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Commentary

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Who Owns Canada?

Contrary to common assumptions about Aboriginal culture, the Canada of established property rights, and the prosperity they confer, belongs to everyone.

This paper is based on remarks made at the Institute for Liberal Studies' 3rd Annual Canadian Property Rights Conference, held in Calgary on October 17th, 2014.

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My topic is a big one: who owns Canada? Before we get to the answer, I want to make explicit the underlying premise, which is that who owns Canada matters.

I have written before that Canada's good fortune is not really in its vast wealth in natural resources, although that is truly a blessing. But Canada's great advantage is in its wealth of institutions and its values: the rule of law, independent judges and reasonably speedy and reliable resolution of disputes, the enforcement of contract, the absence of corruption among government officials and the police, respect of private property, moderate, predictable and stable taxation and regulatory burden, a stable currency that keeps its value, responsible public finances, freedom to trade both domestically and internationally, a well-developed work ethic and a refusal to resort to violence to resolve political disagreements. *That* is the greatest endowment that we have.

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If I wanted to summarise what most of these institutions mean, I could do a lot worse than to turn to David Hume. Hume said that there were three rules the observance of which were the hallmarks of a civilised society:

1. The stability of property;
2. Its transference by consent;
3. The keeping of promises.

I don't think it would be an exaggeration to say that Hume's three rules underpin everything about the institutions and behaviours that confer success. The keeping of promises is about contracts and their fair and reliable enforcement. The stability of property (including property in your own person, the idea that you belong to you) is the foundation stone of the rule of law, individual rights, personal integrity, the non-arbitrary nature of government and so forth. The transference of property solely by consent ensures that only negotiation and agreement by the parties, and not violence or coercion, underpin transactions.

So the idea of property as a central institution of morality, freedom and prosperity is this: that each human being is entitled to a protected or autonomous sphere within which his or her decisions are theirs alone to make. And starting from that protected sphere of autonomous decision-making in your mind and body, you then branch out to a society in which, when you engage in activities that confer benefits on others, benefits they themselves recognise and value, you earn the right to bring new resources within your protected sphere. You control those resources and decide what to do with them and others may not take those resources nor interfere with them except in accordance with the law, itself subject to rules of fairness.

In addition to the moral benefits, there are of course practical benefits as well. Because as owners of property we capture the benefits of wringing full value from that property, we create a set of incentives across the entire society whereby the sum of all property is more likely to be well managed than when decisions are made by some central authority. Ownership confers the ability to exclude non-owners from benefiting from our property, and that creates the circumstances in which investment in productive capacity is justified because only those who pay the freight may enjoy what you own.

But a further benefit of the stability of property and its transference by consent is to reduce uncertainty, and that is a matter to which too little attention is paid. Life is characterised by all kinds of uncertainty. Death, illness, changes of circumstances, unsuccessful investments, volatile prices and interest rates, war, plague and the other thousand shocks that flesh is heir to are largely beyond the control of people, however much we like to cling to our illusions of control.

That's the origin of the power of property from a practical point of view and why our institutional endowment, essentially founded on private property, confers so much success on those who live under it. Property, in creating a private sphere under your control, gives you fairly strong certainty about what is yours and what is not. And that is important since the most momentous decisions human beings can make are ones that require long-term commitments in circumstances of great uncertainty. The great gift of stable property and its transference by consent is that it creates islands of relative certainty on which we can rely in making these long term decisions, islands afloat in a sea of change.

Add to that the certainty that is created by our ability to make long-term commitments (Humean promises) and to have them impartially and reliably enforced and you have two kinds of certainty created by the state's recognition and enforcement of these institutions and behaviours. It doesn't make uncertainty disappear. What it does do is reduce that uncertainty in a society of dispersed property that rewards experimentation in attempts to add value to our scarce resources. That is the secret of our success.

As Hume would acknowledge, giving this certainty to people will sometimes result in outcomes we would

regard as undesirable or unfair. But his view is that we must not be too distracted by the outcomes in individual cases, but must look at the highly desirable overall pattern that emerges when we allow the rules to operate. The fact that occasionally someone we disapprove of is clearly entitled to an inheritance that we know they will put to poor use, whereas another contender for the inheritance is someone we morally approve of should not influence our thinking. The only question is what the distribution of the property should be under the rules. Unfortunately politicians in particular cannot help themselves from thinking that they could improve on the results of the operation of the rules in specific cases, without thinking about what the vast knock-on effects are of interfering with them. That's when you get things like rent controls, excess profit taxes, unbalanced labour codes and a whole series of other attempts to tilt the rules in favour of specific groups, usually ones with whom politicians want to curry favour. The unintended consequences are almost invariably disastrous compared to the patterns that emerge from letting people pursue their own aims and goals under the Humean rules.

To come back to my theme about Canada's great luck consisting of two endowments, not one, think about the nesting of a rich natural resource endowment inside this endowment of largely property-based rules, institutions and behaviours that I have just described. When these two endowments co-exist companies can invest billions of dollars to unlock opportunities, such as the oilsands, or copper mines in BC, or uranium in northern Saskatchewan, or iron ore in Quebec, reasonably secure in the knowledge that they know the fiscal, regulatory and contractual conditions they will face over a period of years sufficient to recoup their investment and make some money. They know they will not be extorted by megalomaniacal presidents or state-sanctioned gangs of thieves. They know their investment will not be nationalized overnight on a change of regime. They know that they are not in competition with favoured state corporations that will take a share of their business with no compensation, or be given access to opportunities on more favourable conditions than foreign investors. They know they can sell their product wherever they can get the best price and they can repatriate their profits in real hard currency. All of these certainties are deductions or corollaries of Hume's three rules.

Contrast this with Venezuela, Russia, Iran or Argentina, to pick only a few examples, societies where the uncertainty about the future is so great that intelligent people with choices (people living under Hume's three rules) will not invest there, guaranteeing the poverty of locals. And of course they don't just avoid investing in natural resources. They don't invest in power plants or roads or schools or bridges. Failing to honour the Humean rules impoverishes any society that tries it.

So given all I've said about Canada's relative (and I underline relative) success compared to others in honouring the Humean rules, you might think that the answer to the question posed at the outset is clear: that is to say that if we are talking about the national territory, it belongs to the sovereign entity called Canada and the institutions of the state in Canada have essentially endorsed and enforced the basic Humean rules allowing us to benefit from the moral and practical benefits of those rules. Note I do not say the state is the source of the rules; they arise from the long experience of human societies, and in our specific case from the great British tradition of freedom and the rule of law of which we have the inestimable privilege to be the inheritors.

But things are not so simple. One of the biggest problems we face is the violations of Humean rules that the creation of Canada entailed. When Europeans arrived here the land was largely treated as *terra nullius* and was therefore available to be brought under our rules and distributed accordingly. But we simultaneously signed treaties with many existing Aboriginal people and the Royal Proclamation of 1763 made certain promises about how Aboriginal peoples and their institutions would be recognised. So not to put too fine a point on it, if we believe in the Humean rules we have to recognise that there was a kind of European original sin in Canada that resulted in all three of the rules (the stability of property, the requirement of consent for its transfer and the keeping of promises) being broken. And as a result of 40 years of successful judicial,

political and constitutional activism by an ageing generation of Aboriginal leaders, we are now living through the inevitably messy question of how we fix this, several centuries on from the starting point.

You can probably tell that I think that from a classical liberal point of view this is a necessary conversation to have and the wrongs that were done need to be put right, and fixing it will involve the creation of just the sort of uncertainty that property and the Humean rules were designed to minimise. On the other hand I believe that a lot of the hand-wringing that has been going on around the unfolding of this process of reconciliation and reparation has been unnecessarily shrill and confrontational.

Yes, the kind of collective property that Aboriginal communities, on the whole, want to lay claim to, is a less efficient and effective a form of property right than what we have evolved in the West, but I am much less bothered by this than many.

Our own conception of property rights was quite similar to that of Aboriginal peoples not so very long ago. Property was not an absolute concept, but one based originally on a moral and religious order in which God gave Man dominion over the Earth not absolutely but as a kind of stewardship or trusteeship. In other words ownership was conditional on certain kinds of behaviour. In the feudal order, fealty of each level of society to the one immediately above was the condition of rights and property being honoured. We still have vestiges of this in the idea that the Crown has a foundational interest in all land and is entitled, e.g. through fair expropriation, to take it back under certain conditions.

The fact is, however, that as ownership and other rights evolved and became more individual rather than collective, this conferred greater benefits on those with the more developed kind of property. There is nothing culturally specific about this. Hong Kong is hugely successful because it creates the right kind of framework for people to succeed economically and it matters not one whit whether those people are Chinese or British.

The reason I am not bothered by the collectivist nature of much that is being confirmed by the courts and so forth is that there is lots of evidence that Aboriginal people are going through exactly the kind of evolution the West went through. As we all know, the Nisga'a and others have been negotiating, in modern treaties, various forms of let out provisions that will allow the emergence of close equivalents to private property, in home ownership, for example, on reserve. And the Nisga'a have recently signed a mining deal on their land as well. The Nisga'a have taken advantage of this through their own legislation (<http://www.cbc.ca/news/canada/british-columbia/b-c-s-nisga-a-becomes-only-first-nation-to-privatize-land-1.2355794>). Not every FN wants this kind of property right evolution, but we must allow for the operation of time and the insights that arise from experience, as communities compare their success with that of others. I predict that over the course of time more and more communities will demand this kind of flexibility for themselves.

Indeed let me take just a moment to challenge a widespread belief that Aboriginal traditional culture is hostile to notions of private property and that all property was collectively held. It is more than time that we put out of their misery these romantic Rousseauian notions of the Noble Savage who existed in perfect freedom and authenticity precisely because he avoided the corruptions of property.

As those of you familiar with my work will know that 20 years ago I was writing about the existence of numerous concepts in traditional Aboriginal culture that presuppose the idea of property.

Just one consequence of the absence of property would be a corresponding absence of the notion of theft, for example. The two are interdependent. Was there, then, no concept of theft in Aboriginal society? Any familiarity with traditional Aboriginal mythology, such as the story of the Fire Theft, shows that the idea of theft was perfectly comprehensible to Aboriginal people.

But what about everyday Aboriginal life? Can anyone seriously contend that the maker of a West Coast

copper, or a birch canoe, or a buckskin jacket, would not have fought to prevent someone from taking it for their use without his or her consent? Can it seriously be suggested that their neighbours would not have come to their aid? Yet on what basis could such resistance be justified except by the notion that one owns what results from mixing one's labour with the fruits of nature? One owns one's labour, because one owns one's body; those are one's property.

Perhaps there is still doubt that the fundamental property on which this argument is based – property in one's person – existed in aboriginal culture. Consider then, two ideas relative to the security of the person that are intimately linked to property: kidnapping and slavery, concepts that were well understood in Aboriginal culture. Kidnapping, of course, is nothing less than taking possession of a body without the consent of the owner who inhabits it. Again, mythology offers us ample proof of Aboriginal awareness of the idea of kidnapping and its moral impropriety, as in the tale of Grass Woman's abduction and rescue.

As for slavery, its existence is amply documented. Slavery, considered from the point of view of property, is nothing but a transfer of the ownership of the body and labour of a person from that person to another. Without a conception of property, the very idea of slavery would be incomprehensible, for slaves would not remain under the control of their owners except by constant coercion, which would render them virtually useless. Only if slaves and owners believe in the essential right of possession and the corresponding loss of autonomy can slavery survive.

Consider something else that is closely allied to property: gifts and friendship. It is hard to conceive of friendship without gifts, which are tokens of respect and affection. Gifts can also be symbolic of the status and importance of the giver. Certainly, gift giving existed in Aboriginal culture. It goes without saying, however, that one cannot give what one does not own. You cannot have potlatches without property to be given away.

Not only does the institution of the potlatch confirm the existence of private property in goods necessary to the ceremony, but the historical descriptions also refer to "wealthy hosts," an idea inseparable from the concept of property.

Finally, it is helpful to dwell briefly on the concept of sharing. Much of the romanticism surrounding Aboriginal culture comes from the notion that all was shared, that needs were satisfied for all, that the burden of shortages was equally borne by all. While not denying that sharing on this scale existed, it would be a mistake to believe that sharing resulted from an absence of property. Sharing does not imply that everyone got whatever they wanted whenever they wanted it. Each was entitled to certain things under certain conditions. And sharing did not extend to non-tribe members (except under extraordinary circumstances), or to those who were exiled from the tribe. Again, one cannot share with others what one does not own, and one cannot prevent others from taking what is rightfully theirs. What must interest us, then, are the conditions of sharing, for they, and not the superficial question of property, truly distinguish aboriginal from non-Aboriginal practice. This is a matter to which we shall return shortly.

But again, it should not be suggested that there was no Aboriginal concept of property in land. Take for instance the notion of nations, whether Western or Aboriginal. Each nation has a territory, and its nationhood is defined in part by its ability to control that territory. Such control would include excluding outsiders or, where access is allowed, ensuring that outsiders conform to local norms of behaviour. Control of national territory also includes defence from external attacks. In short, the nation exercises a right of property over its territory, and those who are not welcome or who refuse to observe the rules are trespassers who may be killed or chased off the property. This property right was exercised with considerable vigour by the First Nations, who were known to go to war with one another over various forms of territorial incursion long before the arrival of the Europeans. The recent *Tsilhqot'in* Supreme Court case was won largely on the First Nation's stalwart defence of their territory over time.

And, of course, what basis could there be for the settlement of aboriginal land claims today if *both* sides did not recognize the legitimacy of Aboriginal title to their traditional lands?

It is true that the protection of territory does not add up to a full-blown notion of individual property in land, but acknowledging that Aboriginal societies protected their land is a further step in rejecting the notion that before the arrival of the European there was no property, that all people were free to wander as they pleased, helping themselves to the fruits of nature wherever they were to be found. Furthermore, within tribal territories the arrangements governing land use were complex and depended on notions very much akin to our concept of property. After all, one could not knock down a neighbour's lodging because one wanted the site for one's own home, any more than tribe members could practise their games or bowmanship in the maize patches cultivated by tribes like the Algonquin and the Iroquois. Somehow the impression seems to have grown that this differentiation of land use and complex social co-operation was based on the simple goodwill and helpful nature of the Aboriginal peoples, and not on a regime of property rights. All land simply was; it was not and could not be possessed by anyone.

As the territorial defence example shows, however, matters were considerably more complex than that. In fact, there was a regime of communal property, ownership of all land being vested in the community as a whole. Tribal authorities were called upon to mediate disputes regarding the appropriate uses to which tribal resources, including land, should be put. Obligations, backed by sanctions, bound each member of the community to respect the established rights of use. This is far from being radically dissimilar to our own system. Property need not imply exclusivity; in fact, as both communes and shopping malls attest, collective control and public access are both entirely compatible with the notion of property.

The confusion that arises grows out of the same mistake that has often been made with respect to communism, a system in which, it is often believed, property has been abolished. Nothing could be further from the truth; property exists under communism, it's just that there is a unique property holder or owner. As anyone trying to build a house on a site reserved for a factory by the state in the few remaining communist countries quickly discovers, property (in the sense of an authoritative allocation of ability to use scarce resources) is very much present.

The same was true in Aboriginal society. Certainly alternative land uses were forbidden by those entitled to determine how tribal resources would be used, or rather, the notion of proposing non-traditional land uses simply didn't arise. There simply wasn't enough population pressure to cause land to become scarce, so the problem of how to decide between competing alternative uses for, as an example, tribal burial grounds, simply would not have been posed.

Aboriginal life before the arrival of Europeans does not, in fact, show much in the way of fundamental or irreconcilable cultural differences compared to European institutions, any more than it is incompatible with western notions of property. The differences reside chiefly in a different order of social complexity and population density. Aboriginals lived in a face-to-face traditional society founded on a concrete shared end (for example, successful prosecution of the hunt); Europe was already groping towards the vast extended order of social co-operation we all enjoy today without having to agree on a common purpose to pursue as a society.

Let me return for a moment to issue of how sovereignty (also a property-related concept) is to be understood. On this I fear that some Aboriginal leaders and firebrands are leading us astray. While they like to put it about that they are fully sovereign and independent nations, the Mohawks even claiming not to be Canadian, the fact of the matter is that this is neither the legal nor the political reality. Nor do Aboriginal people act as if it is when it comes right down to it. I think one of the positive things about how this relationship has played out in recent years is the extent to which Aboriginal peoples have pursued the vindication of their rights through the Canadian courts, and sought the constitutionalisation of treaties in the reforms of 1981. They

cannot have it both ways, applying to Canadian institutions to have their rights honoured, insisting on the sanctity of treaties, and seeking the protection of the Canadian Constitution and the Canadian Crown, and then claiming not to be under Canadian sovereignty.

Having mentioned the Canadian courts, it might be worth a moment of our time to look at a representative example of how they have been interpreting the law and treaties for the insight this can give us into our question of who owns Canada. If, for example, there were dispute about whether the Canadian state is the repository of ownership of Canadian sovereignty, or Aboriginal claims and title were a competing sovereignty, the courts would not have found, in my opinion, a duty on governments to consult and accommodate Aboriginal interests where development affects them.

Remember that the Aboriginal plaintiffs in that case were asking the courts to declare Aboriginal people the sovereign owners of their land and the resources under it. This the courts declined to do; instead they recognised that there was unresolved Aboriginal *title* and unresolved Aboriginal interest – hence the Aboriginal celebration of the decision – on lands not covered by treaties. As the Macdonald-Laurier Institute’s research on the topic shows, the duty involved is one of good faith consultation by governments. Moreover it is the courts, not Aboriginals, who are the relevant authority in deciding whether consultation has been adequate, so this is demonstrably not a right of veto. Finally the Supreme Court was careful to stipulate that governments maintained the right to act in the larger public interest through expropriation, permits of use and convenience, etc.

So my assessment, for what it is worth, is that Canada’s national territory still belongs to the state and that property rights within Canada remain largely intact. Canada still belongs to Canadians and the courts have pointedly not tried to unwind the property right acquired by individuals and companies over time despite the breaking of the Humean rules that occurred on the arrival of Europeans.

By contrast where Aboriginal people can show that their treaty or Aboriginal title entitlements have not been honoured, the state in Canada owes them compensation, and we will spend some considerable time negotiating this. All the Humean rules require this rectification in my view.

In addition, where various kinds of property, including natural resources, remain in the hands of the Crown, Aboriginal people have acquired rights to extensive but not limitless consultation where developments needed to get access to those resources affect Aboriginal interests. This introduces a whole new layer of complexity in making decisions about natural resource development in that Aboriginal people have acquired substantial power, falling short of a veto, over decision-making with regard to natural resource development. This has not put an end to the state’s ownership of unalienated natural resources, but makes the conditions under which they can be developed extremely unclear. And that is not even mentioning the extra-legal power conferred by threats of or actual carrying out of various kinds of civil disobedience and violence.

Should we be worried?

Well, I mentioned earlier that the Humean rules are not just morally but also practically justified. And the reasons for this are made abundantly clear by thinking about the opportunities for resource development and the incentives that Aboriginal people now face in resource development. While I believe that the world’s demand for natural resources will be insatiable for the next 50 years and more I want to be very clear that the opportunities for specific projects are extremely dependent on the circumstances at any given moment.

For example, in the wake of the Fukushima disaster, Japan is considering closing some as yet undetermined part of its nuclear power industry. That opens a window for the suppliers of natural gas who can build the infrastructure and make long-term contractual commitments to get that gas to Japan in time for the opening of the natural gas fired plants that will take the place of any closed nuclear capacity. In this race there will be winners and losers. Those who cannot deliver on time and on budget will lose, and that opportunity will be gone for a very, very long time.

This perishable nature of opportunity in natural resources is of particular importance to many Aboriginal communities. Unlike many other kinds of economic opportunity, natural resources are often located in relatively remote regions, often on the doorstep of Aboriginal communities. The natural resources over which Aboriginal Canada has acquired such important power and influence may, in many instances, be among the very few real opportunities that are available to many communities. Canada can withstand missing out on specific investments because we didn't get the conditions right and we can wait for the next turn of the cycle. For many Aboriginal communities, failing to capitalize on specific opportunities may put back local economic development by decades.

Those with long memories recall the 1970s proposal to build a Mackenzie Valley Pipeline (MVP) to bring Northwest Territories gas to southern markets. This proposal coincided with a rising Aboriginal self-awareness and organizational muscle under outstanding leaders like Georges Erasmus.

As the pipeline project gathered steam, these newly organized Aboriginal communities began to complain about their exclusion from decision-making despite the fact that the pipeline's greatest impact would fall on them and their land. As we all know, Aboriginal people have for too long and in too many cases borne the brunt of poorly-designed and poorly-executed natural resource projects.

In the face of the growing controversy, Ottawa appointed Thomas Berger, a judge, former BC NDP leader and defender of Aboriginal rights, to head a royal commission on the pipeline.

The Berger Commission exposed Canadians to something few expected and hardly anyone had ever seen: nightly news footage of Aboriginal elders talking, often in their language, about the importance of the land, animals and Indigenous ways of life.

Aboriginal testimony made clear their opposition to uncontrolled development on their lands – but also their desire to see land claims resolved and for greater control over their territories.

Contrary to a common misconception, Berger did not recommend against the MVP, but said it should be postponed until Aboriginal people were ready for development. That recommendation, plus the changing economics of the project, led Ottawa to agree to set the project aside. The Trudeau government's National Energy Policy seemed to put the final nail in the pipeline's coffin. This opportunity at this particular moment perished.

There the interest of the southern public in NWT energy resources largely ended. But after the cameras left, life continued to unfold on two parallel tracks.

On the one hand, land claims and self-government negotiations proceeded. The Inuvialuit settled in 1984, and some, but not all, of the other First Nations in the Northwest Territories followed suit.

At the same time, largely unbeknownst to southerners, Enbridge got permission to build a 50,000-barrel-a-day oil pipeline from Norman Wells in the NWT to connect with Alberta's pipeline network. Unlike the experience with the original MVP proposal, this time there has been a gradual ramping up of First Nations participation – including training, employment, and contracts for local Aboriginal-owned suppliers. And note that this pipeline was built across the territories of Aboriginal peoples who approved of its construction and the territories of others who did not.

Today Aboriginal people themselves in the NWT are putting their shoulders to the wheel to try, in concert with non-Aboriginal project proponents, to revive the gas pipeline idea. Whether the economics will justify such a project anytime in the near future (and I have to say that the shale gas revolution seems to make it unlikely) is less important than what the new project reveals about the evolution of Aboriginal attitudes. As Fred Carmichael, past president of the Gwich'in Tribal Council and Chair of the Aboriginal Pipeline

Group (APG), says, “This time, northern Aboriginal people are at the planning table. In a sense, we are now wearing two hats. One hat we wear identifies our traditional role as guardians and stewards of the land. The other hat represents our emerging role as business opportunity developers.” APG is a business created and owned by Aboriginal groups in the Northwest Territories, and has negotiated with the project’s non-Aboriginal proponents a right to own one-third of the proposed pipeline.

The new proposal triggered the usual massive governmental environmental and regulatory assessment that immediately bogged down, to the fury of most northerners, *including Aboriginal people*. As I’ve already said, often Aboriginal communities in remote locations have only a very limited number of resource plays on which to build a local economy. Fearful of losing their opportunity, some Aboriginal people have demanded faster decision-making, something that contributed to Ottawa’s decision to streamline the environmental assessment process in the 2012 budget, which few people realise.

What lessons might be drawn from the NWT experience? Aboriginal communities gain confidence from thoughtfully negotiated modern treaties that recognize and embody their rights and decision-making power. First Nations and companies are learning to work together. Today Aboriginal communities can be supportive of well-designed projects that involve them from Day One, make provision for equity participation, and confer real economic benefits on them. They benefit from clear property rights, just as Hume knew they would, and as they get drawn deeper into the development of resources the investment they will have in the success of property rights will only deepen as well.

The moment of Aboriginal readiness to engage with development that Thomas Berger foresaw is here. But the uncertain economics of the pipeline underline a different lesson that all parties on the natural resource frontier must confront: that perishable nature of opportunity. Time and tide, as Shakespeare might have said, wait for no project. Aboriginal people now have the capacity, the ability and in many cases the desire to be part of this development, but the conditions that would make that opportunity real have been lost to all Canadians for the foreseeable future, including for the Aboriginal Canadians who are now anxious to see their communities benefit from intelligent, well-planned development.

The challenge we have before us, then, is *not* whether or not Canada still belongs to Canadians, but how do we fully integrate the power and authority Aboriginal people now enjoy over a good deal of natural resource development in a way that makes them full partners in development and decision-making, while unlocking opportunity when it is ripe rather than allowing it to wither and die on the vine? How do we make their power and authority an integral part of the endowment of institutions that I referred to as a far more important endowment than our resources? It is to this theme that I now turn, because we have reached the point, in my humble opinion, where Indigenous Canadians must realise that acquiring power, as they have done so successfully, isn’t enough. They must also learn to use that power to turn opportunities into real jobs, investment, capacity and prosperity. The good news is, it is happening on a scale most Canadians would find startling.

In short, Aboriginal people have pursued a strategy of judicial, political and constitutional activism over the last 40 years that has paid handsome dividends. But this strategy, while highly successful, has also come with an increasing cost. That cost, in my view, is that some – but in no way all – Aboriginal communities have been reluctant to use their power to actually strike deals and realise benefits for themselves because they have been seduced by the idea that yet another court case will give them even more power, and that to strike deals today may mean giving up even greater benefits tomorrow.

It would also be my view, though, that we have actually reached something getting quite close to the high water mark for further judicial enlargement of the recognition of Aboriginal rights. Recent court decisions, after decades of decisions favourable to Aboriginal claims, have begun to signal pretty clearly that the courts now believe they have given Aboriginal communities the tools they need and to which they are entitled in order to protect and promote their interests in relation to natural resource development, although I certainly recognise

that many important questions remain unresolved, including natural resource revenue sharing, as well as the extent of Aboriginal title in non-treaty lands and provincial jurisdiction over resource activity in treaty areas, the subjects of recent judicial decisions in the *Tsilhqot'in* and *Grassy Narrows* court cases respectively.

My point, however, is that holding back on participating in natural resource development on the grounds that even more benefits will be forthcoming, if only we delay and launch new court challenges, is costing Aboriginal communities dearly, as concrete jobs and benefits today are sometimes forgone in favour of theoretical extra benefits years down the road. It is also worth observing that the legal challenge route runs both ways, and natural resource companies that find their legitimate rights damaged by Aboriginal obstruction may well increasingly take to the courts to have their rights vindicated. This has already started in the stalled mining developments in the Ring of Fire region of northern Ontario.

I believe that is why I increasingly see evidence of a generational divide between young Aboriginals and their parents, who led the strategy of judicial and political activism. Young Aboriginal people trapped in poverty and on social benefits on the reserve see less and less advantage in further court cases that will perhaps delay real jobs and economic opportunity for years into the future. And if I am right, those further court cases will provide less and less in terms of concrete additional benefits over where we are today.

Put that together with the perishable nature of many of our natural resource opportunities and the uncertainty created for investors by the lack of clarity on what is needed to bring Aboriginals on board as full partners in development, and you can see why the Indigenous communities that have embraced modern treaties, capacity-building and responsible resource development are providing many hopeful models for all of us. And what is emerging from those complex circumstances is an evolution in the relationship of Aboriginal people to modern conceptions of property, an evolution that will only gather steam. Then the Canada that really matters, the Canada of that institutional endowment that confers prosperity, really will belong to everyone.



About the Author

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Brian Lee Crowley has headed up the Macdonald-Laurier Institute (MLI) in Ottawa since its inception in March of 2010, coming to the role after a long and distinguished record in the think tank world. He was the founder of the Atlantic Institute for Market Studies (AIMS) in Halifax, one of the country's leading regional think tanks. He is a former Salvatori Fellow at the Heritage Foundation in Washington, DC and is a Senior Fellow at the Galen Institute in Washington. In addition, he advises several think tanks in Canada, France, and Nigeria.

Crowley has published numerous books, most recently *Northern Light: Lessons for America from Canada's Fiscal Fix*, which he co-authored with Robert P. Murphy and Niels Veldhuis and two bestsellers: *Fearful Symmetry: the fall and rise of Canada's founding values* (2009) and MLI's first book, *The Canadian Century; Moving Out of America's Shadow*, which he co-authored with Jason Clemens and Niels Veldhuis.

Crowley twice won the Sir Antony Fisher Award for excellence in think tank publications for his health care work and in 2011 accepted the award for a third time for MLI's book, *The Canadian Century*.

From 2006–08 Crowley was the Clifford Clark Visiting Economist with the federal Department of Finance. He has also headed the Atlantic Provinces Economic Council (APEC), and has taught politics, economics, and philosophy at various universities in Canada and Europe.

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- First book, *The Canadian Century: Moving out of America's Shadow*, won the Sir Antony Fisher International Memorial Award in 2011.
- *Hill Times* says Brian Lee Crowley is one of the 100 most influential people in Ottawa.
- The *Wall Street Journal*, the *Economist*, the *Globe and Mail*, the *National Post* and many other leading national and international publications have quoted the Institute's work.



"The study by Brian Lee Crowley and Ken Coates is a 'home run'. The analysis by Douglas Bland will make many uncomfortable but it is a wake up call that must be read."

FORMER CANADIAN PRIME MINISTER PAUL MARTIN ON MLI'S PROJECT ON ABORIGINAL PEOPLE AND THE NATURAL RESOURCE ECONOMY.

Ideas Change the World

Independent and non-partisan, the Macdonald-Laurier Institute is increasingly recognized as the thought leader on national issues in Canada, prodding governments, opinion leaders and the general public to accept nothing but the very best public policy solutions for the challenges Canada faces.



About the Macdonald-Laurier Institute

What Do We Do?

When you change how people think, you change what they want and how they act. That is why thought leadership is essential in every field. At MLI, we strip away the complexity that makes policy issues unintelligible and present them in a way that leads to action, to better quality policy decisions, to more effective government, and to a more focused pursuit of the national interest of all Canadians. MLI is the only non-partisan, independent national public policy think tank based in Ottawa that focuses on the full range of issues that fall under the jurisdiction of the federal government.

What Is in a Name?

The Macdonald-Laurier Institute exists not merely to burnish the splendid legacy of two towering figures in Canadian history – Sir John A. Macdonald and Sir Wilfrid Laurier – but to renew that legacy. A Tory and a Grit, an English speaker and a French speaker – these two men represent the very best of Canada’s fine political tradition. As prime minister, each championed the values that led to Canada assuming her place as one of the world’s leading democracies.

We will continue to vigorously uphold these values, the cornerstones of our nation.



Working for a Better Canada

Good policy doesn’t just happen; it requires good ideas, hard work, and being in the right place at the right time. In other words, it requires MLI. We pride ourselves on independence, and accept no funding from the government for our research. If you value our work and if you believe in the possibility of a better Canada, consider making a tax-deductible donation. The Macdonald-Laurier Institute is a registered charity.

Our Issues

The Institute undertakes an impressive programme of thought leadership on public policy. Some of the issues we have tackled recently include:

- Getting the most out of our petroleum resources;
- Ensuring students have the skills employers need;
- Aboriginal people and the management of our natural resources;
- Controlling government debt at all levels;
- The vulnerability of Canada’s critical infrastructure;
- Ottawa’s regulation of foreign investment; and
- How to fix Canadian health care.

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What people are saying about the Macdonald- Laurier Institute

I commend Brian Crowley and the team at MLI for your laudable work as one of the leading policy think tanks in our nation's capital. The Institute has distinguished itself as a thoughtful, empirically-based and non-partisan contributor to our national public discourse.

PRIME MINISTER STEPHEN HARPER

As the author Brian Lee Crowley has set out, there is a strong argument that the 21st Century could well be the Canadian Century.

BRITISH PRIME MINISTER DAVID CAMERON

In the global think tank world, MLI has emerged quite suddenly as the "disruptive" innovator, achieving a well-deserved profile in mere months that most of the established players in the field can only envy. In a medium where timely, relevant, and provocative commentary defines value, MLI has already set the bar for think tanks in Canada.

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, a historical 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,
MANNING CENTRE FOR BUILDING DEMOCRACY