Paths to reconciliation in the post-Tsilhqot’in world

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Everyone here knows the salient features of Tsilhqot’in.1 The culmination, for the moment, of a long series of decisions stretching back to Calder2 in 1973, it put a stake through the heart of a century and a half of intransigent and racist behaviour by the province of BC, demonstrating that the Royal Proclamation of 1763 is still alive. The exhaustion of imperial Britain at the end of the Seven Years War, its realization that it was not the military superior of the American peoples whose lands it had acquired, led to a piece of realpolitik that has been mistakenly understood ever since as enlightened and liberal. It was not. It was the calculated chess move of an imperial power that recognized it had no alternative but to rule with, and through, its nominal subjects. But what was in the minds of the framers of the Proclamation doesn’t matter to anyone but a Nino Scalia, and the Proclamation has survived him.

Formally, the Proclamation is an essential piece of Canada’s common law conception of aboriginal title, for it is the Crown’s early recognition that these vast territories belonged to the “Indian Nations” who had long occupied them.3 It applies not just to the province but to the Crown Colonies and Hudson’s Bay mandate territories that preceded Confederation. Its residue in BC, until 1982, was the scatter of Douglas Treaties not stolen back by Joseph Trutch and his greedy minions, the small valley reserves set up during the railroad-building time (less the cut-off lands that had to be reclaimed for the convenience of the CPR), and the extension of Treaty 8 into the northeast corner of the province. For more than a century, the provincial Crown resisted all claims by ‘Indian bands,’ asserted Crown title to all the territory, granted fee simple title to white settlers, sold off timber rights, granted mineral titles, and flooded valleys central to the traditional territories of the indigenous peoples. BC fought s. 35; its chief negotiator of the day even wrote a bitter book about it.4

The tides began to change with the 1973 split decision in Calder, which accepted aboriginal title as a contemporary common law concept. Big changes followed the patriation of the constitution and the protection offered by s.35 of the Constitution Act, 1982.5 In Delgamuukw6 the Supreme Court recognized aboriginal title in the lands of the Gitxsan but declined to go beyond theory and actually delimit them. They recommended negotiation, a process I will return to.

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3 The doctrine of discovery was not applied in Canada except in New France; terra nullius never.
4 Melvin H. Smith, Our Home or Native Land? Victoria, 1995
5 Note that s.35 is not part of the Charter itself, which therefore does not have a direct effect on aboriginal and treaty rights.
In the consolidation of lower court cases that preceded *Tsilhqot’in*, a remarkable judge saw a practical case of the theory that the Court had previously developed. In 364 sitting days and in the judgment that followed, Mr. Justice David H. Vickers accepted the contemporary existence of the “Indian nation” that had originally and continuously occupied the lands in question, in ways that met the common law requirements for establishing communal ownership. The original complaint had been about BC granting cutting rights in the vaguely defined territory of the Xeni Gwet’in. Vickers J. found that aboriginal title existed, but that its holders were not the *Indian Act* band but rather the Tsilhqot’in people, an aggregation of six communities sharing land, culture, language and history—and notably in the Chilcotin War of 1864, a history of defending its territory against hostile invaders, a war answered by settler treachery and murder. He granted aboriginal title to more than 1700 square kilometres to an entity that in most respects did not yet exist.

Of course the province appealed, and of course its Court of Appeal scaled back the decision to specific sites and scraps. The threat that a broader territorial definition of aboriginal title exists to all the unceded lands of BC was unendurable. Two years ago this June a unanimous Supreme Court, in a relatively short and plainly drafted decision, reaffirmed the remarkable work of Justice Vickers. And here we are.

II

The Court said that aboriginal title flowed from the sufficient, exclusive, and continuous occupation of land since pre-contact times. The only remaining element of the Crown’s radical title is “what is left when Aboriginal title is subtracted from it” [at para. 70]: no beneficial interest, only the Crown’s fiduciary duty, and the right to encroach if some broader public interest justifies it. The holders of aboriginal title have otherwise complete discretion about the use and benefits of this land: fee simple plus. But it is a collective title which can only be surrendered to the Crown, and cannot be “developed or misused in a way that would substantially deprive future generations of the benefit of the land” [at para. 74]. “Governments and others seeking to use the land must obtain the consent of the Aboriginal title holders.” If consent is withheld, the government’s only recourse is to justify its actions pursuant to the Sparrow test. After an exhaustive process of consultation, accommodation and compensation in pursuit of a valid public purpose—one that leads toward reconciliation, and which is to be accomplished through the least infringing technology possible—then and only then can title be infringed. Even the suspicion of aboriginal title invokes these duties. Premier Clark is lucky that Site C is on treaty, not aboriginal title, land. Importantly, proceeding willy-nilly allows injunctions, damages, orders for consultation, project cancelation, and the ousting of legislation.

The Court shines an intense but narrow beam of light into the shadows of its own creation. That’s what happens with case law, rather than the broad debate that normally precedes statute law.

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8 BC must still meet the *Sparrow* test when infringing treaty rights, an issue now before the courts. The previous federal government decided that the test had been met, apparently, as it approved the project under the *Canadian Environmental Assessment Act, 2012*. The present government’s refusal to date to reconsider this decision is highly contentious among the First Nations of BC.
Thus much is left open—an invitation, if ever there were, for Parliament to cease averting its eyes and getting on with its duty. Among the open questions:

- Control of land necessarily implies a governance regime: not necessarily full-bore self-government, but at least we would seem to have a nascent constitutionally-protected third order of government. This kernel of an idea cries out for statutory expansion, if only to give clear authority and direction to public servants, and to lay the groundwork for a 21st-century system of intergovernmental relations with First Nations.
- There are strong implications for the rest of Canada, too. Aboriginal title is alive and well all over the Maritime Provinces, and possibly in old New France as well.
- Subsurface rights go with aboriginal title, apparently. Immobile groundwater would surely be included, though no court has said so. What about lakes? Flowing water?
- Is reserve land aboriginal title land? The argument could be made that it is the residue of a much larger territory that was ceded at the time of treaty. In BC and the Maritimes, in the absence of treaties ceding land, the argument is particularly compelling.
- Do treaty lands have some characteristics of aboriginal title lands (has the bar been raised for treaty infringement)? There is nothing in s.35 to suggest that treaty rights are lesser rights and not protected equally from infringement.
- What shall we do about potential conflicts between self-government rights on aboriginal territory lands and the Charter? Leave it to the courts on a case-by-case, piecemeal basis?
- What shall we do about third-party interests granted in innocence on aboriginal title land, or on land which may become aboriginal land?

However, one does not have to enter the realm of legal speculation to recognize that things are going to have to change. There has been a huge tilting of the negotiating table in favour of (some) First Nations—for resource project revenues and jobs, for treaty negotiations, for undisturbed peace and quiet despite the wishes of trophy hunters and of forestry and mining companies. There will be a shift of resource rents away from provinces, though this may be no big deal; even in BC, direct resource revenues are less than eight percent of the budget. More ominously, there will be a slowdown in resource development in BC and elsewhere until decisions get taken on who the proper title holder is in each case; overlaps are resolved; firms, governments and financial institutions come to grips with radically reshaped land tenure; and the governance of aboriginal title land is resolved. Serious disinvestment is already happening. The CEO of a large forest company in BC told me last year that he has been moving every investment dollar he can out of Canada. It is already clear that new pipelines, railroads, roads, mines, forestry, farming, oil and gas exploitation, fishing, dams and power lines will not go ahead on timelines relevant to private sector investment, and may not go ahead at all. Moreover, the federal government, piling on, has committed to implement the UN Declaration on the Rights of Indigenous Peoples, a document rife with broad and aspirational language. What, for example, is “free, prior and informed consent”? Each oft-repeated UNDRIP word requires arduous definition.

There is a huge job for Parliament, hitherto ignored, in the defining details of a land use regime consistent with Supreme Court decisions, and possibly with UNDRIP. We don’t have time to leave it to the courts. We are where we are because the respectful dialogue between Parliament and the Court has not taken place, with the result that the law in this area is increasingly judge-driven. We need to
rebalance judicial and legislative roles in Canadian democracy in some areas if we are to maintain legitimacy. At the moment, we are distinctly not on the road to “peace, order, and good government.”

III

Since June 2014, the province, under great if self-inflicted pressure to develop an LNG industry and deal with pipeline proposals, and in the face of a twenty-year process to settle new treaties that had yielded little, has done four things of importance.

- One, it has decisively, if clumsily, moved away from the tripartite treaty process. It has declined to appoint a member the Treaty Commission and has wound down its level of effort on continuing negotiations.
- Second, the province has quietly been ceding to coastal First Nations some rights to near-shore water lots. Cottagers who have tied their boats up to home-built docks for generations are now being told that their hitherto routine lease renewals will be subject to expensive archaeological assessment, to be paid for by the lessee, and approval by a local band council.
- Third, it has been actively and with open chequebook trying to strike deals with First Nations whose lands straddle key pipeline routes or terminal locations. These deals have a commercial flavour and try to avoid statements of principle regarding land or self-government rights.
- And fourth, in the specific case of the Tsilhqot’in people, BC recently signed a framework agreement that contemplates the extension of Tsilhqot’in title to a much greater share of the traditional territory than Judge Vickers granted, and that offers some exemplary resource management rights to the Tsilhqot’in National Government. The lead issue turns out to be the right to shoot bears for sport, something natives rarely did, which is to be cut back. Guiding companies object both to the result and to the fact that they were not at the table to bargain for their long-exercised trophy hunting rights.

These are baby steps, not fully defined, and not apparently part of some multi-faceted strategy. But they contain implications. The business of secretly giving to coastal bands a veto over the continued enjoyment of the simple pleasures of boating that have been enjoyed by non-native residents for many years can hardly be said to be a step on the path to reconciliation. It’s seen as an example of native people holding rights to be consulted about public policy decisions that are not accorded to the rest of society. When the archaeological survey must be undertaken by a consultant who is approved by the band, or is a member of the band, suspicions of toll-gating arise. When shells of long-consumed oysters are found and a deeper archaeological assessment is suddenly required, at a cost of thousands to the cottager and performed by the same approved consultant, real anger can be sparked. To date there has been no explanation by the province regarding its motives in this matter, or what benefits are to be achieved.

More consequential is the drawing back from treaty negotiations, with their complex three-party structure and agenda of contentious issues like extinguishment (or not), aboriginal title (or not), and whether self-government stems from aboriginal title and therefore may not be subject to some of the limitations of later constitutional documents. These issues are hard for negotiators to deal with,

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9 Nenqay Deni Accord between British Columbia and the Tsilhqot’in Nation, 11 February 2016
especially when everyone knows their principals would rather rag the puck than reach conclusions satisfactory to the newly empowered First Nations, but will not say so out loud.

IV

But negotiations are indispensable. The courts have always said so, restraining the impulse to hand down final solutions in hopes that the parties can do better. This was the strong lesson of Delgamuukw, for instance. That’s why the bad faith of the senior governments through the treaty process is so sad. They took a promising beginning and trashed it, in the process loading huge (but never repayable, in the absence of a conclusion satisfactory to the feds) costs on their First Nation negotiating partners. Strong words: what’s the evidence?

For the federal government, all the lessons of the successful Arctic negotiations were forgotten. For example, you should empower genuinely senior negotiators with broad mandates that allow for careful listening and for crafting solutions that do not have to slipstream favoured examples elsewhere. Negotiation means give and take, and it requires empathy and respect among the parties. I have been at negotiating tables in BC, and I have to say that junior officials on short leashes cannot take us to agreement and reconciliation. The Ottawa strings, in the last decade particularly, have become far too short. Positions have to be agreed through lengthy interdepartmental consultations back in Ottawa. The real string-pullers in the central agencies are never seen. It’s clear to the other parties that the people across the table are puppets, which says a lot about the respect for the other parties that Ottawa has. We have never seen, in a quarter century, federal representatives with the experience, gravity, ability to listen, and imagination of people like Tom Molloy, Mike Whittington, Barry Dewar or Rick Van Loon.

The feds have also been willing to negotiate with any band that steps forward. This leads to the wholly ridiculous idea that the Yale Band, a community of 160, half of whom live on the reserve, are a suitable entity to exercise the quasi-national powers available under the standard treaty model. One thing Vickers got right was the idea that a native nation is an entity sharing history, culture, language and land—not some random creation of a discredited Indian Act. Many observers see the recognition of Yale, a small part of the Sto:lo Nation, as simply payback for the occasionally Bolshie approach of the Sto:lo to fishing rights on the Lower Fraser. Divide and conquer! This much-touted evidence of the success of the treaty process has cost immense amounts of effort on the part of governments, a huge debt to Yale, the passage of legislation in Ottawa and Victoria—and it has now been rejected by the Band. Among the reasons for rejection are the desire of the Band to live in harmony with their neighbours, and to have their aboriginal title recognized rather than extinguished.

The province has been dragged kicking and screaming all the way. BC does not want to recognize aboriginal title, or relinquish its grasp on First Nations’ traditional territories or resources, or watch the slow seeping away of their resource revenues into the hands of an upstart new level of government. BC’s endless information demands, their negotiators’ inability to secure negotiating mandates that at least abut the wishes of the First Nations, their general sloth in doing business, fully match the feds. And they can be downright racist, as well. It may be unconscious on their part, but every dart is felt, and leaves wounds. Don’t believe me? The Gitxsan once put forward the idea of turning their reserves into municipalities under BC law. BC saw this as meaning that perhaps 7,000 new citizens
would be eligible for BC’s social programs—an intolerable expense. Yet this same government boasts to all the world how welcoming they are to 40,000 to 50,000 immigrants a year. The Victoria bureaucrats who may have thought they were just protecting the public purse did not understand how embarrassed they were making their colleagues in the field, nor the consequences for the reputation of their political masters.

The largest meaning of *Tsilhqot’in* may be that the Court has sharply tilted the playing field in the direction of the First Nations. Discussion must now begin on the basis of this newly articulated element of constitutional law. There is no point otherwise. The holders of s.35 rights will accept no less, as even tiny Yale demonstrates. This requires a policy shift on the part of both governments that goes beyond rhetoric. I have other suggestions for governments, but while I am on the matter of title and appropriate negotiating partners, let me not forget to mention some tasks that the First Nations must undertake.

V

First among them is the formation of “national” organizations in the spirit of the definition of Vickers J. and not the “band” definitions of the *Indian Act*. The federal government might assist in this through a national discussion, perhaps based on some sort of green paper, or better, through an expression of the will of Parliament. We would be expressing willingness to entertain negotiation of the boundaries of lands where aboriginal title would be recognized, of more appropriate intergovernmental relations, of the requisites for effective self-government and many other matters with suitable partners. I suggest that in addition to the Vickers criteria, we should also insist on negotiating partners representing polities of sufficient scale to be able to exercise the jurisdictions involved with something approaching the efficacy we generally expect of governments in the 21st century.

The First Nations likewise need to resolve overlap issues so that a unified face can be presented to the federal and provincial governments. Governments in the past have taken unilateral assertions as proof, to their cost. It’s an issue that the First Nations must deal with, not us—though the Court has been helpful, noting that shared title may be consistent with history and the tests they have laid out. Perhaps a regional or national First Nations entity might commission independent, trusted, multi-party research on strength of claims to specific territories.

They will also need to design concrete and specific governance structures, consistent with both aboriginal history, the Charter, and s.35 rights, to the degree possible. Many traditional governance structures, though, are not based on gender equality or even voting but instead assign roles based on gender, age, wisdom and other things the larger society has eschewed. This should provide a good deal of amusement. It is not far-fetched to imagine some future Court deciding that there is a contradiction between sections 35(1) and 35(4), and that to the degree of the contradiction, 35(1) wins. Or that aboriginal government on aboriginal title land is simply not subject to the Charter, absent agreement that it should be—and that slave raids may be resumed. Making aboriginal rights subject to the fashion of gender equality strikes at the heart of the Court’s definition of those rights as pre-existing the
assertion of British sovereignty. Maybe FITFIR applies to more than water rights. Jokes aside, inventing governance structures stemming from aboriginal title appropriate to a new, constitutionally protected level of government—an exercise which logically follows the recognition of just who the First Nations are—may take some time.

Structural and constitutional issues are one thing: organizing sufficient internal cohesion in these new/old polities so that positions can be advanced, decisions taken, and reasonably enduring conclusions reached will not be simple, as the Gitxsan experience demonstrates.

Governments will have to change their policies and practices too. For British Columbia, a change in policy is needed to actively seek agreement on the definition of territories where aboriginal title may be agreed to exist. As noted, there is already what amounts to a pilot project in Tshilhqot’in territory. This would be a huge shift in B.C.’s traditional position, and would have to be accompanied by some rules of the game consistent with Tshilhqot’in. BC will also need to amend provincial policy on the negotiation of treaties to include the possibility of continuing aboriginal title, as the court urged in the Delgamuukw case. Currently, neither government will even discuss the issue.

Those things can be done unilaterally. Others require the formulation of a provincial policy followed by negotiation with the federal and aboriginal governments. For example, BC will surely want to negotiate assurances from the federal and tribal governments that relinquishing Crown title will not lead to an imbalance between provincial obligations and provincial resources. More importantly, BC will need to negotiate a policy on fee simple enclaves within aboriginal title lands. Doing these things will require building a serious policy capacity in the provincial government, with appropriate avenues for public consultation and input. There are nascent actions regarding consultation with First Nations, but the rest of the community has been left out.

Canada needs explicitly to change treaty or comprehensive claims policy to do away with the objective of the extinguishment of s.35 rights, which includes moving away from euphemisms that have the same meaning. Federal practices in negotiations have to change a lot. We need to allow treaty negotiators to hear and understand the pleas of First Nations regarding land ownership; join the province in negotiating without preconditions about aboriginal rights; appoint representatives with the seniority and wisdom to depart from the precedents established since 1990 if this is necessary to accommodate the specific nature of the First Nations’ cultures at issue. We simply must get away from the practice of sending scared junior officials into the field with insanely detailed take-it-or-leave-it language and a sense that they are there to protect obsolete federal policy positions.

Back in Ottawa, we should stop insisting that all departments operate with Indian Act bands as the sole claimants to the title of First Nations. Departments, starting with Indigenous Affairs, should actively encourage the possibility that aggregations of communities might define themselves along the lines of Vickers’ analysis. Last year’s decision to withdraw funding from tribal councils was a more

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10 “First in time, first in right,” the ancient doctrine of early white settlers, did not, however, apply to the resident indigenes.

11 It may be, in rare circumstances, that the Band is all that remains of an historic First Nation or tribe, but one of the first steps should be the establishment of the identity of the title holders and their authorized representatives.
backward step than most people realize. The Department of Finance is rightly said to favour scale in our negotiating partners, but then it cut off the funds. It seems that the honour of the Crown is missing in action.

VI

And there is a large and demanding legislative agenda, going well beyond the issues highlighted in the Liberal platform. Quite apart from Tsilhqot’in issues, the federal government should continue to elaborate alternatives to the Indian Act, but without the degree of continuing Ottawa control that has characterized some recent attempts, notably on education. More fundamentally, the federal government should consider legislating the terms under which holders of s.35 rights will gain priority for negotiation. These terms might include a description consistent with Tsilhqot’in—in other words, very different from current practice—as well as some practical conditions of scale, governance, and institutional stability. I suggest that these and other ideas could be the proper subject for political rather than bureaucratic leadership. What about a special joint committee of the House and Senate, appropriately staffed, with a travel budget and no cast-iron deadlines, to engage directly with First Nations, and maybe the Métis and Inuit peoples, with a view to drafting legislation that would further reconciliation and command broad support? These profoundly political questions ought to be dealt with by Parliamentarians rather than unelected officials, and might incidentally give depth to the nation-to-nation idea.

These are things that in my view need to be undertaken with a sense of urgency, if the resource-based sectors of the Canadian economy are to continue their substantial contribution to the nation. Even so, we must accustom ourselves to a lengthy slow-down in the pace of resource-based economic development. Beyond this, of course, are some enduring dilemmas: the proper balance between collective and individual rights, the idea of a constitutionally-protected regime of de facto separate but unequal rights, even the creation of a shared vision of what a wonderful future might look like—noting that nothing is ever static, and that a social imaginary has to include a design for resilience and change. There is even the grand dream of Brian Slattery, now being seriously pursued by my friends at the University of Victoria Law School, of integrating indigenous law with the civil and common law bases of Canadian law.

We are halfway into a thousand-year collision between Europeans, mostly, and the indigenous peoples of Canada: in other words, probably at the point of maximum confusion. Old colonial certainties have collapsed and a hundred old and new ideas are contending. I hope, as you grapple with the ambitious agenda of the new government, that you can arrange matters so that the urgent does not drive out the important.