:3 UTLJ 405; Gordon Christie, *Canadian Law and Indigenous Self-Determination: A Naturalist Analysis* (Toronto: University of Toronto Press, 2019); Joshua Nichols, *A Reconciliation without Recollection?: An Investigation of the Foundations of Aboriginal Law in Canada* (Toronto: University of Toronto Press, 2020).

[102] *Haida*, *supra* note 4 at para 20.

[103] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 42 [*Taku River Tlingit*].

[104] *Haida*, *supra* note 4 at para 27.

benefits of the land; and *the right to pro-actively use and manage the land*."[105] It is unclear whether these rights, particularly the last one, are meant to convey governance or law-making power beyond those associated with property rights. Yet the use and management of Aboriginal title land will be governed under the legal order of the Aboriginal title-holders, as Aboriginal title is held communally. As several commentators have pointed out, such governance necessarily construes title as having a jurisdictional component.[106] The Court's wording, however, studiously avoids explicitly jurisdictional language. Given that *Tsilhqot'in* was a landmark case focused on the nature of Aboriginal title, this wording, and the ambiguity or hesitation it conveys, are surely deliberate.

Certainly, the Court's decision not to explicitly recognize jurisdiction or law-making power as an incident of Aboriginal title resonates with a second striking feature of *Tsilhqot'in*. The Court minimizes and all but eulogizes the role of interjurisdictional immunity ("IJI") in examining whether provincial laws of general application improperly impinge on the core federal jurisdiction in relation to "Indians and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*. The Court concluded "that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title."[107] Rather, the applicability of provincial laws to Aboriginal title land should simply be subject to the same justifiable-infringement test as federal laws: "[t]he s. 35 framework applies to exercises of both provincial and federal power."[108]

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[105] *Tsilhqot'in*, *supra* note 5 at para 73 [italics added].

[106] See e.g. Brian Slattery, "The Constitutional Dimensions of Aboriginal Title" (2015) 71 SCLR 45 at 56 [Slattery, "Constitutional Dimensions"]. Slattery argues that the recognition of collective decision-making authority over the management of title lands "means that some authoritative body or bodies within the Nation must be vested with the power to ascertain and allocate rights to the land and to control its use and preservation, including the power to expropriate individual interests." Thus, "[w]hile the existence and scope of this jurisdiction are determined globally by the common law of Aboriginal rights, the legal machinery and modalities through which it is exercised are governed by the particular constitution and laws of the Nation in question." Slattery also argues that Aboriginal title "does not deal with the rights of private entities but with the rights and powers of constitutional entities that form part of the Canadian federation." For these reasons, among others, Slattery argues that proprietary interests such as the fee simple estate are not the best analogy for Aboriginal title. As we argue in this paper, a recognition of the jurisdictional aspects of title ought to shift the frame of Aboriginal title doctrinal development away from Crown infringement of property rights to coordination of Indigenous jurisdiction with provincial and federal law, i.e. to questions of federalism. See also Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873; Jeremy Webber, "The Public-Law Dimension of Indigenous Property Rights" in Nigel Bankes & Timo Koivurova, eds, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Oxford, UK: Hart, 2013) 79; Sari Graben & Christian Morey, "Aboriginal Title in Tsilhqot'in: Exploring the Public Power of Private Property at the Supreme Court of Canada" in Angela Cameron, Sari Graben, & Val Napoleon, eds, *Creating Indigenous Property: Power, Rights, Relationship*s (Toronto: University of Toronto Press, 2020) 287; Sari Graben & Christian Morey, "Aboriginal Title and Controlling Liberalization: Use It Like the Crown" (2019) 52:2 UBC L Rev 435.

[107] *Tsilhqot'in*, *supra* note 5 at para 151.

[108] *Ibid* at para 152.

In reaching this conclusion, the Court expressed particular concern that "applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests—some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all."[109] In other words, when the Court explicitly addressed issues of coordinating jurisdictions, it defaulted to the application of federal and provincial law. As detailed below, This framing construes Aboriginal title primarily as a proprietary interest, subject to provincial and federal infringement, rather than as including Indigenous law-making power and inherent jurisdiction that must be coordinated with provincial and federal jurisdictions. Such coordination is precisely what the QCCA saw as an inescapable consequence of recognizing Indigenous jurisdiction in the child and family services reference.[110] *Tsilhqot'in,* however, is ambiguous about the jurisdictional aspects of title and therefore provides little guidance about coordinating Crown and Indigenous jurisdictions. In this, *Tsilhqot'in* amounts to a doctrinal reversion to a more strictly positivist picture of all lawful authority flowing from the state, allowing only property rights or delegated authority to Indigenous peoples.

We do not mean to minimize a practical reality that must partly underlie the Court's reasoning. The courts cannot claim to have the interpretive resources that would be needed to meaningfully interpret Indigenous law. Further, Indigenous peoples and their legal orders have been radically disrupted through colonial interference and disruption. This is obviously not meant as criticism of Indigenous legal orders, but simply an acknowledgment of the disruption they have experienced. Simply put, there are important practical questions about the current institutional capacity of both the courts and Indigenous peoples to fully implement a jurisdictional understanding of Aboriginal title.[111] We do not, therefore, criticize the Court on the basis that such practical concerns may animate its reasons in *Tsilhqot'in*. To the contrary, we think that the Court would have done well to acknowledge them explicitly, along with the practical questions of jurisdictional coordination involved, rather than to avoid them by minimizing or obscuring the inescapable jurisdictional component of Aboriginal title. Indeed, the failure to recognize a jurisdictional component of Aboriginal title is out of step not only with the momentum of the Court's own jurisprudence, but also with recent legislative developments and evolution in other areas of the case law.

The central tension or ambiguity in Aboriginal law, what we've called the Marshall ambiguity, has tangible effects. Framing section 35 rights as involving a jurisdictional component that must be coordinated with federal and provincial jurisdictions has important practical and doctrinal consequences. Interpretations which

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[109] *Ibid* at para 147.

[110] *Quebec Reference, supra* note 6.

[111] See Grammond, "Conceptual Framework", *supra* note 44.

acquiesce to inflated claims of sovereign authority serve as the explicit justification for the Crown's authority to infringe Aboriginal and treaty rights and for placing the burden for proving inherent rights on Indigenous peoples. Upholding the Crown's unilateral decision-making authority on the basis of a limited conception of section 35 rights and deference to Crown claims undermines the legitimacy of the doctrine in the eyes of many.[112] This problem is vividly illustrated by Kent J. in Saik'uz when he notes,

> As the Court noted in *Delgamuukw*, "we are all here to stay", and while the legal justification for Crown sovereignty may well be debatable, its existence is undeniable and its continuation is certain. The task of the Court is therefore to somehow reconcile continued settler occupation and Crown sovereignty with the acknowledged pre-existence of Aboriginal societies.[113]

The tension between the presumption of Crown sovereignty and the task of reconciliation is aptly expressed by the choice of the indefinite "somehow". The judiciary is caught between presumptions that it must accept and unilateral authority that it cannot explain. On the one hand, the *de facto* existence of Crown sovereignty constrains the constitutional remedies that the judiciary can provide. While on the other, the courts are tasked with interpreting the constitution in a manner that will "provide a continuing framework for the legitimate exercise of governmental power."[114] The legitimacy problem does not arise, however, merely because the courts recognize a legally and morally dubious sovereign claim; rather, the problem arises because of the ongoing effects assigned to that recognition. Where the Court continues to give effect to sovereignty and underlying title in a way that constrains the Court's own generative ambitions for s. 35 and continues to send the parties to an unbalanced negotiating table, it is difficult to establish meaningful consent-based decision-making structures and practices of shared governance. In short, without guidance it is difficult to "coordinate jurisdiction" in the manner advocated for by the QCCA.[115]

We agree with the many commentators who have noted the implicit recognition of Indigenous jurisdiction in the doctrine of Aboriginal title.[116] There remains, however, a considerable lack of clarity on this issue. The explanation of the doctrine in *Tsilhqot'in* left many issues unsettled, and the Marshall ambiguity continues to shape the doctrine in ways that undermine its ability to effectively mediate disputes. Five areas of uncertainty in Aboriginal title doctrine, in particular, present an opportunity to make explicit the jurisdictional aspects of the title interest and, in so

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[112] As Abella J wrote in Mikisew Cree "Unilateral action is the very antithesis of honour and reconciliation": *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 87.

[113] *Thomas and Saik'uz*, *supra* note 21 at para 203.

[114] *Hunter et al v Southam Inc*, [1984] 2 SCR 145 at 155, [1984] 6 WWR 577 [emphasis added].

[115] *Quebec Reference*, *supra* note 6 at paras 559–60.

[116] See note 106, above.

doing, bring needed clarity to the doctrine while situating the courts to be able to better mediate the negotiated resolution of contested jurisdictional issues.

a) Doctrinal clarifications

i. Jurisdiction is an incident of Aboriginal title

In *Tsilhqot'in,* the Court emphasized the "use," "control," and "management" of title lands by title holders. Yet, as Gordon Christie has pointed out, without more this does not tell us a great deal about the nature of the use and control that title holders are entitled to.[117] To use Christie's example, a group of individuals who collectively own real property in British Columbia in fee simple have the right to exclude others and to determine the uses of the land. They may design rules outlining a collective decision-making process on land use and determining the allocation of resources or proceeds flowing from the property. Yet, their "control" of the land remains subject to federal, provincial, and perhaps municipal laws. Their collective rules are subordinate to these jurisdictions.[118] The language in *Tsilhqot'in* permits an interpretation in which Aboriginal title more closely resembles this arrangement than it does territorial jurisdiction. In particular, while the Court cautioned against understanding title through analogy to fee simple ownership, in doing so the court held that "analogies to *other forms of property ownership*—for example, fee simple—may help us to understand aspects of Aboriginal title."[119] While acknowledging that such analogies "cannot dictate precisely what [title] is or is not," the phrase "other forms of property ownership" suggests title is to be conceived of as a property interest, regardless of what the proper analogy might be. Again, property interests are typically conceived of as conferring rights to use, control, and manage, though not law-making authority on par with the legal systems which surround it: property includes decision-making authority, but not jurisdiction.

As outlined above, however, the Court's recognition of collective decision-making authority over title lands and the grounding of title in prior the social organization of Indigenous peoples suggests a jurisdictional aspect to title. The *Tsilhqot'in* Court's citation of *Delgamuukw*, holding that Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts,"[120] seems to more clearly capture the Court's intent than a more limited reading. Strengthening this conclusion, the Court emphasized that the incidents of Aboriginal title reflect the pre-sovereignty nature of the title holding nation's use and occupation of the land: Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with "all the pre-sovereignty incidents of use

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[117] Gordon Christie, "Who Makes Decisions over Aboriginal Title Lands" (2015) 48:3 UBC L Rev 743 at 747–50.

[118] *Ibid*.

[119] *Tsilhqot'in, supra* note 5 at para 72 [emphasis added].

[120] *Delgamuukw*, *supra* note 3 at para 190, cited in *Tsilhqot'in*, *supra* note 5 at para 73.

and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group—most notably the right to control how the land is used."[121] Pre-sovereignty occupation was governed by Indigenous systems of law and political authority, as recognized by the Supreme Court in *Calder*: "the fact is that when the settlers came, the Indians were there, *organized in societies* and occupying the land as their forefathers had done for centuries."[122] Similarly, in *Haida Nation* the Court spoke of pre-existing *Aboriginal sovereignty*, while in *Mitchell* the Court relied on the doctrine of continuity in holding that pre-existing Indigenous legal orders survived the assertion of Crown sovereignty.[123] More recently, a majority of SCC stressed in *Uashaunnuat*: "We reiterate that the legal source of Aboriginal rights and title is not state recognition, but rather the realities of prior occupation, sovereignty and control".[124]

By linking the incidents of Aboriginal title to the nature of pre-sovereignty occupation, the Supreme Court has indicated that Aboriginal title is a means of recognizing and giving effect to these pre-existing social and legal orders.[125] The alternative – that title is a mere proprietary interest without jurisdictional or law-making features - would mean that Indigenous peoples invest the considerable time and expense required to achieve a declaration of Aboriginal title, only to need subsequent litigation to determine the scope of their governing authority and inherent right of self-government on title lands. A clear recognition that Aboriginal title includes legislative and executive authority – those terms being construed broadly and by way of analogy to include various forms of Indigenous law and political association—would avoid the need for multi-stage litigation and direct the parties to the negotiation and co-ordination of jurisdictional issues.

ii. 'Legislative vacuums' should not be understood as a lack of legal authority but as an absence of currently enforceable law

In *Tsilhqot'in Nation* the Court justified the recognition of provincial authority on Aboriginal title lands by explaining that the absence of such authority "may lead to legislative vacuums."[126] This framing raised concerns with many, as it seemed to ignore the existence of Indigenous legal orders and imply that title could exist without Indigenous law-making authority. John Borrows, for example, argues that "[a] legal vacuum would not be created if the Court recognized the pre-existing and continuing nature of Indigenous jurisdiction along with Aboriginal title. Indigenous law exists in

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[121] *Tsilhqot'in, supra* note 5 at para 75; Borrows, "Durability", *supra* note 35.

[122] *Calder, supra* note 1.

[123] *Haida, supra* note 4 at para 20; *Mitchell v MNR*, 2001 SCC 33 at para 9 [*Mitchell*].

[124] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 49.

[125] Borrows, "Durability", *supra* note 35 at 739.

[126] *Tsilhqot'in*, *supra* note 5 at para 147.

Canada."[127] This is an understandable concern, especially in light of the history of the subordination of Indigenous law. The notion of legislative vacuums, then, seems on its face to work against the Court's intention to recognize jurisdictional aspects of title, and some clarity is required to resolve any contradictions.

The only way to read the concern with legal vacuums as consistent with a jurisdictional conception of title and an understanding of the purpose of s. 35 as reconciling Crown and Indigenous legal orders is to read it as a temporary practical concern. The Court's concern here, it seems to us, is that upon a declaration of title there may well be some issues of considerable immediate importance that the title holding Indigenous jurisdiction will not *yet* have legislated about or otherwise be prepared to regulate under their laws. Note, the Court did not hold that vacuums *will* arise, but that they *may*. The "vacuum", then, arises not because of a lack of legal or legislative *authority*, but because of a lack of cognizable and applicable law in relation to specific subject matters. Federal or provincial law may continue to apply after a declaration of title in relation to subject matters that Indigenous law has not yet regulated.[128] The application of such laws is subject to the consent of the title holders unless justified under the test for infringement where such consent cannot be obtained.[129] In British Columbia, or where federal legislation is at issue, the legislating government also must ensure that all steps have been taken to ensure that any legislation impacting title lands is consistent with the *United Nations Declaration on the Rights of Indigenous Peoples.*[130]

Understood as emphasizing currently enforceable laws rather than legal authority, the language of "vacuum" reveals the need for transitional co-ordination of jurisdictions in areas where gaps in regulation or enforcement could pose serious collective problems.[131] The title holding group may enter into agreements with provincial or federal governments permitting laws to apply until such time as the Indigenous nation develops their own. That may be in one year, or it may be in ten. The choice belongs to the title holding group. This is what the consent requirement recognized in *Tsilhqot'in* requires. Indigenous nations can expedite this process by ensuring that they develop laws before title is declared in any areas where they anticipate federal or provincial governments may try to exercise jurisdiction. In either event, proceeding without consent would constitute an infringement requiring justification. As in *Yahey*, a court may craft remedies designed to prevent

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[127] Borrows, "Durability", *supra* note 35 at 739.

[128] Subject of course to the proviso that a jurisdiction may consciously decide not to make laws about a given issue without ceding jurisdiction over that matter to another level of government.

[129] *Tsilhqot'in, supra* note 5 at paras 76, 88, 90.

[130] *UNDRIP Act*, *supra* note 20; *UNDRIP Act BC*, *supra* note 20.

[131] Borrows anticipates this: "If there was a concern about interim transitional authority between the time when provincial laws would cease to apply and when First Nations laws would take effect, the Court could have created an order to this effect": Borrows, "Durability", *supra* note 35 at 739.

infringements by requiring negotiated agreements be reached to mitigate the impacts to Aboriginal rights *before* the Crown can authorize actions that may infringe.[132]

iii. "Inalienable except to the Crown" refers to Indigenous territorial jurisdiction not property

Aboriginal title can only be alienated to the Crown.[133] Clarification around the meaning of this feature of the title interest highlights the jurisdictional nature of title and assists with resolving challenging areas of doctrinal development such as title to submerged lands and conflicts with private property. As currently articulated, there is considerable ambiguity in the doctrine concerning the relationship between Aboriginal title and property rights held by individuals outside the title holding group.[134] Can title co-exist with private ownership, or are title and other interests mutually exclusive? The rationale behind the inalienability of title clarifies some conceptual issues raised by this problem.

While the Court in *Delgamuukw* held that "[l]ands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown,"[135] this overstates the historical position. The rule itself originates in the 17th and 18th centuries and was articulated in the *Royal Proclamation,* 1763.[136] There were several historical justifications. One, at common law the doctrine of tenure requires that all titles in land originate from the Crown.[137] Common law courts, therefore, were hesitant recognize titles acquired by purchase from Indigenous peoples. Second, common law courts in several jurisdictions prohibited such purchases because a subject of the Crown could not purchase *territory* from another polity: Indigenous lands had to be ceded to the Crown before they could be converted into property.[138] This was recognized in *Johnson v M'Intosh:* "The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject-to their laws."[139] Thus, as Professor

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[132] See *Yahey v British Columbia*, 2021 BCSC 1287 at para 1894. For analysis, see Robert Hamilton & Nick Ettinger "The Future of Treaty Interpretation in *Yahey v British Columbia*: Clarification on Cumulative Effects, Common Intentions, and Treaty Infringement" (2022) 54:1 Ottawa L Rev.

[133] *Tsilhqot'in, supra* note 5 at para 74; *Delgamuukw, supra* note 3 at para 113.

[134] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 293.

[135] *Delgamuukw*, *supra* note 3 at para 113.

[136] Slattery, "Constitutional Dimensions", *supra* note 106 at 55.

[137] *Ibid.*

[138] Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47:3 McGill LJ 473. See also Kent McNeil, "The Source, Nature, and Content of the Crown's, Underlying Title to Aboriginal Title Lands" (2018) 96:3 Can Bar Rev 273 at 286 ("Aboriginal title cannot be acquired by private persons or corporations, as they lack the legal capacity to acquire governmental authority from anyone other than the Crown") [McNeil, "The Crown's Underlying Title to Aboriginal Title Lands"].

[139] See e.g. *M'Intosh, supra* note 22 at page 593: "If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their

Slattery concludes: "the rule against alienation does not affect the Aboriginal Nation's capacity to grant or lease lands under its own laws, so long as the lands remain part of the communal territory and subject to the Nation's jurisdiction."[140] Inalienability, in others words, applies to the territory over which the title holding group holds jurisdiction, not any discrete property interest within that territory. This is one of the reasons Slattery argues that the most accurate analogy for Aboriginal title is not fee simple but provincial title.[141] Similarly, Val Napoleon argues that title incorporates Indigenous institutions of public law which regulate the specific allocation of lands and resources within the territory.[142] Thus, the prohibition on alienation except to the Crown applies to *territory*, not *property*. This aligns with Marshall CJ's position in *Johnson* outlined above.

Note that these are generic properties of Aboriginal title. Other Aboriginal rights—e.g. rights to hunt or fish or to gather timber—are defined by properties specific to the Aboriginal rights-holders. That is, the scope of such rights is established by the specific historical practices of the Aboriginal people claiming the right—the specific locations and species they traditionally hunted or fished or how they traditionally used forests or other resources. Professor Slattery has emphasized this distinction between the generic properties of Aboriginal title and the specific properties of other Aboriginal rights to argue that Aboriginal self-government should, like Aboriginal title be understood in terms of generic properties. The QCCA adopted Professor Slattery's analysis as key to its own reasoning about Indigenous jurisdiction over child and family services, quoting a long passage from Professor Slattery and highlighting his conclusion that "In light of *Delgamuukw*, it seems more sensible to treat the right of self-government as a generic Aboriginal right, on the model of Aboriginal title, rather than as a bundle of specific rights."[143] The QCCA relied on this point to set aside the analysis found in *Pamajewon*.[144]

This clarity helps reframe the ongoing debate in Canada concerning the relationship between Aboriginal title and private property interests. Recognizing that private property interests and Aboriginal title are not necessarily inconsistent or

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power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject-to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty."

[140] Slattery, "Constitutional Dimensions", *supra* note 106 at 56.

[141] *Ibid*.

[142] *Ibid*.

[143] *Quebec Reference*, *supra* note 6 at para 422 [underlining in original].

[144] See McNeil, "Inherent Right of Self-Government", *supra* note 12.

irreconcilable, alternatives can be explored other than those typically on offer. A declaration of title need not disturb private interests, as Aboriginal title as a jurisdictional interest can sit "under" existing fee simple estates. This is the argument the Haida Nation put forward when the Crown alleged that all private property owners in within their claimed title area needed to be made parties to the title litigation.[145] Clarity concerning the inalienability of title would help future courts resolve these difficult questions.

iv. The attributes of the Crown's underlying or radical title

In *Tsilhqot'in,* the Court introduced some confusion concerning the nature of the Crown's underlying title. To review, outside of Quebec it is assumed that the doctrine of tenure was received with the common law, meaning that the Crown acquired underlying title when it acquired sovereignty.[146] Aboriginal title has been conceived of as a burden on this underlying title, with the extent of the burden changing over time.[147] In *Tsilhqot'in,* the Court held that Aboriginal title includes the full beneficial interest in lands subject to title. Given this, the Court asks the next logical question: "what is left of the Crown's underlying title?" The Court posited that underlying title has two attributes: the Crown's fiduciary duty and the authority (what the Court terms the "right") to encroach on title.[148]

This has caused confusion because these principles have typically been associated with Crown *jurisdiction*, not Crown *property*. In *Guerin*, for example, the Court held that the Crown's fiduciary duty derives from the *Royal Proclamation, 1763* when the Crown asserted that Indigenous lands could only be surrendered to the Crown.[149] This duty was derived from the jurisdiction assumed in relation to Indigenous interests, not the Crown's underlying title.[150] The authority to encroach, by turn, has been assumed to have "always" existed, to use the *Sparrow* court's language, and was incorporated into s.91(24) as part of the Crown's jurisdiction in relation to "Indians, and lands reserved for the Indians."[151] This approach is not without its problems, many of which have been discussed at length in the literature. Nonetheless, it provided a reasonably straightforward explanatory model, and the apparent change in *Tsilhqot'in* raised important questions.

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[145] *The Council of the Haida Nation v British Columbia*, 2017 BCSC 1665 at para 7.

[146] McNeil, "The Crown's Underlying Title to Aboriginal Title Lands", *supra* note 138 at 278.

[147] *Ibid*. See also Nigel Bankes & Jonnette Watson-Hamilton **"**What Does Radical Title Add to the Concept of Sovereignty?" (31 July 2014), online (blog): *ABlawg* <https://ablawg.ca/2014/07/31/what-does-radical-title-add-to-the-concept-of-sovereignty/>.

[148] *Tsilhqot'in*, *supra* note 5 at para 71.

[149] Guerin, *supra* note 2 at 349, 376.

[150] See Bankes & Watson-Hamilton, *supra* note 147 ("On the question of the Crown's duties, our pre-Tsilhqot'in understanding was that there were none arising from radical title").

[151] *Sparrow*, *supra* note 30.

In our view, however, the problem is more superficial than it seems. The Court, it seems, used "underlying title" as synonymous with sovereign jurisdiction. The fiduciary duty and the authority to encroach flow not from the Crown's property interest, but from its *de facto* jurisdiction (setting aside questions of the legitimacy and legality of such). That jurisdiction, however, is better considered a part of the Crown's sovereign authority than as an incident of its underlying proprietary interest. As Professor McNeil notes, "It is important to understand that the Crown's underlying title is a property right derived from the doctrine of tenure, rather than a source of jurisdiction (governmental authority)."[152]

If the Court intended to refer to jurisdiction, this leaves the question of what incidents of the Crown's underlying title remain. There are two possible answers. The first is escheat or something analogous to it. Having clarified the issue of inalienability above, it can be seen that aboriginal title land can be granted or otherwise encumbered while remaining under the jurisdiction of the title holding group (subject only to the inherent limit). Actions that might require a surrender to the Crown under the *Indian Act*—to create leasehold interests, for example—do not on title lands. The only way for the Crown's underlying title to vest, then, is for the territorial interest itself to be surrendered or to otherwise no longer be held by the title holding group.

The second possibility, if it is correct that the Court has taken to speaking of underlying title as synonymous with the jurisdictional powers of the Crown, is that there no distinct doctrinal role for underlying title. If we take the SCC at its word in *Tsilhqot'in*, "underlying title" is a term that refers only to the Crown fiduciary duty relating to Aboriginal title land and to the Crown's power to infringe Aboriginal title in the broader public interest. It seems that the court has already removed all the proprietary features of the interest, instead emphasizing only those aspects that are redundant to the jurisdictional aspects of Crown sovereignty. The doctrinal role for a traditional conception of underlying title is therefore minimized and may play no role at all where Aboriginal title lands are concerned. While it may seem radical to excise underlying title, there is no compelling reason why underlying title must remain where Aboriginal title is concerned. Aboriginal title is unique precisely because it is a form of allodial title that is not dependent on Crown grant.[153] In other words, its existence does not depend on the explanatory model provided by the doctrine of tenure, and it is an exception to the rule that all interests must be held of the Crown. There is precedent for the recognition of such exceptions and forms of allodial title: title to much of the land in Shetland and Orkney is held under udal law and is not held of the Crown.[154]

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[152] McNeil, "Crown's Underlying Title to Aboriginal Title Lands", *supra* note 138 at 280.

[153] It pre-exists Crown sovereignty. See *Tsilhqot'in*, *supra* note 5 ("what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*" at para 14).

[154] Michael RH Jones, "Perceptions of Udal Law in Orkney and Shetland" in Doreen Waugh & Brian Smith, eds, *Shetland's Northern Links* (Edinburgh: Scottish Society for Northern Studies, 1996) at 186–88. Sakej Henderson argues that Aboriginal title is a form of allodial title: James [Sakéj] Youngblood Henderson, "Mi'kmaw Tenure in Atlantic Canada" (1995) 18 Dal LJ 196.

Clarity on the nature of, and distinction between, Crown jurisdiction and underlying title would help bring clarity to discussions about how to best co-ordinate Crown and Indigenous jurisdiction on title lands.

v. Relationship between Indigenous and state legal orders

A jurisdictional approach to Aboriginal title requires clarity on the interaction between Indigenous legal orders and state law. These rules will ideally be developed through negotiation. Yet, courts will undoubtedly have a role to play and will need to identify and articulate tools adequate to the task. Further, courts should not be concerned that moving to a jurisdictional frame will create intractable issues: a variety of judicial tools exist to mediate jurisdictional disputes and co-ordinate the co-existence of multiple legal orders. Some of these tools may foreshadow the types of agreements that may be reached in negotiation.

The common law has long recognized the legal orders of Indigenous peoples. In the earliest Indigenous land claim in a common law jurisdiction, *Mohegan Indians v Connecticut*, the Privy Council recognized the existence and relevance of Indigenous law.[155] In 1823, Nova Scotia Judge T.C. Haliburton wrote of the Mi'kmaq: "[t]hey never litigate or are in any way impleaded. They have a code of traditionary and customary laws among themselves."[156] In 1959, the Ontario High Court recognized that "it might be unjust or unfair under the circumstances for the Parliament of Canada to interfere with [the Six Nations'] system of internal Government by hereditary Chiefs."[157] Indigenous legal and political orders have long been recognized as existing prior to Crown assertions of sovereignty and as surviving such assertions.

Despite this recognition, Canadian courts have been unclear, and likely very uncertain, about how to best recognize and give effect to these laws.[158] As outlined above, the Supreme Court has consistently recognized both that Indigenous law is relevant to proving aboriginal rights and title, particularly as evidence of the 'Aboriginal perspective' and as evidence of exclusive occupation of territory, and that Indigenous law survived the Crown assertion of sovereignty. The particular effects of the continuation of Indigenous law, however, has been more difficult to peg.

One line of argument mentioned above holds that courts cannot give effect to Indigenous customary law until such time as it is recognized through a formal legal

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[155] See Mark Walters, "Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America" (1995) 33:4 Osgoode Hall LJ 785.

[156] Leslie FS Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: UBC Press, 1979) at 143.

[157] *Logan v Styres*, [1959] OWN 361, 1959 CanLII 406 (ON SC) at 424 (the Court upheld the authority of the federal government to displace that traditional government through the *Indian Act*, but its recognition of the ongoing existence and relevance of traditional governance is important).

[158] See Grammond, "Conceptual Framework", *supra* note 44.

instrument.[159] In respect of adoptions and marriages, however, there is some historical precedent for the recognition and application of Indigenous law in Canadian courts.[160] Recently, the Federal Courts have turned to Indigenous law in resolving elections disputes on First Nations.[161] Indigenous law has been relied on in interpreting a constitution drafted under an Indigenous self-government agreement.[162] These latter examples invite us to draw a distinction between customary and written law when considering judicial approaches. In sum, there is considerable uncertainty about how, and to what extent, courts can consider or give effect to Indigenous law. Neither is it clear that Indigenous peoples support Canadian courts interpreting and applying their laws. The courts have, however, explored several approaches that have potential in these areas. The three we consider briefly here are: conflicts of laws analysis; application of traditional doctrines of federalism; and judicial deference to Indigenous decision-makers.

Conflicts of laws rules may have a role to play in co-ordinating Crown and Indigenous jurisdictions. In *Beaver v Hill*, a Haudenosaunee man defended against a claim for child support and spousal support under the Ontario *Family Law Act*[163] by asserting a right to have the dispute decided by Haudenosaunee law.[164] The ONSC developed a modified conflicts of laws analysis to resolve both the challenge to its own jurisdiction and the relationship between provincial and Haudenosaunee law.[165] The approach in *Beaver v Hill* illustrates how the doctrine may apply in modified form where Indigenous customary law is at issue. While this decision was overturned with the ONCA declining to apply the modified conflicts of law analysis,[166] the case illustrates the potential for rules of private international law to be adopted to situations where conflicts arise between state and Indigenous legal orders. Whether conflicts of laws rules are appropriate in respect of Indigenous customary or unwritten law, as in this case, its utility in respect of written law can be seen in the fact that many self-government agreements explicitly state that common law conflicts of laws rules will apply to resolve jurisdictional disputes not contemplated or explicitly dealt with in the agreement.

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[159] *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264 at paras 127–29

[160] See Sébastien Grammond, *Terms of Co-Existence: Indigenous Peoples and Canadian Law* (Toronto: Carswell, 2013).

[161] See *Alexander v Roseau River Anishinabe First Nation Custom Council*, 2019 FC 124 at para 18; *Henry v Roseau River Anishinabe First Nation Government*, 2017 FC 1038 at paras 7–11; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 34; *Mclean v Tallcree First Nation*, 2018 FC 962 at para 10; *Whalen v Fort McMurray No. 468 First Nation*, 2019 FC 732, at paras 31–40; *Clark v Abegweit First Nation Band Council*, 2019 FC 721 at para 79; *Potts v Alexis Nakota Sioux Nation*, 2019 FC 1121 at para 41.

[162] See *Harpe v Massie and Ta'an Kwäch'än Council*, 2006 YKSC 1.

[163] *Family Law Act*, RSO 1990, c F.3.

[164] *Beaver v Hill*, 2017 ONSC 7245 at para 2.

[165] *Ibid* at paras 50–74.

[166] *Beaver* ONCA, *supra* note 92.

Conventional doctrines of federalism may also play an important role. *Indian Act* by-laws provide an example of how this might work. By-laws passed under s.81 of the *Indian Act* prevail over inconsistent provincial legislation and regulation.[167] By-laws also take priority over inconsistent federal regulations.[168] Some cases have suggested they also take priority over inconsistent federal legislation,[169] though some case law has held that the *Criminal Code* will prevail in the event of a conflict between the *Criminal Code* and *Indian Act* by-laws.[170] In either event, the direction of paramountcy is not important for the purposes of this example: what is relevant here is that, while the by-law powers under the *Indian Act* are clearly a constrained and inadequate basis for Indigenous jurisdiction, the courts have no problem resolving jurisdictional claims when they are explicitly framed as such and when directed to do so under the governing statutory regime. Laws passed by an Indigenous governing body on the basis of the inherent rights of self-government and territorial jurisdiction could be dealt with in much the same way.

Indeed, it is along these lines that the QCCA dealt with Indigenous jurisdiction over child welfare and family services. The Court held that exercises of Indigenous jurisdiction in these areas would prevail over inconsistent provincial or federal laws, unless the relevant provincial or federal government could justify overriding Indigenous law to the extent such law conflicts with any provincial or federal law at issue. The QCCA framed this as an application of the *Sparrow* test, which the courts use to determine whether provincial or federal governments can justify infringements of s. 35 rights. However, the QCCA's application of the *Sparrow* test amounts to a substantial reframing—*away* from the analogy between infringement of *Charter* rights and of s. 35 rights established in previous case law and specially emphasized in *Tsilhqot'in*,[171] so as to *reorient* the *Sparrow* test along jurisdictional lines. The QCCA thus establishes the relevance of principles of federalism to the analysis of s. 35 rights, at least those with an acknowledged jurisdictional dimension. Within its analysis of the right of Indigenous self-government over child welfare and family services, in particular, the QCCA notably adopts a principle of Indigenous paramountcy, subject only to the justification of infringements according to the *Sparrow* test.

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[167] *R v Meechance*, 2000 SKQB 156.

[168] *R v Nikal*, [1996] 1 SCR 1013, [1996] 5 WWR 305.

[169] This was the position of the BCCA in *R v Jimmy*, [1987] 3 CNLR 77, 15 BCLR (2d) 145. See Naiomi Metallic, "Indian Act By-Laws: A Viable Means for First Nations to (Re)Assert Control over Local Matters Now and Not Later" (2016) 67 UNBLJ 211.

[170] *St. Mary's Indian Band v Canada (Minister of Indian Affairs and Northern Development)*, [1995] 3 FC 461, [1996] 2 CNLR 214. See also Metallic, *supra* note 169.

[171] *Tsilhqot'in*, *supra* note 5 at paras 142–44 ("The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers" at para 142).

A further potentially generative way to recognize or give effect to customary or traditional law is through deference to Indigenous decision makers. In *Pastion*, for example, Grammond J. held:

> Indigenous decision-makers are obviously in a better position than non-Indigenous courts to understand Indigenous legal traditions. They are particularly well-placed to understand the purposes that Indigenous laws pursue. They are also sensitive to Indigenous experience generally and to the conditions of the particular nation or community involved in the decision. They may be able to take judicial notice of facts that are obvious and indisputable to the members of that particular community or nation, which this Court may be unaware of. Indeed, for many Indigenous peoples, a person is best placed to make a decision if that person has close knowledge of the situation at issue … This Court has recognized that certain of those reasons militate in favour of greater deference towards Indigenous decision-makers.[172]

That is, courts can support the autonomy and agency of Indigenous decision-makers by adopting a deferential approach to reviewing their decisions concerning the application and interpretation of Indigenous laws.

All of these are examples of courts mediating Crown-Indigenous jurisdictional disputes. The suggestion here is not that any of these approaches be adopted unchanged. The rules governing jurisdictional co-ordination ultimately need to be negotiated, and the tools the judiciary adopts will be shaped by the nature of the negotiated agreements. Once those agreements have been reached, courts ought to adopt a deferential approach to the agreements, ensuring that jurisdictional issues are dealt with through political agreement to the greatest extent possible.[173] Explicit recognition of the jurisdiction aspects of title would help the court step into this more comfortable judicial role.

b) An example of jurisdictional contests on title lands

With these five doctrinal clarifications in mind, how would a declaration of title play out in this jurisdictional context? Suppose, for instance, the Tsilhqot'in Nation adopted, through its governance structures, specific laws to govern forest management on the land the Nation holds under Aboriginal title, including the issuing of licences to cut and remove timber. *Tsilhqot'in* makes clear, of course, that if British Columbia or private proponents wish to engage in timber activities on Tsilhqot'in Aboriginal title land, they must seek Tsilhqot'in consent. The exercise of Indigenous jurisdiction to adopt forestry laws helps all parties to understand what consent means in this

[172] *Pastion*, *supra* note 48 at para 22.

[173] *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at 36; Julie Jai, "The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference" (2010) 26 NJCL 25. While these sources deal with the interpretation of modern treaties, we do not mean to suggest that all jurisdictional agreements will take this form, only that the deferential judicial attitude ought to extend to all agreements.

context: in particular, we move away from consultation models and worry about "vetoes" to the simple application of Tsilhqot'in law. Proponents should simply apply for timber licences under Tsilhqot'in law.

If the Province believes that Tsilhqot'in law is somehow inadequate or unconstitutional and wishes to authorize proponent activity contrary to existing Tsilhqot'in law, the first step for the Province should of course be to engage the Tsilhqot'in in negotiation. But note that such negotiations will now be centered on coordination of provincial and Tsilhqot'in laws and whether a satisfactory agreement can be reached to amend Tsilhqot'in laws in ways acceptable to all parties.
If no agreement can be reached through negotiation and the Province intends to proceed with issuing licences or adopting regulations that purport to override Tsilhqot'in law, that raises questions about the Province's power to infringe section 35 rights. This is the framework envisioned by the QCCA in the *Quebec Reference:*

> Where there is a real conflict between Aboriginal and federal or provincial legislation, one must conclude that there is an infringement of the Aboriginal right. Since the Aboriginal right is recognized and affirmed by s. 35, the Aboriginal legislation must prevail. Concluding otherwise would render s. 35 meaningless. Thus, in principle, Aboriginal legislation prevails over incompatible federal or provincial legislation, unless the government concerned can establish that the infringement is justified.[174]

Under current title doctrine, the Province can proceed with its infringing action, subject to judicial review if the Tsilhqot'in bring the matter to court. Current doctrine does not determine precisely how this burden might shift if Indigenous jurisdiction were explicitly recognized as a component of Aboriginal title. We think, however, that the explicit recognition of Indigenous jurisdiction would at least suggest the need to reconsider who should bear the burden of bringing matters of potential infringement to court. In the scenario considered here, if the Province wished to act or regulate contrary to Tsilhqot'in forestry laws, should the presumption not be that such laws are valid over Tsilhqot'in Aboriginal title lands, with the burden on the Province to take the matter to court if it wishes to act contrary to Tsilhqot'in laws?

In other words, in this scenario, (1) obtaining the consent of Aboriginal title-holders means accepting that relevant matters are governed by the laws of the title-holding nation, and (2) for the Crown to proceed without Indigenous consent, i.e. for the Crown to act contrary to governing Indigenous laws, the Crown should first have to establish the justifiability of this proposed infringement. This scenario also suggests the need for dispute resolution processes that can interpret Indigenous laws and their interaction with provincial and federal laws. The burden for this work cannot fall entirely to Canadian courts in the first instance; coordination of jurisdictions will require co-management and co-adjudicatory processes and bodies.[175] While joint

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[174] *Quebec Reference*, *supra* note 6 at para 497.

[175] For an elaboration of this point in the context of implementing UNDRIP into Canadian law, see Ryan Beaton, "Articles 27 and 46(2): *UNDRIP* signposts pointing beyond the justifiable-infringement morass of

Indigenous-state processes and institutional forms develop, Canadian courts are not without doctrinal tools for assessing jurisdictional coordination and conflict between Indigenous laws and federal and provincial laws. Principles drawn from conflicts-of-laws doctrine, federalism jurisprudence, and a commitment to providing deference to Indigenous law-makers in the exercise of their own jurisdiction provide tools for courts to develop doctrine recognizing Indigenous jurisdiction within a renewed framework of Canadian federalism. Thoughtful elaboration of these principles may be especially important for dealing with issues such as conservation and environmental protection, which will likely require greater coordination and integration of Indigenous and provincial and federal laws, as compared with matters of resource extraction that may be, in many cases, more thoroughly governed under local Indigenous laws.[176]

4. Jurisdictional Title and the Constitution

The trajectory of Aboriginal title, as developed since *Calder*, seemed destined to arrive at a jurisdictional conception, or at least as including a clear jurisdictional component. Section 1 of this paper noted how that trajectory stalled in *Tsilhqot'in*, leaving Aboriginal title hovering somewhat uncertainly between a set of property rights (limiting federal and provincial law-making powers by analogy with *Charter* rights) and inherent law-making authority. Section 2 highlighted ways in which this ambiguity troubles Canadian Aboriginal law more broadly, with courts recognizing the existence of Indigenous law and the importance of the Indigenous perspective, yet unsure of how to incorporate Indigenous law and perspective within Canadian Aboriginal law. Section 3 returned to Aboriginal title as a particularly compelling doctrinal site for the explicit recognition of Indigenous jurisdiction. We reviewed how certain specific elements of Aboriginal title doctrine might evolve if the courts were to take this step of explicitly recognizing Indigenous jurisdiction as a component of title.

Taking this step does not require domestic courts to call into question state sovereignty itself. It is clear, of course, that courts can (and do) review legislative and executive *exercises* of sovereignty. Such judicial oversight is at the heart of public law and of the rule of law. The courts also have a role in defining the *attributes* of Crown sovereign authority. In *Mitchell v MNR*, Justice Binnie noted that the Crown is the "inheritor of the historical attributes of sovereignty."[177] The courts may be called on to determine specific contours of these historical attributes. Further, section 35

section 35", in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019).

[176] This is evident, for example, in the example the Supreme Court relied on in *Tsilhqot'in*—pine beetle infestations—which would present a policy problem that crossed jurisdictional lines and required co-ordination. The most prominent recent example may be climate change, as discussed by the SCC in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

[177] *Mitchell*, *supra* note 123 at para 129.

requires these inherited attributes be assessed to ensure that the sovereignty of the Crown can be reconciled with pre-existing Indigenous interests.[178]

The justification for the review of attributes and exercises of sovereignty is analogous to the review of prerogative power: unfettered discretionary authority undermines the legitimacy of a legal and political order. As Mark Walters writes, "[a]s a construct of ordinary legal discourse, sovereignty is, like all ordinary legal constructs, something that must be constantly interpreted and reinterpreted over time to ensure that it contributes to the general understanding of law as an enterprise that integrates legality and legitimacy."[179] The attributes of Crown sovereignty in Canada are inevitably intertwined with those of Indigenous sovereignty, through treaty relationships, of course, but more broadly through their very co-existence within Canadian territory. The broad question of whether Indigenous legal orders, law-making capacity, and jurisdiction survived the Crown's acquisition of sovereignty is settled.[180] Yet the forms taken by Indigenous law and jurisdiction today must not, in the Court's view, be "incompatible with the historical attributes of Canadian sovereignty."[181] The early American case law and Justice Binnie's discussion of sovereign incompatibility in *Mitchell v MNR* both illustrate that there is no fatal inconsistency between Crown and Indigenous sovereignties.[182] Both can, and indeed do, exist within a single federated constitutional order. While Indigenous legal and political regimes may have been modified by the Crown's assertion of sovereign authority, they survived.[183] Indigenous sovereignty may be limited, diminished to an extent, by Crown sovereignty. But Indigenous sovereignty also places boundaries on Crown sovereignty. A consideration of the legal history of Crown sovereignty illustrates that it has always been shaped in relation to Indigenous sovereignty.[184]

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[178] *Ibid.*

[179] Mark D. Walters, "Law, Sovereignty, and Aboriginal Rights" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) at 40.

[180] See the discussion above, especially the text accompanying notes 33–36 and 42–47.

[181] *Mitchell, supra* note 123 at para 163.

[182] *Ibid* at paras 9, 62. The approaches mapped out in the Marshall Trilogy and by Justice Binnie in *Mitchell* are distinct as to the extent Chief Justice Marshall recognizes Indigenous laws, he says that the US courts do not recognize or apply them and so parties would have to find Indigenous tribunals or processes if they want Indigenous laws applied. Whereas the concept of "merged" or "shared" sovereignty that Justice Binnie takes up from the Two-Row Wampum (or *Guswenta*) and the final *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (Restructuring the Relationship (1996)) contemplates a more integrated "single vessel", which he helpfully refers to at para 130 as "partnership without assimilation." These differences aside, as Justice Binnie notes at para. 169 the U.S. law demonstrates that "[t]he United States has lived with internal tribal self-government within the framework of external relations determined wholly by the United States government without doctrinal difficulties since *M'Intosh* was decided almost 170 years ago." For a critical analysis of the concept of merged sovereignty in *Mitchell*, see Gordon Christie, "The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum" (2002) 16 SCLR 285.

[183] *Mitchell, supra* note 123; *Campbell, supra* note 40 at paras 83–86.

[184] See Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (New York: Cambridge University Press, 2005) (argues that legal conceptions of sovereignty were developed *through*

Rather than the absolute idea of sovereignty sometimes asserted by the Crown, historical practices of Crown-Indigenous treaty making and customary intersocietal law suggest a more limited conception of sovereignty and political authority that was worked out over time in collaboration with Indigenous peoples.

The scope of both Crown and Indigenous sovereignty is determined by their historical and ongoing entanglements. Furthermore, Crown *assertions* of absolute sovereignty are just that: assertions. The legality of those assertions is always subject to review.[185] The prior existence of Indigenous legal and political orders is incorporated into the Constitution as a limit on Crown sovereignty. An explicitly jurisdictional approach to Aboriginal title promotes the reconciliation of Crown sovereignty and these pre-existing orders. It recognizes a conception of Crown sovereignty that can accommodate and recognize, in Val Napoleon's words, "the continuation of Indigenous public-law institutions and legal orders."[186] In this way, the effect of doctrines of discovery and *terra nullius* in Canadian law can be minimized. Under the property-rights conception of Aboriginal title partially reaffirmed in *Tsilhqot'in*, Crown sovereignty encompasses both a fiduciary duty owed to the Aboriginal title holders and the authority to infringe Aboriginal title in the broader public interest. By contrast, on a jurisdictional conception of Aboriginal title, while Crown sovereignty may still encompass the fiduciary duty and infringing power, the doctrinal focus is shifted towards a constitutional obligation to co-ordinate jurisdictional issues arising from the co-existence of Indigenous and state law. If the Court were to move to embracing this jurisdictional conception of Aboriginal title, they would come far closer to being able to provide a reasonable response to Indigenous claimants who, to adopt Dyzenhaus' framing, ask, "how is this law for me?" An explicitly jurisdictional conception of Aboriginal title, and of section 35 rights more generally, may help heal some of the current confusion and pathologies in Canadian Aboriginal law.

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the colonial encounter while simultaneously shaping it). See also Lindsay G Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2007).

[185] See e.g. *Restoule*, *supra* note 33 at paras 3–4, where Hennessy J. found that the Crown has a "mandatory and reviewable obligation" to increase treaty annuity payments in order to fulfill its commitments under the Robinson treaties. Further, the Crown's discretionary authority "must be exercised honourably and with a view to fulfilling the Treaties' promise. The discretion is not unfettered and is subject to review". While dealing with treaty implementation, the principle applies to all s.35 rights: the Crown's discretionary authority is limited by its constitutional obligations and is subject to review and curtailment by the courts.

[186] Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873 at 877.