



THE END IS NOT NIGH

Reason over alarmism in
analysing the *Tsilhqot'in* decision

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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

The Supreme Court of Canada's decision, *Tsilhqot'in Nation v. British Columbia* delivered on June 26, 2014, was historic, with the Court making the first-ever judicial declaration of Aboriginal title in Canada. What this means exactly was the subject of much heated debate and frequently gloomy conjecture. First Nations leaders were elated, and some proponents of resource development were dejected. A few observers suggested that Canada was about to lose sovereignty over much of British Columbia, sometimes aided with inaccurate maps. This paper proposes to counter such alarmism.

The decision certainly marks a significant turning point in relations between First Nations, provincial, territorial, and federal governments. However, contrary to the media hype surrounding the unexpectedly decisive ruling, the victory for Aboriginal peoples has limits.

First, where treaty relationships have seen Aboriginal communities surrender their lands, the decision has extremely limited implications – despite claims that have been floated in the media by various advocates for a much broader interpretation of Aboriginal rights as defined under *Tsilhqot'in*. Even so, unceded lands cover most of British Columbia – where outstanding and unresolved land claims exist for well over 100 percent of the province, due to overlapping claims – but also in parts of the Yukon, Quebec, Atlantic Canada, and elsewhere.

Secondly, Aboriginal title is a concept close to, but still different from, the sort of private land ownership held by most Canadians. Aboriginal title is collective in nature and must be held for succeeding generations. As put by the court, “it cannot be alienated except to the Crown.” It is frankly conceivable that some Aboriginal communities may prefer to have a form of land-holding other than that now within the doctrine of Aboriginal title given the restrictions it imposes on economic development on their territories, and the possibility of private ownership.

Finally, media discussions of the *Tsilhqot'in* decision have, with some limited exceptions, not engaged with the fact that the Court clearly envisages a situation where resource development projects could justify a government override of Aboriginal title.

In another important Aboriginal rights case released shortly after *Tsilhqot'in*, the *Grassy Narrows or Keewatin* decision, the Supreme Court held that the province of Ontario could take up lands without any requirement for involvement from the federal government. As in *Tsilhqot'in*, the *Grassy Narrows* case thus strongly reaffirms the power of the provinces to operate within their spheres of constitutional jurisdiction, even when their activity must interact with Aboriginal communities.

The following recommendations can be drawn from this analysis of the historic *Tsilhqot'in* and *Grassy Narrows* decisions:

- **Come to the table.** There remains the obvious and much supported solution that the negotiation of modern treaties is a valuable tool available to governments and First Nations alike.
- **Governments need policy statements on overriding Aboriginal title.** Governments could offer greater clarity to resource development proponents and Aboriginal communities concerning when they might be willing to use their power to override Aboriginal title, possibly through careful policy statements, developed in concert with Aboriginal communities.

The challenge is to turn good law, carefully constructed, into effective public policy and practice.

- **Provincial governments should use their more clearly defined powers.** Provinces are closer to the issues at hand, and bilateral negotiations are less costly, less time-consuming, and often less difficult than tripartite conversations. The Supreme Court has given provinces new room to operate. They should use it.
- **Seek clarity on the limits to Aboriginal title.** The new rules on the inherent limits on the scope of Aboriginal title create a problem for all sides. Provincial governments should be contemplating seeking reference decisions from their Courts of Appeal to clarify the rules on this matter. Governments, resource companies, and Aboriginal communities could also consider the possibility of pursuing cases that seek declarations on the rules on that element.
- **Improve Aboriginal law expertise in the courts.** We need big thinkers on the courts who understand Aboriginal law and also see how Aboriginal rights fit into a larger picture of law, of economic and social effects on Canada, and on the international discourse on rights.
- **Stakeholders need to advocate for themselves.** Those making representations to the courts on related matters should be framing things in a way that captures their impact, and groups that are currently not represented before the courts as they make major decisions that affect them – for instance, resource industry associations – should be contemplating seeking intervenor status in upcoming cases.

Those governments that embrace the details and direction of *Tsilhqot'in* will have the best chance of moving forward with carefully planned resource development. Those that resist will spend a great deal more time in court and will see resource activity stagnate in their jurisdictions. The challenge is to turn good law, carefully constructed, into effective public policy and practice.

Nobody should be approaching these decisions in an alarmist way. Rather, we should all see them as an opportunity to build a stronger Canada.

SOMMAIRE

La Cour suprême du Canada a rendu un jugement historique le 26 juin 2014 dans l'affaire *Nation Tsilhqot'in c. Colombie-Britannique* en reconnaissant pour la première fois l'existence d'un titre ancestral autochtone sur un territoire. La portée précise de cette déclaration judiciaire a donné lieu à des débats enflammés et des conjectures souvent sombres. La déclaration a réjoui les dirigeants des Premières Nations, mais déçu certains partisans de la mise en valeur des ressources. Selon un petit nombre d'observateurs qui se sont appuyés parfois sur des cartes inexactes, le Canada serait sur le point de perdre sa souveraineté sur une grande partie de la Colombie-Britannique. Dans cette étude, on cherche à calmer les esprits.

Le jugement marque certainement un tournant important dans les relations des Premières Nations avec les gouvernements provinciaux et territoriaux et le gouvernement fédéral. Cependant, malgré tout le battage médiatique qui a salué le caractère déterminant et inattendu des conclusions du jugement, la victoire pour les peuples autochtones est limitée.

Premièrement, en ce qui concerne les terres cédées par les communautés autochtones en conséquence des relations issues de traités, l'arrêt *Tsilhqot'in* a des répercussions négligeables – malgré les déclarations dans les médias des divers défenseurs d'une interprétation beaucoup plus large des droits ancestraux tels que définis dans l'arrêt *Tsilhqot'in*. Tout de même, les terres non cédées couvrent la plus grande partie de la Colombie-Britannique – les terres sur lesquelles portent les revendications en suspens ou non encore résolues se chevauchent, ce qui élargit la superficie totale du territoire visé à une grandeur qui dépasse celle de la province – ainsi que des parties du Yukon, du Québec, du Canada atlantique et du reste du pays.

Deuxièmement, même si le titre ancestral autochtone est un concept qui s'apparente à la notion de propriété foncière privée telle que possédée par la plupart des Canadiens, il se définit différemment. Le titre ancestral autochtone revêt une dimension collective et doit être conservé pour les générations futures. Comme l'a déclaré la Cour, il « ne peut être aliéné, sauf par la Couronne elle-même. » On peut très franchement s'attendre à ce que certaines communautés autochtones préfèrent détenir des droits fonciers différents de ceux prévus actuellement dans la doctrine du titre aborigène en raison de leurs limitations sur le développement économique et des possibilités offertes par la propriété privée.

Enfin, dans l'arrêt *Tsilhqot'in*, les médias, à quelques exceptions près, ont ignoré le fait que la Cour prévoit qu'un gouvernement peut faire exception à la reconnaissance d'un titre ancestral lorsque les projets de mise en valeur des ressources le justifient.

Dans un autre arrêt important sur les droits autochtones rendu peu de temps après l'arrêt *Tsilhqot'in*, soit le *Grassy Narrows* ou *Keewatin*, la Cour suprême a statué que la province de l'Ontario pouvait prendre des terres publiques situées sur son territoire sans l'approbation préalable du gouvernement fédéral. Comme l'arrêt *Tsilhqot'in*, l'arrêt *Grassy Narrows* réaffirme ainsi avec force le pouvoir des provinces d'opérer dans leurs domaines de compétence constitutionnelle, même lorsque leur activité nécessite qu'elles interagissent avec les communautés autochtones.

Les recommandations suivantes sont tirées de cette analyse des arrêts historiques *Tsilhqot'in* et *Grassy Narrows* :

Le défi est de concevoir une législation adéquate et de l'élaborer assez soigneusement pour qu'elle puisse appuyer des actions et des politiques publiques efficaces.

- **C'est un rendez-vous à la table de négociation.** La négociation des traités modernes, précieux outil au service des gouvernements comme des Premières Nations, reste la solution la plus évidente et la plus largement acceptée.
- **Les gouvernements devront s'appuyer sur des énoncés de politique pour déroger à l'application d'un droit ancestral.** Les gouvernements pourraient être plus clairs avec les promoteurs de projets de mise en valeur et les communautés autochtones concernant les cas où ils seraient disposés à utiliser leur pouvoir de déroger à l'application d'un droit ancestral, éventuellement par le biais d'énoncés de politique prudents, élaborés de concert avec les communautés autochtones.
- **Les gouvernements provinciaux devraient utiliser les pouvoirs clairement définis dont ils sont pourvus.** Alors que les provinces sont plus près des questions en jeu, les négociations bilatérales sont moins coûteuses, prennent moins de temps et sont souvent moins difficiles à mener que les discussions à trois. La Cour suprême a accordé aux provinces une nouvelle marge de manœuvre. Ces dernières devraient l'utiliser.
- **Il faudra réclamer des précisions sur les restrictions inhérentes à un titre ancestral.** Les nouvelles règles sur les restrictions inhérentes à la portée d'un titre ancestral autochtone posent des difficultés pour toutes les parties. Les gouvernements provinciaux devront songer à se tourner vers leurs cours d'appel pour réclamer des décisions de référence qui clarifieront les règles en la matière. Les gouvernements, les sociétés de ressources naturelles et les communautés autochtones devront aussi envisager la possibilité de réclamer des tribunaux qu'ils se prononcent sur les règles relatives aux restrictions.
- **L'expertise en droit autochtone au sein des tribunaux devra être améliorée.** Les tribunaux doivent se reposer sur des experts du droit autochtone qui peuvent comprendre comment il s'inscrit dans le cadre plus large du droit, des effets économiques et sociaux sur le Canada et du discours international sur les droits autochtones.
- **Les parties prenantes devront se défendre elles-mêmes.** Les parties prenantes qui feront appel aux tribunaux sur des questions d'intérêt devront présenter leurs cas de façon à bien préciser leurs répercussions. En outre, les groupes qui ne seraient pas représentés devant les tribunaux qui rendront des décisions importantes les concernant – par exemple, les associations sectorielles – devront chercher à obtenir un statut d'intervenant dans les cas à venir.

Les gouvernements qui accepteront l'orientation de l'arrêt *Tsilhqot'in* ainsi que les précisions qui y sont formulées auront de meilleures chances d'avancer dans le dossier de la bonne gestion des ressources. Ceux qui résisteront devront passer beaucoup plus de temps devant les tribunaux et verront plutôt ce secteur stagner. Le défi est de concevoir une législation adéquate et de l'élaborer assez soigneusement pour qu'elle puisse appuyer des actions et des politiques publiques efficaces.

Personne ne devrait considérer les présentes décisions de manière alarmiste. Au contraire, tous devraient les voir comme une occasion de bâtir un Canada plus fort.

INTRODUCTION

There has been a great deal riding on the outcome of the Supreme Court of Canada's deliberations on the Aboriginal title case commenced against the province of British Columbia by Chief Roger William, his Xení Gwet'in First Nations Government, and the Tsilhqot'in Nation. When the court released the judgment on June 26, 2014 – under the formal name *Tsilhqot'in Nation v. British Columbia* – the *Tsilhqot'in* people anticipated the end of the legal journey whose origins stretched back over two decades. The Government of British Columbia awaited a determination of its authority over natural resource development on non-treaty provincial lands. The Government of Canada expected to learn if it had additional legal obligations to join with the province on negotiating land use with First Nations in non-treaty areas. And resource developers across the country were eager to find out if their current arrangements for dealing with permits, approvals, and regulatory evaluations of development projects would hold.

With its decision, the Supreme Court ruled generally but not entirely in favour of the Tsilhqot'in. However, on one particular point, it was a historic first for Canadian Aboriginal communities generally, with the Court making the first-ever judicial declaration of Aboriginal title in Canada.

As one Aboriginal leader described the immediate reaction to the case, reports CBC News, "We all heard the decision at the same moment, and the room just erupted in cheers and tears. Everybody is absolutely jubilant. It's very emotional" (26 June 2014a). The judgment touched off a firestorm of puzzled and contradictory commentary across the country. This was, some argued, a "game changer," providing new powers to Aboriginal people in non-treaty areas. Others forecast chaos in the resource sector, with First Nations gaining an effective veto over future development activity. For the Tsilhqot'in, the decision is a cause for great celebration, an expensive and time-consuming vindication of their belief in their ownership of their traditional territories.

Percy Guichon, chief of the Tsi Del Del responded, saying: "I'm so thankful and grateful to say that 150 years later we see the Supreme Court of Canada's decision today as the final justice for six chiefs who died for their land, way of life and the future of the Tsilhqot'in people" (Moore 26 June 2014). Chief Joe Alphonse, Chairman of the Tsilhqot'in National Government, saw a more promising future: "Today we can barely afford to have houses for our people . . . We can barely afford to give our leaders enough fuel money to go to Williams Lake to go see a doctor. A former tribal chief used to call our reserve a glorified concentration camp. I sure as hell hope we broke down some of those barriers today" (Moore 26 June 2014).

Grand Chief Stewart Phillip of the Union of BC Indian Chiefs said, "It only took 150 years, but we look forward to a much brighter future. This, without question, will establish a solid platform for genuine reconciliation to take place in British Columbia. . . . I didn't think it would be so definitive . . . I was actually prepared for something much less. It's not very often that I'm without words, and I'm quite overwhelmed at the moment," reports CBC News (26 June 2014a).

Lawyers found much to consider in the decision. Jack Woodward, whose firm litigated on behalf of the Tsilhqot'in, reflected on the quarter century struggle to seek justice through the courts: "People said don't do these court cases. Go to the treaty table. Talk with the government . . . It was a lonely struggle to go forward and be in the courts and say, no, we're not going to settle for the few crumbs the government's willing to offer" (CBC News 26 June 2014a). Louise Mandell, a prominent BC law-

Tsilhqot'in is the first-ever judicial declaration of Aboriginal title in Canada.

yer, argued that "The Crown has held the illegal status quo in place by a theory of Aboriginal title that it was just limited to small spots . . . I would find it quite fascinating to hear how those who need to make changes are planning to do that" (Paris 8 July 2014). A lawyer representing the James Bay Cree, Murray Klippenstein, argued that the BC decision would have an impact across the country and that Canadians will "have to deal with the fact that Aboriginal land rights are very real, they exist today and we all have to deal with them" (Wiens 27 June 2014).

Governments took a more cautious approach to the news of the decision. The Government of Canada indicated a preference for negotiated agreements with First Nations rather than a continued reliance on the legal process. British Columbia was conciliatory as well. BC Attorney General Suzanne Anton said that the Supreme Court judgment "provides additional certainty around processes and tests that are applied to the relationship between the province and Aboriginal peoples" (Hampel and Bennett 5 September 2014).

Many business-side lawyers played down the significance of the decision, with comments by the likes of Tom Isaac and Robin Junger suggesting that the decision simply applied existing law in a reasonably predictable way.¹ Many mining, pipeline, and forestry executives indicated that relations with First Nations had already changed and would continue to adjust to take the new ruling into account. Taseko Mines (26 June 2014) posted a news release suggesting that the decision reawakened possibilities for its New Prosperity Mine project which it suggested was now shown to be outside of the area of Tsilhqot'in Aboriginal title and to be the only mining project in British Columbia with the legal certainty of not being on lands subject to an ongoing land claim. On the other hand, some business-friendly commentators rapidly warned of alarming risks to economic development in British Columbia.²

In many ways, everyone has struggled to determine the full impact of the decision. That many First Nations headed quickly to court to file their own demands for the recognition of their territorial rights suggested that the years to come would be filled with uncertainty and further legal action. The Gitksan First Nation moved to issue eviction notices to companies that operate in its claimed traditional territory the size of the Netherlands in northwestern British Columbia – including to CN Rail, whose line has subsequently been subjected to occasional blockades along the route to Prince Rupert's important port.

In our view, there is no doubting that there are big questions ahead and possible uncertainties on what all may result. Supreme Court decisions, in *Tsilhqot'in* and in all other cases, are both more and less than they seem. The Tsilhqot'in had unique historical circumstances that allowed them to prove uninterrupted and uncontested control over a portion of their traditional territories – and even this portion was a claim area of only 5 percent of their traditional territory, with the Tsilhqot'in ultimately obtaining only 40 percent of the claim area.³

Map: Reality of the claim

There is a great deal of confusion about the differences between the traditional territories claimed by First Nations, their official claims in legal proceedings, and the lands specifically determined to be under Aboriginal control as a result of a court decision or negotiated settlement. For years, British Columbians have struggled to deal with the fact that more than 100 percent of the province has been claimed by First Nations. The reality is that boundaries between First Nations have always been imprecise, with considerable sharing of territories. As a result, there are many “overlapping” claims to parts of British Columbia. As First Nations enter into negotiations or legal proceedings, there is typically greater precision in the delineation of traditional territories, which, incidentally, are many times greater than the postage stamp-sized official reserves allocated to First Nations over the years.

In the *William* case, the Tsilhqot'in had a cultural claim to a large area but focused their legal efforts on a smaller piece of territory, where they were confident that they could demonstrate – to the satisfaction of the court – ownership and control over their territories. The Supreme Court, in making the final judgment, focused the award on a much smaller piece of the original legal claim, which is smaller in turn than the Tsilhqot'in traditional territories. In several of the media reports produced in the aftermath of the *William* decision, maps related to the larger claims were presented, implying that the Tsilhqot'in had secured a ruling on title to a substantial portion of the interior of British Columbia. The title recognition is significant, but it is not on the scale that many observers have now come to believe. The area claimed and the areas awarded title are shown in the map.



Source: Appendix to *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

Not many First Nations across Canada could reproduce the scale and nature of their evidence. The *Tsilhqot'in* decision will have a substantial impact on resource development in Canada, and the effects are already being felt. Over time, and through negotiations, accommodations, and future court rulings, the full impact of the *Tsilhqot'in* judgment will become clear. If it turns out to be less than the ground-shaking, transformational foundation for a new economic role for Aboriginal people, it will nonetheless mark a significant turning point in approaches by First Nations, provincial, territorial, and federal governments and by the resource companies working on Aboriginal lands.

On all fronts, there has been recognition that the impact would reach beyond the title claims of one Aboriginal community and could have a much broader influence. British Columbia First Nations engaged in discussions on the decision over the summer in which they were grappling with how to organize their claims so as to avoid problems arising from overlapping claims (Moore 15 August 2014), and BC chiefs were scheduled to meet with the BC Cabinet on September 11, 2014 to discuss the decision. That meeting is the beginning of a set of larger conversations.

This paper, building upon past work in the Macdonald-Laurier Institute's ongoing series *Aboriginal Canada and the Natural Resource Economy*, seeks to analyse the broader impact of the *Tsilhqot'in* decision and the Supreme Court of Canada's historic summer 2014 analysis of Aboriginal rights. We begin with some deeper background on the decision before turning then to an analysis of the key features of the decision and some of their implications, including for the role of the provinces, cited just a few weeks later in another Supreme Court of Canada decision, *Grassy Narrows*, also referred to as Keewatin. In a concluding section, we offer some reflections and policy recommendations that flow from our analysis.

BACKGROUND

The *Tsilhqot'in* case emerged out a complex web of court cases that have, since the 1960s, sought to define and clarify Aboriginal rights to their traditional territories and their role in shaping and approving resource development on these lands. The issues are particularly acute in British Columbia, where there are only a handful of negotiated modern treaties (and a few historic treaties affecting parts of Vancouver Island and parts of northeastern British Columbia) and where the provincial government had, for generations, resisted efforts to build sustainable partnerships with Aboriginal people. This legal context is vitally important, for Supreme Court decisions build on the cases and decisions that preceded them. It is also valuable to remember how recent the legal empowerment of Aboriginal people in Canada has been. The table below provides a partial list of several major Supreme Court of Canada judgments bearing on resources and, especially, control of Aboriginal territories.

TABLE 1 Selected Supreme Court of Canada cases impacting control of Aboriginal territories

CASE	DATE	ISSUE	OUTCOME
<i>White and Bob</i>	1965	Aboriginal hunting rights	In favour of the First Nations
<i>Calder</i>	1973	Nisga'a land and territorial rights	Split decision (3-3-1) that resulted in the claim being rejected by the Court on procedural grounds

CASE	DATE	ISSUE	OUTCOME
<i>Gladstone</i>	1996	Aboriginal fishing rights in British Columbia	In favour of the Government, and providing further guidance on limitation of rights
<i>Delgamuukw</i>	1997	The nature of Aboriginal title to traditional lands	An apparent victory for First Nations, with specific guidance as to the standard of proof over lands but without a remedy in the particular case
<i>Marshall</i>	1999	Aboriginal commercial fishing rights under treaty in the Maritimes	In favour of the First Nation
<i>Marshall & Bernard</i>	2005	Aboriginal commercial timber rights under treaty in the Maritimes	In favour of the Government
<i>Tsilhqot'in</i>	2014	Territorial and land use rights on non-treaty lands	In favour of the First Nations
<i>Grassy Narrows</i>	2014	Attempt to limit the rights of the Government of Ontario to regulate resource use	In favour of the Government of Ontario

There are, to be clear, literally hundreds of existing court decisions, most stopping well before the Supreme Court of Canada and hundreds more in the legal pipeline. While many Canadians recoil with dismay at the number and intensity of the legal challenges to the authority of provincial, territorial, and federal governments, and while there is considerable unease about the legal empowerment of Indigenous Canadians through these means, the reality is that Aboriginal people and governments are simply asking the courts to ensure that Canadian (and British) law is applied equitably and fairly to their situations. In contrast to those who are sharply critical of the “activist” court, the judges of the Supreme Court are simply doing the job they are required to do by section 35 of the *Constitution Act, 1982*, deciding if and when governments (or, possibly, others) have infringed on Aboriginal rights. The process is a vital one, for Aboriginal people and for all Canadians. Only 50 years ago, Aboriginal people had virtually no recognized territorial or resource rights save for those defined by the imposed *Indian Act* (1876 and supra) and historic treaties (such as the numbered treaties – largely on the prairies – as well as predecessor treaties in the province of Ontario and pre-Confederation treaties). In both contexts, these rights were limited and without substantial benefit to Aboriginal people. Piece by legal piece, First Nations, Inuit, and Métis people resorted to the courts, seeking legal sanction for their arguments that, under British and Canadian law, they had unresolved and as yet unspecified rights to their traditional territories and the resources to be found thereon and underground. Slowly – at times painfully and expensively so – Aboriginal claimants have driven the court to define specific rights, gradually building an edifice of territorial and resource rights that they can use to their economic, political, social, and cultural benefit. In more recent years, much of the litigation has been about consultation for unproven rights, but the *Tsilhqot'in* decision returns to a line of past litigation more specifically identifying the scope of proven rights.

The 2014 *Tsilhqot'in* decision did not, therefore, come out of the blue. Instead, it emerged from a long history of legal dispute and court interpretation, a process that has run generally but not exclusively in the favour of Aboriginal people. While much has been made of a lengthy string of Aboriginal victories in the courts – over 150 successive wins by the count of lawyer Bill Gallagher⁶ – the reality is that the incremental change has been comparatively small, with the Supreme Court judgments

often couched in balanced and careful prose that respects the law but that also consistently urges governments and Aboriginal peoples to find non-legal means to reconcile their differences, such as through negotiation.

For the individual Aboriginal communities engaged in these court battles, the costs and implications are enormous. The Tsilhqot'in, a small and far from wealthy group of communities in the interior of British Columbia, spent more than \$10 million on legal and other fees associated with the William case. That sum, while substantial, is not out of line with several other court cases brought by First Nations. The Indigenous peoples go this route because they think that they are right, because their lawyers tell them that will likely win (and they have been right more often than wrong in recent times), and because they see the issues at play as being crucial to the future well-being of their communities and society. Governments do provide funds on an advanced costs basis, out of an attempt by the courts to level the playing field, but there is nonetheless significant financial risk for Aboriginal communities that go the litigation route.

Governments, for their part, contest these cases because they possess dueling responsibilities: to the Aboriginal peoples as laid out in the *Canadian Constitution Act of 1982* (Section 35) and to the general provincial or national

population by dint of their role as the representatives of the people. Although governments have many more resources to put into the court cases than do most Aboriginal communities, this imbalance has not slowed the willingness of Indigenous peoples to fight for what they see as their rights.

The Tsilhqot'in are a numerically small group of First Nations people who live in the Chilcotin territory west of Williams Lake in the central interior of British Columbia. There a total of six bands and approximately three thousand band members in the Tsilhqot'in Nation. They inhabit a remarkable territory, dominated by high mountains, sweeping valleys, and impressive lakes. The area attracted comparatively little attention from newcomers until after the Second World War, in large part because the Tsilhqot'in kept the outsiders at bay. In the latter half of the nineteenth century, they resisted efforts by the Hudson's Bay Company to expand into their territory, resisted a proposed railway through their lands, and fought back against outsiders in a small Chilcotin War or Uprising that saw the Tsilhqot'in resist an intrusion by road workers into their territory. They gained a reputation as fierce defenders of their territories. Things changed somewhat with the post-War resource boom. Loggers, miners, tourist operators, and others made their way into the region, although the long distances from the major highway at Williams Lake and the sparse population of the region kept development at a comparatively low level. The Tsilhqot'in held to their position that the ancestral lands belonged to them. The absence of a negotiated land surrender agreement reinforced this position. The simple reality that the Tsilhqot'in could, in general, use the land as they had traditionally done kept strong the communities' ties to their territories and to the culture that was intertwined with it. The Tsilhqot'in have not signed a treaty with the Governments of Canada and British Columbia.

This was the context when, in the early 1980s, the Government of British Columbia authorized commercial logging on Tsilhqot'in territory. Lengthy negotiations did not produce an agreement, leading one band (the Xenigwet'in) to claim Aboriginal title over the lands in question. A court case, presented over the name of then Chief Roger William, proceeded in an attempt to resolve this matter and lasted for over five years – a legal marathon that is among the longest court processes in the history of the British Commonwealth. At great expense, the Court sat for over three hundred trial days. While some of the hearings were held in Tsilhqot'in

Aboriginal people are simply asking the courts to ensure that the law is applied equitably and fairly to their situations.

Supreme Court judgments consistently urge governments and Aboriginal peoples to find non-legal means to reconcile their differences.

territory, the majority took place in Victoria, British Columbia, which meant that many days of testimony and debate proceeded with few if any Tsilhqot'in in the courtroom. The judge, David Vickers (who died in 2009), found that Aboriginal title did exist, but also ruled, on a technicality, against the Tsilhqot'in on the basis that they had not properly defined the claim area (*Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at paras. 957–62).

The court proceedings were marked by the flexibility of the judge in his attempt to respect Supreme Court of Canada guidance on hearing Aboriginal evidence and the Aboriginal perspective.⁷ On one occasion, Justice Vickers relocated the court to a hospital room to hear the testimony of a dying Tsilhqot'in elder. On others, he held night-time sittings in order to hear oral history evidence that could culturally be recounted only at night.

The trial was also marked by the aggressive position taken by the Government of British Columbia. BC's lawyers argued that the Tsilhqot'in were not truly an organized society, in large measure because they moved substantial distances over the course of a year and therefore did not maintain control over their territories. The Tsilhqot'in bitterly resented the depiction of themselves as nomadic and, by implication, uncivilized. It is important to note that the Government of British Columbia later abandoned this line of argumentation, but the feelings it engendered no doubt complicated some phases of proceedings.

The legal proceedings did not end after the trial. Although the trial judge urged negotiation, which proceeded for a period of time, negotiations eventually broke down, and both sides appealed to the British Columbia Court of Appeal. The Appeal Court rejected the demand for the recognition of Aboriginal title, suggesting that such title could only exist on small, continuously, and intensively occupied pieces of land (*William v. British Columbia*, 2012 BCCA 285 at para. 344). The Court of Appeal did recognize the right of the Tsilhqot'in to continue to hunt and fish, as before, over their traditional territories. The Tsilhqot'in were not satisfied with this limited victory, and they applied for leave (permission) to plead their case before the Supreme Court of Canada. Permission was granted and, in 2013, the Tsilhqot'in legal team presented arguments to the Supreme Court, focusing largely on their right to control a large portion of the land – those areas traditionally utilized by the Tsilhqot'in – in the Chilcotin region.

It is important to note that some of the strongest response by the Tsilhqot'in to the decision focused on the British Columbia government's attempt to portray them as uncivilized and unorganized, like "dogs", as one Tsilhqot'in leader had interpreted it angrily (CBC News 26 June 2014b). In the broader discussion of the importance of the Tsilhqot'in decision for resource development, virtually everyone missed one of the most important vindications to the Tsilhqot'in, namely that the Supreme Court of Canada, unlike the British Columbia Court of Appeal, did not assume that the people were disorganized simply because they followed a mobile lifestyle.

The Supreme Court did not assume that the Tsilhqot'in were disorganized simply because they follow a mobile lifestyle.

THE SUPREME COURT OF CANADA'S DECISION

The Supreme Court of Canada's June 2014 decision in the *Tsilhqot'in* case is a historic first, providing a judicial declaration of Aboriginal title in a Canadian courtroom, thus ending a decades-long effort by First Nations to have their title to non-treaty lands recognized in the courts. Past cases opened the door for such a declaration. However, in each case where a claim was put, the courts always identified a reason not to make an actual declaration. The *Tsilhqot'in* case itself only narrowly avoided a repeat of that scenario.

In 1973, the decision in *Calder v. British Columbia* first saw six out of the seven justices of the Supreme Court of Canada hearing the case supporting in principle the legal concept of Aboriginal title. However, the particular claim failed for the majority of the court, with some of those judges deciding based on a conclusion that the title had been extinguished. The final decision rested on relatively minor procedural questions unique to the case. In 1997, in *Delgamuukw v. British Columbia*, the Supreme Court of Canada articulated an Aboriginal title test that would apply in the context of Aboriginal title claims after the adoption of the section 35 Aboriginal rights entrenchment as part of the 1982 constitutional patriation. However, again, the particular claim failed, again on procedural grounds and with a clear suggestion that the courts would prefer that governments and Aboriginal communities negotiate about such claims. Moreover, the test established by the court was difficult for most First Nations to achieve.

In the *Tsilhqot'in* decision, the trial judge, Justice Vickers, wrote very favourably of the community's claim.⁸ And his reasoning adopted an approach to the Aboriginal title test – to be overturned by the Court of Appeal (*William v. British Columbia*) en route to the Supreme Court of Canada – in which a claim like that advanced by the community could succeed. However, even the trial judge ultimately concluded that the particular claim failed on procedural grounds. However, because the province of British Columbia abandoned the procedural argument before the Supreme Court of Canada to allow the case to be determined on its merits, it became possible, for the first time, for the Court to make a declaration of title (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 7).

In doing so, the Court interpreted its past cases based on the perceived legal requirements needed to establish Aboriginal title. In Canada, this test is based on the ability to prove, to the satisfaction of the Court, occupation or possession of particular territories by an Aboriginal community prior to the assertion of European sovereignty (para. 25). That occupation needs to have been sufficient and needs to have been exclusive – it cannot be held by more than one First Nation (paras. 47–49), although some have argued for the possibility of shared exclusivity by more than one community (a concept still to be legally tested). These elements are what make a territorial claim a title claim. If an Aboriginal community had sufficient, exclusive possession of land prior to the assertion of European sovereignty, its historic right to that land gets translated within the modern legal context into a title claim. A community that used land in some non-exclusive way may continue to have Aboriginal rights in relation to the use of that land for the purposes of hunting, fishing, trapping, and other activities, based on the pertinent legal tests, but its claim would not be to title.

A third element of the Aboriginal title test referenced within the *Tsilhqot'in* decision is that of “continuity.” Unlike the other elements, continuity is not a rigid requirement, as became clear in the *Tsilhqot'in* decision. The continuity element becomes pertinent only where present occupation is being relied upon as evidence of past occupation. When present occupation is part of the evidence put forth, the Court established and thereby applies a non-rigid test focused on whether the present occupation can be shown to be “rooted” in past occupation (para. 46).

So, the test for whether an Aboriginal community holds Aboriginal title to particular unceded lands hinges on whether it had sufficient, exclusive occupation of those lands prior to the assertion of European sovereignty. A key development within the *Tsilhqot'in* decision is that the Court interprets these concepts in a manner such that they can potentially be satisfied by a community that was historically “semi-nomadic” (using the terminology still commonly applied within legal circles to mobile communities). This is a crucial change from earlier interpretations that had rested on implicit assumptions that mobile populations were not organized societies of a sort that the British legal system would recognize.

Specifically, and counter to interpretations that many had made of a 2005 Supreme Court of Canada decision in a case called *Marshall and Bernard*, “sufficient” occupation does not require intensive occupation of specific sites but only a use of land in a manner appropriate to the nature of that land and its historic carrying capacity. If certain areas were used on a seasonal basis over the course of a year or years, that may well have been sufficient occupation of those areas. “Exclusive” occupation does not require that the community have been the only user of the lands. It requires only that the community have been recognized by others as the community that used certain lands and one from which permission would have been sought by others going onto those lands.⁹

With these interpretations, a mobile or semi-nomadic community, like the *Tsilhqot'in* Nation, becomes capable of satisfying the requirements of the Aboriginal title test. The test, for the first time, clearly accommodates the circumstances of a semi-nomadic community. Whether the Aboriginal title test could work for a semi-nomadic community was highly uncertain after the *Marshall and Bernard* decision. That such a community has succeeded and obtained a declaration of Aboriginal title shows other communities that such a claim can succeed in the courts. In these ways, the Supreme Court of Canada’s decision shifts the legal landscape and broadens the scope of Aboriginal title claims that have a good potential to succeed.

That said, it is vital to note that the *Tsilhqot'in* decision related specifically to land not covered by either a historic treaty (such as Treaties 1 to 11 or other historic treaties) or a modern treaty signed after the treaty-making process revived in the 1970s. Where treaty relationships have seen Aboriginal communities cede their lands, the decision has no particular implications on title issues – despite claims that have been floated in the media by various advocates for a much broader interpretation of Aboriginal rights as defined under *Tsilhqot'in*.¹⁰ However, those implications are still far-reaching because non-treaty areas in Canada are substantial, covering most of British Columbia (although with the Douglas treaties covering parts of Vancouver Island and Treaty 8 covering parts of northeastern British Columbia), parts of the Yukon and Northwest Territories, parts of Quebec, and all of the Atlantic provinces (with a partial exception in Labrador). In parts of the Yukon Territory, the Governments of Canada and the Yukon signed modern treaties with most First Nations, but three remain outside those frameworks. In parts of Quebec, modern treaties have not yet covered all areas. In the Atlantic provinces, the Peace and Friendship Compacts of the mid-1700s did not include clauses for the surrender of land, so there remain possible Aboriginal title claims, a position that First Nations groups hold very strongly. In other provinces, some First Nations claim to have been left out of treaties in the past and are today pursuing Aboriginal title claims. In these areas, the Government of Canada had never completed a land surrender treaty, leaving unresolved the questions of Aboriginal title and land and resource rights. Aboriginal people in treaty areas have, however, argued that the empowerment relating to resource development applies equally across the country, and some challenge the interpretation of “cede, release, and surrender” clauses relating to land.

The Tsilhqot'in decision broadens the scope of Aboriginal title claims that have a good potential to succeed.

In addition, even in regions of the country with widespread treaties with First Nations, outstanding Métis land claims that have not been settled may be bolstered by the decision – though its application to that different cultural context is complex, as are the complex overlapping territory issues as between First Nations and Métis communities. The decision does not have unlimited application, but it potentially has very significant implications in a number of different settings. Its new test for Aboriginal title applies to the legal arguments in all of these different contexts.

The Nature of Aboriginal Title and Its Limits

Aboriginal title is a concept close to, but still different from, the sort of private land ownership held by most Canadians, which is called *fee simple*. The similarities and differences are immensely important to a clear understanding of the consequences of the *Tsilhqot'in* decision, particularly as many Aboriginal and non-Aboriginal commentators are asserting that *Tsilhqot'in* has sweeping implications. The Supreme Court's decision both expands upon the nature of Aboriginal title and also imposes on it what are potentially new limits.

First, that Aboriginal title is close to the concept of fee simple and encompasses all the economic dimensions of private land ownership is perhaps clearer in law than ever before. Its economic dimension had long been acknowledged in prior cases.¹¹ But there had been uncertainty on some major matters, such as whether Aboriginal title encompassed all subsurface rights associated with the land, and whether and how the Indigenous interest in the land extends to questions of resource development and land use.¹²

In *Tsilhqot'in*, the Supreme Court of Canada describes the scope of Aboriginal title in this way:

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land. (para. 73)

In the absence of any particular limit on the scope of the right, this description suggests that this right encompasses all the economic uses of the land.

However, at the same time, the Court emphasizes the distinctions between Aboriginal title and fee simple ownership, making clear that Aboriginal title cannot be understood simply in terms of a Western property concept.¹³ In particular, there are two very significant differences in the nature of Aboriginal title as compared to privately owned land, both flowing from the origins of Aboriginal title as a claim by the community. As put by the Court,

Aboriginal title, however, comes with an important restriction – it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. (para. 74)

This places a constraint on Aboriginal title that does not encumber fee simple land ownership. The rule that Aboriginal title lands can be alienated or sold only to the Crown – rather than directly to private land purchasers – is a long-standing principle in the management and control of First Nations lands and has been made reasonably clear in its application. The other facet of what the Court says here, by contrast, is the first time the Court has put matters in this way. Earlier cases had referred to a so-called “inherent limit” on the scope of Aboriginal title that could potentially restrict the use of Aboriginal title lands (*Delgamuukw v. British Columbia* at para. 125). However, the expression of this inherent limit in the *Tsilhqot'in* case puts new considerations to the forefront.

This dimension of the case immediately raises crucial questions. At this stage, there is no guidance in the case law as to what the restriction might mean when the court says that Aboriginal title lands can be developed only in ways that would not “substantially deprive future generations of the benefit of the land”. Whether this precludes certain types of resource development on the basis that they would damage the land is simply not clear. In what circumstances can someone put a claim that a particular use will deprive future generations – and who can put such a claim on behalf of future generations – has not been defined. In other words, to the degree that each Supreme Court decision provides additional pieces to the puzzle of Aboriginal rights and title, *Tsilhqot’in* includes several unresolved issues of crucial importance.

Aboriginal title is collective title held for the present and all succeeding generations.

Those seeking to engage in resource development on Aboriginal title lands where the development has any potential effect on future use of the land would be well-advised to approach this restriction cautiously. Ratification of a resource development by a whole community – as opposed to simply by its leadership – probably becomes a highly prudent precaution.¹⁴ With a strong community-wide declaration of intent that a proposed development, by providing benefits in the short term that will help the community over the long term, is in the collective interest, the government and the resource companies will be on a strong footing. Even still, the strong possibility exists that dissenting members of the community may attempt to bring a legal challenge based on the supposed claims of future generations. It is even conceivable in some circumstance that outside environmental groups could attempt to invoke that restriction, even to override the overwhelming wishes of a community to pursue resource development that would be economically beneficial to the community. What prospects such legal challenges would have remain to be seen as the courts offer more clarity on this part of the nature of Aboriginal title. In addition, the negotiation of a modern land surrender treaty would supercede the Supreme Court’s description of Aboriginal title on unceded lands, providing First Nations and governments with another way of moving beyond the *Tsilhqot’in* decision, albeit in a manner requiring extensive community engagement and consent.

Given the seemingly restricted nature of Aboriginal title, it is frankly conceivable that some Aboriginal communities would prefer a form of land-holding other than that now within the doctrine of Aboriginal title. A declaration of Aboriginal title could well put severe constraints on the use of lands and resources for community purposes. The essentially collective nature of Aboriginal title lands fits well with the cultural patterns and current priorities of some Aboriginal communities. However, receiving a declaration of Aboriginal title could well hamstring future generations who might wish for economic development on their territories based on individual land ownership.

It is not clear that Aboriginal title can be divided into individual ownership while in keeping with the inherent limit related to future generations’ collective ownership. Other Aboriginal communities have long-standing traditions of individual members of the community owning land privately, and some communities are working hard to reclaim these traditions. The Nisga’a, for example, operating within the scope of their negotiated self-government agreement and modern treaty, have been working to establish individually titled lands and have even established a Torrens-style (or title by registration of land holdings) system for the registration of land transactions. The Nisga’a were, of course, the community whose Aboriginal title claim was unsuccessful on procedural grounds in the *Calder* decision of the Supreme Court of Canada. But that decision set governments and the Nisga’a community onto a decades-long effort toward a negotiated agreement. That settlement assured the Nisga’a the ability to establish private land ownership within their territory. Had they succeeded in their Aboriginal title case, the judicially pronounced restriction on the nature of Aboriginal title might actually have precluded them from establishing private land ownership, undermining the community’s culturally

rooted pursuit of a different policy framework. In the long term, the Nisga'a, had they succeeded in their Aboriginal title claim, might have obtained a form of land ownership not as much in keeping with their own community cultural norms and expectations than they were able to negotiate.

Similarly, Aboriginal communities that wish to proceed with resource developments that could be challenged in regards to their impact on future generations' use of the land may also have reservations about the legal limits that now apply to Aboriginal title lands. If Aboriginal title does not permit certain sorts of resource development on Aboriginal title lands, a community may prefer to cede their lands to the Crown in exchange for something like fee simple ownership of lands that then permits resource development without the same restrictions. That they can do so has some paradoxical features, thus highlighting the challenging legal frameworks at issue. But the fact that some would wish to do so does highlight some of the problems associated with the form of Aboriginal title that has developed.

The big caveat here, though, is that there is uncertainty on many pertinent points. What kinds of development might be precluded by the limit on Aboriginal title is ill-defined in the Court's one-sentence development of a major policy rule. Indeed, the legal uncertainty generated by the Court's pronouncements in this statement may call for various parties trying to seek clarification sooner rather than later. This, it needs to be emphasized, is often the case with Supreme Court decisions. The Court's rulings are complex and subject to many different interpretations. Future claimants will, through court proceedings, further refine and clarify the meaning of the William-style

Aboriginal title declaration. Certainty in the law is an elusive goal and it is only to be expected that First Nations, governments, companies and other interested parties will, in subsequent years, return to the courts to seek clarification and more precise definitions. This, too, of course, is one of the country's great frustrations with legal processes, for even relatively clear decisions like *Tsilhqot'in* create ambiguities and uncertainties.

What Aboriginal title means for development is yet to be understood.

Implications of the *Tsilhqot'in* Decision for Consultation/Consent Requirements

Where Aboriginal title is established, the usual expectation is that uses of the Aboriginal title land by others – such as for resource development – could be only with the consent of the community (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 76). That is the usual implication of land ownership and applies to all people, Aboriginal and non-Aboriginal. That said, private land is subject in certain circumstances to expropriation for public use, and the next section will examine an analogy in the Aboriginal title context. Before turning to the circumstances in which Aboriginal title may be overridden, however, it is also important to understand that the Court's decision on Aboriginal title has implications going far beyond those lands over which Aboriginal title has been established through the courts.

In the last decade, the Supreme Court of Canada developed a doctrine called the “duty to consult” that applies in the context of Aboriginal or treaty rights claims even where those claims have not been adjudicated in the courts or settled through negotiation. The doctrine requires governments to consult with Aboriginal communities any time their administrative decisions may adversely impact asserted Aboriginal or treaty rights, even where there remains uncertainty on the scope of those rights.¹⁵

Thus, the requirement of consultation is triggered relatively easily. The depth of that consultation (what needs to be done by way of consultation and the possible legal requirements for appropriate accommodation) then depends upon the apparent legal strength of the claim and the severity of the

negative impact. In practical terms, the doctrine has strongly encouraged resource development proponents to negotiate impact and benefit agreements with Aboriginal communities who might have consultation claims. In principle, the duty to consult is a duty applying only to governments, but resource development proponents and Aboriginal communities often simply negotiate around it, so that governments need be involved as little as possible. That said, patterns on this point differ between different provinces and territories, with some jurisdictions seeing companies and Aboriginal communities dealing directly on a widespread basis and others keeping a greater governmental involvement.

One significant consequence of the *Tsilhqot'in* decision does not appear explicitly in the decision. However, it flows directly from the decision. That is, the legal claims of a variety of different Aboriginal communities with outstanding Aboriginal title cases are stronger than they appeared to be before the decision. As a result of that, the depth and intensity of consultation required of government in the context of various lands and development plans across Canada has increased.

The decision implicitly recognizes this. It actually also makes moves toward a language not just of consultation but of consent, albeit without making it a formal legal requirement except in established cases of title. But the Court, in the words of Chief Justice Beverley McLachlin, offers this warning of sorts: “I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group” (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 97). Although the Court does not make consent a generalized legal requirement, it goes out of its way to reflect upon its desirability. It is worth noting here that the Supreme Court has also made it clear on several occasions that it favours negotiated settlements between Aboriginal people and governments and not constant reliance on the courts to adjudicate complex and diverse claims. The warning thus seeks to guide these negotiations toward greater application of an expectation of consent.

Notably, the Court did not take up arguments from intervenor parties in the case to rely more heavily upon provisions of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007), which some see as embodying greater expectations of free, prior, and informed consent in various contexts. In this aspect of the decision, the Court has continued to apply Canadian law, which has resisted any outright veto rights in this context, and it has also implicitly operated on the basis that the Declaration has not somehow outright become part of Canadian law. Both the legal status of the Declaration and what it actually says on consent are actually far more complicated than are often recognized,¹⁶ so this approach reflects appropriate prudence from the Canadian court.

That said, the warning within the *Tsilhqot'in* judgment in terms of the expectation of consent in Canadian domestic law is even further extended by the implications if a government mistakenly assesses a situation as not requiring consent:

Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, 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)

Although the duty to consult doctrine remains formally unchanged – except for the factual change of an increased strength of a number of claims it must consider – there is a shift in the Court’s language

The legal claims of other Aboriginal communities with outstanding Aboriginal title cases are stronger than before the decision.

toward the possibility of significant possible consequences for those who operate in unceded Aboriginal traditional territories without the consent of Aboriginal communities. There are real dangers that authorizations could be subsequently cancelled and/or that damages could become payable. Phrases like “unjustifiably infringing” do not provide a precise new standard but only general guidance to governments and Aboriginal peoples based on the legal standard for justified infringements. Much legal risk now exists for those who operate without Aboriginal consent in areas where a future title claim could succeed.

The decision affects not only situations where Aboriginal title has been established but, implicitly through the duty to consult framework, all contexts where Aboriginal title has been asserted or claimed. To that extent, it has immediate implications in the various parts of the country with outstanding Aboriginal title claims. British Columbia, of course, is most significantly affected in having Aboriginal title claims that, through their overlapping structure, cover more than the landmass of the entire province. Resource operations within British Columbia especially – but also in other areas with outstanding land claims – must now operate within a new reality of Aboriginal communities’ consent being a requirement on future uses of that land.

Governmental Override of Aboriginal Title

Media discussions of the *Tsilhqot’in* decision have, with some limited exceptions, not engaged with the decision’s extended discussion of the circumstances in which governments may override or justifiably infringe Aboriginal title. That discussion actually appears twice within the judgment, in the context of the Court’s discussion of an outright override of Aboriginal title and the discussion of the justification of a law whose application infringes on Aboriginal title (paras. 77–88, 118–27). There are some peculiar features to the way in which these discussions are framed, notably the revival of a broad language of “fiduciary duty” that in recent years the Court had been limiting to very specific contexts in favour of a broader language of “honour of the Crown”.¹⁷ The broader significance of that is a more technical legal question that matters immensely but not for present purposes. The repetition in the discussion is an unusual (albeit not unknown) feature within a Supreme Court of Canada judgment. The two discussions, however, do not seem to point to fundamentally different analyses within the judgment.

Nonetheless, for clarity’s sake, it makes sense to focus on an outright override of Aboriginal title – a concept roughly analogous to government expropriation of privately owned lands. To put it simply, if the provincial or federal government decides that a project that does not have the consent of the

appropriate Aboriginal communities is in the broader provincial or national interest, can it proceed with the development? The Court specifically authorizes such an override in the specific circumstances of a compelling public interest, with the requirements that the government must fulfill its procedural duties of consultation and must meet a test of proportionality of the incursion (paras. 77–88). In other words, the override cannot be used flippantly or easily and must be based on a compelling public interest. As for the kind of public purposes that are sufficiently compelling, the Court cites back to an earlier passage and emphasizes developments that include the following purposes: “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations” (*Tsilhqot’in* at para. 83, citing *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 165). The Court clearly envisages a situation where resource development projects could justify a government override of Aboriginal title.

Governments may override Aboriginal title for the sake of a compelling public interest, subject to meeting a legal test for doing so.

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For such a purpose to justify the imposition of a limit on Aboriginal title, the limit must fit with the nature of Aboriginal title – “incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land” (para. 86)¹⁸ – and there must be a proportionality that looks to the need for the incursion, that the incursion is not more than necessary to meet the stated objective, and that the incursion into Aboriginal space and title does not outweigh the objective (para. 87).

This part of the judgment becomes quite technical. But, in essence, it says that governments may override Aboriginal title for the sake of a compelling public interest, subject to meeting a legal test for doing so that looks to the relative importance of the interests underlying Aboriginal title and the broader public interests at stake. Even though this element of the judgment has received less attention, the Court is actually striking a careful balance within a significantly nuanced judgment, one that respects Aboriginal title and the rights of Indigenous peoples but that recognizes the compelling broader interests involved with land and resource development.

That said, any use of this override would of course be subject to the complex political and legal dynamics of Aboriginal rights. Imagine, for example, if the Government of Canada and the Government of British Columbia opted to use this provision to authorize the construction of the Northern Gateway Pipeline, a controversial project that crosses the traditional territories of many Indigenous groups. If the governments could meet the test, they would still face ongoing challenges of various sorts. It is unlikely, therefore, that governments will make use of it in every circumstance in which they would be legally permitted to do so. However, the possibility of its use could be very real in some situations. Assume that a pipeline was proposed that would cross the lands of a dozen First Nations and all but one of those First Nations became equity partners in the project. The one outlier might then attempt to block the project. In this circumstance, one could envision a real possibility of a government overriding the Aboriginal title of the holdout community for the sake of the other First Nations and the broader public interest. Such are the necessary choices in a diverse community of communities like Canada where there will always be disagreements.

The effects of the *Tsilhqot'in* decision on the bargaining power of different sides within negotiations are not one-sided. The decision does expect an equitable role for Aboriginal communities in future resource discussions, but it does not do so to the exclusion of governmental interests or the broader public interest that governments represent. The decision should not be interpreted in any alarmist way, as some media reports might have encouraged, but it should be taken at face value in its different aspects that do have significant effects.

The Role of the Provinces

A final dimension of the *Tsilhqot'in* decision concerned a question with a rather technical name – that of interjurisdictional immunity – but a rather simpler meaning. Despite arguments by the *Tsilhqot'in* lawyers that provincial laws cannot apply to Aboriginal title lands, the Court concluded that they can and do. This decision was significant and reversed an important aspect of the trial judgment in the case (paras. 132–52). That part of the trial judgment had been based on a long line of precedents on interjurisdictional immunity in general (outside the Aboriginal context) and represented the trial judge’s principled application of that jurisprudence.

However, since 2007, the Supreme Court of Canada has been very significantly altering its case law in this area in general, seeking to develop an approach more in keeping with more recent approaches to federalism that allow both levels of government to legislate within their areas of jurisdiction even where some overlaps result.¹⁹ The Supreme Court of Canada has also described several pragmatic reasons for limiting the implications of that interjurisdictional immunity doctrine. The *Tsilhqot'in* decision effectively applies broader changes in the law to the specific context at issue. The Court’s decision

thus resolved a long-standing argument in a very pragmatic manner that allows provinces to operate within their spheres of constitutional jurisdiction, even when affecting Aboriginal lands, subject of course to legal tests for the degree of their effects on Aboriginal title, Aboriginal rights, or treaty rights.

Tsilhqot'in, Grassy Narrows, and the Reinvigorated Role of Provincial Governments

On the last matter within the judgment concerning the authority of the provinces to have their laws and regulations apply on Aboriginal lands, the *Tsilhqot'in* decision actually came to be cited on the point weeks later as if it had been long-established law (*Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 at para. 53). In another important Aboriginal rights case, the *Grassy Narrows* or *Keewatin* decision, the Supreme Court of Canada considered a specific question on the interpretation of Treaty 3 in northwestern Ontario but actually pronounced on an important set of practical issues with broader application. The specific question in the case concerned the rules governing the province of Ontario “taking up” for development purposes Crown lands in the Keewatin region that had been ceded under Treaty 3. In other words, could the province move ahead with development on lands inside the treaty area without the approval of the First Nations in the area? In particular, the claimants in *Grassy Narrows* asked whether the federal government had to be involved given that it had been the original treaty signatory. But the case ultimately spoke to the broader role of the provinces in relation to treaty lands and to clearer rules on taking up land under treaties.

The Court held that Ontario could take up lands without any requirement for involvement from the federal government. At a broader level, as in *Tsilhqot'in*, the *Grassy Narrows* case thus strongly reaffirms the power of the provinces to operate within their spheres of constitutional jurisdiction, even when their activity must interact with Aboriginal communities (and as against claims to federal jurisdiction traditionally applying in that context). This conclusion is significant in the context of provincial ownership and jurisdiction over most natural resources.²⁰ When operating in relation to natural resources, it has been reaffirmed that provinces may now clearly regulate and make decisions relating to natural resources, even when Aboriginal rights and title questions are involved. Federal authority over reserve lands under the *Indian Act* is one very specific element carved out from provincial jurisdiction. The combined effect of these decisions is also to continue to support the application of provincial law on reserve except in very limited circumstances of conflict with federal law, subject of course to compliance with Aboriginal rights and treaty rights. First Nations in Ontario and British Columbia wanted the courts to recognize the primacy of the Government of Canada on all such matters, but they were unsuccessful.

At the same time, the *Grassy Narrows* case provides clearer guidance as to when provinces may take up land under treaty provisions authorizing such land usage. Government actions, for instance, cannot render treaty-based harvesting rights meaningless or there will be an infringement of treaty rights. In order to operate appropriately, provinces will need to engage in consultation when taking up land under treaties, so as to identify and address harms to protected treaty rights (paras. 50–52).

Although not directly addressed in either judgment, another conclusion that may flow from them concerns the ability of provinces to negotiate directly with Aboriginal communities on various issues and, indeed, essentially to enter bilateral treaty arrangements without the involvement of the federal government. They might not choose to do so, particularly if significant federal funds are at stake, but the decisions would seem to open up much more room for provinces to negotiate.

REFLECTIONS AND RECOMMENDATIONS

The Supreme Court of Canada's summer 2014 Aboriginal rights jurisprudence is immensely significant and changes many rules of the game. It also comes at a particularly important moment in the development of Canada as a natural resource superpower. The significance of the timing was highlighted by the coincidence of the *Tsilhqot'in* decision coming out just weeks after the federal government's approval of the recommendations of the Joint Review Panel of the National Energy Board concerning the construction of the Northern Gateway Pipeline, one of the massive resource infrastructure projects of our time. The decision did not directly pertain to any First Nations' lands along the route of the Northern Gateway Pipeline. But the shifts in the law on Aboriginal title do affect the strength of the claims of communities in the affected areas. There was not simply then a coincidence of decisions but likely some increased challenge – legal realities that can conceivably still be worked through without further court challenges – for the Northern Gateway Pipeline.

What the Supreme Court of Canada has highlighted at a fundamental level is that Aboriginal communities have a right to an equitable place at the table in relation to natural resource development in Canada. Their empowerment through *Tsilhqot'in* and earlier decisions has the potential to be immensely exciting as a means of further economic development in Aboriginal communities and prosperity for all.

All sides must come to grips with these decisions and their nuances. There are real dangers in different constituencies fostering misunderstandings of the decisions, and there is a real responsibility on scholars and others to work to promote accurate understandings of what the Supreme Court of Canada has said and what it has not. Nobody should be approaching these decisions in an alarmist way. Rather, we should all see them as an opportunity in building a stronger Canada. More to the point, regardless of what one thinks of the judgments, they are now the law of the land.

That said, this report has highlighted a number of uncertainties and challenges arising from the Supreme Court of Canada's restrained approach to some parts of what it said. In some ways, that restrained approach opens the opportunity for other governmental actors and Aboriginal communities to work together to define some things. In other ways, lingering uncertainties could cause real problems when moving forward on various issues. There remains the obvious and much supported solution that the negotiation of modern treaties is a valuable tool available to governments and First Nations alike.

Where there is room to operate, the time is now for governments, Aboriginal communities, and resource sector companies to work together to build partnerships for the future. There should be a broad-based dialogue with Aboriginal communities as part of a larger national conversation about Canada's natural resource potential and the ways it can contribute to prosperity for all. We need to keep building a national consensus that responsible resource development that takes account of sustainability issues and that respects Indigenous communities contributes positively – very positively – to Canada and its future.²¹ In building a new and sustained national consensus, all players must make sure that Aboriginal communities are an important part of the conversation. Governments and resource companies need to think of these issues as a major strategic dimension within development processes. Some elements of the new legal framework will undoubtedly have implica-

The negotiation of modern treaties is a valuable tool available to governments and First Nations alike.

tions for the financial viability of specific projects, but Aboriginal communities increasingly appreciate that properly managed resource development is one of the few decent economic development options for their communities.

Provincial governments, in particular, should be thinking on how to take up fully the reaffirmation of their powers. Where they can advance goals effectively without the federal government, they should consider doing so. Provinces are closer to the issues at hand, and bilateral negotiations are less costly, less time-consuming, and often less difficult than tripartate conversations. Provincial governments have a key role to play. The summer 2014 decisions of the Supreme Court of Canada give them new room to operate. They should use it and they should indicate to First Nations how they intend to use it.

At the same time, some of the uncertainties remaining after the Supreme Court of Canada's pronouncements are highly problematic. The new rules on the inherent limits on the scope of Aboriginal title create a problem for all sides. Provincial governments should be contemplating the possibility of mechanisms such as seeking reference decisions from their Courts of Appeal to clarify the rules on this matter. Governments, resource companies, and Aboriginal communities could also think of the possibility of pursuing cases that seek declarations on the rules on that element. But the use of the reference power may be a faster option than full-fledged court cases, and it should be contemplated.

Governments should also be contemplating whether they can offer greater clarity to resource development proponents and Aboriginal communities concerning when governments might be willing to use their power to override Aboriginal title, possibly through careful policy statements on the point. Again, such indications would foster an environment of greater clarity for all involved. These statements must, for political more than legal reasons, be developed in concert with Aboriginal communities if they are to have sustained political authority.

More generally, of course, the reality that court decisions on these matters have a highly polycentric impact – that they affect many parties who are not all represented in the courtroom – needs to receive more attention. The courts should also be thinking further on how to grapple with this reality, and judicial appointments should be undertaken with a real awareness of the very central role of Aboriginal rights issues in the years ahead for Canadian courts. We need big thinkers on the courts who understand Aboriginal law and also see how Aboriginal rights fit into a larger picture of law, of economic and social effects on Canada, and an international discourse on rights, on the

environment, and on resource development. Those making representations to the courts on related matters should be framing matters in a way that captures their impact, and groups that are currently not as well represented before the courts as the courts make major decisions that affect them – for instance, resource industry associations – should be contemplating seeking intervenor status in some of the upcoming cases that will continue to flesh out the implications of section 35 and the various Supreme Court decisions.

More than a few Aboriginal leaders and many commentators expected the *Tsilhqot'in* to lose their title case. It speaks volumes to the uncertainties of the legal processes in Canada that the final decision could be so strong and, in the context of Supreme Court decisions generally, so definitive on the core question of Aboriginal title. At present, there are dozens of important cases working their way through the court system; some of them will make their way to the Supreme Court and some of the decisions will be *Tsilhqot'in*-like in their reach and importance. If nothing else, the *Tsilhqot'in* decision does two vital things: strengthens the hand of First Nations in non-treaty or unceded territory and increases the pressure on federal, provincial, and territorial governments to conclude final agreements through the treaty processes. The Supreme Court has made it clear that Aboriginal title exists on First Nations claimed lands in non-treaty areas, that consultation bordering on if not requir-

Provincial governments should advance goals without the federal government where allowed.

ing consent is at least expected, and that governments still have the authority to govern resource and land use in the interests of the public at large.

With each major Supreme Court decision, the legal framework for Aboriginal title, Indigenous rights, and Aboriginal claims becomes clearer. It is remarkable that only 40 years ago, almost none of this legal framework existed. That it has grown in that period is a testament to the determination of Aboriginal communities to secure recognition of their rights under British and Canadian law. It is also an illustration of the careful, thoughtful, and incremental decision-making of the Supreme Court of Canada that has slowly built an edifice of Aboriginal title and rights that is the envy of many Indigenous peoples from around the world.

The environment for natural resource development on Aboriginal claimed lands in non-treaty areas has certainly changed. Those governments that embrace the details and direction of the Supreme Court of Canada decision will have the best chance of moving forward with carefully planned resource development. Those governments that resist the decision will both spend a great deal more time in court and will see resource activity stagnate in their jurisdictions.

Aboriginal communities face extremely difficult decisions. It is clear that they can use – or at least attempt to use – the *Tsilhqot'in* tests and directions to stall if not stop unwanted resource development, but not without a substantial cost in terms of economic opportunities, business growth, and jobs. The Supreme Court clearly put a cap on the authority of Aboriginal peoples, and Indigenous governments have to recognize that their rights are not absolute. Consent or support unreasonably withheld or deemed to be contrary to the national or public interest could result in a government override and expropriation of Aboriginal lands. There is a good reason that the overriding metaphor for the modern legal system is that of a balance – between Indigenous and non-Indigenous rights, development pressures and community requirements, Aboriginal title and the public interest. In *Tsilhqot'in* and *Grassy Narrows*, the Supreme Court of Canada continues the balancing act, simultaneously empowering and limiting the powers of both Indigenous peoples and governments.

The challenge is to turn good law, carefully constructed, into effective public policy and practice. It is imperative, in the interests of Canada's overall economic well-being and the ongoing effort to share prosperity with Indigenous peoples, that public and Aboriginal governments move quickly to clarify and implement the *Tsilhqot'in* decision.

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Dwight Newman is a Professor of Law and Canada Research Chair in Indigenous Rights in Constitutional and International Law at the University of Saskatchewan. He has published a number of books and numerous articles on constitutional law, international law, and Indigenous rights issues. His writing on the duty to consult is well known, and his 2009 book, *The Duty to Consult: New Relationships with Aboriginal Peoples*, won a Saskatchewan Book Award and has been cited in many court decisions; a revised and expanded version of that book, *Revisiting the Duty to Consult Aboriginal Peoples*, was released in May 2014. He holds an economics degree from Regina, a law degree from Saskatchewan, and three graduate degrees in law from Oxford, where he studied as a

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ENDNOTES

- 1 Thomas Isaac is the lead author of an Osler Update on the decision 27 June 2014, “*Tsilhqot’in* Decision: The Sky is Not Falling”, Robin Junger from McMillan LLP wrote a *National Post* column questioning the effects of the decision, 11 July 2014, “Why the Supreme Court’s *Tsilhqot’in* Land Title Decision is no Game Changer”.
- 2 Ravina Bains, 10 July 2014, “A Real Game Changer: An Analysis of the Supreme Court of Canada *Tsilhqot’in* v. British Columbia Decision.” In a presentation, Fasken Martineau partner Neal Smitherman warned that “[e]very treaty in Ontario is about to be challenged”: Alisha Hiyate, 11 July 2014, “*Tsilhqot’in* Decision Fuels Uncertainty in Ontario”, *Mining Markets Daily News*.
- 3 The sobering calculation that the area awarded amounts to 2 percent of the total traditional *Tsilhqot’in* territory (5 percent of traditional lands claimed, 40 percent of that awarded) appears in Robin Junger, 11 July 2014, “Why the Supreme Court’s *Tsilhqot’in* Land Title Decision is no Game Changer”, *National Post*.
- 4 For one of our reactions that immediately suggested an impact on various resource projects, see Dwight Newman, 27 June 2014, “Pipeline Prospects Take a Hit as Supreme Court Grants Land Title to B.C. First Nation”, *Financial Post*.
- 5 The previous papers have been: Ken Coates and Brian Lee Crowley, 2013, “New Beginnings: How Canada’s Natural Resource Wealth Could Re-shape 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”; Ken Coates and Greg Poelzer, 2014, “An Unfinished Nation: Completing the Devolution Revolution in Canada’s North”; and Dwight Newman, 2014a, “The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and Canada’s Resource Sector”.
- 6 See his discussion in Bill Gallagher, 2012, *Resource Rulers: Fortune and Folly on Canada’s Road to Resources*.
- 7 For discussion on some of the approach to Aboriginal oral history in the case, see Dwight G. Newman, 2005, “*Tsilhqot’in* Nation v. British Columbia and Civil Justice: Analyzing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History,” *Alberta Law Review*.
- 8 See, for instance, his attempt to salvage a claim in *Tsilhqot’in* Nation v. British Columbia, 2007 BCSC 1700 at paras. 957–62. One could also reference his general discussions of decolonization and reconciliation.
- 9 See *Tsilhqot’in* Nation v. British Columbia, 2014 SCC 44 at paras. 33–44, 47–49 for development of these parts of the test.
- 10 Our statement here assumes that the “cede, release, and surrender” clauses in treaties do amount to a cession of land, something which some Aboriginal advocates challenge. On their view, there are ways the decision could affect land claims if the treaties do not stand.
- 11 In *Delgamuukw* v. British Columbia, [1997] 3 S.C.R. 1010 at para. 166, Chief Justice Lamer referenced the “inescapable economic component” of Aboriginal title.
- 12 Some of these are discussed, with reference to other authorities, at various spots in Dwight Newman, 2013, *Natural Resource Jurisdiction in Canada*.

- 13 As stated in *Tsilhqot'in* at para. 72, “Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not.”
- 14 Our discussion here has been meaningfully informed by discussion at a panel at the Canadian Bar Association Annual Meeting, St. John’s, Newfoundland, August 2014, with especially helpful insights offered by Robert Janes and Sandra Gogal.
- 15 For a full account of the duty to consult, see Dwight Newman, 2009, *The Duty to Consult: New Relationships with Aboriginal Peoples* and Dwight G. Newman, 2014b, *Revisiting the Duty to Consult Aboriginal Peoples*. For a past paper on the duty to consult within the present Macdonald-Laurier Institute series, see Dwight Newman, 2014a, “The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and Canada’s Resource Sector”.
- 16 See Dwight G. Newman, 2014a, *Revisiting the Duty to Consult Aboriginal Peoples* at 143–53.
- 17 This became especially clear in *Wewaykum Indian Band v. Canada* and in *Manitoba Métis Federation v. Canada (Attorney General)*. Jamie Dickson recently completed an LL.M. at the University of Saskatchewan in which he carefully examined this development, with publication hopefully forthcoming. Some might try to argue that the reason “fiduciary duty” language applies in the *Tsilhqot'in* case is because it involves Aboriginal title to specific lands, but that explanation does not track precisely the shifting statements on the limited scope of “fiduciary duty”. There is more to be sorted out on this point, again in a more technical context.
- 18 This is a peculiar element, and it is very unclear what kinds of override are consistent with this rule, given that the Court goes on to clearly intend the possibility of override analogous to expropriation, which would seem to inherently deprive future generations. Much remains to be sorted out in future case law.
- 19 This area is highly complex. For some further technical discussion of interjurisdictional immunity, see Guy Régimbald and Dwight Newman, 2013, *The Law of the Canadian Constitution* at 196–208.
- 20 On various legal dimensions of jurisdiction over natural resources, see generally Dwight Newman, 2013, *Natural Resource Jurisdiction in Canada*.
- 21 Brian Lee Crowley (2014) issued an important Macdonald-Laurier Institute *Commentary* on the point, “The Natural Resource Sector: Economic Opportunities, Policy Challenges”.



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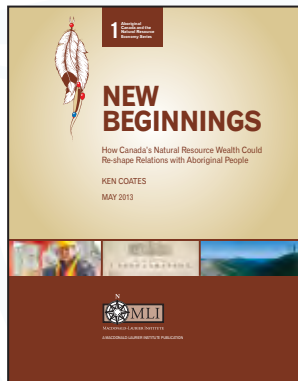


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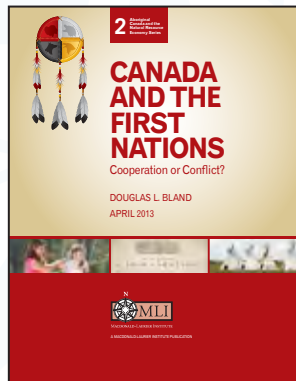
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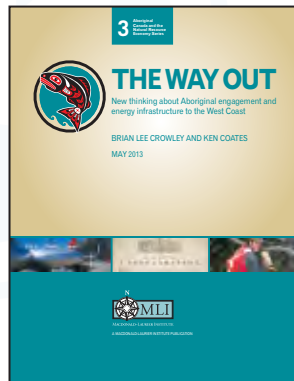
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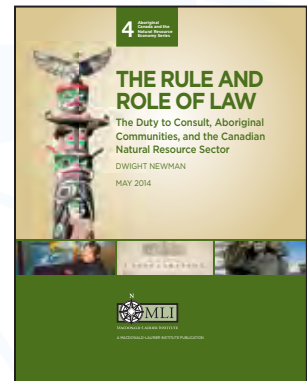
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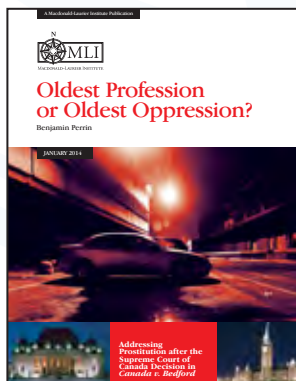
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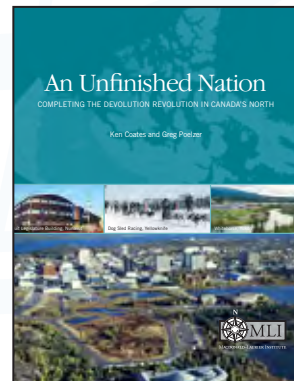
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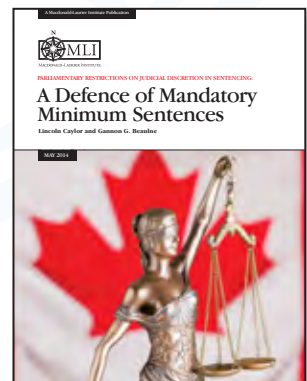
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Greg Poelzer



A Defence of Mandatory Minimum Sentences
Lincoln Caylor and
Gannon G. Beaulne



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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, 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,
MANNING CENTRE FOR BUILDING DEMOCRACY