
TSILHQOT'IN NATION v. BRITISH COLUMBIA: IS IT A GAME CHANGER IN CANADIAN ABORIGINAL TITLE LAW AND CROWN-INDIGENOUS RELATIONS?

*by Bradford W. Morse**

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* BA, LLB, LLM. Morse is Professor and Dean of Law, Thompson Rivers University Faculty of Law (Canada), Professor part-time at University of Waikato (New Zealand), and Professor Emeritus at University of Ottawa (Canada). I wish to thank Gosia Piasecka, TRU JD (2016), for her help in updating and revising my earlier article, which was previously published as Bradford W Morse, "Tsilhqot'in Canadian Aboriginal Title Landmark Decision—A Game Changer?", online: Live Encounters <liveencounters.net/january-2014/09-september/professor-bradford-w-morse-tsilhqotin-nation-win-landmark-canadian-aboriginal-title-judgement/>. Any errors and omissions are entirely my own.

I INTRODUCTION

The Supreme Court of Canada (SCC) rendered an absolutely groundbreaking decision on June 26, 2014 in the case *Tsilhqot'in Nation v. British Columbia* (*Tsilhqot'in Nation*).¹ The decision quickly attracted massive publicity² as it is the first time in Canadian history in which the highest court issued a specific declaration that Aboriginal title continues to exist today. The ruling effectively removes the power of the province to authorize logging without the consent of the Aboriginal title holders unless it can justify its actions under s. 35(1) of the *Constitution Act, 1982*. It is worth noting that the Government of British Columbia (B.C.) has yet to seek to do this since the Court unanimously pronounced that the Tsilhqot'in Nation held Aboriginal title over 1700 km² of land in a relatively remote area of south central British Columbia 200 km west of the town of Williams Lake. This land forms a significant part of the traditional territory of the Tsilhqot'in Nation, which consists of six distinct First Nations recognized as “bands” under the *Indian Act* with approximately 3000 members.

II BACKGROUND TO THE DECISION

The Tsilhqot'in Nation (previously called “Chilcotin” by outsiders) constitutes a distinct people who have occupied a valley bounded by mountains and blessed with rivers in the Chilcotin Plateau region of B.C. since time immemorial. It is an area that has been somewhat isolated and difficult to access since long before Europeans arrived. While possessing fish, animals, forests, and other resources, it is an arduous terrain relatively far from major trading routes and has never supported a large population. Like most First Nations in B.C., the Tsilhqot'in Nation never entered into a treaty with either Britain or the government of Canada. Unlike many B.C. First Nations, however, they faced little interference of settler migration into their territory wanting quality farmland, nor major resource developers seeking mineral or timber wealth. Given the remoteness of the Tsilhqot'in Nation, there was little pressure on the Crown to extinguish their Aboriginal title to their traditional territory by purchase or treaty so as to smooth the path for outside interests to transform their valley.³

A. The Beginning of the Dispute

On December 9, 1983, the government of B.C. granted a forest licence to Carrier Lumber Ltd. to cut five-million cubic metres of timber over a ten-year period without any prior discussion or consultation with the Tsilhqot'in Nation. Complaints from Tsilhqot'in people to the B.C. government were ignored and proposals for a more sustainable approach to logging were rejected by Carrier. The company proceeded with the creation of modular lumber mills, road improvement and logging plans. Carrier's actions were met with resistance, with the first

¹ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in SCC*].

² The significance of the decision is evident by the Wikipedia page for the decision. Further, a Google search of the case name generates 52 100 hits in 0.40 seconds. See “*Tsilhqot'in Nation v British Columbia*”, online: Wikipedia <en.wikipedia.org/wiki/Tsilhqot'in_Nation_v._British_Columbia>.

³ *Tsilhqot'in SCC*, *supra* note 1 at paras 3–6. See also Robert B Lane, “*Tsilhqot'in (Chilcotin)*” in *Canadian Encyclopedia*, online: Historica Canada <www.thecanadianencyclopedia.ca/en/article/chilcotin-tsilhqotin/>.

road blockade established by the Ulkatcho Indian Band on July 17, 1989.⁴ A second blockade was launched three years later by the Xení Gwet'in First Nation to block a bridge that the company needed to use to access a major logging site. The Xení Gwet'in, one of the six First Nations that comprise the Tsilhqot'in National Government, took a lead role in protesting what they saw as an unauthorized invasion of their homeland. The B.C. Premier stepped in on May 13, 1992 to defuse the situation and promised that no further logging would occur without the consent of the Xení Gwet'in.⁵ The province subsequently terminated Carrier's licence. Negotiations ensued between parts of the Tsilhqot'in Nation and the Ministry of Forests over several years but ultimately broke down when the government refused to grant a right of first refusal over any logging.

The Xení Gwet'in, under Chief Roger William's guidance, launched litigation in the B.C. Supreme Court (BCSC) on April 17, 1990 to block any timber harvesting that would negatively impact their traplines. This claim was later amended in 1998 to include an assertion of Aboriginal title on behalf of the entire Tsilhqot'in Nation covering 4381 km², roughly five percent of their traditional territory. The pre-trial process was prolonged and expensive. Fundraising efforts by the Tsilhqot'in Nation were quickly proven to be inadequate as the bills mounted.⁶ As an example, Chief Roger William was asked 11 042 questions over twenty-eight days of cross-examination in pre-trial discoveries (none of the answers were used during his forty-six days on the witness stand).⁷ Justice Vickers of the BCSC granted a motion filed by the Nation on November 27, 2001 directing the province to pay "all reasonable disbursements" and to share equally all future costs of the plaintiffs.⁸ The decision was appealed all the way to the SCC but was sustained.⁹ This still left the Tsilhqot'in with significant financial pressures and it is believed that their lawyers generally worked for fifty-percent of their normal fees.¹⁰

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4. The Ulkatcho Indian Band are comprised of members of the Ulkatcho'en ethnic group, which is a subgroup of the Carrier (Dakelh) Nation, and are neighbours of the Tsilhqot'in Nation at the western edge of the Chilcotin District. Some members are Tsilhqot'in people. See Ulkatcho First Nation, online: <carrierchilcotin.org/ulkatcho-first-nation/>.
 5. See *Carrier Lumber Ltd v British Columbia*, 47 BLR (2d) 50, [1999] BCJ No 1812 (for details of the blockades, government promises, terms of the licence that was issued and later cancelled by the Crown, and the lumber company's successful lawsuit against the provincial government for damages).
 6. CLEBC, "Rejection of the 'Postage Stamp' Approach to Aboriginal Title: The Tsilhqot'in Nation Decision", online: CLEBC <<https://www.cle.bc.ca/PracticePoints/REAL/01%2030%20Tsilhqotin.pdf>> at 15.
 7. Aboriginal Mapping Network, "Decision Reached in Historical Land Claim Case: Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700" (21 November 2007), online: Aboriginal Mapping Network <nativemaps.org/node/2809>. Chief William spent a further forty-six days giving evidence during the trial. Night sittings were held in Victoria so Elders could share sacred knowledge through stories that could only be told after dark.
 8. *Nemaiah Valley Indian Band v Riverside Forest Products Ltd*, 2001 BCSC 1641 at para 35, 95 BCLR (3d) 371.
 9. *Tsilhqot'in Nation v Canada (Attorney General)*, [2002] SCCA No 295, relying on the earlier decision in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371.
 10. A series of actions were brought seeking an order for prepayment of the plaintiffs' interim legal fees and disbursements, culminating in *William et al v HMTQ et al*, 2004 BCSC 610. The order was for the Crown to pay 100% of disbursements and legal fees at 50% of special costs.

B. Decisions of the Lower Courts

The trial began in 2002 and continued over a five-year period involving three hundred and thirty-nine days of court time and an estimated cost of approximately thirty-million dollars.¹¹ Those court days do not include the ten pre-trial motions brought by the federal and provincial Crowns to have the case dismissed. Vickers J. devoted a major part of his judicial life to this case, including visits to many places within the lands claimed and hearing evidence in the traditional territory. He listened to extensive oral testimony over many days from Tsilhqot'in elders, as well as other experts, and saw first-hand both the rugged nature of the terrain as well as the visible evidence of usage of specific sites.¹²

In November 2007, Vickers J. concluded that the evidence in support of Aboriginal title was compelling for roughly thirty-percent of the territory sought, along with a small area within their traditional territory but not claimed in the lawsuit.¹³ He ultimately decided that he could not issue a declaration confirming that title for procedural reasons (based on arguments later dropped by the Crown on appeal); however, he provided extensive comments about the nature of Aboriginal title, the legal test required to be met, the evidence submitted, and his assessment of the strength of the claim. He further declared that the Tsilhqot'in people have "an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses."¹⁴ In his view, their Aboriginal rights were protected by s. 35 of the *Constitution Act, 1982*,¹⁵ which included a commercial right to earn a moderate livelihood through hunting and trapping.¹⁶

Members of the Tsilhqot'in Nation were pleased overall with the comments made by Vickers J. about their proof of Aboriginal title over part of their territory; however, they appealed in order to obtain a final ruling that pertained to their entire territory. They did not want to start again with another protracted trial and the Court had still only confirmed evidence for thirty-percent of their land. Both the federal and B.C. governments also appealed as they were unhappy with the Aboriginal rights finding along with the permission granted to the plaintiffs to relaunch their lawsuit for damages and title, among various other rulings.

¹¹ Aboriginal Law Group, "The Tsilhqot'in Nation v. British Columbia Case: What It Means and What It Doesn't Mean", Case Comment by Lawson Lundell LLP, online: World Services Group <www.worldservicesgroup.com/publications.asp?action=article&artid=2189> [Aboriginal Law Group]. See also Blake, Cassels & Graydon, "The Tsilhqot'in Nation Decision on Aboriginal Title and Right", Case Comment on *Tsilhqot'in Nation v British Columbia*, online: NationTalk <nationtalk.ca/story/the-tsilhqotin-nation-decision-on-aboriginal-title-and-right>.

¹² *Tsilhqot'in SCC*, *supra* note 1 at para 7.

¹³ *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700, [2007] BCJ No 2465 [*Tsilhqot'in BCSC*]. For a detailed review of this trial decision, see Dwight G Newman & Danielle Schweitzer, "Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v British Columbia*" (2008) 41 UBC L Rev 249.

¹⁴ *Tsilhqot'in BCSC*, *supra* note 13 at para 1240. In the Executive Summary of the decision at p vi, Vickers J adds to this statement by saying, "This right is inclusive of a right to capture and use horses for transportation and work."

¹⁵ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 (the section states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed").

¹⁶ *Tsilhqot'in BCSC*, *supra* note 13 at paras 1242–65.

The formal decision on Aboriginal rights and title was upheld by the B.C. Court of Appeal (BCCA) in 2012; however, that Court took a markedly narrower view on the legal test for Aboriginal title.¹⁷ It concluded that previous Canadian law indicated Aboriginal title only existed at specific locales where the occupation of the land that existed pre-Crown sovereignty assertions was used so intensely as to be similar in nature to permanent usage. The Court cited examples such as village sites, “salt licks” and “particular rocks or promontories used for netting salmon.”¹⁸ The national political voice of federally recognized First Nations in Canada, the Assembly of First Nations, commented on the decision in these words:

The BCCA justified its “postage stamp” approach expressly because of its stated desire to avoid “unnecessarily interfering with Crown sovereignty and the well-being of all Canadians.” This justification is not consistent with the principles of reconciliation but is instead a denial of First Nations’ rights, including Aboriginal title.¹⁹

The BCCA upheld all aspects of the trial judge’s rulings on the scope of Aboriginal rights possessed by the plaintiffs, including that the provincial government had breached them. However, neither Court provided an explicit remedy for that breach. The Tsilhqot’in Nation appealed again as their goal of obtaining recognition that this was their land and that they should have significant power in determining its usage remained unachieved.

C. The Evolution of the Aboriginal Title Doctrine in Canada

Canadian law has flip-flopped over the generations when it has come to addressing the major legal questions regarding the nature of Indigenous-settler relations. Our courts have yet to declare definitively what rights the original peoples of Turtle Island still retain over their historic lands and waters, although it has been making some significant steps in this regard in recent years. Similarly, resolving which governments among the three competing ones have what precise jurisdiction in relation to the peoples and territories within Canada remains unresolved. At the same time, our society has yet to clarify under whose legal system—Indigenous or imported—that these critical issues should be decided. On the one hand, Canada has never been as regressive as Australia was from settlement in 1788 through asserting that the continent was *terra nullius*, or effectively vacant, when the British arrived. Despite the fact that Aboriginal peoples had resided there for over forty-thousand years, they were viewed as possessing no sense of land ownership, no government, and no legal system.²⁰ On the other hand, Canadian governments and courts did not adopt the approach of the Supreme Court

¹⁷ *Tsilhqot’in v British Columbia*, 2012 BCCA 285, 33 BCLR (5th) 260 [*Tsilhqot’in* BCCA].

¹⁸ *Ibid* at para 221.

¹⁹ Assembly of First Nations, Background Information, “Backgrounder: William Case” (30 October 2013), online: Assembly of First Nations <www.afn.ca/uploads/files/13-10-30_backgrounder_tsilhqotin_nation_fe.pdf>.

²⁰ This situation only changed when the Australian High Court decisively rejected the application of the doctrine of *terra nullius* in *Mabo v Queensland (No 2)*, (1992) 107 ALR 1, (1992) ALJR 408 (Aus HC) [*Mabo No 2*]. The Court instead recognized the common law doctrine of Aboriginal title, as developed in the United States and Canada, along with recognizing that Indigenous Australians had long standing legal systems of their own.

of the United States (SCOTUS) in its trilogy of decisions from 1823-32.²¹ American law recognized Indian title as being different from but “as sacred as the fee simple of the whites.”²² Indian Nations were described by the SCOTUS as previously independent nations who had been transformed into “domestic dependent nations”²³ by the tides of history washing over the land through the superior size and might of the immigrants.

Instead, our courts have shied away from addressing the toughest issues, such that the sovereign status of First Nations and the legal status of the right to Aboriginal self-government remain effectively untouched by judicial scrutiny. In 1888, the Judicial Committee of the Privy Council in London ruled that Aboriginal title was merely “a personal and usufructuary right, dependent upon the goodwill of the Sovereign”,²⁴ whose good will has frequently been absent. As the SCC declared in 1990, there “can be no doubt that over the years the rights of the Indians were often honoured in the breach.”²⁵ Subsequently, in *R. v. Pamajewon*,²⁶ the SCC dodged addressing the substantive argument as to whether s. 35(1) included the inherent right of self-government on the basis of insufficient evidence in the case at hand. As a result, the Canadian courts have ignored analyzing the legality of the Crown’s bold assertion of its overarching sovereignty and its underlying title to all of Canada. It naturally then flows from this that our judiciary has not questioned the legitimacy of the prevailing legal system’s imposition on top of pre-existing longstanding legal regimes.

The SCC did dramatically change the legal landscape beginning with its decision in the *Calder* case in 1973, in which six of seven judges declared that “aboriginal title” was recognized by the common law as it existed in Canada, although they split evenly on whether general colonial legislation had indirectly extinguished the title of the Nisga’a Nation that had brought the appeal.²⁷ The existence of Aboriginal title in Canadian common law was reaffirmed by the same court in *Guerin*, where the federal government was held to be in a fiduciary relationship with Aboriginal peoples and had breached its obligations so that it was liable for ten-million dollars in damages to the Musqueam First Nation.²⁸ The *Delgamuukw* decision²⁹ in 1997 was even more important as it articulated a clear and reasonably straightforward three-part conjunctive test for establishing Aboriginal title:

[T]he aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity

²¹ *Johnson v M’Intosh*, 21 US (Wheat) 543 (1823); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831) [*Cherokee Nation*]; *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

²² *Mitchel v United States*, 34 US (9 Pet) 711 (1835) at 746.

²³ *Cherokee Nation*, *supra* note 21 at 17.

²⁴ *St Catharines Milling and Lumber Company v The Queen*, (1889) LR 14 App Cas 46 at para 7, 1888 CarswellOnt 22, Watson LJ.

²⁵ *R v Sparrow*, [1990] 1 SCR 1075 at 1103, 70 DLR (4th) 385 [*Sparrow* cited to SCR].

²⁶ [1996] 2 SCR 821, 138 DLR (4th) 204.

²⁷ *Calder v British Columbia (Attorney-General)*, [1973] SCR 313, 34 DLR (3d) 145. The Nisga’a Nation ultimately lost its appeal as the seventh judge, Justice Pigeon, concluded that the appeal must be dismissed on procedural grounds without ruling on the merits of the Aboriginal title claim.

²⁸ *Guerin v Canada*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*].

²⁹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].

between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.³⁰

The *Delgamuukw* judgment reversed a decision of the BCSC that had confined Aboriginal title solely to village sites and other locations of very intensive and ongoing use.

In 2005, the same SCC, in its judgment in *Marshall and Bernard*,³¹ seemed to embrace the view espoused by the trial judge which was rejected by the Court in *Delgamuukw*. Chief Justice McLachlin, for the majority, reinstated the convictions previously reversed by the Nova Scotia and New Brunswick Courts of Appeal. She declared that proving Aboriginal title required the claimant to demonstrate “possession similar to that associated with title at common law.”³² She concluded that there was inadequate proof of sufficient occupation to meet the test for title on the facts of the two separate cases joined on appeal. This conclusion was despite the evidence in *Bernard* that clearly showed the Mi’kmaq had been present in the area for 2500 years and the logging site in question in New Brunswick was near an existing reserve that itself reflected a longstanding semi-permanent village with a burial site nearby. At the very least, the strong impression left by the decision was that possession required a level of intensity analogous to villages and enclosed farms as required at common law for adverse possession claims. Both governments heavily emphasized such a reading before the BCCA and Justice Groberman, for the unanimous Court, relied on her statements when he said:

While...there is no reason that semi-nomadic or nomadic groups would be disqualified from proving title, their traditional use of land will often have included large regions in which they did not have an adequate regular presence to support a title claim. That is not to say, of course, that such groups will be unable to prove title to specific sites within their traditional territories.³³

III THE STAGE IS SET AT THE SUPREME COURT OF CANADA

Oral argument was presented before the SCC on November 7, 2013. The appeal attracted a large number of interveners including five provincial governments (Alberta, Saskatchewan, Manitoba, Ontario, and Quebec), many regional and national First Nations organizations and individual First Nations, five associations of natural resource companies, and two other non-governmental organizations. The journey by Tsilhqot’in elders from their traditional lands to the SCC building in Ottawa was captured on film and is available on the Internet.³⁴ The judgment, authored by McLachlin C.J., can definitely be seen as an answer to their prayers.

The unanimous judgment really concentrates on three main issues: (1) identifying the proper test for Aboriginal title in Canada in 2014 and whether it was met by the evidence

³⁰ *Ibid* at para 143, Lamer CJC.

³¹ *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 [*Marshall and Bernard*].

³² *Ibid* at para 54.

³³ *Tsilhqot’in BCCA*, *supra* note 17 at para 222.

³⁴ Jeremy Williams, “Tsilhqot’in Journey for Justice (part 1 of 3)” (October 31, 2013), online: YouTube <www.youtube.com/watch?v=QbjIPGqOaMs&feature=youtu.be> (subsequent parts to this video have also been posted on YouTube).

adduced at trial; (2) what rights do titleholders possess; and (3) what is the impact of existing Aboriginal title rights on provincial government jurisdiction and legal interests in those lands. The Court reversed the BCCA's view of the Aboriginal title doctrine and largely agreed with Vickers J. except that the SCC was freed of the procedural shackles that had restrained the trial judge from granting the declaration sought.

IV CHANGING THE LEGAL LANDSCAPE

A. Test for Aboriginal Title

After briefly reviewing the historical record, key prior decisions, and providing pleading guidance for future Aboriginal title cases all in twenty-three paragraphs, McLachlin C.J. turned her attention to the question of how to apply the three-part Aboriginal title test from *Delgamuukw*³⁵ into assessing the claim of a “semi-nomadic indigenous group.”³⁶ The specific stress on the Tsilhqot'in Nation as semi-nomadic could have led to a simple reaffirmation of the *Marshall and Bernard*³⁷ cases, or their reconsideration, as the Mi'kmaq peoples involved in those two cases were described as “moderately nomadic” and “semi-nomadic.” Instead, she stated this question had never previously been directly answered by this Court, thereby opening the field for a first consideration.³⁸ McLachlin C.J. concluded that the BCCA's approach would result “in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping”³⁹ in contrast to the trial judge's recognition of beneficial rights to the much larger territory that had been traditionally and exclusively used.

The distinction between the two extremes turned on the aspect of “sufficiency of occupation.” In other words, how *intensively* must the land have been used before the Crown claimed sovereignty? Relying upon a decision of the High Court of Australia,⁴⁰ she concluded that the three characteristics of necessary occupation (being (1) sufficient; (2) continuous; and (3) exclusive) should be viewed together, but in a way that does not lose the Aboriginal perspective through focussing solely on “common law concepts.”⁴¹ The Indigenous nation looks to its own system of “laws, practices, customs and traditions of the group”⁴² while European views stress possession and control of territory. The *Delgamuukw* Court stated that the search for the appropriate answer in any particular case must consider the particular group's circumstances in relation to its size, technology, lifestyle, resources available in their traditional territory and its natural geography, as these factors will affect the degree to which they could intensively use any portions of their land. The evidence indicated that the Chilcotin Plateau's weather and resources were such that only one hundred to one thousand people could

³⁵ *Delgamuukw*, *supra* note 29 at para 143.

³⁶ *Tsilhqot'in SCC*, *supra* note 1 at para 24.

³⁷ *Marshall and Bernard*, *supra* note 31.

³⁸ *Tsilhqot'in SCC*, *supra* note 1 at para 24.

³⁹ *Ibid* at para 29.

⁴⁰ *Western Australia v Ward*, [2002] HCA 28, (2002) 191 ALR 1.

⁴¹ *Tsilhqot'in SCC*, *supra* note 1 at para 32.

⁴² *Ibid* at para 35, citing *Delgamuukw*, *supra* note 29 at para 148.

be supported there, and thus less intense use was to be expected. Less intensity does not mean invisibility, however, as McLachlin C.J. stressed that the presence on the land must be obvious to any outsiders who would conclude the territory was occupied by some group of people.⁴³

Ironically, in doing so in *Tsilhqot'in Nation* the Chief Justice adopted Justice Cromwell's reasoning in *Marshall* from the Nova Scotia Court of Appeal,⁴⁴ which the SCC had previously reversed on appeal through her majority judgment on the wide range of acceptable forms of possession recognizable at common law that could be accepted as proof of Aboriginal title.⁴⁵ In *Tsilhqot'in Nation* she advocated for a "culturally sensitive approach" that would reflect the importance of embracing both common law views of sufficient possession for its purposes but also Aboriginal perceptions of what constituted possession of land under their legal systems.⁴⁶ The latter would include recognition of subsistence harvesting over a broad swath of land so long as it was regularly possessed in a way that displayed the intention to control the behaviour or access of any outside users.⁴⁷

The second element that must be proven is to show the occupation of current Aboriginal residents is connected to those people who were residents when the Crown asserted its sovereignty over the lands. This does not necessitate having to demonstrate "an unbroken chain of continuity" but the extent and nature of any break in time is left undiscussed.⁴⁸

The final requisite is that exclusive occupation must be proven. As the Court stated in *Delgamuukw*, "exclusive" does not equal "sole" as that Court indicated shared exclusivity could occur. In other words, the jurisprudence suggests two things: (1) that the Indigenous occupation prior to the arrival of colonization must not have co-existed with non-Aboriginal peoples; and (2) the Aboriginal group must have viewed itself as being both in control of the land and capable of excluding others whenever they wished. This latter aspect meant that they could also choose to share some of their territory with other Indigenous peoples and allow passage through their territory on whatever terms they set.

The Court concluded that the trial judge was correct in his assessment of the evidence as proving sufficiency of occupation, continuity, and exclusivity to warrant Aboriginal title over some parts of the territory. The SCC upheld the appeal on the basis that Vickers J. was correct in his interpretation of the sufficiency of occupation element in relation to the evidence, which thereby meant title was awarded over large areas of traditional territory rather than small islands of villages and other sites. McLachlin C.J. declared that proof solely of intensive presence on and usage of the land was in error as a "territorial use-based approach to Aboriginal title"⁴⁹ was the correct standard.

⁴³ *Tsilhqot'in SCC*, *supra* note 1 at para 38.

⁴⁴ *R v Marshall*, 2003 NSCA 105, 218 NSR (2d) 78.

⁴⁵ *Marshall and Bernard*, *supra* note 31 at para 41.

⁴⁶ *Tsilhqot'in SCC*, *supra* note 1 at paras 41–42.

⁴⁷ *Ibid* at para 50.

⁴⁸ *Ibid* at para 46.

⁴⁹ *Tsilhqot'in SCC*, *supra* note 1 at para 56, citing *Delgamuukw*, *supra* note 29.

B. Rights Conferred Before Title Proven

The SCC in *Tsilhqot'in Nation* reiterated principles from *Haida Nation*⁵⁰ and other key cases that stressed the spectrum analysis when considering what obligations are on the Crown when faced with an assertion that Aboriginal or treaty rights existed. Aboriginal title, like other Aboriginal rights, can exist prior to their official declaration by a Canadian court.⁵¹ The onus is initially on the Aboriginal party to declare that they have rights protected by s. 35 and to offer enough evidence to raise a *prima facie* case such that the onus shifts to the Crown to respond. The government then “owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases.”⁵²

The Crown faces a clear risk in these circumstances if it does *not* obtain formal consent in writing from the Indigenous communities concerned. If it proceeds in a way that may damage the ability to exercise the Aboriginal or treaty rights in the future, or to enjoy fully any Aboriginal title that may be later proven to exist, then it is vulnerable to being sued for breaching its fiduciary duties, violating the honour of the Crown, and acting contrary to s. 35. The only salvation for the Crown could be if it can prove (1) the rights have been extinguished prior to April 17, 1982; (2) the Indigenous party surrendered or amended the rights willingly by agreement; or (3) the *Sparrow* justification test can be met. As the Court suggested, “appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim.”⁵³ The balance of power shifts significantly once title is proven to remain in existence.

C. Rights Conferred When Title Proven

The SCC has reaffirmed in *Tsilhqot'in Nation* that the nature of the subsisting Aboriginal interest that burdens the Crown’s underlying, or radical, title is an independent legal interest. Aboriginal title not only generates a fiduciary duty on the part of the Crown—as the Crown unilaterally claimed sovereignty and imposed itself as the only legal buyer of that interest, that had been first articulated in *Guerin*—but it also means that the Crown’s authority is limited to circumstances where it can justify its encroachment. As McLachlin C.J. wrote: “In simple terms, the title holders have the right to the benefits associated with the land—to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land.”⁵⁴

This reflects a far, far more significant change in the law than a mere refinement to the test for Aboriginal title; it renders the legal import of a declaration that title exists potentially massive. The holders of continuing Aboriginal title have “ownership rights” that the judgment

⁵⁰ *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 245 DLR (4th) 33 [*Haida Nation*].

⁵¹ This well-established principle was recently confirmed in *Saik'uz First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154 at para 61, 76 BCLR (5th) 221.

⁵² *Tsilhqot'in SCC*, *supra* note 1 at para 91.

⁵³ *Ibid.*

⁵⁴ *Tsilhqot'in SCC*, *supra* note 1 at para 70, referencing *Guerin*, *supra* note 28.

states are “similar to those associated with fee simple” except that it is a communal or collective title.⁵⁵ These incidents of Aboriginal title include:

- “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.”⁵⁶

The latter incident is also framed as “the right to control how the land is used.”⁵⁷ While this right, and the title itself, flows from the reality that First Nations were in full possession of the land as sovereign peoples before the Crown came along, their uses of their traditional territory is *not* limited to how they lived at the time of European contact. Instead, the Court declared that their position is effectively the same as that of any other Canadian. All landowners have the ability to alter land use patterns over time as technology, personal preferences, and economic factors change. It must be noted though that landowners in Canada are subject to local government land use bylaws as well as federal and provincial legislation that can impose limits on the full usage of land. Recognition of Indigenous governmental jurisdiction over Aboriginal title territory can create a significant difference in this regard.

A further key distinction, as hinted in *Delgamuukw* but made more explicit here, is that Aboriginal title is not just for the living members of the peoples or First Nations concerned; rather it is for the present *and all future generations*. This appears to impose a restriction on the manner in which the territory can be developed, as it may not be “misused in a way that would substantially deprive future generations of the benefit of the land.”⁵⁸ Who will decide whether a potential use of the land would violate the rights of future generations is left unaddressed. Does such a question fall within the purview of the Canadian courts for decision, or is it to be left to culturally appropriate methods of Indigenous decision making as established by the traditional Aboriginal title holders?

It is also unclear if this is a matter that is solely to be raised among the present beneficiaries who must keep an eye on the interests of their descendants. Does the Crown, in its capacity as fiduciary, have a right—and perhaps even be subject to an enforceable obligation—to ensure that any proposal being promoted by the Aboriginal leadership of today to alter the land significantly has been assessed with proper consideration of the beneficial interests of the future generations?⁵⁹ If so, is this right or obligation one possessed by either the federal or provincial Crown, or by both?

What is clear, though, is that anyone, including non-Aboriginal local or territorial governments, seeking to make use of land subject to Aboriginal title must first “obtain the consent of the Aboriginal title holders.”⁶⁰ No private person, corporation or local government

^{55.} *Ibid* at para 73.

^{56.} *Ibid*.

^{57.} *Ibid* at para 75.

^{58.} *Ibid* at para 74.

^{59.} For a discussion about the difficulties with the inherent limits of common law Aboriginal title see Nigel Bankes, Sharon Mascher & Jonnette Watson Hamilton, “The Recognition of Aboriginal Title and Its Relationship with Settler State Land Titles Systems” (2014) 47:3 UBC L Rev 829 at 871–72.

^{60.} *Tsilhqot’in* SCC, *supra* note 1 at para 76.

can proceed in a way that would affect that land where that consent is denied or has not been validly obtained.

In the view of the SCC, however, federal and provincial governments are treated differently. Superior governments can act in the name of the Crown and have the ability to proceed even where consent is withheld *if* it can meet the s. 35 constitutional justification test. The Court stated:

To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.⁶¹

The duty to consult has largely been regarded in Canada as a procedural rather than a substantive duty triggered by the expectation that the Crown will always act honourably. This judicially articulated concept has caused all federal, provincial, and territorial governments to change their behaviour in interacting with First Nations, Inuit, and Métis wherever there is the prospect that a s. 35 right might be affected. Consultation policies, departmental processes and civil servant training has all become commonplace since the *Haida Nation*⁶² decision in 2004. The SCC in *Tsilhqot'in Nation* is reframing this somewhat when Aboriginal title has been confirmed. Not only must the Crown in fact have fulfilled its procedural obligation, but it "must also ensure that the proposed government action is substantively consistent with the requirements of s. 35."⁶³

While this second element was first articulated in *Sparrow* in 1990 in the context of Aboriginal rights to fish for food, social, and ceremonial purposes, I believe the Court in *Tsilhqot'in Nation* has recast it when title has been judicially declared. The Crown must now prove by conclusive evidence that there is a "compelling and substantial objective" that justifies its actions in violating that title, rather than merely proposing a justification that could theoretically be "compelling and substantial." In *Sparrow* itself the Department of Fisheries and Oceans (DFO) had argued that its regulations controlling the length of fish nets and the times for the open season were essential for conservation purposes.⁶⁴ The SCC in response made clear that conservation of a species would meet this test but only if the government did in fact prove, by clear and convincing evidence, that the method of regulation was essential to achieve that compelling and substantial objective *and* it involved the least interference possible with the s. 35 right. DFO's own evidence was that the total Aboriginal fishery reflected less than five percent of the Fraser River salmon catch and that its conservation goal could easily be met if it chose to regulate sport or commercial fishing more actively.

In *Tsilhqot'in Nation* the Court emphasized that the government's objective must be canvassed from both the Aboriginal and the broader public's perspective.⁶⁵ It drew upon the train of SCC cases in the 1990s that declared the goal of s. 35 is to aid in bringing about

⁶¹ *Ibid* at para 77, referencing *Sparrow*, *supra* note 25.

⁶² *Haida Nation*, *supra* note 50.

⁶³ *Tsilhqot'in SCC*, *supra* note 1 at para 80.

⁶⁴ *Sparrow*, *supra* note 25.

⁶⁵ *Tsilhqot'in SCC*, *supra* note 1 at para 81.

“reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown.”⁶⁶ The government purporting to serve the “broader public goal...must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective”⁶⁷ with its proposal if it seeks to justify violating the constitutionally protected Aboriginal title. Reconciliation is a “two-way street” because the Crown must act honourably in asserting its rights, while First Nations must accept infringements on their rights that can meet this justification test.⁶⁸

The Court drew upon *Delgamuukw* to answer its own question as to what interests might justify such an incursion on a constitutionally protected right by quoting with emphasis:

In my opinion, 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 to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.⁶⁹

Turning to this language in *Delgamuukw* seems to open a very wide door through which federal and provincial governments can steam roll in pursuing their goals for economic development that largely seem to benefit mainstream rather than Indigenous interests.

The final element is the Crown demonstrating that even though it seeks to infringe upon a proven s. 35 right it has still acted in a way that respects its role as fiduciary. At the very least this entails avoiding any hint of favouring its own interests at the expense of the Aboriginal party. Given that the federal or provincial Crown is frequently proposing such significant changes to occur on its “own” Crown land for larger public or private sector economic development purposes, it can easily place itself in a position of conflict of interest if it favours outcomes that generate royalty, leasehold, stumpage, or other forms of revenue from private parties or enhanced revenue for Crown corporations, like B.C. Hydro. One way to address that conflict of interest is for the Crown to enter into full, genuine partnerships with the traditional owners of the territory in question who could be the sole recipient of the revenue derived from the land itself while the Crown received increased tax revenue. Even this compromise is predicated on the situation that the Aboriginal title recognition of the Indigenous ownership of the territory in question has not also been accompanied by the assertion of the inherent right of self-government.

⁶⁶ *Ibid*, citing *R v Gladstone*, [1996] 2 SCR 723 at para 72, 137 DLR (4th) 648, Lamer CJC (emphasis added in *Tsilhqot’in* SCC, *supra* note 1 by McLachlin CJC).

⁶⁷ *Tsilhqot’in* SCC, *supra* note 1 at para 82.

⁶⁸ *First Nation of Nacho Nyak Dun v Yukon*, 2015 YKCA 18 at para 173, [2015] YJ No 80, citing *Haida Nation*, *supra* note 50 at para 32 (Crown duty to act honourably in asserting its right); *Sparrow*, *supra* note 25 at 1109; *Tsilhqot’in* SCC, *supra* note 1 at para 139 (Aboriginal group must accept justifiable infringement on its rights).

⁶⁹ *Tsilhqot’in* SCC, *supra* note 1 at para 83, citing *Delgamuukw*, *supra* note 29 at para 165 (emphasis in original).

The Crown must, however, do far more than avoid self-interest. It also carries an obligation to the Aboriginal title-holders to respect and advance the interests of both the current generation as well as *all* the future ones.⁷⁰ This means that the justification argument must now meet a test of “proportionality” by including proof that the infringement is necessary to achieve the goal (“rational connection”); constitutes the least possible incursion (“minimal impairment”); and the benefits anticipated from achieving “that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).”⁷¹ The assessment process may reach very different results if one recasts the three elements from the common short term political and economic horizons of dominant western societies into a timeframe that transcends even the somewhat common First Nations philosophy of weighing decisions in a context of concern for the next seven generations. Arguably, this places a more robust version of the precautionary principle from environmental law as the determinative standard against which proposed Crown conduct must be graded.

V REMEDIES

Prior to proof of s. 35 rights, any breach by the Crown of its duty to consult can give rise to the court granting injunctive relief, damages or orders to carry out the duty properly.⁷² On the other hand, the courts will rarely order a specific form of accommodation upon finding a breach.⁷³ The situation is starkly changed, however, when title has been proven as the Crown simply cannot proceed to infringe unless it obtains consent or can meet the justification test. Failing either, the Crown is subject to the “usual remedies that lie for breach of interests in land...adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.”⁷⁴

Here the provincial government was found to have breached its duty to consult with the Tsilhqot’in Nation and accommodate its collective interest in their traditional territory when it issued a licence to Carrier Lumber Ltd. in 1983. Although no such duty had been fully articulated by the courts at that time and the Tsilhqot’in’s title had obviously not been proven, the B.C. government was aware that the member First Nations of the Tsilhqot’in Nation continued to exist on the lands subject to the timber licence and that they expressly asserted their Aboriginal title. Thus, the provincial government could have—and should have—consulted before authorizing the building of infrastructure and allocation of cutting permits. It did consult at a later point; however, it decided ultimately to proceed without consent, thereby rendering itself vulnerable if future Aboriginal title was proven, as occurred here.

⁷⁰ *Tsilhqot’in* SCC, *supra* note 1 at para 87.

⁷¹ *Ibid.*

⁷² *Ibid* at para 89, citing *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650, at para 37.

⁷³ *Da’naxda’xw/Awaetlala First Nation v British Columbia (Minister of Energy, Mines and Natural Gas)*, 2015 BCSC 16 at para 258, [2015] BCJ No 18.

⁷⁴ *Tsilhqot’in* SCC, *supra* note 1 at para 90.

VI IMPACT UPON PROVINCIAL LEGISLATION

Although unnecessary to dispose of the case after deciding to grant a declaration of Aboriginal title (and therefore arguably *obiter dicta* and not binding), the Court concluded that it was important to give added guidance to all parties “and other Aboriginal groups” in Canada on the status of provincial legislation once title had been declared. The extensive argument before the lower courts, and no doubt in acknowledgement of interventions by five provincial governments, led the Court to advise that “provincial laws of general application apply to lands held under Aboriginal title.”⁷⁵ This general proposition reflects the authority of provincial legislatures to pass laws regulating “property and civil rights” under s. 92(13) of the *Constitution Act, 1867*. On the other hand, provincial authority over land subject to continuing Aboriginal title is constitutionally limited by: (1) s. 35, which brings us back to the fiduciary relationship, and specifically the requirement that the Crown proves a compelling and substantial objective if it wishes to infringe; and (2) Parliamentary power over “Indians, and Lands reserved for the Indians” in s. 91(24). The first limit was described in *Sparrow* regarding Aboriginal rights as meaning that the statute or regulation must not be unreasonable, impose undue hardship or deny the rights holder its preferred method of exercising the right.⁷⁶ Violating any of these three factors would infringe the s. 35 rights.

In this case the B.C. government relied upon its *Forest Act* as empowering it to control all aspects of “Crown timber” on “Crown land”, which it had presumed the land in question to be.⁷⁷ The Act limited its scope to land vested in the Crown. Aboriginal title “confers a right to the land itself”⁷⁸ such that this land was vested in the Tsilhqot’in Nation and could not be “vested in the Crown” simultaneously so as to be eligible to be managed by the Ministry of Forests under the Act. On the other hand, to say that the *Forest Act* had no application whatsoever to the vast majority of the province that is subject to Aboriginal title claims not yet proven could mean that no one would have the legal authority to protect the forests from abuse, respond to forest fires, or deal with invasive species like the mountain pine beetle. The Court was clearly very concerned about creating any vacuum in effective forest management as this would be to the detriment of First Nations as well as all others. McLachlin C.J. concluded that the B.C. legislature must have meant that the Act would apply to forested lands under claim but only “*up to the time title is confirmed by agreement or court order.*”⁷⁹ These lands ceased to be “Crown lands” once the court order confirmed Aboriginal title and the trees ceased to be “Crown timber” so as to be available to be regulated under the Act.

The Court chose to “add the obvious” as a comment that the B.C. legislature could amend the Act to cover Aboriginal title lands, so long as it met all “applicable constitutional restraints.”⁸⁰ What the Court failed to do was consider whether Tsilhqot’in Nation law should apply so that no feared legal vacuum would in fact arise.⁸¹ Although earlier declaring that the

⁷⁵ *Ibid* at para 101.

⁷⁶ *Sparrow*, *supra* note 25 at 1112.

⁷⁷ *Forest Act*, RSBC 1996, c 157, s 1.

⁷⁸ *Tsilhqot’in SCC*, *supra* note 1 at para 112.

⁷⁹ *Ibid* at para 115 (emphasis in original).

⁸⁰ *Ibid* at para 116.

⁸¹ For a discussion about the court’s failure to consider Tsilhqot’in law see Val Napoleon, “Tsilhqot’in Law of Consent” (2015) 48:3 UBC L Rev 873.

“doctrine of *terra nullius* (that no one owned the land prior to assertion of sovereignty) never applied in Canada,”⁸² the Court clearly could only conceive of a legal vacuum if neither federal nor provincial legislation applied.⁸³ It is troubling that our highest court did not even ask the obvious question: since Tsilhqot’in Nation’s Aboriginal title is derived from their pre-existing occupation as the sovereign of this territory with their own legal system, is that pre-existing law not immediately effective or revived to apply on land to which their beneficial title is now recognized once more? This should have been considered particularly because Vickers J. found that the “Tsilhqot’in people were a rule ordered society” and were governed by the laws of their ancestors.⁸⁴ For this reason, John Borrows explains that *Tsilhqot’in Nation* “both diminishes and reinforces colonialism in Canada.”⁸⁵

Instead, McLachlin C.J. could only see s. 35 as providing a limited brake on either federal or provincial efforts to infringe the “aboriginal and treaty rights” protected therein, while simultaneously enabling such infringement to occur that is justified. Justified in the eyes of whom one might ask? The answer of course is the overwhelmingly non-Aboriginal judiciary. McLachlin C.J. drew the parallel with the *Canadian Charter of Rights and Freedoms*⁸⁶ (*Charter*) as similarly imposing a limit on both federal and provincial governments (except it does so to benefit individual rights) but subject to an argument that the breach of the *Charter* is justified. It is critical to note, however, that s. 35 is in Part II of the *Constitution Act, 1982* and so is unaffected by the override clauses found in sections 1 and 33 of the *Charter*.

Here the Court suggests that provincial laws dealing with forest fires and pest invasions “will often pass the *Sparrow* test as it will be reasonable, not impose undue hardship, and not deny the holders of the right their preferred means of exercising it.”⁸⁷ This is strikingly worded, as no such cases have ever been heard regarding fires and pests as meeting the requirements of the infringement test to support a conclusion that they “will often pass the *Sparrow* test.” Legislation with such goals might well be embraced by First Nations, particularly if they were fully involved in the development of the statute as genuine partners and in its subsequent implementation. One might also hazard a guess that such purposes of fire and pest management would pass the “compelling and substantial objective” justification sniff test, at least in the absence of any First Nations regimes to manage such threats; but that is different than our highest Court suggesting that these laws will pass such scrutiny in the absence of any context. The decision does expressly note, however, that the transfer of timber rights reflects “a direct transfer of Aboriginal property rights to a third party” that would be a “meaningful diminution in the Aboriginal group’s ownership right.”⁸⁸ This once again frames Aboriginal

^{82.} *Tsilhqot’in SCC*, *supra* note 1 at para 69.

^{83.} For a discussion about *terra nullius* and *Tsilhqot’in Nation* see John Borrows, “The Durability of *Terra Nullius: Tsilhqot’in Nation v British Columbia*” (2015) 48:3 UBC L Rev 701 at 724 (the author argues that the decision implies “there is some kind of emptiness underlying Aboriginal title that must be filled by Crown-derived law to avoid a legal vacuum”).

^{84.} *Tsilhqot’in BCSC*, *supra* note 13 at para 431.

^{85.} John Borrows, “Aboriginal Title in *Tsilhqot’in v British Columbia* [2014] SCC 44” (2014) Maori L Rev, online: Māori Law Review <maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqot-in-v-british-columbia-2014-scc-44/>.

^{86.} *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

^{87.} *Tsilhqot’in SCC*, *supra* note 1 at para 123.

^{88.} *Ibid* at para 124.

title solely as a proprietary right protected by s. 35, while omitting any consideration of First Nations' governance jurisdiction as part of this section. The Court also chose to state that it agreed with both lower courts when they said "that no compelling and substantial objective existed in this case."⁸⁹

The second constitutional limitation would be the presence of any federal legislation enacted pursuant to s. 91(24) intended to apply to Aboriginal title lands. No such federal statute, outside the *Indian Act* recognized reserves, exists at present regarding forestry, so no paramountcy principle could presently be invoked in favour of the competing federal enactment. Whether the Parliament of Canada will remain so inactive in this space in the future remains to be seen, especially given the clear commitments from the new Trudeau government to respect and implement the *UN Declaration on the Rights of Indigenous Peoples*⁹⁰ (UNDRIP) and forge a new nation-to-nation relationship with Aboriginal peoples in Canada. The recent decision of the SCC in *Daniels v. Canada*⁹¹ may also spur on greater and broader legislative federal activity under s. 91(24).

VII HOW SIGNIFICANT IS THIS DECISION ANYWAY?

It is truly hard to overestimate the importance of this judgment from our highest court. At the least, it will enhance the position of First Nations in negotiations for comprehensive claim settlements and bring Canada up to momentum with the progress in other countries, such as New Zealand.⁹² In 2015 there were approximately one-hundred comprehensive land claim negotiating tables across Canada.⁹³ However, to illustrate the speed of these proceedings it should be noted that only six comprehensive land claims have been signed since 2006.⁹⁴ In Canadian geographic terms, the *Tsilhqot'in Nation* decision immediately applies in all parts of Canada where Aboriginal title has not clearly been extinguished.⁹⁵ Not only does this cover the vast majority of British Columbia, but it also includes areas in the southern Yukon and southern Northwest Territories, the Ottawa Valley, southern Quebec (from the Labrador and New Brunswick borders to Ontario south of the James Bay and Northern Quebec Agreement and Northeastern Agreement boundaries), southern Labrador, and arguably all three Maritime provinces as well as the island of Newfoundland—as none of these have ever been affected

⁸⁹ *Ibid* at para 126.

⁹⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 2008, Supp No 53, UN Doc A/61/53 [UNDRIP].

⁹¹ *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99.

⁹² PG McHugh, "The Crown's Relationship with Tribal Peoples and the Legal Dynamics for the Resolution of Historical and Contemporary Claims" (2015) 46:3 VUWLR 875 at 896–98 ("[i]t could be said that common law aboriginal title has been a judicial initiative aiming implicitly to incentivise government negotiation of contemporary claims rather than to become an alternative to it" at 897).

⁹³ Canada, Indigenous and Northern Affairs Canada, *Comprehensive Claims* (13 July 2015), online: Government of Canada <<https://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578>>.

⁹⁴ *Ibid*.

⁹⁵ The SCC made clear in its first major decision on s. 35 of the *Constitution Act, 1982* in *Sparrow*, *supra* note 25 at 1097–98, that *regulating* Aboriginal rights—even to a great extent—before 1982 is not enough to *extinguish* those same rights. Rather, they merely become narrower in scope through the regulation but return to greater meaning as if they had been sleeping and were awakened in 1982 by s. 35 coming into force, freed from those prior restrictions.

by treaties with First Nations that expressly included the surrender of title to their traditional lands, even in their English language versions.⁹⁶ Thus, millions of Canadians live in areas in which Aboriginal title has never been willingly ceded by its traditional owners or explicitly extinguished by the Crown.⁹⁷

With all likelihood private landowners should be untouched by *Tsilhqot'in Nation*,⁹⁸ but the same cannot be said for most natural resource companies who rely upon leases and licences from the Crown to exploit mineral and petroleum wealth and timber on Crown lands.⁹⁹ Many cottagers, as well as operators of fish and hunting lodges, also rely on Crown leases. Concerns were immediately voiced that the impact could be negative for the resource sector. Companies seeking to develop projects may face increased risks.¹⁰⁰ A leading columnist for the *National Post* said that “the implications are staggering: [i]n B.C., for example, First Nations opposing projects such as the Northern Gateway pipelines may no longer need to raise blockades or anticipate lengthy court battles in order to stop shovels from hitting the ground.”¹⁰¹ *West Coast Environmental Law* celebrated the decision and queried if this meant that the Enbridge pipeline would be cancelled.¹⁰²

While a certain level of panic descended on the resource sector in B.C., the SCC rendered a decision a mere fifteen days later that upheld Ontario’s governmental power to “take up” Crown lands so as to significantly infringe treaty harvesting rights in order to issue licences for clear-cut forestry operations in the Keewatin area of Treaty 3 territory.¹⁰³ A few law firms opined that *Tsilhqot'in Nation* would ultimately not have a major effect on the legal

^{96.} These areas of Atlantic Canada are affected by Treaties of Peace and Friendship negotiated by the Crown in 1660-1761 with Mi’kmaq and Maliseet Nations in what is now Canada as well as a number of Indian nations in New England. These treaties did not include any extinguishment of Aboriginal title.

^{97.} It should also be noted that many First Nations dispute explicit land surrender provisions in their treaties by asserting that such provisions were never part of the oral treaty negotiations such that their leaders never consented to any complete ceding of their territory, a concept that did not exist in their culture or their vocabulary.

^{98.} The Australian High Court dealt with this issue very directly in its landmark judgment in *Mabo No 2*, *supra* note 20. In *Tsilhqot'in* SCC, *supra* note 1, the appellants expressly dropped seeking a declaration that included a small area of privately owned land as well as some lands submerged under water, even though the trial judge had included those lands as covered by Aboriginal title.

^{99.} New Brunswick provides a stark exception to this pattern, as many of the logging companies own their forests outright, although they still require provincial permits to log commercially.

^{100.} See Tracy A Pratt & Neal J Smitheman, “Tsilhqot’in Nation case: What it means for resource development in Ontario”, *Mining Markets* (11 August 2014), online: Mining Markets <www.miningmarkets.ca/news/tsilhqotin-nation-v-british-columbia-what-does-it-mean-for-resource-development-in-ontario/>.

^{101.} Brian Hutchinson, “Supreme Court B.C. land-claim ruling has staggering implications for Canadian resource projects”, *National Post* (26 June 2014), online: The National Post <news.nationalpost.com/news/canada/supreme-court-b-c-land-claim-ruling-has-staggering-implications-for-canadian-energy-projects>.

^{102.} Jessica Clogg, “Tsilhqot’in Nation v. British Columbia: Implications for the Enbridge Tankers and Pipelines Project”, *West Coast Environmental Law* (27 June 2014), online: West Coast Environmental Law <wcel.org/resources/environmental-law-alert/tsilhqotin-nation-v-british-columbia-implications-enbridge-tankers>.

^{103.} *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447.

landscape since it didn't significantly alter Aboriginal law.¹⁰⁴ For example, the Federal Court of Appeal in *Hupacasath First Nation v. Canada* explained that *Tsilhqot'in Nation* did not change the law regarding when the Crown's duty to consult is triggered.¹⁰⁵ Further, the BCSC held that the decision imposed no positive obligation on the Crown to negotiate a disputed claim, at least in the context of existing litigation that was not settled after a two week judicial settlement conference.¹⁰⁶ In another recent case, the Saskatchewan Court of Appeal held that the government could issue oil sands exploration permits on treaty lands without consulting with the First Nation community.¹⁰⁷ The Court here decided that the duty to consult was not triggered until an application for surface access rights or approval of an extraction lease was at issue. As such, some skepticism about the overall national impact of the *Tsilhqot'in Nation* decision on the natural resource sector is warranted.

Some other law firms viewed the decision differently, however, and recommended creating a framework for meaningful discussion with First Nations.¹⁰⁸ The emphasis was placed on collaboration to create mutually beneficial relationships between the natural resource sector and Aboriginal peoples. Other lawyers worried about the futility of negotiations and warned that industries may choose to invest in other jurisdictions when faced with a lengthy negotiation or consultation process.¹⁰⁹ Nonetheless, the legal profession is aware that the challenge of proving Aboriginal title remains difficult, time-consuming, and very costly, which places a considerable barrier for Indigenous communities to overcome in order to obtain future declarations of title.¹¹⁰

The net result for now is that non-treaty First Nations in some major parts of Canada have gained considerable momentum in protecting their way of life and achieving greater prosperity for the future. At the same time, many Treaty First Nations remain impoverished watching the logging trucks roar past their tiny reserves. Grand Chief Stewart Phillip of the Union of B.C. Indian Chiefs described the implications of the judgments in somewhat provocative terms that reflect the view of many First Nations people in Canada when he said:

¹⁰⁴. See e.g. Osler's Aboriginal Law Group, "Tsilhqot'in Decision: The Sky Is Not Falling", Case Comment on *Tsilhqot'in Nation v British Columbia*, online: Osler <<https://www.osler.com/en/resources/regulations/2014/tsilhqot-in-decision-the-sky-is-not-falling>>; Robin M Junger, Joan M Young & Brent Ryan, "Supreme Court declares Aboriginal title in *Tsilhqot'in Nation v. British Columbia*", Case Comment, online: McMillan <www.mcmillan.ca/Supreme-Court-declares-Aboriginal-title-in-Tsilhqot-in-Nation-v-British-Columbia>.

¹⁰⁵. *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 FCA 4 at para 80, [2015] FCJ No 4.

¹⁰⁶. *Sam (Songhees Nation) v British Columbia*, 2014 BCSC 1783, [2014] BCJ No 2376.

¹⁰⁷. *Buffalo River Dene Nation v Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31, 457 Sask R 71.

¹⁰⁸. Sarah D Hansen & Kennedy A Bear Robe, "SCC Ruling on Aboriginal Title: *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 and Significant Changes to the Legal Landscape", Case Comment, online: Miller Thomson <www.millerthomson.com/en/publications/communiqués-and-updates/aboriginal-law-update/july-2014/scc-ruling-on-aboriginal-title-tsilhqot-in>. See also Dan Collins, Case Comment on *Tsilhqot'in Nation v British Columbia*, online: Dentons <www.dentons.com/en/insights/alerts/2014/july/3/case-comment-tsilhqot-in-nation-v-british-columbia-2014-scc-44>.

¹⁰⁹. Harry Swain & James Baillie, "Tsilhqot'in Nation v. British Columbia: Aboriginal Title and Section 35" (2015) 56 Can Bus LJ 265 at 274–75.

¹¹⁰. Roy Millen, Sandy Carpenter & Laura Cundari, "Supreme Court of Canada Releases Landmark Aboriginal Title Case", Case Comment on *Tsilhqot'in Nation v British Columbia*, online: Blakes <www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1968>.

Canada's top court adopted the international law principle of consent. Indigenous peoples in British Columbia have long been fighting for recognition of our rightful place in the Canadian federation. The Supreme Court of Canada has said that it is time to join the modern era of International Human Rights recognition. This decision puts an end to the legal oppression of Indigenous Peoples and enforces our fundamental human rights and freedoms.¹¹¹

Canada initially voted “no” (as one of only four nations to do so) when the UNDRIP was overwhelmingly adopted by the UN General Assembly on September 13, 2007, only to reverse its position three years later. One of the key reasons it had opposed the UNDRIP under the Harper government was disapproval of the frequent imposition of the “free, prior and informed consent” standard upon states in their dealings with Indigenous peoples. In May 2016, under the Trudeau government, Canada finally announced its full support of the UNDRIP.¹¹²

The Minister of Indigenous and Northern Affairs, Dr. Carolyn Bennett, explained before the United Nations in New York City that:

Today's announcement that Canada is now a full supporter of the Declaration, without qualification, is an important step in the vital work of reconciliation. Adopting and implementing the Declaration means that we will be breathing life into Section 35 of Canada's Constitution, which provides a full box of rights for Indigenous peoples.¹¹³

The path ahead to implement UNDRIP is not an easy one. As the federal Minister of Justice, Jody Wilson-Raybould, formerly the B.C. Regional Chief of the Assembly of First Nations (AFN), stated at the Annual General Assembly of the AFN:

So as much as I would tomorrow like to cast into the fire of history the *Indian Act* so that the nations can be reborn in its ashes, this is not a practical option—which is why simplistic approaches, such as adopting the UNDRIP as being Canadian law, are unworkable and, respectfully, a political distraction to undertaking the hard work required to actually implement it.

What we need is an efficient process of transition that lights a fire under the process of decolonization but does so in a controlled manner that respects where Indigenous communities are in terms of rebuilding...

Accordingly, the way the UNDRIP will get implemented in Canada will be through a mixture of legislation, policy and action initiated and taken by

¹¹¹. Grand Chief Stewart Phillip, News Release, “UBCIC, Okanagan Nation Alliance & Shuswap Nation Tribal Council Welcome first declaration of Aboriginal Title” (27 June 2014), online: Union of British Columbia Indian Chiefs <www.ubcic.bc.ca/News_Releases/UBCICNews06271402.html#axzz39fccNNT1>.

¹¹². Indigenous and Northern Affairs Canada, News Release, “Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples” (10 May 2016), online: Government of Canada <news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1063339&crtr.tp1D=1&_ga=1.40822306.1066794629.1422563602>.

¹¹³. *Ibid.*

Indigenous nations themselves. Ultimately, the UNDRIP will be articulated through the constitutional framework of section 35.¹¹⁴

The Federal Court of Canada recently stated that the “UNDRIP may be used to inform the interpretation of domestic law.”¹¹⁵ Many will suggest that the “free, prior and informed consent” standard has been embraced by the SCC, at least concerning proven Aboriginal title, albeit not explicitly. The SCC has truly provided considerable negotiating leverage to those Aboriginal peoples in Canada who retain Aboriginal title through its decision in *Tsilhqot’in Nation*. As the unanimous judgment stated: “[f]or 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.”¹¹⁶

One can readily imagine that such a situation might include public works, such as highways, local streets, mass transit, airports, wharves, etc. In such circumstances, the government concerned will have to persuade future courts that these comply with the “compelling and substantial objective” standard articulated in *Delgamuukw*¹¹⁷ if it seeks to proceed without consent from the Aboriginal title holders. While these types of projects may readily meet the dominant society’s overall perceptions of the public good, it does not necessarily mean that the Crown is home free. As we have witnessed with the prevalence of NIMBY¹¹⁸ reactions, Indigenous communities will similarly likely argue that the government should build its highway elsewhere. Alternatively, demands may legitimately be presented to receive significant financial and other direct benefits. Many Impact Benefit Agreements between Aboriginal parties and resource companies have demonstrated for over two decades through guaranteeing training, employment, service contracts, royalties, profit shares, etc. that compromise may be acceptable. The Court’s very significant requirement that current living members of the collective title holders must ensure that benefits pass to future generations will also trigger the need for longer term arrangements, especially where the land is being altered permanently or a resource (such as petroleum or minerals) is being dissipated through extraction.

The potential necessity to cancel a project, when in midstream or after its completion, will also be of vital concern to the private as well as public sector. Having spent potentially millions if not hundreds of millions of dollars with encouragement from federal and/or provincial governments, any rejection of a major development will logically trigger a lawsuit by the company to recover all monetary losses versus the government that failed to obtain Indigenous consent. The SCC has given clear warning that governments face that real risk if such consent has not been obtained prior to governmental approval of the proposed project. What if the

¹¹⁴. Notes for an address by Hon Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, (July 12, 2016), online: Government of Canada <news.gc.ca/web/article-en.do?nid=1098629&_ga=1.162708603.671365187.1469487071>.

¹¹⁵. *Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981 at para 103, [2015] FCJ No 969.

¹¹⁶. *Tsilhqot’in SCC*, *supra* note 1 at para 92.

¹¹⁷. *Delgamuukw*, *supra* note 29 at para 161.

¹¹⁸. An acronym for “not in my backyard” meaning “[o]pposition to the locating of something undesirable (as a prison or incinerator) in one’s neighbourhood.” *Merriam-Webster Dictionary*, online, sub verbo “NIMBY”, online: Merriam-Webster <<https://www.merriam-webster.com/dictionary/NIMBY>>.

highway or other development has long since been built even though the Aboriginal title is still alive? Restoration of the prior state of the land may be possible in some circumstances, although the cost could be massive. In many other situations it will simply be impossible to mitigate the damage done to the natural habitat. The UNDRIP addressed this very issue by requiring states to provide compensation in “the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.”¹¹⁹

It is clearly arguable that municipal and regional governments will lose all regulatory authority over lands as soon as they are confirmed to be Aboriginal title lands, just as they do at present with *Indian Act* reserves. These governments will need even more in the future to reach agreements with neighbouring First Nations on how they can work together. The Federation of Canadian Municipalities and the Union of B.C. Municipalities have both been encouraging the development of such practical relationships for over twenty years. Formal compacts between Indian tribes with state and local governments are widespread in the USA regarding cross-deputization of police, integrated water and sewage systems, shared correctional facilities, road clearing, fire services, etc. The *Tsilhqot'in Nation* decision will dramatically increase the necessity for more cooperation at the local level in large parts of the country.

Perhaps one of the bigger surprises in the judgment is the Court's comments about the fragility of existing legislation after a declaration of Aboriginal title has been issued. McLachlin C.J. stated that “if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.”¹²⁰

After a rather ineffective start by the B.C. government following the decision, the Tsilhqot'in Nation and the provincial government have been working together to attempt to build a strong relationship based on economic sustainability and improved social well-being of the Tsilhqot'in communities.¹²¹ They signed a five-year framework agreement, the Nenqay Deni Accord (or the “People's Accord”), in February 2016 “to establish the shared vision, principles and structures...to negotiate one or more agreements to effect a comprehensive and lasting reconciliation between the Tsilhqot'in Nation and British Columbia.”¹²² It outlines eight pillars of reconciliation¹²³ that are interrelated and are to be approached holistically.¹²⁴ These pillars are further divided into more detailed components throughout the Accord. The agreement

¹¹⁹. UNDRIP, *supra* note 90, art 28(2).

¹²⁰. *Tsilhqot'in SCC*, *supra* note 1 at para 92.

¹²¹. This is evidenced by memoranda and letters of understanding signed by the government of British Columbia and the Tsilhqot'in Nation: Tsilhqot'in Strategic Engagement Agreement (2014); Tsilhqot'in Nation Letter of Understanding (10 September 2015), and the Tsilhqot'in Nation Letter of Intent (24 September 2015), online: Province of British Columbia <www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/tsilhqot-in-national-government>.

¹²². *Nenqay Deni Accord (The Peoples Accord)*, Tsilhqot'in Nation and the Province of British Columbia, 11 February 2016, online <www.tsilhqotin.ca/PDFs/Nenqay_Deni_Accord.pdf> art 2.1.

¹²³. *Ibid*, art 3.1: ((1) Tsilhqot'in Governance; (2) Strong Tsilhqot'in Culture and Language, (3) Healthy Children and Families; (4) Healthy Communities; (5) Justice; (6) Education and Training; (7) Tsilhqot'in Management Role for Lands and Resources in Tsilhqot'in Territory; and (8) Sustainable Economic Base).

¹²⁴. *Ibid*, art 4.7.

covers a vast landscape of issues and areas of concern for the Tsilhqot'in Nation and represents a step in the right direction. Chief Roger William explained the importance of the Accord:

This agreement is about moving forward for our future generations. We have 150 years where no agreements have been signed...To us, this agreement is about building our people up from a history of injustice. The impact of Smallpox, the Tsilhqot'in War, the Indian Act and Residential Schools are all very recent in our history...We name this agreement the Nenqay Deni Accord to honour our ?Esggidam [Ancestors] and to bridge a positive future with our neighbours.¹²⁵

The road towards a brighter future for the Tsilhqot'in Nation has just begun. The SCC's judgment has provided them with considerable leverage that has led to the negotiating of the Nenqay Deni Accord and future agreements. As the pillars of reconciliation indicate, there are a number of outstanding issues and prolonged history of discrimination that First Nations face among the Tsilhqot'in communities and in Canada as a whole. The Tsilhqot'in Nation expressed its commitment to working with other First Nations as it continues to work with the Accord.¹²⁶

One of the major practical implications of the judgment is how difficult it will be for other First Nations, even those with very strong evidence in support of their title assertions, to follow in the footsteps of the Tsilhqot'in Nation. Many subsequent decisions cite this SCC decision, yet no further declarations of Aboriginal title have yet been made in Canada. The Tsilhqot'in Nation benefited from the extremely limited presence of outsiders within their traditional territory coupled with being the first to push through with an Aboriginal title claim. There was little territorial overlap with other First Nation communities. Even if there had been, the trial judge excluded from the trial all lands with Aboriginal title overlap, and which the Tsilhqot'in Nation subsequently excluded from the appeal to the SCC.¹²⁷ This will definitely not be the case for many other First Nations communities, whose territories overlap with neighbouring First Nations. The presence of boundary overlaps has retarded comprehensive claim negotiation progress in various parts of Canada over the decades and will create significant challenges in the litigation of Aboriginal title claims.¹²⁸ The Tsilhqot'in Nation's counsel,

^{125.} Tsilhqot'in National Government and Ministry of Aboriginal Relations and Reconciliation, Press Release, "Tsilhqot'in and B.C. sign historic accord" (12 February 2016), online: Tsilhqot'in National Government <www.tsilhqotin.ca/PDFs/Press%20Releases/2016_02_12_Joint%20PR%20NDA.pdf>.

^{126.} Tsilhqot'in National Government, Press Release, "Tsilhqot'in Nation committed to working with other First Nations as it moves forward with Nenqay Deni Accord" (29 February 2016), online: Tsilhqot'in National Government <www.tsilhqotin.ca/PDFs/Press%20Releases/2016_02_29%20Working%20with%20Other%20First%20Nations.pdf>.

^{127.} *Tsilhqot'in BCSC*, *supra* note 13 at para 938.

^{128.} See e.g. Kent McNeil, "Exclusive Occupation and Joint Aboriginal Title" (2015) 48:3 UBC L Rev 821.

therefore, recommends that future litigants exclude territorial overlaps from their claims to facilitate a favourable outcome.¹²⁹

As the Tsilhqot'in Nation were breaking new legal ground, they were able to access test case funding under court order to help cover the likely more than thirty-million dollars' cost of litigation.¹³⁰ Such financial support will not be readily available for others as the groundbreaking test case factor is now gone, while provincial governments have deep pockets and a large legal staff to draw upon in asserting jurisdiction to control Crown land. Chief Roger William offers his views as to the importance of the decision:

While lawyers and academics debate the importance of the *Tsilhqot'in* case, I think that it is too soon to tell. Time and perspective will be needed to measure the true importance of this great case. It is true that many First Nations now have great opportunity of reaping benefits that are not being offered to them under the Treaty Process...Some say that this is a game changer and the tide has turned and our lands that were wrongfully taken from us will now be returned...[A]s of the date I write this, I have nothing concrete to report. But what I have learned is not to be too impatient. I do see some promise on the horizon.¹³¹

VIII CONCLUSION

At the end of the day, Canada's highest court has delivered a watershed judgment that will be the subject of comment, debate, anger, and celebration for many years to come. It has elevated the status of Aboriginal title significantly in Canada in a manner that is already attracting attention among Indigenous peoples and states in many parts of the world—especially in common law jurisdictions. The decision enhances the bargaining power for those First Nations who retain strong arguments that they still possess Aboriginal title to all or much of their traditional territory.

At the same time, it has further entrenched the status quo that underpins elements of colonialism based on a much-criticized Discovery Doctrine. This doctrine continues to confirm the legitimacy of the historic right of long dead European monarchs to have claimed overarching sovereignty and underlying title to lands they never saw, simply because their representatives asserted the claim in their royal names.¹³² While the Court accepted that the *terra nullius* doctrine was inapplicable—as millions of Indigenous peoples occupied

¹²⁹ David M Rosenberg & Jack Woodward, “The *Tsilhqot'in* Case: The Recognition and Affirmation of Aboriginal Title in Canada” (2015) 48:3 UBC L Rev 943 at 963–64. See also within this special issue of the UBC Law Review devoted to the *Tsilhqot'in Nation v British Columbia* decision, Gordon Christie, “Who Makes Decisions over Aboriginal Title Lands” (2015) 48:3 UBC L Rev 743; PG McHugh, “Aboriginal Title: Travelling from (or to?) an Antique Land?” (2015) 48:3 UBC L Rev 793; Jacinta Ruru, “Lenses of Comparison across Continents: Understanding Modern Aboriginal Title in *Tsilhqot'in Nation* and *Ngati Apa*” (2015) 48:3 UBC L Rev 903.

¹³⁰ See Aboriginal Law Group, *supra* note 11 where the trial alone was suggested to have cost thirty-million dollars.

¹³¹ Chief Dr. Roger William, “Foreword” (2015) 48:3 UBC L Rev 697 at 698–99.

¹³² See e.g. Borrows, *supra* note 83 at 726 (where the author states that “[t]he doctrine of discovery is alive and well in Canada”).

and governed their own parts of North America—it sustains the legal architecture that has supported the theft of most of the continent and marginalized Indigenous self-determination.

Our highest court has championed a goal of reconciliation for the past two decades. Many Canadians have also embraced this spirit, fueled in large part by the influence of the Truth and Reconciliation Commission.¹³³ However, for genuine reconciliation to be achieved there must be an honest effort to explain how Indigenous sovereignty was displaced and rightful possession ignored for generations. Alternatively, we have to accept that this longstanding assertion of Crown title and sovereignty was based upon assertions issued from sand castles that need to be replaced by a new foundation grounded on mutual respect that includes accepting shared—as well as separate—areas of jurisdiction for both Indigenous and non-Indigenous governments. Celebrating our sesquicentennial this year will compel us to confront our shared history and to assess how prepared we Canadians really are to embrace decolonization while we build a new image for our country, well before our bicentennial in 2067.

¹³³. Truth and Reconciliation Commission of Canada, Final Report, (Library and Archives Canada Cataloguing in Publication, January 2015), online: Truth and Reconciliation Commission of Canada <www.trc.ca/websites/trcinstitution/index.php?p=890>.