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CBA Real Property Essay Contest

The Conflict between Aboriginal Title and Private Property in the Secwepemc Territory.

Abstract: This paper examines the conflict between Aboriginal title and fee simple private property owners with a focus on the Secwepemc Nation of British Columbia. To provide a legal framework for the conflict, the nature of Aboriginal title and the test for infringement will be briefly outlined. Two historical conflicts between Secwepemc Nation bands and fee simple private property owners will be examined to give insight into the current conflict. Lastly, theoretical solutions for reconciling the conflict between Aboriginal title and private property will be proposed and examined.

> *"Sooner or later, the question of whether those who hold certificates of indefeasible title, whether to ranch lands on Kamloops Lake or to a small lot with a house on it on Railway Avenue in the Village of Ashcroft or an office tower on Georgia Street in the City of Vancouver, are subject to claims of aboriginal right must be decided… Twenty years ago, this cloud, then no bigger than a child's hand, was on the far horizon. If the appellants and the intervenor, especially the latter, are correct in their interpretation of Delgamuukw, that cloud has grown to lower over the whole of the Province"* [1]

1. Introduction.

In 2014, for the first time in Canadian history, the Supreme Court of Canada declared that an Indigenous Nation holds Aboriginal title to more than 1700 km^2 of Crown land.[2] The court in *Tsilhqot'in* also decided that the grant of forestry licences to harvest timber on such title lands was a serious and unjustified infringement of the Tsilhqot'in Nation's title rights.[3] As seminal as the decision was, areas of private property were strategically removed by the Tsilhqot'in Nation from their action to better their claim's success.[4] This left questions regarding the conflict of Aboriginal title and private property rights in British Columbia to be settled another day.

Less than a year after the *Tsilhqot'in* decision, in response to the proposed KGHM Ajax gold and copper mine south of Kamloops, the Secwepemc Nation filed a notice of civil claim seeking a declaration of Aboriginal rights and title over its traditional territory, and an injunction against the proposed Ajax mine.[5] While the claim was precipitated by the controversial mine proposal, the territory claimed went beyond the fee simple titles held by KGHM, covering vast amounts of

[1] *Skeetchestn Indian Band v British Columbia (Register, Kamloops Land Title District),* 2000 BCCA 525 at para 6, [2000] 10 WWR 222.
[2] *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*].
[3] *Ibid* at paras 95-97.
[4] *Ibid* at para 9.
[5] *Secwepemc Nation v British Columbia (AG), KGHM AJAX Mining Inc., and Canada (AG),* (21 September 2015), Kamloops Registry, BCSC 051952 (Notice of Civil Claim).

private property, including the entire City of Kamloops and other small municipalities.[6] The B.C. government responded by saying it would, "vigorously oppose a declaration that has the potential to create uncertainty over the land base and for private property owners across this territory."[7]

The conflict between fee simple title and Aboriginal title has come to a head in the Secwepemc territory. Although this fight is not entirely new to the Secwepemc Nation, this claim is unique in that it attempts to claim rights over private property on an unprecedented scale. Former Tk'emlúps Chief Manny Jules once said: "Kamloops has always been what I call the bleeding edge. Meaning that we're always among the first communities in this country to be able to deal with the challenging issues. Issues that are not easily dealt with but that we rise to the challenge as a community, and that means that there will be debate."[8] Only time will tell if the Secwepemc Nation's claim is the bleeding edge that clears the cloud over fee simple title, but the Secwepemc Nation has certainly brought the challenging issue front and center both past and present.

This paper examines the conflict between Aboriginal title and private property interests focusing on the bands of the Secwepemc Nation. To provide a legal framework for the conflict, the nature of Aboriginal title and the test for infringement will be briefly outlined. Two historical conflicts between Secwepemc Nation bands and private property owners will be examined to give insight into the current conflict. Lastly, theoretical solutions for reconciling the conflict between Aboriginal title and private property will be proposed.

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[6] *Ibid.*

[7] "Provincial government opposes Aboriginal title claim on KGHM Ajax-owned land", *Kamloops This Week* (15 January 2016), online: <www.kamloopsthisweek.com/provincial-government-opposes-Aboriginal-title-claim-on-kghm-ajax-owned-land/>.

[8] Meeting Minutes of Kamloops Indian Band (25 February 2004) at 68, online: <http://tkemlups.ca/wp/wp-content/uploads/2015/07/TteS-Resolutions-on-FNGST-1990-20041.pdf>.

2. Aboriginal Title and Infringement

Aboriginal title is said to have crystalized as a burden upon the underlying Crown title at the assertion of sovereignty.[9] The Crown retains no beneficial interest in Aboriginal title land.[10] What remains of the Crown's underlying title is a fiduciary duty owed when dealing with Aboriginal lands, and the right to infringe on Aboriginal title if the government can justify it in the broader public interest under s.35 of the *Constitution*[11].[12] *Tsilhqot'in* makes the distinction that Aboriginal title is a *sui generis* property right flowing from the special relationship between the Crown and Aboriginal People.[13] Analogies can be drawn to property law concepts such as fee simple title to help us understand Aboriginal title, but it is important to be careful not to allow those concepts to dictate exactly what it is or is not.[14]

The rights bestowed by Aboriginal title are 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 benefits of the land; and the right to pro-actively use and manage the land."[15] However, Aboriginal title is subject to the inherent limit that it is a collective title held not only for the present generation but the future as well.[16] This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it; however, Aboriginal title holders can

[9] *Supra* note 2 at para 69.
[10] *Ibid* at para 70.
[11] Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11 [*Constitution].*
[12] *Supra* note 2 at para 71.
[13] *Ibid* at para 72.
[14] *Ibid.*
[15] *Ibid* at para 73
[16] *Ibid* at para 74.

use their lands in modern ways if they choose.[17] The inherent limit is really what sets Aboriginal title apart from fee simple title in the practical everyday world.

Government and others seeking to use Aboriginal title land must obtain consent of the Aboriginal title holders.[18] However, if the Aboriginal title holders do not consent, the government can infringe the Aboriginal title if the infringement is justified under s.35 of the *Constitution*.[19] In order to justify the infringement, the Crown must establish: "(1) that it has discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective, and (3) that the action is consistent with the Crown's fiduciary obligation to the group."[20] Compelling and substantial objectives must further the goal of reconciliation and have regard to both the Aboriginal interest and the broader public objective.[21] The examples of compelling and substantial objectives are quite broad and can include: agriculture, forestry, mining, and the general economic development of British Columbia.[22] Once a compelling and substantial objective is met, the infringement must be consistent with the Crown's fiduciary obligation to the group.[23] *Tsilhqot'in* breaks this down further: (1) the infringement cannot be justified if it would substantially deprive future generations, and (2) there is an obligation of *R v Oakes*[24] like proportionality: the infringement is necessary to achieve the government's goal (a rational connection); the government goes no

[17] *Ibid* at para 75.
[18] *Ibid* at para 76.
[19] *Ibid.*
[20] *Ibid* at para 77.
[21] *Ibid* at para 82.
[22] *Ibid* at para 83.
[23] *Ibid* at para 77.
[24] *R v Oakes,* [1986] 1 SCR 103, CCC (3d) 321.

further than necessary to achieve it (minimal impairment); and the salutary benefits are not outweighed by the deleterious effects on the Aboriginal interest (proportionality of impact).[25]

3. A History of Conflict between the Secwepemc Nation and Private Property.

Conflict between Aboriginal title and private property owners is not as new to the bands of the Secwepemc Nation as the government's position suggests. The two key players in the KGHM Ajax claim are the Tk'emlúps te Secwepemc band (formerly the Kamloops Indian Band), and the Skeetchestn band. Both bands have fought claims of Aboriginal title over private property developments in the past. While these claims of Aboriginal title over private property were ultimately settled out of court, subsidiary legal battles concerning interlocutory injunctions and disputes with the Registrar of Land Titles did make into court and shed some insights towards the conflict in the case at hand.

<u>The Tk'emlúps Band's claim of Aboriginal title over Schiedam Flats</u>

The first claim was by the Kamloops Indian Band (as they were formally known at the time), and involved the granting of an interlocutory injunction against a private property owner.[26] In 1989, Kamloops developer Bill Bilton of Best West Realty purchased two fee simple lots, known as Schiedam Flats, from Harper Ranch Ltd., hoping to develop an 18-hole golf course and residential subdivision.[27] The land was originally granted by the Crown to a Mr. John Holland in 1872, and title was conveyed in fee simple to several owners until conveyed to Harper Ranch Ltd

[25] *Supra* note 2 at 87.
[26] *Jules v Harper Ranch Ltd,* [1989] BCWLD 1574, [1989] 3 CNLR 67 (BCSC), aff'd [1991] BCWLD 1223, 81 DLR (4th) 323 (BCCA) *[Schiedam Flats].*
[27] *Ibid* at paras 6-8.

in 1955.[28] The Kamloops Indian band claimed the original reserve land promised to them by Governor Douglas in 1862 should have included Schiedam Flats and Harper Ranch, and were opposed to the development.[29] In January of 1989, based on a claim to Aboriginal title, the Band filed a writ against Best West Realty and the Harper Ranch, claiming primarily a declaration that the band is entitled to the exclusive use and occupation of the Scheidam Flats land.[30] In March of that year, Best West Realty moved heavy equipment onto Schiedam Flats.[31] With RCMP present to keep the peace, Bilton attempted to operate a bulldozer, but band members stood in front of it, blocking its movement. Bilton presented Chief Manny Jules a copy of his certificate to title, and advised the Chief that the band members were trespassing on his land.[32] Chief Jules replied that it was Bilton who was trespassing on their land and asked him to leave.[33] Bilton and his crew eventually left. Three days later the band filed for an interlocutory injunction against Best West Realty restraining them from entering the land until the land title claim was settled at trial.[34] Best West Realty responded by filing for their own interlocutory injunction against the band.[35] In a rare and remarkable decision by Mr. Justice MacDonald, the Kamloops Indian Band was granted their interlocutory injunction against Bilton, and Bilton's motion was dismissed.[36] Bilton, a private property owner in fee simple, would remain unable to step foot on his own private property for the next 6 years. In 1991, Bilton, with the Provincial government added as a defendant, went to the Court of Appeal to get the injunction lifted.[37] Unfortunately for Bilton, the

[28] *Ibid* at para 4.
[29] *Ibid* at paras 13-59.
[30] *Ibid* at paras 1-2.
[31] *Ibid* at para 10.
[32] *Ibid.*
[33] *Ibid.*
[34] *Ibid* at *para 11.*
[35] *Ibid* at para 12.
[36] *Ibid at para 198.*
[37] *Jules v Harper Ranch Ltd,* [1991] BCWLD 1223, 81 DLR (4th) 323, (BCCA).

Court of Appeal dismissed his case and upheld the Band's injunction against him.[38] In 1994, after Bilton had already spent over $500,000 in legal fees fighting for the land he only paid $600,000 for, a deal was offered by the Provincial government to buy his land for $2.2 million and an option on other Crown land for development.[39] Although Bilton felt the deal was far less than the assessed value, the expense of fighting the band had become an unbearable burden.[40] Bilton's interest was finally purchased by the government in 1995, six years after the injunction was put on him, and the land was used to settle the claim of Aboriginal title over Schiedam Flats.[41] In 1999, the band paid $6.9 million of its own money for the remaining Harper Ranch and arranged to have it transferred into their reserve.[42] The band financed the purchase by creating its own innovative tax regime for tobacco and gas purchases made on the reserve.[43]

While the overall claim was ultimately settled out of court, the decision by MacDonald J. granting the interlocutory injunction was quite remarkable and relevant to issues at hand today. MacDonald J. carefully considered in detail the issues to be tried including the claim to Aboriginal title and extinguishment, and delays amounting to laches. In granting an interlocutory injunction, the court found a strong prima facie case that the right which is sought to be protected in fact exists.[44] The decision was rare and remarkable because interlocutory injunctions are rarely awarded in cases of unproven Aboriginal title due to the fact that the claims take a very

[38] *Ibid.*
[39] Brian Kieran, "Land claims dissolve NDP resolve" *The Province* (22 November 1994) A6.
[40] *Ibid.*
[41] "Reserve Land and First Nations Development Preliminary Project Results, Annex 7, Approved First Nation Interview Reports" (2010) at 244, online: < https://buffalopoint.files.wordpress.com/2012/04/annex-7.pdf>.
[42] Keith Matthew, "Kamloops Indian Band purchases historic Harper Ranch" *Raven's Eye* (14 November 1999), online: <http://www.ammsa.com/sites/default/files/html-pages/old-site/raven/NOV99.html>.
[43] *Supra* note 8 at 65-91.
[44] *Supra note 26 at para 69.*

long time and the courts find interlocutory injunctions cause unnecessary prejudice on the losing party and diminish incentives on the part of the successful party to compromise.[45]

In considering whether the Kamloops Indian Band had established that their Aboriginal title right was a fair question to be tried, the court concluded that "Scheidam Flats had been occupied and possessed by the band's ancestors for periods dating back in excess of 2,500 years and that the bands ancestors were an organized society and that they were in occupation of these lands at the time sovereignty was asserted by the British Crown." [emphasis added][46] It is interesting to note, that in the Government's response to the Secwepemc Nations claim against KGHM, and in particular to their claim to Aboriginal title, the Crown argues that the court must consider: "at the date of Sovereignty, Aboriginal people speaking the Secwepemc language lived in bands which were comprised of loosely knit networks of extended families and households and were not politically unified or organized." [emphasis added][47] This argument by the Crown is in direct contradiction to the finding of fact found by MacDonald J. in the *Schiedam Flats* case regarding the same band.

Even more interesting, is MacDonald J.'s statement that he "would conclude, therefore, from material filed as to the band's use and occupation of the land, and on the basis of the decision of the Supreme Court of Canda in Calder, supra, that the members of the Kamloops Indian Band derived from their historic occupation and possession of Schiedam Flats Aboriginal title thereto. Whether their Aboriginal title has been extinguished by general land legislation before British Columbia entered confederation is a question which still remains very much at issue and is yet to

[45] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 14, [2004] 3 SCR 511.
[46] *Supra* note 26 at 73.
[47] *Secwepemc Nation v British Columbia (AG), KGHM AJAX Mining Inc., and Canada (AG),* (15 January 2016), Kamloops Registry, BCSC 051952 (Response to Notice of Civil Claim).

be decided by Canada's highest court. Suffice to say that there is a fair question to be tried in this regard." [emphasis added][48]

MacDonald J. had concluded that the Kamloops Indian Band derived Aboriginal title to the privately owned Schiedam Flats 25 years before *Tsilhqot'in*, and that the question to be tried at trial was really whether or not that title had been extinguished by the general land legislation before confederation. Although the trial never proceeded, *Delgamuukw* later affirmed that any extinguishment of Aboriginal title requires clear and plain legislative intent, something general land legislation cannot do.[49] Therefore, in examining the *Schiedam Flats* case it is clear that the answer to the question to be tried is that the general land legislation would not extinguish title because it lacks the clear legislative intent to do so.

Is it possible then to look back at MacDonald J.'s statement, knowing what we know now, and find that he essentially made a finding of fact that the Kamloops Indian band had Aboriginal title to land held in private property? It can be argued that the nature of Aboriginal title was understood much differently pre *Delgamuukw* than it is now, and this is not an appropriate issue to be decided in a decision for an interlocutory injunction. However, MacDonald J. did a thorough study of the history and evidence and concluded, in a decision in upheld by the Court of Appeal, that the Kamloops Indian Band held Aboriginal title to fee simple land (though the question of extinguishment was uncertain). Furthermore, Macdonald J. ultimately found there was a need to protect the Aboriginal title holder's rights over the private property owners temporarily by interlocutory injunction. MacDonald J. was ahead of his time and going against

[48] *Supra note 26* at para 88.
[49] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 180, 153 DLR (4th) 193 [*Delgamuukw]*.

the grain of popular opinion on the supremacy of private property with his decision and findings of fact in the *Schiedam Flats* case back in 1989.

What distinguishes the *Schiedam Flats* case from the current KGHM Ajax claim, is that the private land in question was contiguous to the reserve and it was argued that the land was originally promised as reserve land. In *Schiedam Flats,* Macdonald J. undertook a thorough examination of the historical evidence in an attempt to determine whether or not the band's Aboriginal right to possession of the land was a fair question to be tried.[50] The historical evidence showed that Governor Douglas' original instructions for setting aside reserves was to leave the extent of land selection up to the "wishes in every particular" of the bands.[51] Then in 1865, under the new Commissioner of Lands, Joseph Trutch, there was an intention to reduce the size of the reserves because they would interfere with settlement.[52] The plan to reduce the reserves was to gain the agreement by the bands and Trutch even authorized gifts to the "Indians" up to $500.[53] The Kamloops Indian Reserve was eventually reduced, without the agreement by the bands, from 6 miles up the North Thompson River and 12 miles eastward up the South Thompson River from their confluence, to a mere 3 miles up each branch of the river.[54]

In 1874, Indian Commissioner Powell visited Kamloops and he reported, "one thousand Indians and 12 chiefs assembled in front of Chief Louis' long house and Chief Louis spoke on behalf of the band stating, 'we do not have enough land. I want more so that when I am dead my children

[50] *Supra* note 26 at paras 13-88.
[51] *Ibid* at para 15.
[52] *Ibid* at para 27.
[53] *Ibid* at para 36.
[54] *Ibid* at para 41.

may profit by it'."[55] The grievances and refusal to accept the reduction of their reserve lands were recorded to continue for years after. In 1877, Reserve Commissioner Sproat was dispatched to Kamloops due to trouble and dissatisfaction of the Indians. He reported that the reserve lands were insufficient and he stated, "the reserve is compact, but unfortunately 320 acres or there about are owned by Mr. Harper, a large land and cattle owner, in the middle of it."[56] They attempted to negotiate with Harper for his land but failed.[57] When the reserve was surveyed in 1878 it was slightly increased, but Schiedam flats was ultimately left out of the reserve boundaries.[58]

One of arguments put forth in the *Schiedam Flats* case, which is also argued by the Crown in the current *KGHM* claim, is that the bands are barred from taking action by the equitable doctrine of laches: the bands have knowingly acquiesced in the matters complained of and are therefore blocked from taking action. Laches is a common defence argued against claims of Aboriginal title. In *Chippewas of Sarnia Band v Canada (AG)*[59], laches were found fatal to the Chippewas' claim due to an unnecessary delay in asserting their claim. However, in the *Schiedam Flats* decision, MacDonald J. made the important conclusion that, "the Kamloops Indian Band have made their claims known to officials in government since 1874… it [is] clear that this court could not rule, particularly at this stage of the proceedings, that the Kamloops Indian Band have been sleeping on their rights."[60] While MacDonald J. only needed to decide whether the issue of laches was a fair question to be tried,[61] his conclusion is based on historical facts and supportive

[55] *Ibid* at para 46.
[56] *Ibid* at para 50-53.
[57] *Ibid* at para *54.*
[58] *Ibid*.
[59] *Chippewas of Sarnia Band v Canada (AG),* [2000] 51 OR (3d) 641 at para 310, 195 DLR (4th) 135 (ON CA).
[60] *Supra note 26* at para 140.
[61] *Ibid* at para 142.

of the fact that the Tk'emlúps Band has raised issues with their reserve boundaries since 1874 and have been taking action ever since that time. The Crown, in defence of the current Secwepemc Nation claim against KGHM Ajax, could try to distinguish the *Schiedam Flats* case as dispute about original reserve boundaries, and that the current mine site is nowhere near the original reserve boundaries and a mine has been in operation at the site with no opposition in the past. However, the overall argument by the Secwepemc Nation could be, more broadly speaking, that based on the findings of MacDonald J., the original intention of Douglas was to set aside reserves in accordance with their wishes and needs, and that has never been satisfied. Therefore, the past grievances extend to all traditionally used sites including the current site of the proposed KGHM mine. Ultimately the Secwepemc people have been fighting for more land than they were promised since 1874, and there is no reason that cannot include the boundaries of their current claim for Aboriginal title. If MacDonald J. found in 1989 that it was difficult to believe the Kamloops Indian Band had been sleeping on their rights for the past 115 years, it is hard to conclude any differently now.

MacDonald J.'s decision granting an interlocutory injunction is a very noteworthy and rare decision in which he thoroughly examined the issues at stake; however, the decision was just the preamble to a trial for Aboriginal title that never happened. The case is significant because it made a finding of fact that the band had Aboriginal title to land held in fee simple, and granted an interlocutory injunction to protect the rights of Aboriginal title over the rights of a fee simple land owner until the ultimate decision was to be made at trial. The fact that the trial never happened represents what will become a recurring theme by the government when dealing with Aboriginal title disputes over private property: settle the dispute out of court at all costs.

Skeetchestn Indian Band v The Land Title Registrar

Shortly after the government settled the *Schiedam Flats* case by buying out the developer and transferring the land to the band, another dispute was brewing with the Skeetchestn Band over the development of the private Six Mile Ranch overlooking Kamloops Lake. In 1995, developer Michael Grenier of Kamlands Holdings Ltd. purchased the Six Mile Ranch with plans to build golf course and real-estate development.[62] The band opposed the development by bringing an action against Kamlands seeking a declaration of Aboriginal title, and claimed that the authorization by the Government to remove the land to be developed from the Agricultural Land Reserve was an unjustifiable infringement of their Aboriginal title rights.[63] In March of 2001 the claim was, once again, settled out of court when the NDP government gave the Skeetchestn Band $1.4 million to drop their legal action and sign a covenant essentially agreeing to allow all future infringements of Aboriginal title over the Six Mile Ranch land.[64] Grenier developed the Six Mile Ranch into what is now known as Tobiano.

During the battle leading up to the settlement, the Skeetchestn band went to the Land Title Office in Kamloops and attempted to register a certificate of pending litigation and their claim to Aboriginal title as a caveat on the title.[65] The Land Title Office refused to do so, and the issue went to court.[66] The court stated, "There are only two reported cases where Aboriginal land claims involved fee simple lands. They resulted in injunctions being granted and were ultimately settled out of court. Thus the question of registration under the land title act did not emerge.

[62] *Skeetchestn Indian Band v British Columbia (Registrar, Kamloops Land Title District),* 2000 BCSC 118 at paras 1-4, [2000] BCJ No 177 [*Skeetchestn*].
[63] *Ibid.*
[64] Cam Fortems, "Natives get cash deal on Six Mile: Skeetchestn band to receive $1.4 million to drop legal action", *Kamloops Daily News* (31 March 2001) A1.
[65] *Supra note 62* at para 5.
[66] *Ibid.*

Consequently this is the first case to directly confront the inherent conflict between fee simple title and Aboriginal title."[67] The band was unsuccessful both at trial and at the Court of Appeal to have the charges registered on title.

While the decision was focused on the very narrow issue of the registration of Aboriginal title in the land title system, it gives some insight into the courts' unwillingness to accept Aboriginal title into traditional property law structures like the Torrens land title system, and how the inalienability of Aboriginal title acts as a barrier to resolving the conflict. The Registrar argued that the *sui generis* nature of Aboriginal title has no place in the Torrens system, and that under s.197(2) of the *Land Title Act*[68], the Registrar has the discretion to refuse registration of charges if he is of the opinion they fail to establish safe holding and marketable title. The trial judge concluded that there was no reason to conclude the Registrar exercised his discretion improperly because the fact that Aboriginal title is only alienable to the crown makes it not marketable and therefore not registerable under the current land registration system.[69]

The band attempted to argue that Aboriginal title is still marketable because it can be alienated to the crown who can then alienate to third parties on behalf of the band.[70] The trial judge found this argument too speculative to say Aboriginal title is marketable.[71] The courts' response that the marketability of Aboriginal title is too speculative is now tenuous given recent real estate developments, such as that on the Tk'emlúps reserve. The Tk'emlúps band has since developed, in cooperation with private developers, a golf course and residential subdivision called Sun

[67] *Ibid.*
[68] *Land Title Act,* RSBC 1996 c 250.
[69] *Supra note 62* at para 23.
[70] *Ibid* at para 25.
[71] *Ibid.*

Rivers where the land is leased to the private property owners. The homes built on these leased lots are of luxury quality, and they are bought and sold on the market for prices similar to homes off reserve on fee simple lots. The difference is that the land is ultimately held by the private owners as a leasehold and not in fee simple. Therefore it is difficult to say there is no real marketability to Aboriginal title given the success and marketability of the Sun Rivers development. However this is an example of how the inalienability of Aboriginal title acts as a barrier to reconciling Aboriginal title with private property. This barrier will be pointed out again in the theoretical solutions. The trial judge ultimately made a finding that there is no current mechanism for reconciling fee simple title and Aboriginal rights, and concluded that Aboriginal title does not fit within the current scheme of real property law in that it is not an estate or interest in land that is registerable under the *Land Title Act*.[72] The decision was upheld by the Court of Appeal.[73]

It is clear from this decision that the court was not ready to recognize Aboriginal title as an interest comparable to current real property interests under the current land registration legislation, and used the inalienability of Aboriginal title as the rationale behind its decision. This is important because it demonstrates that if we are hoping to find a way to reconcile Aboriginal title and fee simple title by turning to our current property law concepts we are likely to come up empty handed. The Supreme Court of Canada aptly warned in *Tsilhqot'in* that we must be careful not to let traditional property law concepts define Aboriginal title[74]; in light of the *Skeetchestn* decision, perhaps this warning should be extended to defining ways to reconcile conflicts between Aboriginal title and private property.

[72] *Ibid* at para 43-47.
[73] *Supra* note 1.
[74] *Supra* note 2 at para 72.

Professor Bruce Ziff, an expert in property law, finds that the curtain principle of the Torrens system, by bringing a curtain down on all past dealings, will always protect private property owners from having to accept any pre-existing Aboriginal claim registerable on title.[75] Ziff thinks that it is ultimately better for a band to take the stance that the Torrens system is irrelevant to the validity of Aboriginal title, and that Aboriginal rights are overriding interests outside of land registration systems, because attempts to fit Aboriginal title into the Torrens system might actually undermine the Aboriginal interests due to the basic rule of indefeasibility.[76]

While these two examples of conflicts between the bands of the Secwepemc Nation and private property owners do not provide us with any mechanism for reconciling Aboriginal title with private property, they show us how it will not be reconciled, and give us some insights into the arguments of the KGHM Ajax case. The two cases stand as evidence that Aboriginal title has been claimed over private property in the past, and the current claim is not as new or radical as the government may suggest. Most importantly, the decisions shed light on the government's principal method of dealing with such claims: settle the matter out of court rather than allow the issue to go to trial. It is likely that the government recognized some real probability of success on the part of the band's claim and choose to settle before taking the risk that the probability of success could eventuate in a court decision allowing Aboriginal title to threaten the security and stability of indefeasible title in the province. Therefore, given the decisions of the past, the Secwepemc Nation's current claim for Aboriginal title may very likely never end up in court. Aboriginal title has so far been used as a powerful bargaining chip to force government into

[75] Bruce Ziff, "Principles of Property Law" 6th ed (Toronto: Carswell, 2014) at 496.
[76] *Ibid.*

paying financial restitution. Private law recognizes the payment of financial damages as the primary way to restore an injured plaintiff back to their original position had the injury not occurred. There is no reason why this principle cannot extend to Aboriginal title infringement, and it seems the bands have been using Aboriginal title to achieve this purpose. The problem with allowing Aboriginal title to be constantly used as a bargaining chip against the government for financial compensation is that it sets an expectation between the bands and government that is equally as problematic as an uncertain cloud over title. Bands will be more eager to launch claims of Aboriginal title over any private development knowing the government would rather negotiate large financial settlements than allow it to go to court. This is just as discouraging for investment in British Columbia as the possibility of litigation over Aboriginal title. John Burrows believes that this type of ad hoc approach, where the government buys land every time a conflict of Aboriginal title arises, is too expensive, economically disruptive, and politically dangerous given its uncertainty.[77] John Burrows believes frustration and anger would mount if both Indigenous and non-Indigenous people had to constantly deal with their lands being under legal siege and thinks there is a better answer available; a doctrinal framework that can protect private property holders by turning to Indigenous law and the constitutional protections of Aboriginal rights as a solution, not a threat.[78]

4. Solutions

If fee simple title encompasses the largest bundle of property rights known to the common law, including the right of enjoyment and use to the exclusion of all others,[79] one can easily see how a conflict is going to arise between Aboriginal title and fee simple title. Private property owners

[77] John Burrows, "Aboriginal Title and Private Property" (2015) 71 SCLR 91 at 100.
[78] *Supra* note *77.*
[79] *Supra* note 75.

cannot have an exclusive right to use and enjoyment if Aboriginal title confers the same exclusive rights. The two forms of title are mutually exclusive by definition. We have created a legal conflict where the law is simultaneously trying to protect both the private and Aboriginal rights to exclusive use and occupation, which is impossible unless one gives way.

It is important to note that unlike in the United States, private property rights are not explicitly protected by the Canadian *Constitution* while Aboriginal rights and title under s.35 are.[80] If the *Constitution* is the supreme law of the land, one might infer that private property should give way to Aboriginal title; however the inherent limit allowing justification of infringement under s.35 allows Aboriginal title to be infringed in the face of substantial and compelling interests.[81] Therefore, although private property interests are not constitutionalized the way Aboriginal rights are, through the infringement framework the Courts have effectively opened a back door to allow non-constitutionally protected interests to infringe upon constitutionally protected Aboriginal rights. In order for a precedent setting case to lift the cloud of Aboriginal title from fee simple title in a general way, the precedent would have to show infringement is justified in every possible circumstance, but it is clear that infringement comes in many forms. Therefore, it is unlikely that a decision by the courts will settle the dispute once and for all.

How would the infringement test look in the context of a conflict of Aboriginal title with fee simple land holders? It will depend on the circumstances of each conflict and the way that the infringement is framed. The difficulty is in determining what exactly the acts of infringement will be. *Tsilhqot'in* states: "The right to control the land conferred by Aboriginal Title means that

[80] *Supra* note 11, s 35.
[81] *Supra* note 2 at para 77.

government and others seeking to use the land must obtain the consent." [emphasis added] [82] However, this sentence does not talk about who can justify infringing Aboriginal title; it only speaks to the fact that anyone seeking use of Aboriginal title lands must first get consent. Therefore, the fact that all other references to the justification of infringement in *Tsilhqot'in* refer only to government implies that only government can justify an infringement without consent. This means if there is some government decision necessary to the private development, such as the granting of a licence or removal of land from the Agricultural Land Reserve, the band could oppose those governmental actions by framing them as infringing on their rights. However, with regard to the conflict between Aboriginal title and private property owners without any such apparent government actions, the justification of infringement can still be framed.

Assuming the band is successful in acquiring a declaration of title, at first the private property owners have an opportunity to seek the consent of the band through a private deal. Consent through private negotiation should not be discounted as settlement deals can be struck and have been the government's primary method of resolving the conflict with private property owners in the past. However, if consent is not achieved, the band could then file for an injunction against the private property owners for trespassing on their Aboriginal title lands. The bands could frame the act of refusing an injunction as the infringement on their Aboriginal title rights requiring justification under the s.35 framework. While a judicial decision is technically not the same as a government decision, courts are bound to uphold the Constitution, and therefore should be bound to justify a decision that infringes upon constitutionally protected Aboriginal rights. The compelling public objective would be easily overcome by defining the decision as protecting the rights of innocent private property owners and the general economy of British Columbia. The

[82] *Supra* note 2 at para 76.

difficulty will be in satisfying the proportionality test of the Crown's fiduciary duty to the Aboriginal group. Remember that Tsilhqot'in breaks this into two parts: (1) the infringement cannot be justified if it would substantially deprive future generations, and (2) there is an obligation of *R v Oakes* like proportionality: the infringement is necessary to achieve the government goal (a rational connection); the government goes no further than necessary to achieve it (minimal impairment); and the salutary benefits are not outweighed by the deleterious effects on the Aboriginal interest (proportionality of impact).[83] The court will to have a hard time satisfying this test when the result of refusing an injunction will completely deprive Indigenous peoples from access to their title lands.

The other way infringement can be framed is that the original Crown grants of land in fee simple are an infringement of Aboriginal title. If the original Crown grant is void because it infringed on Aboriginal rights by being granted, it would feed defective title from the original grant all the way to the current owner, and the current owner would be without good title. Under the common law, the maxim *nemo dat quod non habet*[84] would render the current fee simple holders title void. However, statutory schemes like the Torrens land title system create an exception to the *nemo dat* maxim to enhance commercial efficiency and certainty of land transfer transactions.[85] Under a Torrens land title system, whoever is registered has indefeasible title against the world regardless past claims: the registry acts as a curtain which is brought down on all past dealings.[86] This exception to the *nemo dat* rule allows title to pass wrongly from a true owner in exchange for efficiency as one no longer has to search back in time to make sure the transferor indeed had good title. However, we then arrive at the issue of whether or not the *Land Title Act* itself

[83] *Ibid* at para 87.
[84] *Supra* note 75 at 466.
[85] *Ibid* at 480.
[86] *Ibid* at 481.

infringes upon constitutionally protected Aboriginal title, and, if it does, can that infringement be justified.

It will be nearly impossible to argue the procedural duty to consult and accommodate was ever discharged in the enacting of the *Land Title Act* and the justification of infringement would likely fail at the first step. However if the *Land Title Act* was deemed not to unjustly infringe on Aboriginal title, there is still the ability for it to provide financial compensation to the Aboriginal title holders through the built-in assurance fund: the *Land Title Act* provides an assurance fund to pay compensation in cases where a true owner has had their title wrongly transferred.[87] Therefore, if Crown grants of fee simple are found to be invalid because they infringe upon Aboriginal title, and the *Land Title Act* is valid, private property owners would keep good title to the land with compensation paid to the true Aboriginal title holders. The problem is that a large portion of British Columbia could potentially find itself under title claims, and that would result in compensation so expensive it would not be feasible by the limited budgetary constraints of the government. As the *Land Title Act* is just a legislative scheme, it would also be very easy for the government to amend it to avoid having to pay any compensation, but then again, the amendment could be argued by the bands to have to be justified under the infringement of Aboriginal rights framework. It is clear that trying to find a solution to the conflict hidden somewhere in the current legal frameworks is extremely difficult: every time one door to infringement is closed, another opens. Hopes of discovering a solution through a decision using the justification of infringement framework is very unpromising.

<u>John Burrows Theory: Private Property under Indigenous Law</u>

[87] *Supra* note 68, part 19.1.

John Burrows suggest a much more radical and alternative theory that looks outside the common law and toward Indigenous law itself for a solution. In understanding John Burrows theory, it is important to first recognize that there are limits in the common law, constitutional law, and Indigenous law.[88] Fee simple may be the closest interest we have to absolute ownership, but it is far from absolute. Fee simple owners are subject to mortgages, expropriation, easements, and zoning laws. Burrows believes these limits are based on principles of balancing interests, reciprocity, and respect, and Indigenous law also recognizes these principles of sharing, reciprocal obligations, and non-absoluteness.[89] This is important because *Tsilhqot'in* decided that we need to understand Aboriginal title by both the Indigenous legal and common law perspective.[90] Lastly, even constitutional rights are limited by principles of reconciliation, proportionality, reasonable, fairness, and fundamental justice. Burrows sets out to show that these limitations to interests based on reciprocal obligations for mutual benefit and respect are what should guide the relationship between Aboriginal title and private ownership.[91]

Burrows doesn't see Aboriginal title as an ultimate threat to private property ownership; he sees Aboriginal title and Indigenous law as a place of refuge for private property owners from a potentially void or voidable title due to defective crown grants.[92] He starts with the premise that where Aboriginal title is recognized, private property owners might have to give-way to Aboriginal title if the title in fee simple was derived from a faulty Crown grant.[93] Crown grants of fee simple land are presumptively void or voidable because the Crown did not possess a legal interest which allowed it to grant unsurrendered Aboriginal title land due to the *nemo dat quod*

[88] *Supra note 77* at 101-106.
[89] *Ibid.*
[90] *Supra* note 2 at 14.
[91] *Supra note 77.*
[92] *Ibid at 106-118.*
[93] *Ibid.*

non habet maxim – the Crown cannot give what it does not have.[94] Burrows recognizes that while the holders of flawed grants would not be without remedies and protections under the law, their interests on Aboriginal title land can still be protected by turning to Indigenous law. Indigenous laws accommodate a wide variety of interests, and Burrows feels that private property owners can accrue entitlements under Indigenous law by their presence on such lands. Accrued private interests can therefore be protected under Indigenous law. Not only can an Indigenous legal system potentially accommodate private property interests, but the constitutional protection of Aboriginal rights under s.35 can ultimately better protect private property rights within an Indigenous legal system.[95] Burrows thinks that the Crown could further enable this constitutional protection through signing treaties. Indigenous peoples have long recognized treaties as a way of giving their consent to sharing the land.[96] Burrows points out that while in the past treaties asked Indigenous peoples to extinguish their title in exchange for protection under the Crown, these new treaties protecting private property under Indigenous law could seek extinguishment of the Crown's interests for protection under Indigenous law. This 180 degree shift would further the goal of reconciliation and is possible due to the non-absolute nature of the interests involved. [97]

The greatest obstacle Burrows sees to his theory is the fact that Aboriginal title lands are inalienable to third parties. The courts have used this principle to block the registration of Aboriginal title in a Torrens land title system. Burrows believes this rule is a legal fiction invented by Justice Marshall of the United States Supreme Court to tidy up non-Aboriginal

[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*

people's claims to Aboriginal lands during the revolution.[98] However, he recognizes the possibility that the courts could use this rule to invalidate his theory of carving private ownership interests out of Aboriginal title, and he sees this as an unfortunate direction the court could take as it would not be advancing the spirt of reconciliation at all.[99]

Burrows believes that allowing the safeguarding of private property interests through the Aboriginal Nation's management of title lands is consistent with Canada's constitutional principles of proportionality, reasonableness, fairness, fundamental justice, and a "large, liberal and generous approach" in favour of Aboriginal rights.[100] He does not see why private property interests created under both Indigenous law and common law, could not be marketable and alienable to other parties, because the interests will owe their existence to Indigenous law, and no longer solely on Crown grants.[101] Burrows appears to be saying that the private interests will flow from Indigenous law and can be marketable without requiring the alienability of the underlying Aboriginal title from which the interests flow. He sees that land planning, taxation, expropriation of private interests on Aboriginal title lands would be managed by the Aboriginal Nation, but would be supervised by the courts using the constitutional principles of reconciliation, proportionality, reasonable fairness, and fundamental justice.[102] Burrows appears to envision Aboriginal title as evolving into a bridge between some form of Indigenous self-government and the Canadian Constitutional legal system. His theory reconfigures Aboriginal title into a form of constitutionally limited sovereignty under which private property rights could exist. If private property owners interests are recognized by Indigenous law, not only will the

[98] *Ibid at 113.*
[99] *Ibid.*
[100] *Ibid at 114.*
[101] *Ibid* at 116.
[102] *Ibid.*

interest be preserved when in conflict with Aboriginal title, but will benefit from enhanced protection from Canadian constitutional law as well.

Burrows theory is a very good theoretical attempt to solve the legal issues at hand. As a legal theory it logically works quite eloquently. However, in the real world, it would suffer some serious problems in its practical application of private property being absorbed into an Indigenous Nation's jurisdiction. The biggest obstacle is that it dramatically disrupts the assumptions underlying the nature of private property and could throw private property owners' confidence and perception of legitimacy of the Canadian judiciary and government into question. What would be the political and social consequences if the courts were to recognize all private property owners in the City of Kamloops were now subject to Aboriginal title, that their titles in fee simple are void, and that they must now seek protection and governance of their interests from the Secwepemc Nation instead of their democratically elected government? Apart from the possibility of a civil uprising, if the province lost jurisdiction to private property some significant legal vacuums would need to be filled. Municipal revenue comes almost entirely from collecting property taxes from private property owners, and without this revenue the city services would grind to a halt as essential infrastructure and services depend on municipal funding. Furthermore, all municipal zoning and land use by laws that are essential to a healthy and functioning city would cease to apply. A very serious legal vacuum would be created that would have to filled by an Indigenous Government. Private property owners would have to recognize this Indigenous government as their legitimate government with respect to property rights. Ultimately, such a revolutionary shift would create a recipe for chaos and upheaval by private property owners. The Courts, the Constitution, and the Government exist and have force because the people accept their legitimacy with confidence. If the majority see the entire system ruling them as illegitimate,

the people may attempt to replace the system with one that will uphold their private property rights.

A New Approach: Taxation in Exchange for an Exception to the *Nemo Dat* Maxim.

A more practical and less radical solution seeks a more cooperative approach between the current government and the Indigenous Nations. Burrows theory hinges on the fact that because there is a defect in the Crown's title, the Crown grants are void or voidable due to the *nemo dat* principle. However, as we have seen, legislation often makes exceptions to the *nemo dat* principle in order to balance competing interests of innocent parties. For example, the land title system will recognize whoever is registered on title, even if they are not the true owner, in order to increase efficiency. Sale of goods legislation also recognizes that a thief can transfer good title in stolen goods to an innocent third party. These acts balance the interests of the true owner against the interests of an innocent third party, often giving the innocent third party title to the property and awarding financial compensation to the true owner. A constitutionally protected exception to the *nemo dat* principle will be the most practical solution to reconciling the conflict between Aboriginal title and fee simple tile. The past cases of conflict in the Secwepemc Nation show that the bands are willing to negotiate and come to agreements for financial restitution. The current ad hoc method by the government of waiting until a conflict arises and then buying out the private property owner or paying the band for extinguishment of Aboriginal title is unsustainably expensive, and is an unpredictable and unsatisfactory solution to all the parties. A better solution is to negotiate an agreement that would bring certainty to both the indigenous and non-indigenous interests.

One of the greatest beneficial interests that governments hold over private property owners is the

right to generate income from private property owners through taxation. Municipal government's main revenue generator is annual property taxes, and the Provincial government also collects large sums of money through its property transfer tax. If Indigenous Nations were entitled to benefit directly from taxation of private property owners, it would secure financial compensation for the Indigenous Nations indefinitely into the future. Perhaps the government will have to give up a portion of their tax revenue to the Indigenous Nations, or perhaps additional taxes paid to Indigenous Nations could be placed on top of the current taxes. As long as the new taxation scheme does not create extreme undue hardship for the private property owners, it could eventually be accepted. One may argue that Indigenous Nations can already benefit from taxes collected by Canadian taxpayers through the government, however any financial benefits bestowed by Canadian taxpayers are limited in that the government paternalistically decides where and how the money is spent. This is different than the Indigenous Nation collecting the taxes and deciding what they wish to do with it without restriction.

As any new tax is extremely unpopular for government, it is paramount that the agreement be constitutionalized to prevent future governments from undoing it. As in Burrows' theory, treaties will give such agreements constitutional force. Section s.35(3) of the *Constitution* allows for protection of future treaties without requiring complicated constitutional amendments. An agreement providing taxation over private property owners, in exchange for an exception to the *nemo dat* maxim, ensures stability and financial prosperity that endures and upholds the spirit of reconciliation. It provides financial compensation for the past injustice, an enduring future benefit, and allows private property rights to remain over Aboriginal title land. While financial security may not be the same as physically owning and possessing the land, it can act as a means to acquire land by the Indigenous Nations. Money is the primary means of owning and

possessing land. The Secwepemc Nation has already purchased the privately owned Harper Ranch to restore possession to Aboriginal title lands, and paid for the purchase through a taxation scheme of on reserve gas and tobacco purchases.[103] Recognizing that the Tk'emlúps Band is already willing to purchase private lands on the free market and pay for them using taxation schemes makes this solution seem even more realistic. Taxation of private property owners to reconcile the conflict between Aboriginal title and private property not only upholds the spirit of reconciliation, it upholds Canada's constitutional principles of proportionality, reasonableness, fairness, and fundamental justice. It is the intersecting point between trying to maximize benefits to the Indigenous people and minimize harm to innocent private property owners.

5. Conclusion

Given the recurring history of the government settling conflicts between Secwepemc bands and private property owners through out of court settlements, there is a real possibility the current claim of Aboriginal title against KGHM and property owners of Kamloops will never see a day in court. If the government settled the previous claims because they were afraid of some probability of defeat, a stronger post-Tsilhqot'in Aboriginal title will not diminish that probability when we are faced with many of the same arguments two decades later. Perhaps the government will proceed as it did in Tsilhqot'in and ultimately have the decision decided. However, a more responsible and accountable approach would be to proactively negotiate an agreement that would end the court battles all together. A treaty agreement that admits the Crown wrongfully granted Aboriginal title land, but that makes an exchange of the Crown's

[103] *Supra* note 8 at 65-91.

taxation interest for an exception to the *nemo dat* maxim would provide certainty to private property owners and development while compensating the Indigenous Nations with enduring financial prosperity. This would not only uphold the spirit of reconciliation and Canadian constitutional principles, but would enhance private property rights by giving it constitutional protection, and providing certainty and clarity. This would drive better economic development in the province, which would benefit those Indigenous Nations now vested in the growth through a property tax regime. A solution to the conflict between Aboriginal title and private property does not need to have a clear winner and a loser, it can strengthen both Indigenous and non-Indigenous wealth and prosperity for the future.

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