MAPPING ABORIGINAL TITLE IN BRITISH COLUMBIA

PART I: THE NEED FOR TRANSFORMATIVE CHANGE

By David Rosenberg, Q.C., and Tim Dickson

It is really quite a simple idea, with profound implications. Map Aboriginal title lands in British Columbia. Why? Aside from the ethical imperatives and international obligations,[1] the reasons are completely practical and utilitarian. The map would be a useful tool. It would be a reference guide for government, industry and First Nations. It would inform the ongoing process of reconciliation. It would guide resource development and preservation, the application of laws and general regulations, and help define the geography of this province.

Tsilhqot'in Nation v. British Columbia, [2014] 2 S.C.R. 256 is an unanimous decision from the Supreme Court of Canada in which the Chief Justice, writing for the court, clarified the common law doctrine of Aboriginal title and in doing so confirmed the criteria for establishing proof of Aboriginal title. *Tsilhqot'in Nation* provides both the impetus and the mechanism for undertaking the mapping project.

TSILHQOT'IN HAS NOT YET USHERED IN REAL CHANGE

Two years have now passed since *Tsilhqot'in* was handed down. Commentators have said the judgment "points the country in a new direction"[2] and amounts to a "real game changer"[3] and a "turning point",[4] and First Nations leaders have celebrated the decision as "a victory for all of us",[5] "a solid platform for genuine reconciliation"[6] and "a great step forward in reconciliation".[7] Indeed, at an historic gathering between the provincial cabinet and the chiefs of all B.C. First Nations in 2014, just months after *Tsilhqot'in* was handed down, Premier Christy Clark acknowledged that ignoring the decision would put B.C.'s future in peril, and she confirmed her government's intention to work together with First Nations.[8]

The *Tsilhqot'in* decision was indeed a watershed moment, both in theory and in ways that promise more practical results. While previous decisions

like *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 theorized on the existence of Aboriginal title, the *Tsilhqot'in* decision finally answered a critical aspect of what was long called the "land question"—that is, whether Aboriginal title exists as a legal reality. That question had long been disputed by the governments, who said, variously, that it never existed because Aboriginal peoples did not work the land so as to make it theirs; or if it did ever exist it did not survive Britain's assumption of sovereignty; or if it did survive then it had been extinguished by the subsequent exercise of that sovereignty.

Some of these arguments were dispensed with in *Calder* and the rest of them were rejected in *Delgamuukw*, but nonetheless for a long time it appeared that the courts would avoid judicial declarations of title and instead urge the parties to negotiate. In *Delgamuukw*, for instance, while the court held very clearly that Aboriginal title *could* exist at law, in the result it ordered a new trial, and then urged the parties to negotiate instead of pursuing remedies through the courts: "Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1)—'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'."[9]

Two important aspects of the *Tsilhqot'in* decision are that Aboriginal title exists as a juridical fact that can be found and declared by courts and that Aboriginal title can be territorial. By rejecting the reasoning of the British Columbia Court of Appeal that Aboriginal title was restricted to specific sites, but instead included valleys, mountains and entire watersheds, the Supreme Court of Canada declared Aboriginal title for a territorial claim. Negotiation is not the only pathway for First Nations to achieve recognition of their ownership and governance of their lands; litigation is now a viable option. As the *Globe and Mail* put it, in reporting on Premier Clark's comments at that first All Chiefs meeting, *Tsilhqot'in* has caused the premier to recognize that Aboriginal title "does exist, without question or dispute".[10]

But such recognition of Aboriginal title as a legal concept will do little to promote reconciliation if it is not coupled with action that effects real change on the ground. So far there are few signs that such action is forthcoming. The First Nations Leadership Council[11] has sought the province's acceptance of four principles, at the core of which is the recognition of Aboriginal title and rights.[12] The province is so far resisting these principles. Reporting on the second annual gathering between the provincial cabinet and First Nations leaders, held in September of 2015, the *Globe and Mail* described a "chasm" between the positions of the province and the council, with First Nations predicting a return to litigation and protest if real

progress is not made within a year.[13] The province and First Nations leaders ultimately did sign a "commitment document" that provides a framework for future discussions, but without pledging specific concrete actions.[14]

While litigation will likely lead to real certainty with respect to the existence and extent of title in discrete areas, it is highly unlikely to provide clarity with respect to most of the province. Treaty negotiations—which have largely proceeded on political and commercial bases, as opposed to recognition of First Nations' rights and title—have failed to achieve satisfactory progress. Consultation processes have in most cases devolved into procedural exercises, in which government and industry pay little attention to the strength of First Nations' respective claims and instead simply seek to satisfy the standards of deep consultation. The result is that government and industry end up with more First Nations to consult at a deep level, while First Nations with very strong title claims are given little opportunity to play a meaningful part in the governance of their territories.

As a means of breaking this logjam and advancing reconciliation, we propose that government and First Nations undertake a concerted effort to determine the locations and extent of Aboriginal title throughout the province. The aim would be to produce a map, or series of maps, identifying which areas were exclusively occupied by which First Nations in 1846, the critical date for the establishment of Aboriginal title. Those maps would be produced based on the best available evidence, including archival, archaeological and oral evidence. The process would be jointly established by First Nations and government, and would be transparent and inclusive, with substantial funding and opportunities for participation for First Nations.

The purpose of these maps—and the evidence collected on which they are based—would not be to determine with finality the boundaries of Aboriginal title; that can only be done through treaties or litigation, coupled with agreements between neighbouring First Nations with respect to any shared territory. Rather, the objective is to create a credible and useful tool that can inform consultations, negotiations and nation-to-nation relationships, and thereby advance reconciliation.

Part II of this article will set out more of the possible mechanics of this proposal—the structure and process by which it might be accomplished—as well as some of the elements that we believe are essential to provide it with sufficient legitimacy to serve its purpose.

THE B.C. TREATY PROCESS

Unlike in most provinces in Canada, in British Columbia colonial and post-Confederation governments signed few treaties. The result is that First

Nations did not surrender their rights to the vast majority of the province, and they continued to assert title to their lands, as well as rights to engage in such activities as hunting and fishing.

First Nations also sought recognition of and protection for their rights through treaties, but they were rebuffed by the federal and provincial governments until they turned to the courts. After six Supreme Court judges held in *Calder* that Aboriginal title was cognizable by the common law, Canada initiated the Comprehensive Claims process in 1973, although the B.C. government continued to deny the existence of Aboriginal title and refused to participate. Canada subsequently entered into treaties covering vast portions of the northern territories. British Columbia finally agreed to enter into treaty negotiations with First Nations and Canada, and those three parties together established the B.C. Treaty Process ("BCTP") in 1992. A variety of factors had made the Province's refusal to participate untenable: constitutional protection for Aboriginal rights by way of the entrenchment of s. 35 in the *Constitution Act, 1982*; First Nations' increasing political organization and their articulate calls for self-government in the Meech Lake and Charlottetown constitutional talks; the Supreme Court's upholding of Musqueam fishing rights in *Sparrow* in 1990; and the economic cost of unsettled land claims, which Price Waterhouse estimated in 1990 to amount to $1 billion in lost investment and 1,500 jobs a year in the mining and forestry sectors alone.[15]

The primary goal of the BCTP has always been certainty. The process was founded with high optimism that that goal could be achieved reasonably quickly, but the process has fallen far short of that goal. To date the BCTP has resulted in only four treaties and three agreements-in-principle and it has widely been regarded as a failure, or at least a real disappointment. Most First Nations in British Columbia are either not participating in the process at all or are not in active negotiations. Those groups that are participating have incurred a crushing debt load of approximately $466 million, with an average loan per treaty table of $10 million.[16] For many years, the province has participated half-heartedly in the BCTP, and has instead pursued a more incremental approach by signing interim agreements with First Nations, dealing with such things as fishing rights, forestry proceeds and land management. The premier recently refused to approve the appointment of a new Chief Commissioner for the BC Treaty Commission (the "Commission") stating that the province had made a policy decision not to continue with the *status quo*.[17]

There are many reasons why the BCTP has not been successful to date. First Nations' comments, echoed by the Commission, have pointed to the

governments' rigid positions and slow process for obtaining instructions. Governments, and again the Commission, highlight the problem of overlapping claims to territory by multiple First Nations. That latter problem appears to be baked into the structure of the process. While the Commission facilitates the process, it has no power to opine on the strength of a First Nation's claim to title, and a First Nation does not have to demonstrate *prima facie* proof to enter the process. Nor do either the federal or provincial governments assess the strength of First Nations' competing claims to territory prior to commencing negotiations within the treaty process. Overlapping claims are left entirely to First Nations to sort out between themselves on a consensual basis. This has proved to be very difficult, if not unrealistic. Few overlap agreements between neighbouring First Nations have been completed,[18] with the result that neighbouring First Nations have commenced litigation challenging many of the final agreements or agreements-in-principle that have been initialled.[19]

A fundamental weakness of the BCTP is that the negotiations are politically oriented and proceed with only a relatively tenuous connection to the strength of First Nations' claims. Most critically, the inability of the process to resolve overlapping claims is a major cause of the BCTP's lack of progress. In its 2014 annual report, the Commission observed that *Tsilhqot'in* confirms that the basis for treaties is First Nations' "rights and title to lands in British Columbia", and it focuses on the need to resolve overlapping claims to allow the process to progress, a recommendation with which the First Nations Summit (representing First Nations involved in the process) agrees.[20] Grand Chief Stewart Phillip, the president of the Union of B.C. Indian Chiefs (representing First Nations outside of the BCTP) goes further, calling the overlap issue "the cancer of the B.C. treaty process", a comment he made in the context of the Okanagan Nation Alliance commencement of litigation against the Lheidli T'enneh First Nation's incremental treaty agreement.[21] Douglas Eyford has advised the federal government that intra-First Nation disputes over shared territories and overlapping claims are "a pervasive problem and a significant barrier to treaty-making" that, if left unresolved, "delay the completion of modern treaties and other land and resource agreements, and impede project development."[22]

The BCTP was never meant to provide a "legal solution" to the land question: it is not evidence-based but is rather designed to provide a table for political, interest-based negotiations. One problem that became apparent was the Crown's refusal to recognize Aboriginal title as a legal right, which informs the positions taken by the Crown in negotiations. On the other hand, First Nations insist that they have Aboriginal title to their traditional

territories. The positions of the parties were in conflict and unable to be resolved without a determination on the central issue: the character and nature of Aboriginal title.

LITIGATING ABORIGINAL TITLE

As *Tsilhqot'in* demonstrates, however, there is another avenue to certainty, and one that is entirely grounded in determining the character and nature of First Nations' Aboriginal title. That avenue, of course, is litigation. With the *Tsilhqot'in* decision, the Supreme Court of Canada sent a loud and unambiguous signal to trial courts that Aboriginal title can be found on the facts and declarations of title can be made.

Litigation, however, has its own serious challenges. Three Aboriginal title claims have been fully litigated in B.C.—*Calder*, *Delgamuukw* and *Tsilhqot'in* —and the latter two of them have been among the longest trials in our history in terms of the number of hearing days. Pre-trial preparation is also immense, requiring enormous expenditures of time and money in gathering oral, archival and expert evidence. *Tsilhqot'in* could only have proceeded with the benefit of an "advance costs" order, under which the Crown paid the Tsilhqot'in's legal costs. The order was granted because of the litigation's status as a test case, and it is unclear whether such orders will be as available for future litigation.

Following the release of *Tsilhqot'in*, a number of First Nations have filed title claims or have signalled their intention to do so. Some of these claims, or future claims like them, may proceed to trial, but due to the cost, complexity, necessary political commitment and the risks involved, it is unlikely that many will. That is not to deny the importance of *Tsilhqot'in*. Not only must it put to rest the tired arguments denying the existence of Aboriginal title in principle, it also demonstrates that First Nations can, if they must, go to court and prove the existence of their title. But the courts have signalled that negotiation is the preferable route. In any event, given the cost and complexity of Aboriginal title litigation, and that litigation is generally designed to address a specific dispute, litigation is highly unlikely to provide recognition and certainty with respect to the large majority of First Nations' claims.

THE LIMITS OF CONSULTATION

First Nations face the serious risk that industrial activities in their territories could undermine their rights and title before they are recognized and protected. To ameliorate that risk, the Supreme Court held in *Haida* (2004) that the federal and provincial Crowns have duties to consult with, and

potentially accommodate, First Nations whose claimed title and rights may be adversely affected by Crown decisions, such as those approving industrial activities. That is, while Aboriginal title may not yet be proved in an area, the honour of the Crown requires that the Crown not run roughshod over Aboriginal interests while their claims remain unresolved.

The court's recognition of the duty to consult and accommodate has had enormous impact on First Nations' relationships with government and industry. First Nations are now routinely involved in land use decision-making processes in their territories and, because a failure to fulfill the duty to consult and accommodate can result in legal action that could substantially delay or derail a project, many proponents are keenly interested in obtaining First Nations' consent to their projects and seek to negotiate benefits agreements with them. The benefits can at times be very substantial. The high water mark to date would appear to be Petronas' offer of $1.15 billion to the Lax Kw'alaams First Nation in respect of its proposed Pacific North West LNG liquefaction facility on Lelu Island in Prince Rupert harbour. Lax Kw'alaams turned the offer down, citing environmental concerns, and has since filed an Aboriginal title claim to the area. It is anticipated that, if Petronas continues to push the project forward without Lax Kw'alaams consent, the latter will seek an interlocutory injunction pending the hearing of their title claim.

The Pacific North West LNG project therefore not only demonstrates the degree to which the duty to consult and accommodate empowers First Nations, but it also reveals its limits. Lax Kw'alaams filed its title claim because, notwithstanding the statements of some commentators, the duty to consult and accommodate does not give First Nations a veto.[23] Depending on the strength of the First Nation's claim to rights and title and the seriousness of the potential adverse effects of the decision on those claimed rights and title, the duty to consult entitles First Nations to notice of an impending decision, to information about a project, to be heard by the decision-maker, to have that decision-maker take into account the information supplied by the First Nation, and to have the decision-maker consider whether accommodations of the First Nation's rights and title need to be made. In short, governments' duty to consult provides First Nations with a corresponding right to participate in the decision-making process, but not a right to receive a particular decision.

The duty to consult stands in marked contrast to the far greater burden on governments to justify infringements of *proven* Aboriginal rights or title, or treaty rights. In such cases, not only must government meet the procedural requirements of the duty to consult, but it also must justify its deci-

sion *substantively*. That is, government must demonstrate that it is pursuing a compelling objective, that its measures respect the entitlement of the First Nation's future generations to the benefit of the land, and that the actions it is taking are proportionate to the government's objective, including that the benefits will outweigh the negative impacts on the Aboriginal rights. The challenges of meeting that high standard should not be underestimated. Indeed, in *Tsilhqot'in* the court went so far as to warn that projects approved by the Crown in compliance with its duty to consult but without a First Nation's consent may nonetheless need to be re-evaluated—even cancelled—if that First Nation later proves that project infringes its title.[24]

While certainly constituting an enormous step forward for First Nations, the duty to consult and accommodate therefore provides First Nations with far less control over their ancestral lands than do Aboriginal title or modern treaties. What power the duty provides First Nations to block or substantially alter a project, or to receive a fair share of its economic benefits, lies in threatening to bring an application for judicial review of the governmental decision. A breach of the duty to consult can generally be remedied through more consultation, but the resulting delay and uncertainty for the project can be very detrimental, if not fatal, particularly for projects such as the LNG export projects.

In order to lay the groundwork for such applications, First Nations tender evidence supporting their rights and detailing the project's impacts on them, and they identify gaps in the proponent's information and the government's process they hope the proponent and government cannot or will not fill. For their part, governments now take a broadly inclusive approach to key decision-making processes, such as environmental assessments, in order to avoid judicial review applications brought by First Nations they left out. And instead of taking a hard look at the strength of First Nations' claims, they often simply accept a duty to consult at the deepest level, thereby avoiding the need to conduct strength of claim assessments altogether.[25] The resulting consultation process provides for a number of opportunities for exchange of information and opinions, which savvy proponents readily take up, using their substantial resources to bombard First Nations with information both inside and outside of the process. Proponents now routinely keep "consultation logs" detailing every interaction with each First Nation, no matter how insignificant. For large (particularly linear) projects, these "points of contact" will total in the thousands.

Too often, then, consultation is more about papering the file—ticking off the appropriate boxes—than it is about "good faith efforts to understand each other's concerns and move to address them", as envisioned in *Haida*.[26]

This state of affairs is not only dissatisfying to First Nations, but also to governments and proponents. Fulfilling even the ritualistic motions of consultation require a great deal of resources and energy. Most importantly, it takes time. In a recent report, the Fraser Institute concludes that regulatory and other delays, including consultation with First Nations, are hindering the development of the LNG industry in B.C., which could result in losses amounting to as much as $22.5 billion by 2020, equating to 9 per cent of B.C.'s 2014 GDP.[27] As the co-author of that report told the *Globe and Mail*, "Getting even one project to the construction stage is proving to be difficult because of regulatory delays and a range of other factors such as protracted consultations with First Nations and project changes to address environmental concerns."[28] A report published by Ernst & Young in 2014 observes that the challenges of consulting First Nations and seeking their support "are complex and time consuming" and "ultimately impact the competitiveness of the B.C. LNG opportunity."[29]

Where many First Nations assert claims to lands affected by a proposed project, a lack of clarity over the relative strength of those First Nations' claims can pose serious obstacles to gaining First Nations' approval, and hence greater project certainty. Even where the key First Nations consent to the project, opposition by more peripheral First Nations can cause delay.[30] And even among those First Nations that notionally support a project in exchange for economic benefits, the allocation of those benefits between them can be a major point of contention that causes substantial delay.[31]

Our consultation processes are therefore both too shallow and too wide. They are too *shallow* in that they fail to provide to First Nations with particularly strong Aboriginal title claims the power to actually make decisions themselves with respect to the affected lands. And they are too *wide* in that they include too many peripheral First Nations and too often accord to them equal procedural rights, thereby creating too much complexity and confusion. Underlying both shortcomings is the lack of a detailed understanding of the strength of the claims of the First Nations affected. Governments' preference not to conduct strength of claim assessments for all First Nations affected by all projects may sometimes be understandable, given the magnitude of such an undertaking. So too may be governments' desire to remain outside of First Nations' disputes over shared territories. But the absence of a shared body of evidence relating to all First Nations' title claims, and a reasonably credible assessment of that evidence, is the root cause of much disagreement, delay and expense. It is that absence we argue should now be addressed.

A WAY FORWARD: MAPPING ABORIGINAL TITLE

Our proposal is for a body, jointly established by First Nations and government, to gather and assess the evidence of First Nations' occupation in 1846. That body would consider evidence and submissions from both government and First Nations, the latter of which would receive generous funding to ensure their meaningful participation in the process. The body's objective would be to produce a series of maps credibly delineating—on the best evidence available to it—which lands in British Columbia are subject to Aboriginal title held by which First Nations.[32] Those maps would be backed up by extensive reports summarizing and assessing the evidence of occupation in 1846. All of the maps and the reports would be made available to the public.

We believe that, if properly pursued, the project would yield real benefits for all parties.

Beginning with First Nations, there are at least four broad benefits. First, the project could substantially advance the nation-to-nation relationships based on the recognition of Aboriginal rights and title that First Nations have sought with the provincial and federal governments. A map showing those areas of British Columbia that are subject to Aboriginal title (albeit on a preliminary basis) would go a long way to ousting the denialism with which government has far so long reacted to First Nations' claims.

Second, the project could provide a more stable basis on which treaty negotiations could advance. For one thing, a preliminary assessment of where a First Nation has Aboriginal title would ground those negotiations in how that title ought to be recognized, protected and governed. It would provide a focus and an objective to the negotiations, the absence of which appears to have contributed to the BCTP's glacial pace. And perhaps even more importantly, the mapping project would help resolve the issue of territorial overlaps, because Aboriginal title is an *exclusive* right to the land. Some First Nations would likely be motivated to advance claims to *shared* exclusive title (a concept acknowledged in *Delgamuukw*), while others would simply seek to demonstrate that they were the exclusive occupants. In any event, the mapping project would substantially increase our understanding of overlapping claims to territory and would in many or most cases provide a more solid basis for moving further with treaty negotiations.

Third, the mapping project could strengthen our consultation processes by providing First Nations a more central role in the management of lands over which they have Aboriginal title. In *Tsilhqot'in*, the court opined that "appropriate care" might have to be taken to preserve Aboriginal title where the claim to it is "particularly strong".[33] The court suggested that interim relief might need to be done shortly before a declaration at the end of title

litigation, but that was given as just one example. The court's comment indicates that the merely procedural entitlements of "deep consultation" are not necessarily the endpoint of the pre-proof consultation spectrum. It appears plausible to us that, where a First Nation has had its Aboriginal title credibly identified on a preliminary basis and where the Crown seeks to make decisions that would adversely affect those title lands, then the honour of the Crown will not be satisfied by mere consultation but may require substantive justification.

Indeed, and this is related to the fourth benefit of the mapping project for First Nations, practical considerations would also require some justification of adverse impacts on preliminarily identified title because of the enhanced risk that the First Nation could win a declaration of title in court and force the cancellation of the project causing those impacts. That risk is enhanced because, as a result of participation in the mapping project, First Nations will be in a far better position to litigate their strongest claims to title, if they deem it necessary. As we will discuss further in Part II, the mapping project must include substantial funding for participating First Nations in order to allow those First Nations to muster their evidence and arguments in favour of their title claims. The result will be that First Nations will have assembled, to a fair degree, the evidence necessary to prove their strongest title claims in court, and to seek injunctive relief in the meantime.

The benefits of the mapping project for First Nations could therefore be substantial, and they would be no less significant for government. For one thing, government's interest in speeding up the treaty negotiation process is at least equal to that of First Nations and, for the reasons we have set out above, the mapping project has the potential to ease some of the logjams in the process. Probably government's most pressing motivation in that regard is economic: it seeks to achieve greater certainty over land ownership and governance in the province in order, among other things, to attract greater investment, and to that extent, its interest is parallel to that of industry. But government also has a high duty to seek to reconcile through treaties the rights of the prior occupants of these lands over which the Crown asserted sovereignty. As the court stated in *Haida*, "the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims".[34]

While the business of treaty negotiation remains outstanding, however, both government and industry have a very strong interest in reducing the uncertainty with respect to claims to title throughout the province. As discussed above, that uncertainty complicates and slows the process of consultation, which in turn renders economic development and investment more uncertain. The mapping project would allow government and industry to

better determine which First Nations have serious claims to title in respect of particular tracts of land affected by a proposed project, and which do not. The mapping project would therefore allow them to design a more focused consultation process with greater confidence that the process would be upheld on judicial review, at least on the critical questions of which First Nations were consulted and how deeply.

CONCLUSION

The proposal is certainly ambitious, but with buy-in and commitment from First Nations and government, as well as the necessary resources, it is not beyond reach. It must be remembered that the aim is not to determine the existence or extent of any First Nation's Aboriginal title for all time; it is not to litigate Aboriginal title throughout the province. Rather, the objective is the more modest one of producing a credible and impartial "preliminary assessment" of where and for which First Nations Aboriginal title exists in British Columbia in order to assist in the negotiation of treaties and interim measures and in land management. That assessment would not amount to any sort of binding determination on First Nations or government, and First Nations would be free to litigate their title claims and seek binding judicial declarations of title if they wished. The mapping project is not aimed at settling the Land Question once and for all, but is rather intended to provide a useful and flexible tool in the ongoing journey toward reconciliation. The key lies in ensuring that tool is credible enough to be useful while not purporting to be determinative. The mechanics of how we believe that balance might be struck will be set out in the next part of this paper, to be published in an upcoming issue of the *Advocate*.

ENDNOTES

1. See United Nations Declaration on the Rights of Indigenous Peoples and *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at para 60. There is also a compelling argument that the honour of the Crown constitutionally obliges the Crown to provide an effective mechanism by which Aboriginal title can be "recognized and affirmed", as promised in s 35 of the *Constitution Act, 1982*; see *R v Sparrow*, [1990] 1 SCR 1075, at pp 1105–1106, *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*] at paras 19–20, and *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 78–79.
2. Ken Coates and Dwight Newman, "*Tsilhqot'in* Ruling Brings Canada to the Table", *Globe and Mail* (11 September 12014), online: <http://www.theglobeandmail.com/globe-debate/tsilhqotin-brings-canada-to-the-table/article20521526/>.
3. Ravina Bains, "*A Real Game Changer: An Analysis of the Supreme Court of Canada Tsilhqot'in Nation v British Columbia Decision*", Fraser Research Bulletin (July 2014).
4. Geoff Plant, "Aboriginal title, *Tsilhqot'in*, reconciliation, and the way forward"(20 January 2015), comments at the BC Natural Resource Forum, online: <http://theplantrant.blogspot.ca/2015/01/aboriginal-title-tsilhqotin.html>. See also Geoff Plant, "How the Supreme Court changed British Columbia—my thoughts on the *Tsilhqot'in* decision", The Plant Rant, (4 July 2014), online: <http://theplantrant.blogspot.ca/2014/07/how-supreme-court-changed-british.html>, where the decision is described as "transformational".
5. Perry Bellegarde, National Chief of the Assembly of First Nations (26 June 2015), online: <http://www.afn.ca/en/news-media/latest-news/06-26-15-assembly-of-first-nations-national-chief-marks-one-year-anniv>.

6. Grand Chief Stewart Phillip, President of the Union of BC Indian Chiefs (26 June 2014), online: <http://www.cbc.ca/news/politics/tsilhqot-in-first-nation-granted-b-c-title-claim-in-supreme-court-ruling-1.2688332>.
7. First Nations Summit (26 June 2014), online: <http://thenelsondaily.com/news/first-nations-summit-celebrates-supreme-court-canada's-declaration-tsilhqot'-title-31854#.Vi2hZcuyill>.
8. Dirk Meissner, "Aboriginal Title Supreme Court Ruling Can't Be Ignored: Christy Clark", *Canadian Press* (11 September 2014), online: <http://www. huffingtonpost.ca/2014/09/11/aboriginal-title-supreme-court-christy-clark_n_5805068.html>.
9. *Delgamuukw*, *supra* at para 186.
10. Justine Hunter, "Christy Clark Finally Comes to Grip with Aboriginal Title", *Globe and Mail* (14 September 2014), online: <http://www.theglobeandmail.com/news/british-columbia/christy-clark-finally-comes-to-grips-with-aboriginal-title/article20596945/>.
11. The Council is comprised of the BC Assembly of First Nations, Union of BC Indian Chiefs and First Nations Summit.
12. The Four Principles are: "1. Acknowledgement that all our relationships are based on recognition and implementation of the existence of indigenous peoples' inherent title and rights, and pre-confederation, historic and modern treaties, throughout British Columbia. 2. Acknowledgement that Indigenous systems of governance and laws are essential to the regulation of lands and resources throughout British Columbia. 3. Acknowledgment of the mutual responsibility that all of our government systems shall shift to relationships, negotiations and agreements based on recognition. 4. We immediately must move to consent based decision-making and title based fiscal relations, including revenue sharing, in our relationships, negotiations and agreements."
13. Dirk Meissner, "BC First Nation Chiefs threaten Protest Over Slow Progress of Political Talks", *Canadian Press* (9 September 2015), online: <http://www.theglobeandmail.com/news/british-columbia/bc-at-strike-two-says-aboriginal-leader-as-reconciliation-talks-begin/article26291447/>.
14. A draft of the commitment document can be found online: <http://www2.gov.bc.ca/assets/gov/business/natural-resource-industries/consulting-with-first-nations/agreements/bc_-_fn_commitment_document__oct_1_2015.pdf>.
15. BC Treaty Commission, "What's the Deal With Treaties?" online: <http://www.bctreaty.net/files/pdf_documents/Whats-the-Deal-v5.pdf>.
16. Douglas R Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (2015) at 61 [*A New Direction*].
17. Online: <http://www.timescolonist.com/news/local/premier-george-abbott-out-because-b-c-treaty-process-needs-reform-1.1804829>.
18. *A New Direction*, *supra* note 16 at 60.
19. Examples include the Treaty 8 First Nations' and Secwepemc Nation's separate challenges to the Lleidli T'enneh First Nation final agreement (the first such agreement signed under the BCTP); Semiahmoo First Nation's challenge to the Tsawwassen First Nation's treaty (see *Cook v The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722), as well as a separate challenge to that treaty brought by the Cowichan First Nations; the challenge to the Yale First Nation treaty brought on behalf of all Stó:lo people; and the Okanagan Nation Alliance's recent challenge to an interim agreement signed by the Ktunaxa Nation Council. The courts have recently held that governments must consult First Nations with overlapping claims prior to completion of an agreement-in-principle: *Sambaa K'e Dene First Nation v Duncan*, 2012 FC 204; *Huron-Wendat Nation of Wendake c Canada*, 2014 CF 1154.
20. First Nations Summit, "Treaty Negotiations Still Provide a Path to Reconciliation: First Nations Summit comments on BCTC 2014 Annual Report" (7 October 2014) news release.
21. Tamsyn Burgmann, "First Nations Alliance Launches Challenge of BC Treaty Process", *Globe and Mail* (11 August 2014), found online: <http://www.theglobeandmail.com/try-it-now/?articleId= 19994465>.
22. *A New Direction*, *supra* note 16 at p 65.
23. The point is made very expressly in *Haida*, *supra* note 1at para 48: "This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal 'consent' spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take."
24. T*sihquot'in*, *supra* at para 92.
25. In *Halalt First Nation v British Columbia*, 2012 BCCA 472 the Court of Appeal accepted that the province did not need to conduct a strength of claim assessment where it conceded a duty of deep consultation.
26. *Haida*, *supra* note 1 at para 49.
27. Benjamin Zycher and Kenneth Green, "LNG Exports from British Columbia: The Cost of Regulatory Delay", Fraser Research Bulletin (September 2015), online: <https://www.fraserinstitute.org/sites/default/files/LNG-bulletin-2015_Sep21.pdf>.
28. As paraphrased by the *Globe and Mail* on 22 September 2015, online: <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/bc-lng-industry-could-miss-out-on-billions-if-delays-continue-report/article26464980/>.
29. Ernst & Young, "Competing in the Global LNG Market: Evolving Canada's Opportunity Into Reality", (2014); online: <http://www.ey.com/Publication/vwLUAssets/Competing-in-the-global-LNG-market/$FILE/EY-Competing-in-the-global-LNG-market-Canada-opportunity.pdf>.
30. With respect to the Pacific Northwest LNG project, for instance, Kitsumkalum First Nation and Gitga'at First Nation—which are both more distant from

Prince Rupert harbour—have challenged their exclusion from or marginalization in the environmental assessment and consultation processes. See Shaun Thomas, "Kitsumkalum threatening to block LNG development in Prince Rupert", Northern View, (18 June 2014), online: <http://www.thenorthernview.com/news/263558391.html>; *Gitga'at First Nation v British Columbia (Environment)*, 2015 BCSC 1703; Geoffrey Morgan, "Aboriginal group takes BC to court for lack of consultation in Petronas LNG, even though it's 100 kms away", *Financial Post*, (6 July 2015), online: <http://business.financialpost.com/news/energy/lng?__lsa=e106-69fd>.

31. The Fairview Terminal expansion in the Prince Rupert harbour is an example of such a dispute being resolved by a form of arbitration, and the First Nations Limited Partnership—formed by all bands along the Pacific Trails Pipeline—is an example of First Nations successfully determining that allocation internally. But other examples are hard to find. First Nations that have signed benefits agreements with respect to the Coastal GasLink Project are currently in protracted negotiations as to how to divide the benefits.
32. While their Aboriginal *rights* are of course also of central importance to First Nations, the proposal is limited to mapping Aboriginal *title*, in light of title's relative importance, its exclusivity, the benefit of having a clear date (1846).
33. See *Tsihqvot'in*, *supra* at para 91.
34. See *Haida*, *supra* note 1 at para 20.