



IS THE SKY THE LIMIT?

Following the trajectory
of Aboriginal legal rights
in resource development

DWIGHT NEWMAN

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PREFACE

The year 2013 was the 250th anniversary of the Royal Proclamation of 1763. The Royal Proclamation is widely regarded as having been one of the cardinal steps in the relationship between Aboriginals and non-Aboriginals in British North America – what eventually became Canada.

A quarter of a millennium later it is our judgment that that relationship has often not been carried out in the hopeful and respectful spirit envisaged by the Royal Proclamation. The result has been that the status of many Aboriginal people in Canada remains a stain on the national conscience. But it is also the case that we face a new set of circumstances in Aboriginal/non-Aboriginal relations. Indigenous peoples in Canada have, as a result of decades of political, legal, and constitutional activism, acquired unprecedented power and authority. Nowhere is this truer than in the area of natural resources.

This emerging authority coincides with the rise of the demand for Canadian natural resources, a demand driven by the increasing integration of the developing world with the global economy, including the massive urbanisation of many developing countries. Their demand for natural resources to fuel their rise is creating unprecedented economic opportunities for countries like Canada that enjoy a significant natural resource endowment.

The *Aboriginal Canada and the Natural Resource Economy* project seeks to attract the attention of policy makers, Aboriginal Canadians, community leaders, opinion leaders, and others to some of the policy challenges that must be overcome if Canadians, Aboriginal and non-Aboriginal alike, are to realise the full value of the potential of the natural resource economy. This project originated in a meeting called by then CEO of the Assembly of First Nations, Richard Jock, with the Macdonald-Laurier Institute. Mr. Jock threw out a challenge to MLI to help the Aboriginal community, as well as other Canadians, to think through how to make the natural resource economy work in the interests of all. We welcome and acknowledge the tremendous support that has been forthcoming from the AFN, other Aboriginal organisations and leaders, charitable foundations, natural resource companies, and others in support of this project.

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EXECUTIVE SUMMARY

There has been a tremendous debate in recent years about the impact of a string of court decisions recognizing and expanding Aboriginal legal rights in Canada. What do they mean for Aboriginal prosperity? What do they mean for the natural resource sector? Have Aboriginal communities gained what is, in effect, a veto over development? And will this apparent string of legal victories continue indefinitely?

These legal developments have been welcome, in that they constitute long-overdue recognition of Aboriginal rights in the courts. The hard-won victories came in cases that spanned many years. One thing is perfectly clear: Aboriginal peoples are vital partners in projects that affect their communities and traditional lands, and no one can deny they have a seat at the table with government and industry.

But a lack of clarity about the meaning of key decisions will cause uncertainty for project proponents, could create conflict within Aboriginal communities, and might in fact deny Aboriginal communities some of the economic benefits from well-managed resource developments.

The growing consensus that Aboriginal victories in the courts are decisive and will continue indefinitely is far from assured, however. There have been important Aboriginal losses as well, and there are no guarantees that the trajectory of Aboriginal rights will continue in the same, ever-upward, direction.

It's also important to understand that a "win" or a "loss" in a litigated case is rarely straightforward. What the courts say about why one party has won or lost will often be as important. The *reasons* offered by the Supreme Court set the terms for upcoming cases. It is as if each game in the Stanley Cup playoffs resulted in not just a win or a loss but also in changed rules for all the remaining games.

This paper analyses the recent history of court decisions on Aboriginal rights, particularly focusing on the last five years. Cases regarding the "duty to consult and accommodate" and Aboriginal title, including the historic 2014 *Tsilhqot'in* Supreme Court decision, have changed the legal landscape dramatically in favour of Aboriginal peoples. The implications of treaty rights for resource development have also continued to develop in recent years.

While the recent empowerment of Aboriginal peoples is well-deserved, and anyone has the right to press the full extent of their legal rights, Canada may have reached a point where Aboriginal groups might be setting back their own position by litigating. We have already seen cases of what might be described as overreach by First Nations, pushing for rights beyond those they can plausibly attain within the legal system. Overreach results in losses such as the 2014 *Grassy Narrows* decision, which affirmed the primary provincial role in resource development decisions and the possibility of provinces justifiably infringing on treaty rights. There have been a series of lower court decisions adverse to Aboriginal claims as well, and *Tsilhqot'in* may actually have been a temporary peak for Aboriginal claims.

In the future, the principles that the courts adopt will affect the degree to which continuing to negotiate over resource development projects serves the objectives of Aboriginal people, government, and industry.

It's important to understand that a 'win' or a 'loss' is rarely straightforward.

A number of recommendations can be drawn from this analysis.

- Political actors should be willing to discuss the strength of governments' position and the legal tools available to governments. This approach could be beneficial to all as it would assist in clarifying the possible routes forward. Additionally, governments should develop policies (ideally in collaboration with Aboriginal communities) around when they will use these tools in the public interest.
- Political actors should be willing to discuss the strength of the government's position.*
- Courts should try to refrain from including ambiguous statements in their Aboriginal rights judgments. Governments should consider taking reference cases to the courts to seek faster clarification of some of the ambiguities existing in this case law.
 - Industry associations and others should work to lessen the burdens on smaller companies by providing appropriate assistance to them around duty to consult issues.
 - Industry should continue to develop its understanding of Aboriginal issues and work to engage proactively with Aboriginal communities and organizations. Industry should participate actively in future and current litigation in order to protect its interests.
- Aboriginal communities should take advantage of their considerable legal power and consider where negotiation will lead to better results than litigation. They need to advocate for their rights, while being cautious about overreaching in cases that might set back their own position.

A careful policy response, a clear understanding of the Canadian legal environment, and a commitment to negotiation on all sides will be required to ensure positive shared futures for Aboriginal and non-Aboriginal Canadians alike.

SOMMAIRE

Il y a eu un énorme débat au cours des dernières années à propos des répercussions d'une suite de décisions rendues par les tribunaux reconnaissant et élargissant les droits juridiques des Autochtones au Canada. Que signifient ces décisions pour la prospérité des Autochtones? Que signifient-elles pour le secteur des ressources naturelles? Les communautés autochtones ont-elles acquis un véritable droit de veto sur leur développement? Et cette suite apparente de victoires juridiques se poursuivra-t-elle indéfiniment?

Ces développements juridiques ont été bien accueillis dans la mesure où on attendait depuis longtemps que les droits des Autochtones soient reconnus devant les tribunaux. Les victoires durement acquises concluaient des cas qui avaient duré de nombreuses années. Une chose est parfaitement claire : les peuples autochtones sont des partenaires essentiels dans les projets de mise en valeur qui touchent leurs communautés et leurs territoires traditionnels, et personne ne peut nier qu'ils ont droit à un siège à la même table que le gouvernement et l'industrie.

Mais des décisions clés de nature vague causeront de l'incertitude pour les promoteurs de projets et pourraient engendrer des conflits au sein des communautés autochtones et avoir possiblement pour effet de priver en fait les communautés autochtones de certains des avantages économiques découlant d'une bonne gestion des ressources.

Le consensus qui se dégage de façon croissante sur le fait que les victoires autochtones devant les tribunaux sont décisives et qu'elles se poursuivront indéfiniment pourrait être précaire, toutefois. En effet, les Autochtones ont connu d'importantes pertes et il n'y a aucune garantie que les gains réalisés en matière de droits autochtones continueront de s'accumuler.

Il importe également de comprendre qu'un « gain » ou une « perte » dans une affaire judiciaire est rarement simple. Ce que les tribunaux ont à déclarer à propos des *raisons* pour lesquelles une partie a gagné ou perdu sera souvent tout aussi important. Les raisons fournies par la Cour suprême jettent les bases des causes à venir. C'est comme si chaque partie dans les séries éliminatoires de la coupe Stanley entraînait non seulement un gain ou une perte, mais changeait aussi les règles applicables dans toutes les parties à venir.

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Dans ce document, on analyse l'histoire récente des décisions des tribunaux concernant les droits des Autochtones, en portant une attention particulière aux cinq dernières années. Les cas concernant « l'obligation de consulter et d'accommoder » et les titres ancestraux, notamment la décision *Tsilhqot'in* rendue en 2014 par la Cour suprême, ont radicalement transformé le paysage juridique dans l'intérêt des peuples autochtones. Les conséquences sur la mise en valeur des ressources qui découlent des droits issus de traités ont également continué de prendre de l'ampleur au cours des dernières années.

Bien que les récents pouvoirs obtenus par les peuples autochtones aient été attendus depuis longtemps et que toute personne peut choisir de faire valoir pleinement ses droits juridiques, le Canada a peut-être atteint un point où les groupes autochtones feraient reculer leurs acquis en s'adressant aux tribunaux. Nous avons déjà vu de tels cas, les Premières Nations ayant tenté de faire valoir des droits qui vont bien au-delà de ceux qu'ils sont en mesure de faire reconnaître au sein du système juridique. Ces cas ont entraîné des pertes telles que l'arrêt *Grassy Narrows* en 2014, qui a confirmé la prépondérance du rôle provincial dans les décisions en matière de mise en valeur des

ressources et la possibilité pour les provinces d'empiéter en toute légalité sur les droits issus de traités. Les tribunaux inférieurs ont aussi rendu une suite de décisions adverses aux revendications autochtones, ce qui permet de supposer que Tsilhqot'in a peut-être été un sommet temporaire dans le mouvement de revendications.

À l'avenir, les principes adoptés par les tribunaux influenceront sur la mesure dans laquelle les négociations sur les projets de mise en valeur des ressources pourront servir les objectifs des Autochtones, du gouvernement et de l'industrie.

Un certain nombre de recommandations peuvent être tirées de cette analyse.

- Les acteurs politiques devraient être disposés à discuter de la force de la position des gouvernements et des outils juridiques à leur disposition. Cette approche pourrait être profitable à tous, car elle aiderait à défricher les nouvelles voies possibles pour l'avenir. En outre, les gouvernements devraient concevoir dans l'intérêt public des politiques (idéalement en collaboration avec les communautés autochtones) sur les termes d'utilisation de ces outils.
- Les tribunaux devraient tenter d'éviter les déclarations ambiguës en ce qui concerne les droits ancestraux. Les gouvernements devraient envisager de soumettre aux tribunaux des cas modèles pour chercher à obtenir rapidement d'eux des éclaircissements concernant certaines des ambiguïtés existant dans cette jurisprudence.
- Les associations professionnelles et les autres parties prenantes devraient s'efforcer de réduire le fardeau qui pèse sur les petites entreprises en leur fournissant une aide appropriée pour qu'elles respectent leurs obligations en matière de consultation.
- L'industrie devrait continuer à se renseigner sur les questions autochtones et à s'engager de façon proactive auprès des communautés et des organisations autochtones. L'industrie devrait participer activement aux cas actuels et futurs présentés devant les tribunaux afin de protéger ses intérêts.
- Les communautés autochtones devraient mettre à profit leur pouvoir juridique considérable et examiner les occasions où la négociation pourrait donner de meilleurs résultats. Elles ont besoin de défendre leurs droits, tout en usant de prudence dans les cas pouvant faire reculer leurs acquis.

Une réponse politique attentive, une compréhension claire de l'environnement juridique canadien et un engagement en faveur de la négociation pris par toutes les parties seront nécessaires pour garantir que l'avenir profite tant aux Canadiens autochtones que non autochtones.

INTRODUCTION

On a seemingly regular basis, Canadian headlines are briefly dominated by major issues concerning Canada's interaction with its Indigenous communities. Whether with Idle No More and the protest activities of Chief Theresa Spence in 2012–2013 or with Chief Shawn Atleo's resignation from his position as National Chief of the Assembly of First Nations in 2014, the Canadian media will suddenly focus in on Aboriginal issues, before losing interest. At this writing, it remains to be seen whether the current attention to the residential schools report of the Truth and Reconciliation Commission (2015) is another passing moment of attention or produces longer-lasting engagement with the deep-seated moral issues posed by Canada's past treatment of Aboriginal individuals and communities.

Last summer, there was enormous but short-term media attention on the Supreme Court of Canada's judgment in the *Tsilhqot'in* case concerning Aboriginal title. The decision, which followed shortly after the federal Cabinet's approval of the extensive recommendations of the Joint Review Panel concerning the Northern Gateway Pipeline project, was a historic judicial declaration of Aboriginal title. It also put a spotlight once again on the possible implications of Aboriginal rights for natural resource development.¹ Government of Canada figures from 2014 suggest that the \$650 billion in investment in resource projects then expected in Canada over the next decade could largely be located near Aboriginal communities. This paper will attempt to contribute to a more lasting understanding of the legal environment around Aboriginal rights, what to expect in the future, and the effects on Aboriginal communities and resource development.

A Brief History

Over the past three decades, in the cases that have been brought before them, Canadian courts have continued their work in interpreting the entrenched Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*. Section 35(1) provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." This rather undetailed text clearly presented a significant challenge for the courts in interpreting the effects of that section.

The Supreme Court of Canada, in its 1990 decision in the *Sparrow* fishing rights case, adopted a description of section 35's purpose as that of achieving a "just settlement" with Aboriginal Canadians.² Later decisions of the Court have worked out an evolving conceptual framework that sees the section as aspiring to "reconciliation" between Aboriginal and non-Aboriginal Canadians. In the 2005 *Mikisew Cree* decision, Justice Binnie writes that "[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions" (para. 1).³

The Aboriginal and treaty rights entrenched by section 35 are increasingly recognized as bearing on issues related to natural resource development and management. Although this paper focuses on recent developments and their significance, it is important to ground the recent discussion in a longer history. The judicial recognition of Aboriginal land rights had actually begun before the 1982 constitutional amendment, commencing with the 1973 *Calder* decision. Although the Nisga'a Nation lost on technical issues in the case, six of the seven justices of the Supreme Court of Canada recognized in principle the existence of Aboriginal title – a continuing claim to land where it had not been surrendered through treaties.

The judicial recognition of Aboriginal land rights began with the 1973 Calder decision.

After 1982, such claims had even greater potential impact, since rights, even if ill-defined, were now constitutionally protected. The Supreme Court of Canada gradually had to work out various elements of a jurisprudence, often in the context of claims bearing on resources. Later, in the *Sparrow* case, it established a test for when limits on Aboriginal rights were justified. In the 1996 *Van der Peet* decision, again concerning fishing rights, it worked out a general legal test for the identification of protected Aboriginal rights. In 1997, it applied and modified that test in the context of Aboriginal rights to land, or Aboriginal title, in the well-known *Delgamuukw* decision. Through the same period, it was also working out principles of treaty interpretation, such as in the 1996 *Badger* case on hunting rights under Treaty 8.

However, Aboriginal and treaty rights do not come into play just in the context of a direct government regulation affecting well-established traditional harvesting rights. Resource development projects can have indirect impacts as well, something that has come to the fore in the “duty to consult” jurisprudence that has dominated the last 10 years of case law. In 2004, in the *Haida* decision, the Court elaborated a duty on governments, in situations of uncertainty about rights claims, to consult with potentially affected Aboriginal communities when contemplating a government decision that could impact on their rights. That case has given rise to a massive jurisprudence on the “duty to consult”, and many resource projects are affected.

Revisiting the ‘Winning Streak’

The reality that Aboriginal and treaty rights have implications for natural resource development and management offers enormous opportunities to Canada and to Aboriginal Canadians. The development of jurisprudence that more fully recognizes the rights of Aboriginal Canadians, who have faced a long legacy of dispossession and attempts at assimilation amongst various other injustices, is a welcome and important reading of constitutional text in a manner that responds to the objectives of that text. In this context of increasing recognition of their rights, many Aboriginal communities would be enthusiastic participants in the development of Canada’s natural resource economy, so long as they can protect certain core interests and can participate equitably. The Macdonald-Laurier Institute’s series on Aboriginal Canada and the Natural Resource Economy is grounded in that opportunity and hope.⁴

The legal implications of Aboriginal and treaty rights are often not well understood.

The legal implications of Aboriginal and treaty rights in the context of natural resources issues are often not well understood. Some Canadians seemingly still do not realize that there are constitutionally entrenched Aboriginal and treaty rights that apply in this area. Others think that Aboriginal and treaty rights potentially put relatively complete legal control in the hands of Aboriginal communities.

The latter view has flourished in part through well-meaning efforts by some to explain to Canadians the real legal weight of Aboriginal and treaty rights. Bill Gallagher’s writing and speaking about 200 legal wins by Aboriginal communities has been very prominently referenced of late and has been important in waking up Canadians to Aboriginal communities’ real legal power.⁵ In describing these significant developments, though, Gallagher has used language that suggests that Aboriginal communities are winning, and will win, every case they take before the courts. He has referred repeatedly, for instance, to the “native legal winning streak” (2013, 9; 19; 29; 325) and reported Aboriginal communities achieving “win after win based upon their constitutionally protected rights and charter protection” (19).⁶ Author John Ralston Saul (2013) has similarly sought to highlight that Aboriginal communities have won “case after case” in the courts. And these sorts of claims have had a broader influence, with the claim getting gradually transmuted by media commentators into such statements as this: “First Nations have been on a legal winning streak in Canada, with nearly

200 court victories recognizing their right to be consulted – and in some cases accommodated.” (Freeman 2013)

While these comments are an important corrective for any Canadians who do not realize the significant impacts of Aboriginal rights, they risk going too far in the other direction and falling into inaccuracy. First, Gallagher’s reference to “charter protection” for Aboriginal rights is not correct. The Aboriginal and treaty rights provision in section 35 of the *Constitution Act, 1982* is not part of the *Charter* but is a distinct part of the Constitution, subject to its own interpretive principles in light of its different text and history. Second, many hearing Gallagher’s remarks will interpret a “winning streak” to sound like something without exceptions. In reality, Aboriginal communities have won many important cases, but they have also lost numerous times as well.

That said, what counts as a “win” or a “loss” in litigated cases is not straightforward. A case will yield a result for the parties who have appeared in it, and a particular legal claim will either succeed or not succeed. But, at the appellate levels or in the Supreme Court of Canada even more so, what the courts say in explaining why one party has won or lost will often be as important. The reasons offered by the Court set the rules for upcoming cases. The whole thing is as if each game in the Stanley Cup playoffs resulted in not just a win or a loss but also in changed rules for all the remaining games.

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Consider the following table that tries to capture some of the complexity of this issue about “wins” and “losses” in light of some of the longer history of the case law, and with reference to some of the more recent cases that this paper will discuss.

Table 1: A sampling of landmark case law regarding Aboriginal and treaty rights

CASE	DECISION IN SPECIFIC CASE	LEGAL IMPACTS OF CASE
<i>Calder v. British Columbia (Attorney General)</i> , [1973] SCR 313	Nisga’a lost Aboriginal title claim on technical grounds	Case recognized in principle the idea of Aboriginal title, thus confirming potential legal validity for many land claims
<i>R. v. Sparrow</i> , [1990] 1 SCR 1075	Appellant’s unlawful fishing conviction was set aside, with new trial ordered on principles elaborated in case	Case developed test for justified infringements on Aboriginal rights, contrary to some arguments that section 35 was not subject to such limits
<i>R. v. Badger</i> , [1996] 1 SCR 711	Two appellants’ unlawful hunting convictions affirmed and another sent back to trial for more analysis	Case developed principles on treaty interpretation and justification for infringements on treaty rights
<i>R. v. Van der Peet</i> , [1996] 2 SCR 507	Though the case recognized Sto:lo fishing rights, appellant’s conviction for selling fish was affirmed, as right did not extend to sales	Case developed strict test for Aboriginal rights
<i>Delgamuukw v. British Columbia</i> , [1997] 3 SCR 1010	Aboriginal title issue sent back for possible trial/negotiation in light of principles developed in case	Case developed principles for Aboriginal title claims, use of oral history evidence in some circumstances, and other important principles

CASE	DECISION IN SPECIFIC CASE	LEGAL IMPACTS OF CASE
<i>Mitchell v. MNR</i> , [2001] 1 SCR 911	Appellant's claimed right of Mohawks of Akwesasne to import goods across border lost due to lack of evidence	Majority applied evidentiary principles strictly, arguably becoming one of a series of cases to limit <i>Delgamuukw</i> principles on oral history
<i>Haida Nation v. British Columbia (Minister of Forests)</i> , [2004] 3 SCR 511	Crown ordered to consult Haida before transferring tree farm licence in area subject to their Aboriginal title claim	Principles of duty to consult elaborated
<i>Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)</i> , [2004] 3 SCR 550	Crown's general environmental assessment process held to meet consultation requirements, with Tlingit claim thus lost	Companion case to <i>Haida</i> showing duty to consult met through a reasonable administrative process
<i>Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council</i> , [2010] 2 SCR 650	Carrier Sekani claim of duty to consult on new energy purchase agreement rejected	Case held that government chooses how it meets the duty to consult through administrative tribunals and historic impacts do not give rise to duty to consult. However, Court also extended applications of duty to early strategic decisions.
<i>Beckman v. Little Salmon/Carmacks First Nation</i> , [2010] 3 SCR 103	First Nation lost on claim of insufficient consultation concerning land grant for agricultural uses	Over sharply worded concurring judgment disagreeing with this point of law, majority held in principle that duty to consult could exist outside terms of modern treaty
<i>Ross River Dena Council v. Government of Yukon</i> , 2012 YKCA 13, leave to appeal to SCC denied 19 September 2013	Yukon government required to rewrite mining legislation to allow for earlier consultation where prospectors are staking claim and acquiring some exploration rights	Case raises possibility of wider application of duty to consult than in previous jurisprudence
<i>Tsilhqot'in Nation v. British Columbia</i> , [2014] 2 SCR 256	Tsilhqot'in won claim to Aboriginal title to 2 percent of traditional territory (40 percent of their claim)	Historic first judicial declaration of Aboriginal title, showing Aboriginal title test to be potentially successful for mobile community, other statements within case on circumstances where consent is required, development of test for justified infringements, recognition of provincial jurisdiction to regulate on Aboriginal title lands
<i>Grassy Narrows First Nation v. Ontario (Natural Resources)</i> , 2014 2 SCR 447	First Nation claim concerning special implications of Treaty 3 as requiring federal government involvement rejected	Some further interpretation of Treaty 3 but also strong recognition of provincial regulatory jurisdiction and ability to justifiably infringe on treaty rights
<i>Wabauskang First Nation v. Minister of Northern Development and Mines</i> , 2014 ONSC 4424 (Div. Ct.)	Trial court (under appeal) rejected Wabauskang claims based on Treaty 3	Trial-level precedent that a numbered treaty did not encompass resource revenue sharing or governance rights

CASE	DECISION IN SPECIFIC CASE	LEGAL IMPACTS OF CASE
<i>Courtoreille v. Canada (Governor General in Council)</i> , 2014 FC 1244	Trial court (under appeal) held that First Nation should have been consulted at a particular stage about Bill C-45	Trial-level precedent for requirement of consultation on legislation, but enormously complicated decision in terms of stage at which that is required, and still to be sorted out on appeal
<i>Adam v. Minister of the Environment</i> , 2014 FC 1185	Aboriginal claim of inadequate consultation on an oil sands development project rejected	Court decision in favour of reasonable administrative processes meeting duty to consult
<i>Council of the Innu of Ekuanitshit v. Canada (Attorney General)</i> , 2014 FCA 189	Aboriginal claims of inadequate consultation on major hydroelectric development rejected	Court decision in favour of reasonable administrative processes meeting duty to consult
<i>Hupacasath First Nation v. Canada (Attorney General)</i> , 2015 FCA 4	Community's claim to consultation on Canada-China investment agreement rejected	Court elaborated further elements to requirements for duty to consult to be triggered, articulated test on speculative claims
<i>Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)</i> , 2015 SKCA 31	Aboriginal community's claimed right to be consulted prior to disposition of subsurface minerals rejected	CA-level precedent for no consultation obligation on early-stage minerals disposition; elaboration of elements of the test for duty to consult to be triggered
<i>Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.</i> , 2015 BCCA 154	Court held at very early stage of proceedings that Aboriginal community could in principle sue private party based on unproven Aboriginal title landholding	Novel possibilities of suits between Aboriginal communities and private companies opened, still subject to further modification
<i>First Nation of Nacho Nyak Dun v. Yukon (Government)</i> , 2014 YKSC 69	Trial-level decision that Yukon's Peel River watershed framework struck down due to lack of consultation pursuant to modern treaties (still being appealed)	Modern treaties being read in more purposive manner
<i>Nunatsiavut v. Newfoundland and Labrador (Department of Environment and Conservation)</i> , 2015 NLTD(G) 1	Trial-level decision rejected Aboriginal claims for quashing of permits for major hydroelectric development	Modern treaties read in stricter manner and suggestion that there may not be duties to consult outside as required by text of modern treaty

This chart is in no way comprehensive and highlights simply a number of landmark cases from earlier on as well as most of the cases under discussion in this paper. But it should make clear two things. First, just who can properly describe a particular case as a “win” or “loss” is complicated. Each case has a result for the parties and also has some effects on the law more generally. These do not necessarily match up. In some cases, an Aboriginal litigant has lost on the facts, but the Court has elaborated law that helps future claims. But it is also possible to see the law develop in ways unfavourable to future Aboriginal claims.

Second, on any reasonable reading of the case law history, it is simply not accurate to think there is some unbroken chain of Aboriginal “wins”. Many of the cases in the table above show a loss by the Aboriginal party on the particular issue in the case – for example, the 2004 decision in *Taku River Tlingit*, one of the first duty to consult cases. Many of them also show a loss by the Aboriginal party on

the legal issues for the future – with *Grassy Narrows* in 2014 standing out, though it got less attention at the time, as will be discussed later in this paper. This paper hones in especially on the latter and suggests that such losses have become a substantial risk in recent years, even in a time where there has been welcome recognition of Aboriginal and treaty rights.

One qualification is in order at this stage. The law in this area is very complicated. Decisions about Aboriginal rights or title in areas of the country without historic or modern treaties that cede land (most of British Columbia and with some issues in the Maritime provinces and in limited parts of some other provinces and territories) will have very limited implications for other areas of the country. That said, creative advocates will often later find ways to try to apply them within treaty rights arguments. Many areas of the country are most affected by jurisprudence on treaty rights, which often receives less attention. The paper, and the law in this area generally, must be read relative to a complex reality that some of the cases at issue impact only on some parts of the country.

The object of the current paper, then, is to try to get behind what is really going on in terms of recent developments on Aboriginal and treaty rights that potentially impact on natural resource development. Considering, in particular, the case law of about the last five years, what is the legal trajectory on these issues? As is often the case in the real world of law, the answer is complex and nuanced. This paper traces the developing law in three areas:

- the duty to consult;
- Aboriginal title; and
- treaty rights that could impact on resource development.

The story in each of these areas is distinct. However, three common themes will emerge. One is a theme of what can be called *legal overreach*, where matters may well have reached a point where some Aboriginal communities are pursuing litigation that is not strategic and that harms the long-term position of those and other communities.

A second is the tendency of the courts – and perhaps especially the Supreme Court of Canada – to be developing the section 35 case law in a manner that has *unintended consequences* on the natural resource sector. That there are uncertainties present in the Supreme Court’s legal pronouncements is not a new claim – and not one unique to this area of law – but it is worth continuing to emphasize, particularly in light of real impacts on an engine of Canadian economic prosperity.

A third theme, almost combining the first two, is an emerging set of *flashpoints* where problematic incentives created by legal uncertainties could have some very negative consequences for the future for Aboriginal and non-Aboriginal Canadians.

There are some very difficult questions ahead, and we need to hope that all Canadians approach these questions with good will, with sincerity, and with full consideration of policy implications. Taking account of both the developments outlined in earlier sections and the three themes outlined above, the last section of the paper offers policy recommendations.

What is the legal trajectory on these issues?

THE DUTY TO CONSULT AND RESOURCE DEVELOPMENT

A key part of the legal trajectory on Aboriginal rights and their interaction with resource development arises from the duty to consult doctrine. The Macdonald-Laurier Institute published a full paper on the duty to consult and resource development last year, so those seeking fuller background on it should refer to that report (Newman 2014d).⁷ In brief, though, the duty to consult doctrine has developed in a particular form in the Canadian courts since the *Haida Nation* decision in 2004.

Haida Nation

The transformative aspect of the *Haida* decision was that the Supreme Court of Canada articulated that governments making administrative decisions that may impact on Aboriginal or treaty rights⁸ have a proactive duty to consult with the potentially impacted Aboriginal communities before making the decision. As put by Chief Justice McLachlin in that case, “consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation” (para. 38). In the post-*Haida* case law, both the honour of the Crown and the section 35 aspiration to reconciliation demand that governments consult before they cause negative impacts on Aboriginal and treaty rights, even where there remains uncertainty on the scope of the right.

The more specific requirements of consultation depend on the circumstances and are not always easy to determine. But they vary based on the *prima facie* strength of the right at issue and the degree of adverse impact on the right.⁹ The requirements may include accommodation (still not well defined) in some circumstances, although the courts have also consistently said that the duty to consult is not to be a legal veto power held by Aboriginal communities.¹⁰

The duty to consult stands out as an example of the courts not always foreseeing the actual consequences of their decisions. Although the court judgments were all about governments being subject to the duty to consult – and governments responded by developing various policy regimes to carry out consultation – the main impact of the duty to consult has arguably been to empower some Aboriginal communities in the context of negotiations with the private sector.

Precisely what is required under the duty to consult is uncertain. Because industry project proponents are not sure if governments will meet its requirements, and because any questions about that could give rise to legal delays, it has become common for industry to negotiate directly with Aboriginal communities in whose traditional territories they seek to operate.

Impact Benefit Agreements

Impact Benefit Agreements (IBAs) have become widespread and exist between industry and Aboriginal communities around various developments, whether between Cameco and Aboriginal communities in northern Saskatchewan about uranium mines, between Vale and the Inuit and Innu

Precisely what is required under the duty to consult is uncertain.

of Labrador over Voisey's Bay, or between Syncrude and local Aboriginal communities on its oil sands developments. Databases of IBAs in Canada have dozens upon dozens of entries, and it is entirely possible that IBAs in Canada now number in the hundreds.

The negotiation of an IBA or other type of agreement will typically offer various benefits to an Aboriginal community in exchange for a "support clause" under which the community agrees not to raise duty to consult issues with governments or in the courts.¹¹ Such agreements may provide benefits such as contracting opportunities or training, in addition to direct compensation, and thus may foster longer-term economic possibilities. They may also contain governance regimes on matters like environmental issues – privately negotiated between industry and a community.

What IBAs do, though, is render any later government consultation irrelevant and simply achieve a win-win solution without government involvement. While the courts were creating a legal regime concerned with consultation between the Crown and Aboriginal communities, what they have done is provide the incentives for the privatized negotiation of various matters on the intersection of Aboriginal rights and resource development.

These regimes have had very tangible economic benefits for some communities, which are bringing in benefits worth literally hundreds of millions of dollars under IBAs. For example, the Haisla of coastal British Columbia have been receiving a stream of \$4 million per year from Apache's Kitimat LNG project and sold in 2012 a further ownership option in that project for \$58 million. They are looking in the future toward a share of billions of dollars in investment in other projects (Vanderklippe 2012). The Lax Kw'aalams in BC recently had an offer of \$1,149,000,000 under a proposed IBA from Petronas that they chose to reject (Austen 2015), albeit with the knowledge that they will have other equally lucrative options in future.

But the big irony is that these benefits are attained precisely by working around the uncertain, unwieldy law of the duty to consult. Some lawyers have reported being clear with their clients in Aboriginal communities that they want them to ensure that they never speak with government officials in any manner that could be construed as consultation. If governments are able to complete something that meets the requirements of the duty to consult

without providing tangible benefits to communities – an entirely possible outcome – a community that speaks with government instead of industry is left out in the cold.

It is possible that IBAs in Canada now number in the hundreds.

Unintended Consequences of Duty to Consult

There are thus some real unintended consequences of the duty to consult. Some of these are arguably positive when Aboriginal communities attain real benefits. Some are more nuanced or more troubling.

To mention just some examples, different industry players are very differently set up in terms of their ability to enter into IBAs or similar agreements, depending on their role in the industry and their size. Junior exploration companies struggle in comparison to major resource companies.¹² Indeed, some lawyers who work with junior exploration companies have noted that in the context of shoestring budgets, it is a big request to suggest that companies both carry on their exploration work and find funds for any consultation initiatives that come at any meaningful cost.¹³

The 2015 federal budget does allow consultation costs to be funded under certain tax-incentivized structures involving "flow through" shares, but such a measure does not eliminate the inherent tension between spending these funds on the exploration work and on consultation. While some of the consultation-related costs may be limited in the context of early-stage exploration, they are not necessarily negligible, so such tensions are live for some junior exploration companies.

By contrast, some larger mining companies have whole teams of lawyers dedicated to issues related to consultation, negotiation of IBAs, and so on. Thus, one impact of this developing system is that, as is often the case with new government regulation, large-scale businesses may actually be able to derive advantages from the regulation, while smaller entrepreneurs who have been the historical heartbeat of Canadian mineral exploration struggle. This may have longer-term impacts on mineral discovery in Canada.

Similarly, different Aboriginal communities are very differently situated in terms of their readiness to enter into these sorts of agreements – or their geographical luck in terms of the presence of resources on their traditional territories. The system of IBAs benefits individual communities, but only some. Inequalities between different Aboriginal communities arising from this issue and others will be an important future policy discussion.

Recent Case Law on Duty to Consult

Although, as discussed above, part of the ongoing development in the context of the duty to consult is in an area guided by the law but outside the law itself, there have also been significant ongoing court decisions. Indeed, duty to consult litigation has actually replaced a lot of other Aboriginal rights litigation over the past decade, as all players have tried to sort out various facets of it, and in light of a reality that it is now often more favourable for an Aboriginal community not to resolve its main claim but to keep uncertainty present so as to foster ongoing arrangements structured in light of the duty to consult (Newman 2014c). Though it will often apply, this claim is admittedly complicated and subject to nuance. The next section will return to possibly shifting incentives in the context of Aboriginal title-related issues.

There have been a series of key legal developments since 2010 on the duty to consult. Some of this case law has simply seen the Supreme Court of Canada clearing up certain points. The *Rio Tinto* case in 2010, in particular, saw the Court explaining that how governments meet the duty to consult is effectively up to them. In the context of decisions about the role of administrative boards or tribunals in connection with the duty to consult, governments set the mandates of those boards and tribunals. These mandates can include reviewing consultation efforts, actually carrying out consultation, or having nothing to do with consultation. But governments need to ensure, then, that the duty to consult, if not met by a board or tribunal, is met in some way.

There have been a series of key developments on the duty to consult.

In that same decision, the Court also reaffirmed that the duty to consult related to the future impacts of government decisions and did not provide a means of seeking remedies for historical wrongs (para. 45). However, to complicate matters, the Court almost went out of its way to signal some upcoming issues on the duty to consult, thus generating new uncertainties. First, it affirmed some lower court case law that the duty to consult applies from an early, strategic stage of decision-making, but without offering any explanation on how to identify exactly when the duty is triggered (para. 44). Second, the Court said that the question of whether there was a duty to consult on legislative action was a question for later, thus undermining some past case law on the point (para. 44).

The Idle No More movement emerged in late 2012 partly out of an idea that the federal government should consult First Nations across Canada before passing a law that they saw as impacting on their rights – with treaty rights being in play for many of those involved in the context of a movement that started in a numbered treaty region (Coates 2015a). Shawn Atleo's resignation as National Chief of the Assembly of First Nations in 2014 resulted partly from disagreements between Aboriginal communities themselves regarding to what extent the government had to consult them on reforms to improve First Nations education. On the latter issue, a division between treaty and non-treaty

First Nations had great significance in terms of First Nations' perceptions of their existing rights concerning education, illustrating again the complexity of the issues at play.

The underlying legal question of whether there is a legal duty to consult in the context of legislative action has remained a key uncertainty that has very significant policy implications. In December 2014, a trial court released an enormously complex judgment suggesting that some phases of the process moving toward legislation cannot trigger the duty to consult, but others can (*Courtoreille v. Canada (Governor General in Council)*, 2014 FC 1244). That decision is under appeal, and the uncertainty continues, in ways that have some paralysing effects on government policy-making when governments do not know if they can move forward on statutory reforms or not.

Other decisions engaging with aspects of the duty to consult during this time period have arguably also seen the courts generating new uncertainties. In the same year as *Rio Tinto*, the Supreme Court of Canada's complex, divided decision in *Beckman v. Little Salmon* also saw it enunciating the idea that the legal duty to consult continues to exist in some form even when all parties have signed a modern treaty agreement that purported to exhaustively define consultation arrangements between the Yukon government and First Nations. The case embraced a principle that treaties are just a beginning and not the end of reconciliation. Though that principle is attractive in general terms, at a practical level the decision created significant uncertainties for the Yukon government and has also seemed to start a process of undermining industry perceptions of the Yukon investment climate.¹⁴ Survey data on those perceptions shows a shift in recent years, as some of the implications of the *Little Salmon* case and some subsequent cases have become clearer (Lavoie and Newman 2015).

A division between treaty and non-treaty First Nations had great significance.

Also in Yukon, in the 2012 *Ross River* case, the Yukon Court of Appeal held that the territory's free entry mining regime could not be maintained because it did not leave enough room prior to the staking of a claim for consultation with a Yukon First Nation that had remained outside modern treaty arrangements, which is the situation for three of Yukon's 14 First Nations. The Yukon Court of Appeal thus effectively ordered the Yukon

government to redesign its mining legislation so as to create new opportunities for consultation with non-treaty First Nations in those limited parts of Yukon not under modern treaties. The next year, the Supreme Court of Canada denied leave to appeal this judgment, making the Court of Appeal judgment the final one on this point. On one reading, this case actually significantly changes the application of the duty to consult so that it no longer applies just to government decisions made under the law but may require changes to the design of the law itself.

If the duty to consult doctrine can be used to challenge legislation over whether it provides enough room for consultation, then that altered doctrine has very significant consequences. In 2012, a number of mining legislation amendments came into effect in Ontario so as to require prospectors and developers to engage in consultation and to try to clarify the role of industry in consultation. The statutory amendments rendered moot some litigation that had arisen from the absence of such provisions. However, today some Aboriginal community advocates are looking at the possibility of challenging the constitutionality of the legislation, arguing that it offers inadequate protections.

That said, the Saskatchewan Court of Appeal has recently issued a first appellate-level decision on a somewhat related issue that may suggest limits to these implications. In the *Buffalo River Dene* case, in a treaty lands context in Saskatchewan's oil sands, the Saskatchewan court held that an initial disposition of mineral rights did not trigger a duty to consult, until the developer applied to carry out work that impacted on the surface and thus potentially impacted on treaty rights. Although the triggering of the duty to consult had traditionally been considered relatively easy – with there then being room to debate

the depth of consultation required in particular circumstances – such decisions are now showing a new rigour by courts in considering whether the duty to consult has even been triggered.

Another example is evident in the January 2015 *Hupacasath First Nation* decision in which the Federal Court of Appeal affirmed an earlier trial decision that the Canada-China investment agreement does not trigger the duty to consult and insisted that speculative impacts on Aboriginal rights do not give rise to requirements for consultation.

Indeed, in several major recent court decisions, Aboriginal communities have lost on major duty to consult issues. Where governments have been responsibly attempting to follow the law on duty to consult and been developing reasonable processes, their efforts are being accepted by courts as meeting their legal responsibilities. For example, in August 2014, the Federal Court of Appeal affirmed that consultation requirements had been met through a Joint Review Panel process concerning hydroelectric developments in Labrador at Muskrat Falls and Lower Churchill Falls, illustrating again the potential for an appropriate process to meet the requirements of the duty to consult (*Council of the Innu of Ekuanitsbit v. Canada (Attorney General)*, 2014 FCA 189). That same idea was similarly affirmed in a December 2014 Federal Court decision concerning the Shell Jackpine mine expansion (*Adam v. Minister of the Environment*, 2014 FC 1185). Courts are trying to make the law work in sensible ways, including in the context of projects that have effects on multiple traditional territories.

Aboriginal communities have lost on major duty to consult issues.

Pipelines and Duty to Consult

In proceedings currently scheduled for October 2015, several First Nations will pursue in the Federal Court of Appeal duty to consult cases related to the conditional approval last year of the Northern Gateway Pipeline. Pipelines have become a particular context for debate in recent years, with many environmental activists becoming very involved in regulatory proceedings but with Aboriginal communities often being those with the most specific legal rights that could impact on the projects. Although around two dozen Aboriginal communities have become equity partners in Northern Gateway, there are a number of different First Nations closer to the British Columbia coast involved in the Northern Gateway court proceedings, as are some intervener parties such as Amnesty International.

There are a broad range of arguments being made by different parties: that the generation of risk to Aboriginal rights is itself a breach of legal rights; that the British Columbia government ought to have consulted separately from the Joint Review Process; or that there was inadequate consultation about traditional governance rights asserted by some of the First Nations. The latter say they should have been able to structure the environmental review process in accordance with Indigenous traditional practices.

However, these are challenges to a process with industry–Aboriginal engagement that extended for over a decade, a Joint Review Panel process on which there had been 18 months of consultation with First Nations just on the structuring of that process, and an opportunity for in-person hearings across dozens of different communities, in the context of a Joint Review Panel that examined 100,000 pages of evidence and imposed over 200 recommendations on the project. Though time will tell, contrary to some media commentary and the views of academic activists, there are actually many good foundations for the courts to approve of the Northern Gateway process as having met the pertinent legal duty to consult requirements.

The legal trajectory in this area is nuanced, but it certainly sees the courts trying to make the duty to consult work sensibly in a manner sensitive to Aboriginal and treaty rights but also sensitive to what is practically possible. These realities have led to some significant losses by Aboriginal parties, as well as instances of unexpected uncertainty.

ABORIGINAL TITLE AND RESOURCE DEVELOPMENT

Aboriginal title impacts on resource development because of the possibility that Aboriginal communities own significant areas of land in parts of the country where treaties for the surrender of land were never concluded. For a variety of historical reasons, treaties were not concluded in most of British Columbia. The same was true of Quebec and the North, though modern treaties now address many of the outstanding claims in these areas. In the Maritime provinces, the type of treaties concluded in the mid-1700s (Peace and Friendship Compacts) did not include land surrender provisions, so there are outstanding land claims, although these are complicated in the Maritimes by the fact that there is very little Crown land available for disposition. British Columbia First Nations have strategically avoided making claims against privately owned land, but conflict in the Maritimes between Aboriginal title and private land will probably be unavoidable.

Aside from these general statements, particular First Nations in other parts of the country have claims based on the fact that they did not join treaties, though these are limited in number. Trickier yet will be claims by Métis communities for title, on which the courts have said little as of yet.

The Tsilhqot'in decision

In the context of Aboriginal title, this five-year period has seen a major development in the context of the 2014 *Tsilhqot'in* decision, which included the Supreme Court of Canada's historic first-ever declaration of Aboriginal title in Canada. That decision has also been the subject of a past Macdonald-Laurier Institute report that discusses it in more detail (Coates and Newman 2014), but several key features are important to mention here.

The background to the 2014 decision is lengthy. The issues behind it first arose decades ago when the British Columbia government in the early 1980s authorized logging on Tsilhqot'in traditional territory. The Tsilhqot'in protested this use of their traditional lands. When negotiations over land use did not work, an Aboriginal title claim was filed. This case ultimately made its way to proceedings that involved 339 trial days that led to a lengthy trial

judgment in 2007 with an ambiguous result, due to difficulties in the way the case had been pled. The trial judge gave an opinion in principle in favour of Aboriginal title and encouraged further negotiation between the parties.

When these negotiations broke down, both sides appealed the trial judgment. In 2012, the British Columbia Court of Appeal largely quashed the Tsilhqot'in Aboriginal title claim, holding that established case law allowed title claims only to specific sites of intensive historic occupation (*William v. British Columbia*, 2012 BCCA 185). When the Supreme Court of Canada overturned this result and

This five-year period has seen a major development in the context of the Tsilhqot'in decision.

this reasoning in 2014, its decision actually followed past case law on the Aboriginal title test fairly closely, but it applied the test in a manner such that a historically mobile community could plausibly meet the Aboriginal title test. Whether that was possible had been unclear, and the 2012 Court of Appeal decision had been sceptical on the point. The 2014 Supreme Court of Canada decision was thus significant in legal terms in showing that it was potentially possible for a historically mobile community to meet the test.

The *Tsilhqot'in* decision has many facets that bear on a variety of resource development issues, and Aboriginal communities subsequently responded in a variety of ways in the months since. These responses have not been so much in the form of Aboriginal title claims put to the courts, because such claims continue to be challenging and expensive to litigate. However, some communities have certainly tried to use the *Tsilhqot'in* case to assert their jurisdiction. Some, such as the Tsilhqot'in themselves, the Kaska Nation, and the Secwepemc have moved toward the creation of their own resource laws over their claimed title areas. In mid-2014, the Gitksan First Nation in northern British Columbia purported to issue eviction notices from its claimed title area to individuals and companies including CN Rail. What happens with these various developments remains to be seen.

Based on the specific rules on Aboriginal title applied in the *Tsilhqot'in* case, there are still strict evidentiary requirements to succeed on an Aboriginal title claim. Not all communities will be able to meet those easily or with respect to large areas of land. Contrary to a lot of sensational commentary about the judgment, the Tsilhqot'in themselves were awarded only 40 percent of their claim area, which was itself only 5 percent of their traditional territory, meaning that the title area (2 percent of their traditional territory) is much smaller than the map of Tsilhqot'in traditional territory that was shown in some media reports.

The Tsilhqot'in themselves were awarded only 40% of their claim area.

Subsequent to the *Tsilhqot'in* judgment, some analysts have optimistically seen it as promoting treaty negotiations,¹⁵ and there have been some communities that have called for governments to return to treaty tables, including one of the three Yukon First Nations that remain outside modern treaties.¹⁶ The chief negotiator for that community, the White River First Nation, reflected on the positive legal changes resulting from waiting for the *Tsilhqot'in* judgment, saying that in negotiations based on prior case law, "The offerings from the government to sign on were so pathetic that I'm pleased that our nation at that time chose not to sign" (Ronson 2014). The challenging question becomes: When should each community sign on to modern treaties in the context of ongoing developments in the legal framework that offer the alternative to a treaty in the form of litigation?

Because the *Tsilhqot'in* judgment grants title based on evidence of a mobile community's use of land, the legal shift arising from the decision certainly suggests that viable title claims are available to more communities than before. That, in turn, impacts on the current consultation requirements with those communities, because of the increased *prima facie* strength of their claims. So, there are significant impacts not just for the Tsilhqot'in themselves but for other communities with outstanding title claims.

However, the Court also does some things in the judgment that create uncertainties on the meaning of Aboriginal title, in ways that have potentially negative prospects for Aboriginal communities themselves. The Court, in discussing its theories about the essentially collective nature of Aboriginal title, elaborates on the notion that Aboriginal title is held for not just the present generation but future generations as well, and that title lands cannot be used in a manner that harms their value for future generations (para. 74). The meaning of that restriction and the implications for whether certain types of resource development are actually prohibited are not clear. This seemingly leaves

open the possibility of future court challenges by those disagreeing with a community's decision to engage in certain kinds of economic development, whether they be dissenting community members or perhaps even external interveners (Coates and Newman 2014; 15). The Court also does not make clear whether Aboriginal communities holding Aboriginal title can develop private land ownership systems within that title land, which also potentially limits economic options for communities (15–16).¹⁷

Aboriginal title lands are subject to provincial regulation.

The Court also goes out of its way to make some statements that amplify the effects of uncertainties for development on land subject to Aboriginal title claims. Aboriginal title lands are subject to provincial regulation and even to justified infringements (overrides, analogous to expropriation of other land) on the title based on a specific legal test, and the court elaborates on that test to some extent (paras. 77–88; 125–137), but with a significant lack of clarity remaining on what would meet it. Then the Court says that “if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing” (para. 92).

The possibility that projects might be cancelled based on a set of unclear legal tests is not one that inspires investor confidence to put up the billions of dollars of capital Canada's resource sector needs in order to contribute to prosperity for all. There are strong anecdotal reports of capital flight that occurred after the judgment was released. There are arguments to be made that the Court should have chosen its language differently in some of these passages.

Legal Uncertainties Around Aboriginal Title

The legal trajectory of Aboriginal title over the past five years has seen the significant enhancement of the position of Aboriginal communities with outstanding title claims but also the creation of significant uncertainties. And these uncertainties may seem likely to continue, out of a particular mix of factors:

- First, some of these have driven negotiating positions of governments and Aboriginal communities farther apart, and negotiation processes are not working swiftly. Expectations could be seen as farther apart than ever before. And, in some ways, some parties may have incentives to generate rather than overcome uncertainties, as discussed in the last section on the duty to consult.
- Second, political dynamics make governments reluctant to take some of the steps that they could to pursue increased legal clarity. Though the last section of the paper will return to some of their real options, political actors don't like to discuss matters in any way that sounds negative toward the legal status of particular Aboriginal or treaty rights. That is presumably partly to show respect toward Aboriginal communities in a context of historic and present wrongs against Aboriginal peoples. But also, an individual political actor would typically be taking risks in having an open discussion but gain little individual benefit from doing so. Politicians are under immense scrutiny and criticism in these contexts. (To take just one example, CBC's coverage of some of the events in conjunction with the recent release of the Truth and Reconciliation Commission's report chose to comment on Prime Minister Harper adopting a different posture during prayer than some others at the same event.)¹⁸

- Third, some of the resulting questions may simply get sorted out gradually in the courts in the years ahead, but the reality is also that very few Aboriginal title claims end up in the courts and those only on a gradual basis. So, judicial development of the law is not helping to clarify matters as quickly as it might in some other areas.

A very recent development has suddenly opened a wide range of possibilities in terms of upcoming Aboriginal title litigation and some different ways that it could play out. In mid-April 2015, the British Columbia Court of Appeal held that it is possible for Aboriginal communities to sue private parties based on previously unproven Aboriginal title claims, setting the stage for a possible lawsuit against Rio Tinto Alcan based on riparian rights allegedly stemming from a particular community's previously unproven Aboriginal title (*Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154). Although this decision remains subject to possible appeal, any legal developments of that sort may open a wide range of possibilities.

First, at the most obvious level, prospects increase for Aboriginal communities to sue private companies directly over Aboriginal title and Aboriginal rights questions. That may create increased incentives for industry to negotiate with Aboriginal communities, or may simply drive industry away from some regions.

Second, there could be further dynamics arising from such determinations. Right now, industry largely does not have standing to litigate on Aboriginal title and Aboriginal rights questions. Once there are potential direct impacts on industry, companies could conceivably become more involved in litigation on these matters, including through seeking pre-emptive declarations authorizing industry activity. Industry contemplating such litigation would need to weigh the challenges in obtaining negotiated agreements, the public relations implications of the litigation, and the prospects of its offering an important enhancement of legal certainty.

That kind of litigation might arise, even though it would seem highly undesirable from the standpoint of deeper societal reconciliation. There is a wide range of possibilities for how some of these developments may move forward, with a wide range of possible policy outcomes.

Right now industry does not have standing to litigate on Aboriginal title.

TREATY RIGHTS AND RESOURCE DEVELOPMENT

The implications of treaty rights for resource development have also continued to develop over the five year time period examined in this paper. Here, there are important divisions between the implications of historic treaties and of modern treaties.

Historic Treaties

Historic treaties negotiated in the latter part of the 19th century and first part of the 20th century are relatively short agreements that do not contain detailed textual clauses. Many of the Victorian or numbered treaties that reach from Ontario across the prairies and into northeastern British Columbia and parts of the North have, though, a clause that simultaneously preserves traditional harvesting rights for the treaty First Nations and that allows the Crown to “take up” land for agriculture, mining, and other development.

There have been some important recent judicial decisions on the implications of these treaties for resource issues, including one of the more significant “losses” for Aboriginal communities. In July 2014, the Supreme Court of Canada decided the *Grassy Narrows* case. This case arose from special issues raised related to the application of Treaty 3 in the Keewatin area in northwestern Ontario, which was federal land at the time Treaty 3 was signed and only later annexed to Ontario. The case arose from an argument put by the Aboriginal claimants that even today the federal government needed to be involved in any decisions by the province of Ontario to “take up” land for development.

Historic treaties are relatively short agreements.

The Court reaffirmed the Court of Appeal’s rejection of this argument. In the course of its decision, the Supreme Court also more generally interpreted the “taking up” clause in the Victorian/numbered treaties and affirmed the primary provincial role in resource development decisions and the possibility of provinces justifiably infringing on treaty rights. Several paragraphs of the decision try to develop a careful balance between the protection of traditional harvesting rights, the consultation obligations that arise when there are impacts on these rights, and the ultimate context of possible infringement of these rights. As in much of its section 35 jurisprudence, an optimistic read of the Court’s statements would be seen as trying to create conditions for negotiation between the parties, and a more sceptical read would see it as not creating much certainty on some issues.

With treaty rights, as we have seen in cases analysed elsewhere in this paper, a push to take issues to the courts does not always yield the desired results. In August 2014, in response to a case brought by the Wabauskang First Nation, amongst other issues, the Ontario Divisional Court held that Treaty 3 in northwestern Ontario does not create rights to resource revenue sharing or to shared decision-making and thus did not ground consultation obligations arising from such rights. The First Nation had argued that it was implicit in the relationship embodied in Treaty 3 that the First Nation should receive a share of revenues derived from resource development in the Treaty 3 region and should be entitled to participate in decisions about resource development in the region through shared decision-making. The Court refers to very little evidentiary record on these points, which suggests that the First Nation attempted to reach for a broad reading of the treaty rights without putting an adequate foundation to the court. The Wabauskang First Nation is appealing the decision.

However, unless something changes on appeal, there is a real possibility that the Wabauskang First Nation has pursued a case in a non-strategic manner that could now impact negatively on claims of other First Nations. The text of Treaty 3 in the pertinent parts is very similar to the text of most of the other numbered treaties, so the case will actually stand to some extent as a precedent on the interpretation of these treaties generally, with the implication that the numbered treaties do not ground a legal right to resource revenue sharing or to shared decision-making.

There may be further complexities ahead. First Nations in many regions have been particularly enthusiastic to pursue resource revenue sharing deals. Where advocacy in the political process has not worked – the Saskatchewan government for one has firmly rejected the notion – they have threatened possible legal action based on oral history accounts of the treaties. There are some oral history accounts to the effect that First Nations in some of these negotiations intended only to share the land to the “depth of a plough”, even though this is obviously inconsistent with the treaty text that refers to the Crown taking up land for mining purposes. Based on these accounts, while still Chief of the Federation of Saskatchewan Indian Nations (FSIN), Perry Bellegarde began referring to “unfinished treaty business” and asserting Aboriginal claims to subsurface resources in the regions covered by the numbered treaties in order to seek a resource revenue sharing arrangement. He continued to press these claims after being elected as National Chief of the Assembly of First Nations in December 2014. These claims will be a challenging future issue.

In March 2015, the Blueberry River First Nations filed a lawsuit in British Columbia Supreme Court that claims cumulative violations of its rights under Treaty 8 in northeastern British Columbia, with the lawsuit also implicitly challenging British Columbia’s Site C hydroelectric project. This lawsuit will have a lot to say about just how far the historic treaties affect resource development projects and is certainly a case to watch.

Modern Treaties

Modern treaties, negotiated in recent decades with many First Nations in areas without historic treaties – though not very successfully in British Columbia – are highly detailed agreements hundreds of pages in length. The federal government provides funding to First Nations for the negotiations, which is an advance against a future settlement. Where negotiations have been unsuccessful, there is an emerging issue. In British Columbia, First Nations now have over \$500 million in outstanding debt from treaty negotiations.

Even with agreed modern treaties, a number of legal issues have emerged in recent years. In 2010, the Supreme Court of Canada decided two major cases on the principles applying to interpretation of modern treaties (*Beckman v. Little Salmon/Carmacks First Nation* and *Quebec (Attorney General) v. Moses*, 2010 SCC 17).¹⁹ One of these in particular, the *Little Salmon* case, saw the Court move away from textual interpretation of these treaties and open up room for further consultation in ongoing relationships going even beyond the treaty terms. As referenced earlier, because of what it says on treaty interpretation, this case has had challenging implications for Yukon.

A recent trial court judgment has now moved on the *Little Salmon* case’s relatively unpredictable approach to treaty interpretation. In December 2014, the Yukon Supreme Court struck down the Yukon government’s approach to the Peel River watershed as inconsistent with modern treaties with the territory’s First Nations, which the Court read purposively (*First Nation of Nacho Nyak Dun v. Yukon (Government)*, 2014 YKSC 69). However, weeks later, in January 2015, a trial decision from Labrador took a very different approach to modern treaty interpretation and limited the consultation obligations existing in the context of the Muskrat Falls/Lower Churchill Falls development (*Nunatsiavut*

Where negotiations have been unsuccessful, there is an emerging issue.

v. Newfoundland and Labrador (Department of Environment and Conservation), 2015 NLTD(G) 1). In the former, the Yukon government is appealing and in the latter, the Nunatsiavut Government is appealing. What these courts have to say about the interpretation of modern treaties will have major implications for resource development in the years ahead.

The uncertainty around treaty rights creates very significant challenges.

The particular uncertainty around treaty rights creates very significant challenges. The negotiation of modern treaties has the potential to resolve outstanding issues and to mark an agreement to new paths forward. From many Aboriginal perspectives, such treaties embody new relationships in sacred ways, and from some perspectives, they must thus be allowed to have an evolving meaning. But governments seeking clarity and certainty may well become less inclined to enter into various kinds of treaty terms if they cannot predict what they will mean.

Right now, the standing Supreme Court of Canada precedent on the point has generated uncertainty on what modern treaty terms will mean. The recent lower court decisions create complicated questions about whether that Supreme Court precedent will apply narrowly or more broadly. It is very difficult right now to say how modern treaties are going to be interpreted, although that question is crucial to their implementation and to the negotiation of further agreements.

COMMON THEMES

The last five years have seen a slow, steady progression of section 35 jurisprudence, but a closer look shows some particularly interesting dimensions to the case law in this period. Some common themes have emerged in terms of Aboriginal communities sometimes becoming involved in legal overreaches that are ultimately having negative consequences on them, and affecting their ability to participate in and benefit from natural resource development. We have seen that there have been unintended consequences from key decisions, and uncertainty affecting developers and Aboriginal communities. And we have seen the emergence of possible flashpoints for confrontational stances. Good policy can help to face up to the resulting challenges, although the actors who need to be involved are from a wide range of sectors.

Legal Overreaches by Aboriginal Communities

In the context of long histories of dispossession, assimilation attempts, and other injustices, Aboriginal communities naturally turn to the courts for remedies. Important decisions in support of Aboriginal and treaty rights have been welcome responses to past and present wrongs. However, at a policy and strategic level, the pursuit of some claims through the courts can have unexpected – and negative – outcomes.

Aboriginal communities are sometimes subjected to a chorus of suggestions that they can get farther and farther ahead through more spending on lawyers and more litigation. The language suggesting they have attained an unbroken string of wins, discussed in the introduction, may feed into this idea. But there have been losses as well, and a great deal of uncertainty, and the pursuit of further cases in a nonstrategic manner might actually add further losses or, more seriously, adverse legal precedents.

And then there is the debate about the United Nations Declaration on the Rights of Indigenous

Peoples (UNDRIP), adopted in 2007 by the United Nations General Assembly. This Declaration was historic, but its legal status is highly complex, contrary to the commentary of pundits (Newman 2014d, 17–18). It certainly cannot easily be invoked directly as law in Canada, as some would like to do, although it may have some longer-term impacts in the courts (17–18). A forthcoming Macdonald-Laurier Institute study will be examining the Declaration in more detail. In any event, caution in understanding the actual legal significance of matters – as opposed to that asserted by advocates – is very important to strategic pursuit of Aboriginal and treaty rights.

Aboriginal communities have overreached in some cases, sometimes with negative results that have set back their position from what it would have been if they had never litigated. Obviously, parties are free to press for the full extent of their legal rights. But if they push for rights beyond those they can plausibly attain within the legal system, we may say they have overreached in non-strategic ways.

The *Grassy Narrows* decision of the Supreme Court of Canada is a very important example of the point. While the Aboriginal community that pursued the case wanted only to argue some quite particular aspects of Treaty 3 as it bore on parts of northwestern Ontario, the case ended up being a chance for the Supreme Court of Canada to reinforce the provinces' roles in regulating and their ability to impact on treaty rights. In doing so, the Court extended propositions from *Tsilhqot'in* to the treaty rights context, while silently overturning past case law on the point.²⁰ The effort to use Treaty 3 in highly constraining ways against the Province of Ontario ended with provincial rights affirmed in new ways. A tenuous legal case led to the generation of what other Aboriginal communities may consider a highly adverse precedent.

Further, more recent attempts to litigate on Treaty 3 have also seen a setback for Aboriginal claims. As referenced earlier, in August 2014 in the *Wabauskang* case, the Ontario Divisional Court held that Treaty 3 in northwestern Ontario does not create rights to resource revenue sharing or to shared decision-making and thus did not ground consultation obligations arising from such rights. The *Wabauskang* First Nation, which litigated the point, may not have done so effectively. In any case, there is now a precedent standing against resource revenue sharing claims in the context of a numbered treaty with close analogies to the various other numbered treaties of the late 1800s and early 1900s, possibly setting back the arguments of Aboriginal communities across the prairies. Although the *Wabauskang* First Nation is appealing, unless it has something new in terms of evidence at the appeal, it may get only an appellate judgment reinforcing the point.

More recent attempts to litigate on Treaty 3 have also seen a setback.

Aside from the variety of recent duty to consult cases discussed earlier that Aboriginal communities have lost, the Hupacasath claim for consultation prior to the adoption of an investment agreement between Canada and China also stands out as a recent loss for Aboriginal communities. Frankly, the claim was implausible to start with, and the courts ended up simply adopting very significant language constraining the type of causation needed in the context of duty to consult claims, with the case thus giving the courts an opportunity to constrain future cases.

Although there is not one simple legal trajectory, and there are many things going on at the same time, there is a real possibility that *Tsilhqot'in* should be considered as having marked a sort of peak for Aboriginal rights claims in the courts, at least in the short term. Though time will tell on some claims, there is a real possibility that Aboriginal communities might be better situated right now to build on their legal victories through serious negotiations with governments and industry. Their ability to do so obviously depends on government and industry willingness to come to the table. But the pressure of the case law encourages that as well.

All parties should arguably take the case law of recent years as an encouragement to try to come together around some common understandings, more so than to keep fighting in the courts. A key advantage of negotiated processes, of course, is that more issues can be opened up, on which the law would not necessarily have anything to say, so it is possible to deal with a wider range of policy aspects. Real work now to further the economic opportunities of Aboriginal communities by drawing them into natural resource development processes could help to establish greater economic prosperity and sustainability into the future.

Legal overreaches may arise from genuine misassessments of the likelihood of success of a particular claim, in which case nobody would want to tell a party not to pursue its rights to the fullest extent possible. However, they may also arise from an environment in which it is assumed too readily that cases will succeed, in which there are complex financial incentives on some parties to encourage litigation, and/or in which communities feel like legal claims are their sole option.

Legal overreaches may arise from genuine misassessments of the likelihood of success.

When academics or the media inform the public about Aboriginal and treaty rights issues, they should strive to do so as accurately as possible, not based on underlying advocacy positions but based on a careful, objective assessment of the law where that is what is at issue. Think tanks have an important role in helping to ensure that policy-makers and the public have accurate information. Moreover, many have raised questions about the interaction of the industry of lawyers and consultants who seek work from Aboriginal communities without achieving actual policy outcomes for those communities, but there is very little credible research on the matter as it runs

up against many entrenched interests. This is an important area of study.

The Supreme Court of Canada's Unintended Consequences on the Natural Resource Sector

When matters have gone before the courts, we also see that courts have ended up making decisions that may have unintended consequences on the natural resource sector. That the Supreme Court of Canada can have such unintended consequences has been a reality outside of the section 35 case law in other areas of constitutional law where it has made decisions without considering their implications for resource development.²¹ This is quite possibly because unlike in the days of justices like Jack Major or Gérard LaForest, the Court has not in recent years had any justices with extensive pre-judiciary work on resource sector issues. It may also be that industry associations are not necessarily intervening in cases that appear to be more remote from their direct concerns.

In the section 35 jurisprudence of the last five years, we see the specific paragraphs in *Tsilhqot'in* that cause confusion, such as those on consent discussed earlier. We might also add the case's reference to Aboriginal title lands being subject only to uses that are consistent with their use by future generations, something that constrains Aboriginal communities in their own use of their land, but in ways that are challenging to interpret.²²

We see the duty to consult jurisprudence that has generated major uncertainties on matters like whether legislation is subject to the duty to consult – an uncertainty that paralyses even statutory reforms desired by Aboriginal communities. We have also discussed how a doctrine on government-to-government-style consultation has had unexpected effects of furthering largely corporate-Aboriginal interactions, for example in the form of Impact Benefit Agreements. We also have seen that diverging possibilities on interpretation have a real potential to undermine the incentives to negotiate modern treaties (Lavoie and Newman 2015). The Court arguably needs to measure more carefully the implications of some of its decisions.

Unintended consequences on the resource sector would largely seem to flow from lack of attention to the ways in which cases in this context affect many different parties, only some of whom are before the courts. In the scholarship, that problem is sometimes called “polycentricity”, which refers to how the case has many different “centres” or issues/parties that it affects. As one way of dealing with the broader economic implications of these cases, some have recently called for courts to take judicial notice of basic economic principles in the context of decisions in the section 35 context (Flanagan 2015). Although that is an interesting idea that warrants more widespread discussion, it is not precisely clear how that approach would be operationalized and why it is better for courts to take judicial notice of these principles as opposed to receiving expert evidence and clear argument on them. Yet complex policy-making is unavoidable in this area, and we do need to find ways to ensure that courts are responding appropriately. For example, in the judicial appointments process, governments should ensure that courts that will deal with Aboriginal rights issues have judges on them with strong background knowledge of Aboriginal law, natural resources issues, and economic issues generally.

Emerging Flashpoints

A typical year at the Supreme Court of Canada actually features only a handful of section 35 cases, out of the 70 to 100 cases the Court adjudicates. But there is a significant amount of litigation on section 35 issues filed and underway in lower courts. There are real prospects of major issues in the courts in the years ahead. In a March 2014 speech, which she gave three months before the Court released her *Tsilhqot’in* judgment, Chief Justice Beverly McLachlin articulated that section 35 cases, rather than *Charter* cases, will likely be the key challenges for the Court in the coming years (Brean 2014).

In the context of natural resources, one of these upcoming issues relates specifically to the meaning of modern treaties, and that is one with huge significance to future negotiation processes. In recent months, there have been decisions from different trial courts that have taken radically differing approaches to the interpretation of modern treaties.²³ In one, a trial court in Yukon has struck down the government’s approach to the Peel River watershed based on modern treaty terms. There, the Court reasons that “the honour of the Crown applies in the implementation of modern treaties”, that “the honour of the Crown has the status of a constitutional principle”, and that constitutional obligations to Aboriginal communities must be interpreted broadly and purposively (*Nacho Nyak Dun*, paras. 133–135). Such an approach potentially expands significantly the implications of modern treaties. In the other, in Labrador, a court reasoned carefully about the text of the modern treaty and held as follows:

In my view, the terms of the Agreement exclude any additional common (constitutional) law duty to consult with respect to the Permit application. Given the comprehensive nature of the consultation provisions in the Agreement, and the distinctions carefully drawn between the scope of obligations of the federal and provincial governments, I am satisfied that the parties intended to exclude from the provincial duty to consult any additional common or constitutional law duty to consult with respect to decisions involving specific regulatory permits in the context of an already approved undertaking. In other words, unlike the situation in *Little Salmon*, *supra*, in respect of such permits the field of consultation has been occupied, so to speak, by the agreement of the parties. There is no additional duty to consult imposed by law. (*Nunatsiavut* para. 125)

Here, the Court worked more closely with the treaty text and ultimately distinguished the case from the leading Supreme Court of Canada decision on the point, calling into question how far the Supreme Court’s prior approach reaches. The issue was a vexing one for the Supreme Court of

The Court arguably needs to measure more carefully the implications of some of its decisions.

Canada in a pair of cases in 2010 (*Little Salmon* and *Moses*), and there are lingering questions that are now being fought out. What is important to realize here is that the principles the courts adopt will affect the degree to which continuing to negotiate serves the objectives of either or both sides. Getting the principles right on that issue is immensely important.

At the same time, there are a variety of reasons why there might be emerging flashpoints rather than emerging solutions. The courts have developed some of their Aboriginal rights doctrines that affect resource development in ways that encourage parties to perpetuate or develop uncertainties. In the context of the duty to consult, when their arguments fail in political arenas, Aboriginal communities across the numbered treaty areas can press for better economic opportunities in their often struggling communities. They can argue that there is uncertainty on the historic numbered treaties, and whether they transferred subsurface minerals or only shared land “to the depth of a plough” (Newman 2013, 93–94).²⁴ As noted above, Perry Bellegarde has referred to this as “unfinished treaty business”. The creation of new uncertainties has been seen as a way of furthering opportunities for Aboriginal communities, rather than the focus always being on optimal policy approaches.

Another flashpoint: For a variety of reasons, including opposition from non-Aboriginal Canadians with certain perspectives on environmental and other matters, it has become extremely difficult to get major infrastructure projects done in Canada. Amongst others, the impacts of Aboriginal title and of the duty to consult on long linear infrastructure projects are subject to immense lack of clarity. Those trying to get projects done may end up in the years ahead in more confrontational stances with Aboriginal communities if some greater clarity cannot be achieved. New possibilities of direct litigation between Aboriginal communities and industry seem to be emerging.

There is a significant amount of litigation on section 35 issues.

One impact of rights litigation is a degree of uncertainty while that litigation is going on. Where success is not likely and/or does not offer substantial benefits, that is another factor for communities thinking strategically to consider. For example, in Yukon, recent controversies about regulatory reforms in Bill S-6 have seen First Nations threatening litigation based on their modern treaty rights. But it is unclear how much they stand to gain even if they were successful, as the issues at play are quite technical and do not necessarily have direct impacts. At the same time, this threat of ongoing litigation over the coming years is affecting perceptions on the investment climate in Yukon and could even be seen as putting at risk projects that would offer substantial territorial economic development for all.²⁵

There will be challenging issues in the years ahead, some of which this report has signalled. Courts should consider the policy implications of adopting various approaches to interpretation of modern treaties. Legal scholars and advocates should work to make sure those issues are on the radar screen of courts dealing with these cases. Governments should continue to examine the barriers to business especially in areas like major natural resource infrastructure and work to ensure they provide support for projects in the public interest. All actors need to be ready to work constructively, while finding positive paths forward.

CONCLUSIONS AND RECOMMENDATIONS

This paper has surveyed the recent history of legal decisions on Aboriginal and treaty rights, focussing particularly on the last five years, a period of tremendous change and numerous key decisions. While there have indeed been many important victories and a significant and long-overdue expansion of recognized rights, these decisions have not been unambiguous, and contrary to popular perception, there have been key losses as well. Moreover, uncertainties have been introduced in a number of decisions that could create serious difficulties for Aboriginal communities and resource developers alike, if there isn't a major good-faith effort to seek common ground.

Out of this analysis we can conclude there is a very good chance that the recent upward trajectory of the recognition of Aboriginal rights may not continue. Looking back, we may see that the Tsilhqot'in decision in 2014 represented something of a peak. Looking at cases making their way through the lower courts, there have been important recent losses for Aboriginal communities that will bear watching. A reasoned assessment of this legal environment is vital to resolving the issues of legal overreach by Aboriginal communities, further unintended consequences of court decisions, and some of the emerging flashpoints identified above.

Recommendations:

- Possibly the most important recommendation here is greater clarity in the political discourse, something best achieved by everyone being ready to take some necessary risks. Political actors should be willing to discuss the strength of governments' position and the legal tools available to governments, including their ability to justifiably infringe or override Aboriginal and treaty rights, and should develop policies (ideally in collaboration with Aboriginal communities) around when they will use these tools in the public interest. This approach could be beneficial to all as it would assist in clarifying the possible routes forward. That is a challenging recommendation of course, given all the dynamics in the area. But all sides are going to need to take some courageous steps.
- In the face of calls always pushing for principled stances, Aboriginal communities need to think about what will best move things forward at a practical level. They should take advantage of their considerable new power and consider where negotiation will lead to better results than litigation. They need to advocate for their rights, while being cautious about overreaching in cases that might set back their own position.
- Courts should try to refrain from including ambiguous statements in their Aboriginal rights judgments. When they do, legal scholars and others should critique those court decisions and try to clear up those ambiguities. Governments should consider taking reference cases to the courts to seek faster clarification of some of the ambiguities existing in this case law.

All sides are going to need to take some courageous steps.

- Industry associations and governments should work to lessen the burdens on smaller companies through providing appropriate forms of assistance to them around duty to consult issues. Permitting the use of flow-through share financing for consultation costs is a positive step, but further steps could include the ongoing development of pooled consultation resources and the development of very clear policies on what is required in the context of early-stage exploration activities.
- Industry should continue to develop its understanding of Aboriginal issues and work to engage proactively with Aboriginal communities and organizations. Industry should also consider whether there are new litigation options available to it or whether it should consider intervening in litigation that is underway.

These recommendations are directed to different sectors, but the hope is not to drive wedges, rather to bring various interests together. Many of the recommendations to which this report has pointed will be complex to implement. There are not simple solutions. But appropriate action in response to themes that emerge from the past five years of section 35 jurisprudence, especially strong efforts by all sides that promote principled and practical negotiations, can help further work toward positive shared futures for Aboriginal and non-Aboriginal Canadians in a country that has enormous potential as a resource superpower.

ABOUT THE AUTHOR



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ENDNOTES

- 1 See Dwight Newman, June 26, 2014b, “Pipeline Prospects Take a Hit as Court Grants Land Title to B.C. First Nation”, *Financial Post*.
- 2 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1106, adopting a description by Noel Lyon.
- 3 On the shifting meaning of “reconciliation” in the cases, see Dwight Newman, 2008, “Reconciliation: Legal Conception(s) and Faces of Justice”, page 80.
- 4 There have now been a half dozen papers in this series: Ken Coates and Brian Lee Crowley, 2013, *New Beginnings: How Canada’s Natural Resource Wealth Could Re-shape Canada’s Relations with Aboriginal People*; Douglas L. Bland, 2013, *Canada and the First Nations: Cooperation or Conflict*; Brian Lee Crowley and Ken Coates, 2013, *The Way Out: New Thinking About Aboriginal Engagement and Energy Infrastructure to the West Coast*; Dwight Newman, 2014d, *The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Natural Resource Sector*; Ken Coates and Dwight Newman, 2014, *The End is Not Nigh: Reason Over Alarmism in Analysing the Tsilhqot’in Decision*; and Ken Coates, 2015, *Sharing the Wealth: How Resource Revenue Agreements Can Honour Treaties, Improve Communities, and Facilitate Canadian Development*.
- 5 Bill Gallagher’s self-published *Resource Rulers in Canada: Fortune and Folly on Canada’s Road to Resources* (2013) is a very informative book about the broad context, but his writing is mentioned by many as supporting the claim that there have been 150 or 200 successive wins in the courts by Aboriginal communities. Some of his media comments may have fed into this. See, e.g., Bill Gallagher, February 18, 2015, “Some Choices for Canada’s Native Leadership in 2015,” *Yukon News* (stating that “[t]he native legal winning streak hit the 200 mark the same week that Perry Bellegarde was elected national chief of the Assembly of First Nations.”).
- 6 See also Gallagher (2013) at 75 (“Why, for almost forty years now, have Aboriginal peoples won virtually every time they go to the Supreme Court?”).
- 7 See also Dwight G. Newman, 2009, *The Duty to Consult: New Relationships with Aboriginal Peoples*; and Dwight G. Newman, 2014c, *Revisiting the Duty to Consult Aboriginal Peoples*.
- 8 This was an extension of *Haida* in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.
- 9 For the basic spectrum analysis, see *Haida Nation* at paras .43–45.
- 10 *Haida Nation* at para. 48. The same point has been put repeatedly in the case law; for other references, see Newman, 2014d, “The Rule and Role of Law”.
- 11 For discussion, see Dwight Newman, 2013, *Natural Resource Jurisdiction in Canada* at 99–101.
- 12 See, e.g., Newman, 2014c, *Revisiting the Duty to Consult*, at 135–36.
- 13 See, e.g., Jennifer Brown, September 17, 2012, “Conflicting Decisions Call Duty to Consult Into Question”, *Canadian Lawyer Magazine*, (quoting Fasken Martineau partner Neal Smitheman, who went on to note that “[j]unior exploration’ is just a fancy name for prospectors. The whole basis for the free-entry system in Ontario was to get mining into Ontario, and it’s done a very good job, but it’s often on a shoestring budget. This kind of thing [referring to problems in certain cases] has a huge impact on the kind of exploration that is going to be done especially in this province.”).

- 14 Some of these issues were brought to public attention by an op ed: Yule Schmidt, February 25, 2014, “When ‘Final Land Claims’ Aren’t Actually ‘Final’”, *National Post*. For background on developments in Yukon over recent years, see Dwight Newman, 2014a, *Evolution of Yukon’s Aboriginal Law and the Goal of Reconciliation, A 360 Degree Perspective*. Malcolm Lavoie and Dwight Newman are currently completing a research paper with another think tank on the impacts on Yukon industry of legal uncertainty arising from Aboriginal and treaty rights case law [hereinafter Lavoie and Newman 2015].
- 15 For one such recent take, see Christopher Alcantara and Michael Morden, 2015, “Aboriginal Title One Year After *Tsilhqot’in*”, *Policy Options*.
- 16 See Jacqueline Ronson, July 4, 2014, “First Nations Assert Land Rights in Wake of Historic Case”, *Yukon News*.
- 17 On some of the economic implications of the type of property rights created through the Court’s Aboriginal title jurisprudence, see also Tom Flanagan, 2015, *Clarity and Confusion? The New Jurisprudence of Aboriginal Title* (Fraser Institute Centre for Aboriginal Studies).
- 18 See CBC_Aboriginal Twitter feed, “While everyone else holds hand during the prayer, @PMHarper bows head, doesn’t hold hands. #TRC2015” (3 June 2015), available at https://twitter.com/cbc_aboriginal/status/606147066021048320.
- 19 For a discussion of the treaty interpretation principles in these cases, see Dwight Newman, 2011, “Contractual and Covenantal Conceptions of Modern Treaty Interpretation,” *Supreme Court Law Review* 54 (2d): 475–491.
- 20 *Grassy Narrows* at para. 53 (citing *Tsilhqot’in Nation*, just weeks after its release, while ignoring the precedent speaking specifically to the point, *R. v. Morris*, 2006 SCC 59. [2006] 2 SCR 915).
- 21 See, e.g., Dwight Newman, 2013, *Natural Resource Jurisdiction in Canada* (discussing the Court’s jurisprudence on certain division of powers questions that could affect pipelines in unexpected ways).
- 22 See discussion in Coates and Newman, 2014, *The End is Not Nigh*.
- 23 There are entirely contrasting approaches in *Nacho Nyak Dun* and *Nunatsiavut*.
- 24 On the longer history of disagreement about treaty terms and implementation, see Jean-Pierre Morin, 2007, “Perceptions of Implementation: Treaty Signatory Views of Treaty Implementation.”
- 25 For some discussion, see Jax Jacobsen, May 25, 2015, “Tussle Over Proposed Yukon Environmental Bill Could Spell Grief for Miners,” *SNL Financial*.



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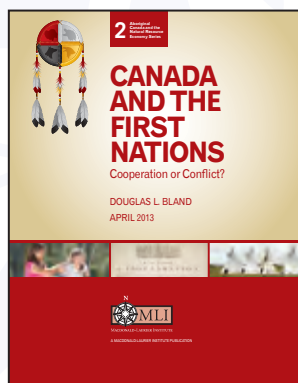
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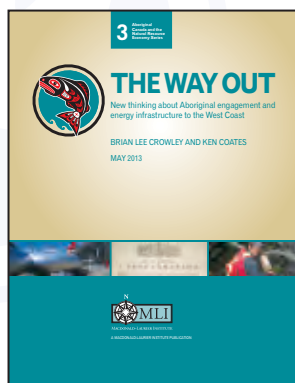
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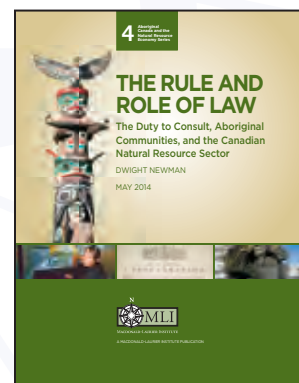
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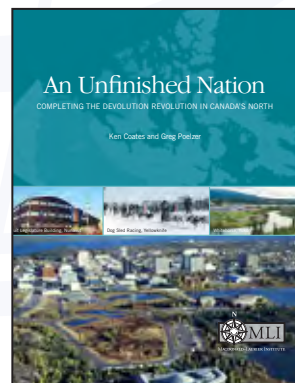
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PETER NICHOLSON, FORMER SENIOR POLICY
ADVISOR TO PRIME MINISTER PAUL MARTIN

I saw your paper on Senate reform [Beyond Scandal and Patronage] and liked it very much. It was a remarkable and coherent insight – so lacking in this partisan and anger-driven, data-free, ahistorical debate – and very welcome.

SENATOR HUGH SEGAL, NOVEMBER 25, 2013

Very much enjoyed your presentation this morning. It was first-rate and an excellent way of presenting the options which Canada faces during this period of “choice”... Best regards and keep up the good work.

PRESTON MANNING, PRESIDENT AND CEO,
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