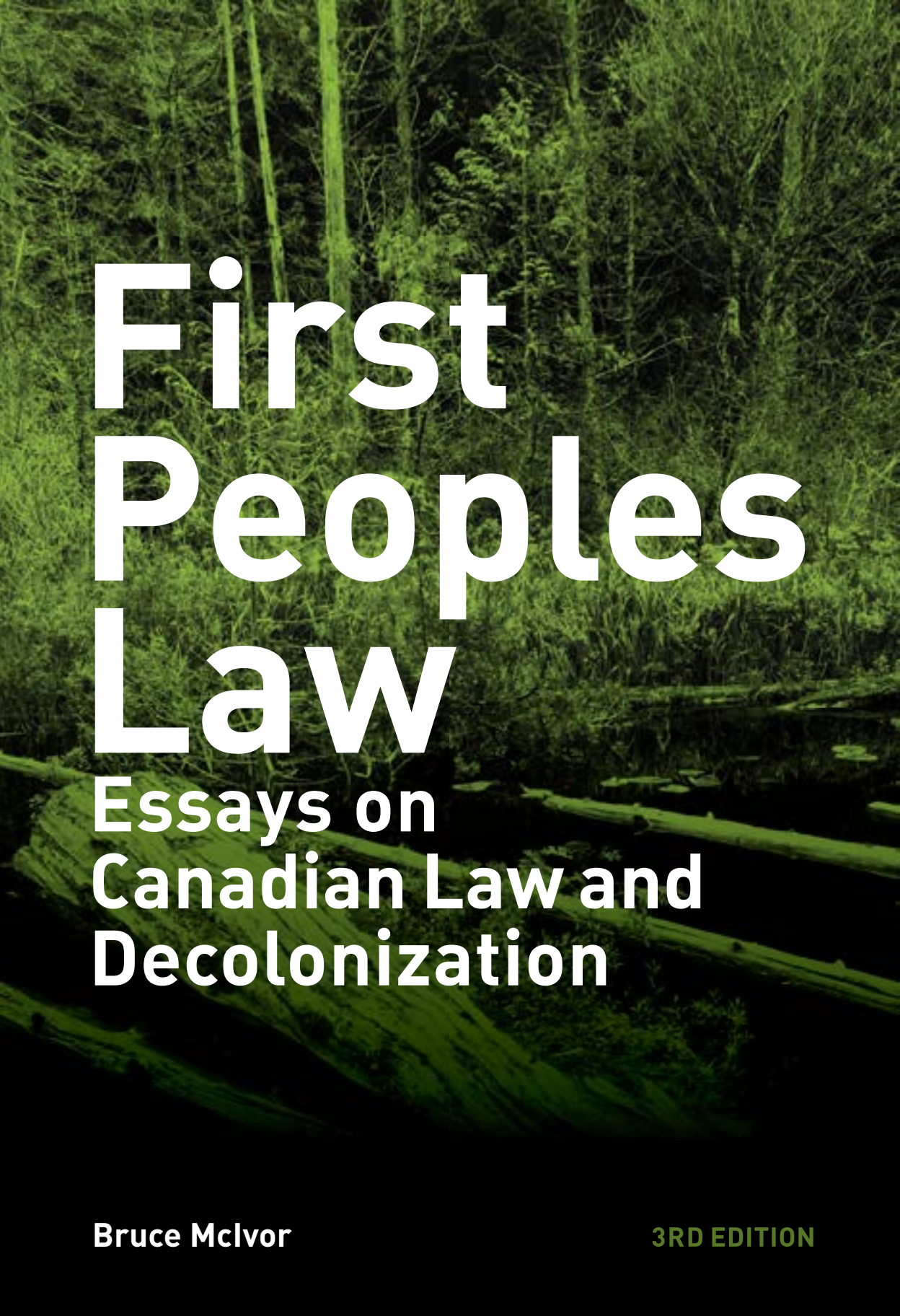
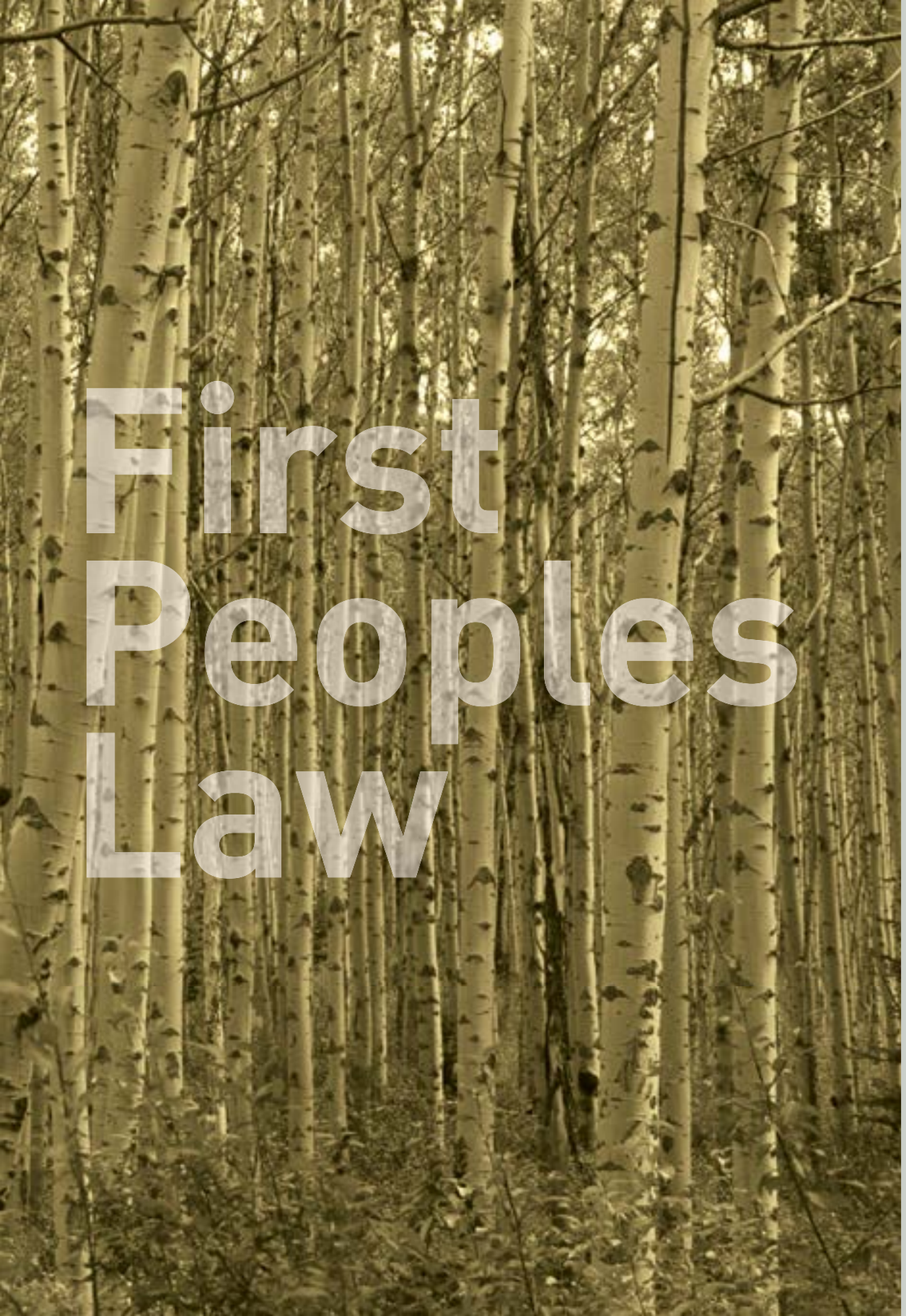

First Peoples Law
Essays on Canadian Law and Decolonization
Bruce McIvor
3RD EDITION



Preface

Advocacy is not restricted to the Courtroom.

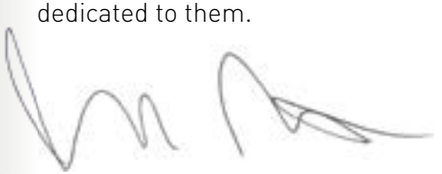
The essays in this collection are part of my contribution to advancing and protecting Indigenous Peoples' rights in Canada. They are grounded in my training as a lawyer and historian, informed by my legal work on behalf of Indigenous Peoples' across Canada, and inspired by my clients' strength and optimism. I hope you find them informative, engaging and encouraging.

ACKNOWLEDGEMENTS

I am indebted to my colleague Kate Gunn for reading and commenting on these essays. Her insightful and critical eye has improved each and every one of them.

My family understands and supports my work on behalf of Indigenous people. They are the best of what I aspire to be.

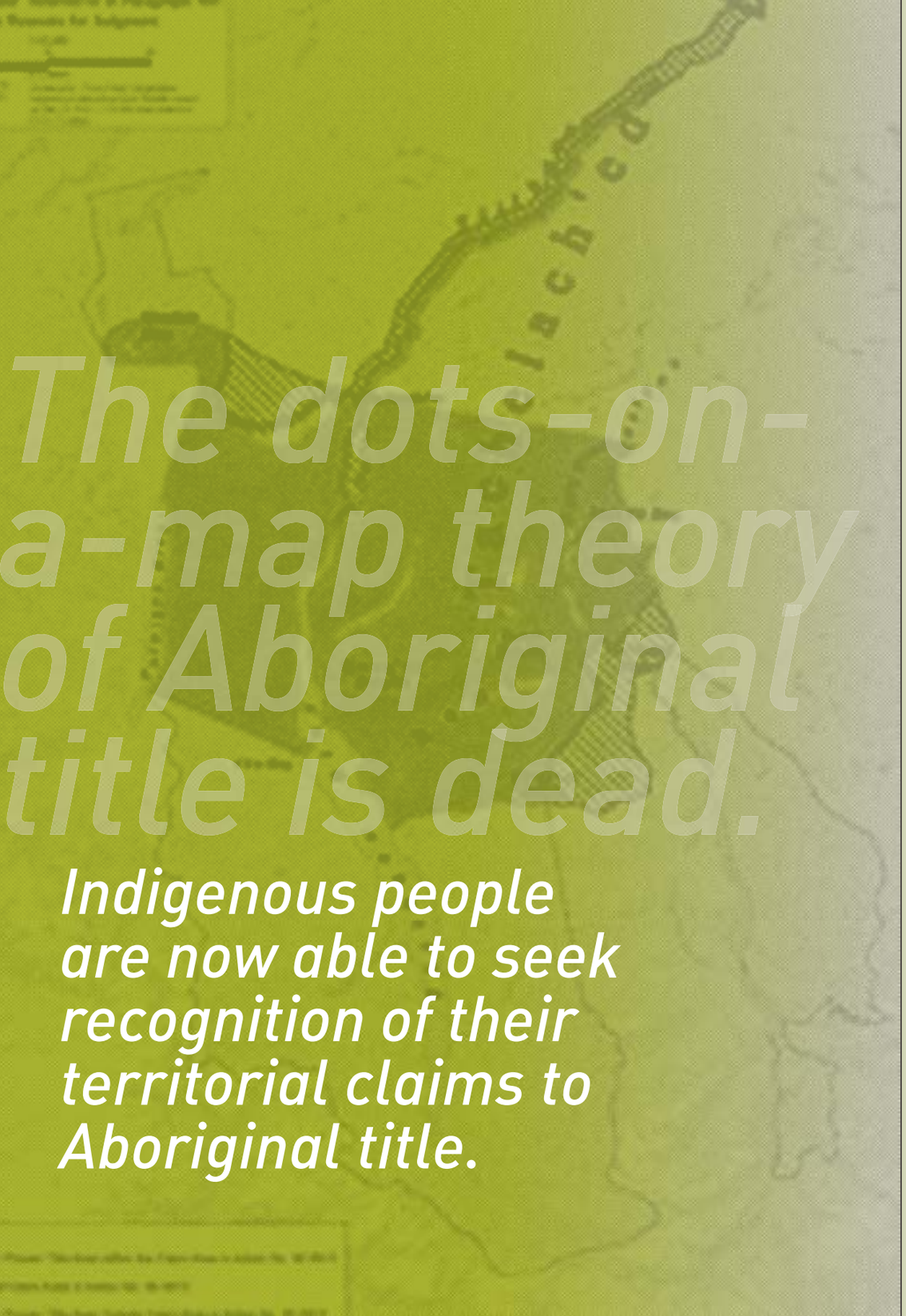
I have the honour and privilege to work with principled, committed and inspiring clients all across the country. This volume is dedicated to them.



Bruce McIvor, PhD
First Peoples Law Corporation
FEBRUARY 5, 2018

Contents

ABORIGINAL TITLE



CASE COMMENT

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44

JUNE, 2014

The Age of Recognition: The Significance of the *Tsilhqot'in* Decision

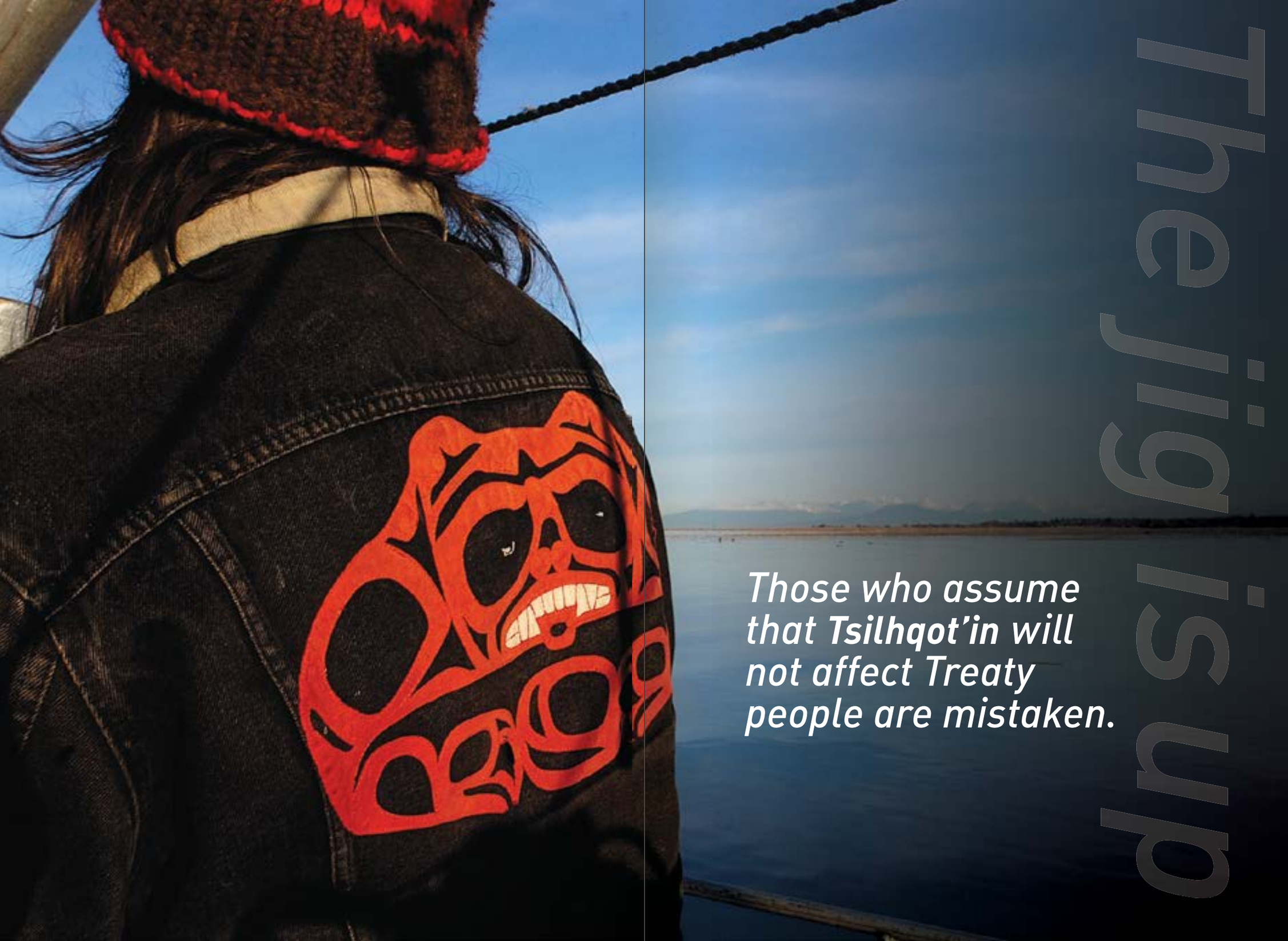
The release of the *Tsilhqot'in* decision on June 26, 2014 marked the beginning of the post-denial period of Indigenous rights. Like any new day, promise and hope abounds. What the future will bring is up to all Canadians, Indigenous and non-Indigenous alike. But first, it is time to take stock of what *Tsilhqot'in* means.

ABORIGINAL TITLE

The dots-on-a-map theory of Aboriginal title is dead.

The Supreme Court confirmed that Aboriginal title can include territorial claims and that the occupation requirement for proof is not limited to intensive, regular use of small geographical sites (e.g. fishing spots and buffalo jumps). Rather, regular use of large swaths of land for traditional practices and activities (e.g. hunting, trapping and fishing) when coupled with exclusivity may be sufficient to ground a claim for Aboriginal title.

The implications are profound. Government's myopic focus on dots-on-a-map is now indefensible. Indigenous people are now able to seek recognition of their territorial claims to Aboriginal title. For those, like the Tsilhqot'in, who are ultimately successful, the change will be dramatic. Subject to justifiable infringements, they will enjoy the right to exclusively use and occupy their Aboriginal title lands, to benefit from their lands and to decide on how their lands will be managed. In other words, they will, in large part, enjoy the rights and privileges of their ancestors. Over a century of denial will be put to rest.



*Those who assume that **Tsilhqot'in** will not affect Treaty people are mistaken.*

The Jiig is up

THE DUTY TO CONSULT

The duty to consult has new life.

Tsilhqot'in is about more than how to prove Aboriginal title and what happens if you succeed. For Indigenous people across Canada it is also about the here and now.

The possibility of territorial claims for Aboriginal title based on traditional activities will shift the duty to consult equation in favour of Indigenous people. Government and industry will have to step up and acknowledge the new reality—ostriches will be playing a high-risk game. The Court in *Tsilhqot'in* confirmed that a failure to meaningfully consult and accommodate Indigenous people prior to a successful claim for Aboriginal title will leave government and industry exposed to cancelled authorizations and claims for damages.

As the Court specifically stated, there is a simple and effective way for government and industry to avoid the uncertainty and risk they now clearly face—obtain the consent of Indigenous people before you mess with their lands and resources.

PROVINCIAL LAWS

The Provinces have assumed a heavy burden.

In permitting provincial laws to apply to Aboriginal title lands the Court made new law and saddled the provinces with hefty legal obligations. The Court clarified that when Indigenous people succeed in confirming their Aboriginal title a province will not simply be able to apply their laws through box-ticking consultation. They will be subject to the much more onerous burden of obtaining consent or justifying infringements.

The Court's justification test has largely fallen by the wayside since its 2005 decision in *Mikisew* in favour of less onerous—and often unsatisfactory—consultation obligations. When the provinces awaken to the reality of what it takes to justify an infringement, they may well regret their 'success' on this issue.

The implications extend beyond Aboriginal title. Based on its reasoning in *Tsilhqot'in* the Supreme Court in *Grassy Narrows* opened the door to provinces regulating treaty rights. Logically, the same onerous obligations to obtain consent or meet the high standards of justifying an infringement of Aboriginal title apply to Treaty rights. The days of shuttling Treaty rights to the side through *pro forma* duty to consult processes is hopefully at an end. Similar standards should also apply to uncontested Aboriginal rights.

TREATIES

The jig is up.

New government mandates for the British Columbia treaty process are necessary. It is hard to imagine why Indigenous people would join or continue to participate in the current process with its pre-determined, non-negotiable government limitations when the reality and promise of Aboriginal title has been confirmed.

Those who assume that *Tsilhqot'in* will not affect Treaty people are mistaken. For Indigenous people with pre-Confederation treaties (e.g. the Douglas treaties on Vancouver Island and the peace-and-friendship treaties in the Maritimes) the implications are obvious. Their claims to Aboriginal title can now be pursued with renewed confidence. Their demands that government obtain their consent before exploiting their lands have new credibility.

Tsilhqot'in is also vitally important for Indigenous people with one of the numbered treaties negotiated in Ontario, the prairies, British Columbia and the north since Confederation.

For generations successive provincial and federal governments have proceeded on the assumption that through these treaties Indigenous people ceded, released and surrendered their Aboriginal title to so-called Crown lands. In contrast, Treaty people have widely maintained that their ancestors did nothing of the kind. The numbered treaties for them are about establishing respectful, mutually beneficial relationships. The Supreme Court's endorsement of a liberal test for Aboriginal title encompassing territorial claims based on traditional Indigenous practices will embolden Treaty people to repudiate the language of 'cede, release and surrender' while they assert Aboriginal title over their ancestral lands.

WHERE TO FROM HERE?

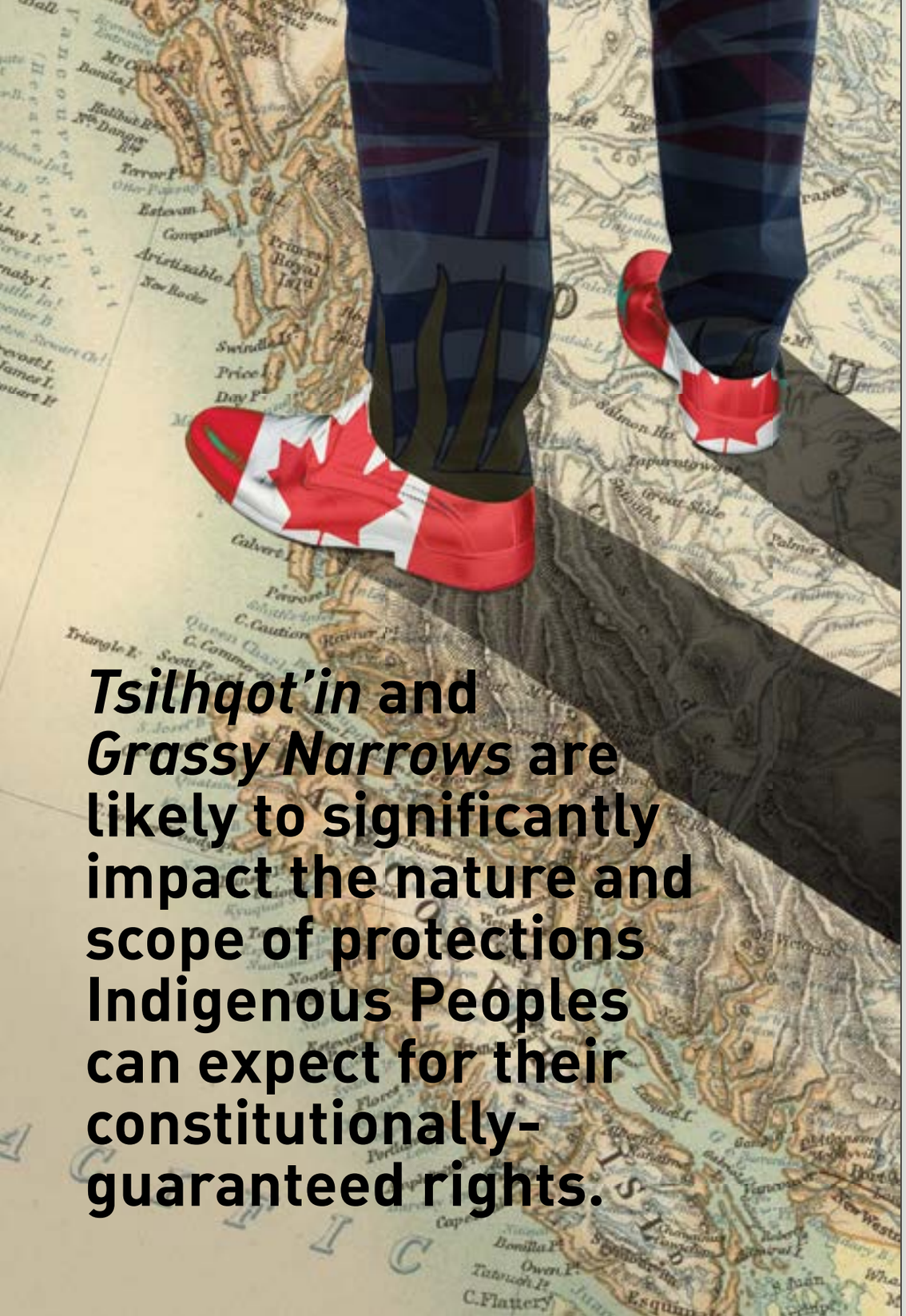
Now is the time to honour, thank and recommit.

We honour those, both Indigenous and non-Indigenous, who did so much in the long struggle to have Aboriginal title recognized and confirmed but did not live to see their dream realized.

Thanks are owed to the current generation who inherited the weight of their ancestors' efforts and did not shrink from the responsibility.

And a recommitment is owed to future generations to ensure that this remarkable success is not undermined by complacency.

The Supreme Court has handed all Indigenous people a mighty victory—now is the time to see that the promise is realized.



***Tsilhqot'in* and *Grassy Narrows* are likely to significantly impact the nature and scope of protections Indigenous Peoples can expect for their constitutionally-guaranteed rights.**

NOVEMBER, 2016

The Downside of the *Tsilhqot'in* Decision

The Supreme Court's 2014 *Tsilhqot'in* decision was a watershed moment. As I wrote shortly after the decision was released, it marked the beginning of the "Age of Recognition." Largely lost in the deserved excitement was the downside of the *Tsilhqot'in* decision.

There were two main issues in *Tsilhqot'in*: can Aboriginal title exist on a territorial basis and, if Aboriginal title exists, can the provinces seek to justify its infringement? The first issue was decided in favour of Indigenous Peoples. The second was decided in favour of the provinces.

After *Tsilhqot'in* was argued at the Supreme Court, but before the decision was released, the question of the provinces' power to infringe section 35 constitutional rights was again argued at the Supreme Court in the context of Treaty rights as part of the *Grassy Narrows* appeal.

My colleague, Kate Gunn, and I had the honour to make arguments on this issue on behalf of Wabauskang First Nation, one of the appellants in *Grassy Narrows*. The Supreme Court in *Grassy Narrows* ultimately followed its decision in *Tsilhqot'in* and opened the door to provinces infringing Treaty rights.

Last fall I received an invitation from the editors at the *University of New Brunswick Law Journal* to revisit the issue of provincial power to infringe Aboriginal Title, Rights and Treaty rights. Like a dog with a bone, I couldn't resist the opportunity.

The result is an article by Kate and I entitled "Stepping into Canada's Shoes: Tsilhqot'in, *Grassy Narrows and the Division of Powers*," published in volume 67 of the *University of New Brunswick Law Journal*. Thanks very much to the editors for an opportunity to get on the record in what I see as an unsupportable and misguided about-turn in Aboriginal law. Below is a summary of our article.

Overview

In *Tsilhqot'in* and *Grassy Narrows* the Supreme Court disregarded existing law and dramatically reduced the federal government's role when a province proposes to undertake activity that could negatively affect Aboriginal and Treaty rights.

The decisions reduce constitutional protections formerly guaranteed to Indigenous Peoples and significantly expand provincial jurisdiction to make decisions which limit the exercise of Aboriginal and Treaty rights.

Prior to *Tsilhqot'in* and *Grassy Narrows* the law was settled—Canada bore exclusive constitutional responsibility for regulating Aboriginal and Treaty rights and the doctrine of interjurisdictional immunity operated to protect the federal government's exclusive role from provincial interference.

As a result, until 2014 Indigenous Peoples were entitled to rely on established law to prevent provinces from acting outside of their constitutional sphere and attempting to justify infringements of Aboriginal and Treaty rights.

In *Tsilhqot'in* the Supreme Court made the first declaration of Aboriginal title in Canadian history. However, the Court also reduced Indigenous Peoples' ability to rely on the federal government's exclusive legislative authority when provinces seek to enact legislation affecting Aboriginal title and rights. According to the Court, provinces are now entitled to attempt to justify infringements of Aboriginal title and rights.

The *Grassy Narrows* appeal centred on the issue of what limits exist on provinces that seek to "take up" land for forestry and other purposes pursuant to the numbered treaties. Based on its interpretation of Treaty 3 and the constitutional division of powers, the Court held that the numbered treaties were with the Crown, not the federal government, and that provinces could "stand in Canada's shoes" with respect to the fulfilment and infringement of Treaty rights.

Implications

Tsilhqot'in and *Grassy Narrows* are likely to significantly impact the nature and scope of protections Indigenous Peoples can expect for their constitutionally-guaranteed rights.

The decisions increase provincial authority to legislate in ways that could infringe the rights of Indigenous Peoples. Early decisions since *Tsilhqot'in* and *Grassy Narrows* suggest that courts are relying on the decisions as basis to affirm the expansion of provincial jurisdiction over Aboriginal and Treaty rights, and by extension, land and resource development.

The decisions are contrary to many Indigenous Peoples' understanding that their relationship is with the Crown in right of Canada and they are entitled to look to Canada to fulfil the Crown's obligations.

Importantly, the provinces might ultimately rue the day the Court changed the law and increased provincial authority over Aboriginal and Treaty rights.

The corollary of broadened provincial legislative jurisdiction is greater constitutional responsibility. As the Court explained in *Tsilhqot'in*, justifying an infringement of a section 35 right is no easy task. Except for instances where lands are being taken up, i.e. put to a visibly incompatible use, it is now arguable that the provinces must also obtain First Nation consent or justify infringements of Treaty rights.

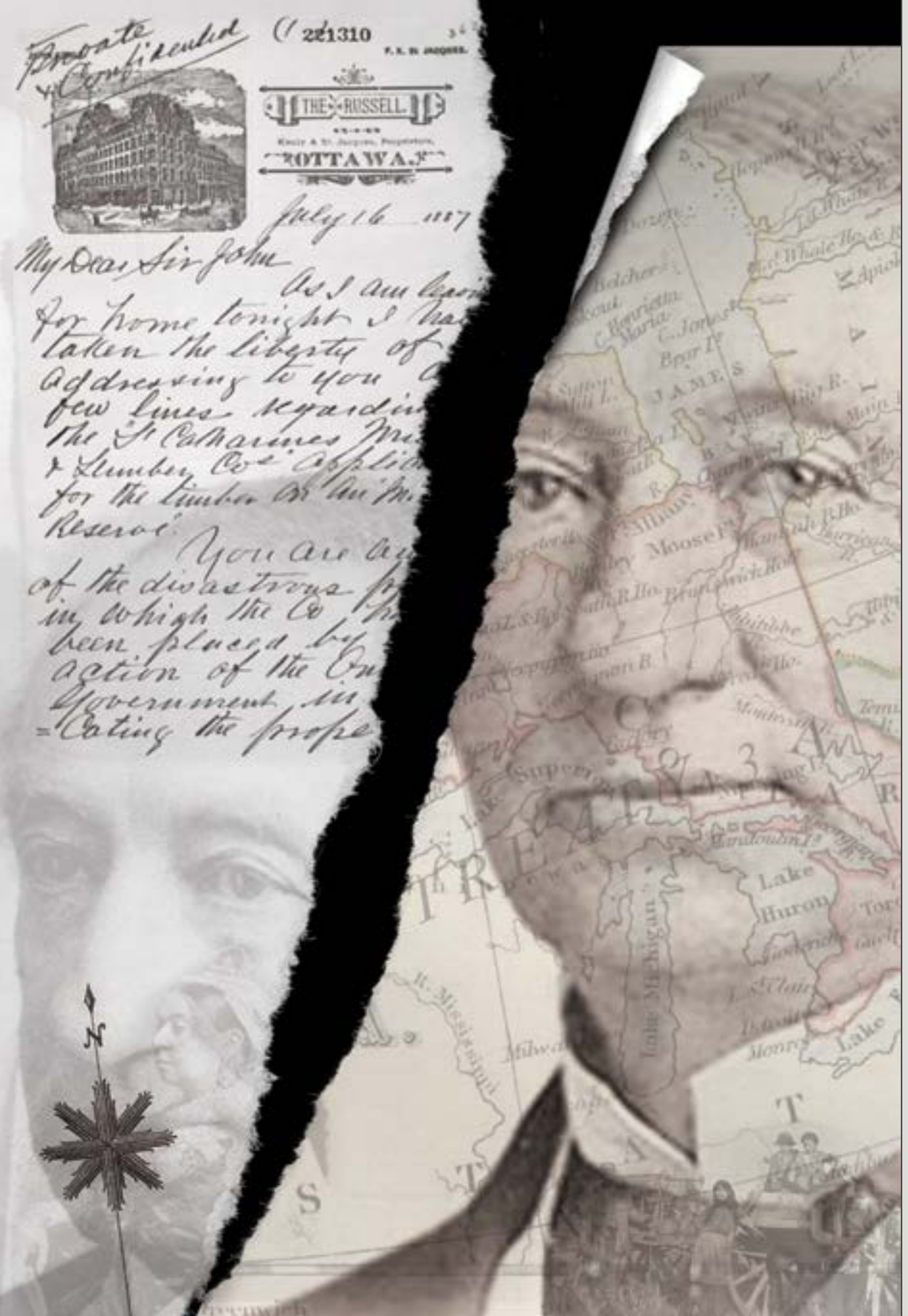
The provinces have clear responsibility for fulfilling outstanding Treaty promises and cannot simply hide behind the federal government's inaction. For example, there is no principled reason for the provinces to refuse to negotiate with First Nations for loss of use compensation based on outstanding Treaty land entitlements. At a minimum, the cost of enjoying the use and benefit of Crown lands should include responsibility for ensuring Treaty obligations are promptly fulfilled.

Looking Forward

In *Tsilhqot'in* and *Grassy Narrows*, the Court ignored the historical and continuing importance of Canada's constitutional responsibilities and the promises it made to Indigenous Peoples.

For Indigenous Peoples, the decisions mean they must now deal with the prospect of provincial governments attempting to justify decisions that infringe Aboriginal and Treaty rights. For the provinces, it means fulfilling the onerous obligations imposed by the Supreme Court for decisions affecting the rights of Indigenous Peoples.

TREATIES



CASE COMMENT

Keewatin v. Ontario, 2013 ONCA 158

MARCH, 2013

Is Canada No Longer Responsible for Historical Treaties?

Has the Canadian constitution evolved to eliminate the federal government's obligations to honour the historical treaties between Aboriginal people and the Crown? Based on its recent decision in *Keewatin v. Ontario*, that is the view of the Ontario Court of Appeal. The decision will be of surprise and concern to First Nations across the country.

What it is about

The case is about Ontario's authority to issue forestry authorizations in Treaty 3, which covers most of north-western Ontario and extends into Manitoba. After one of the longest and most thorough treaty interpretation trials in Canadian history, Justice Sanderson of the Ontario Superior Court of Justice decided that the Anishinaabe made treaty in 1873 with Canada, not Ontario. This, coupled with Canada's exclusive responsibility for "Indians, and lands reserved for the Indians" under the constitution, meant that only Canada had the authority to issue forestry authorizations that would significantly affect Treaty 3 hunting and fishing rights.

What the Court said

A unanimous Court of Appeal disagreed. Relying heavily on the Privy Council's 1888 decision in *St. Catherine's Milling*, the Court held that Ontario's ownership of Crown lands in Treaty 3 left no role for the federal government in land-use decisions affecting treaty rights. To involve Canada, said the Court, would create an "unnecessary, complicated, awkward and likely unworkable" process.

The correct understanding, according to the Court, is that the constitution has evolved to allow Ontario to step into Canada's shoes in respect of the Crown's obligation to honour its treaty promises. Providing that it respects the Crown's responsibilities to consult and possibly accommodate, Ontario is free to make any land-use decisions it likes without Canada's involvement. The only limit is if the province goes so far as to virtually eliminate a First Nation's ability to exercise its treaty right. And even then Canada would have no role. Instead, the First Nation's only recourse would be to sue the province for treaty infringement.

Providing that it respects the Crown's responsibilities to consult and possibly accommodate, Ontario is free to make any land-use decisions it likes without Canada's involvement.

Why it matters

The decision is a setback for the supposed solemn promises embedded in the historical treaties across Canada. While Justice Sanderson in the court below relied heavily on contextual evidence and the Aboriginal perspective, the Court of Appeal looked almost exclusively at the wording of the written treaty document. Even more troubling, the Court relied on what it called the "doctrine of constitutional evolution" to conclude that regardless of the Anishinaabe understanding that Canada was and is their treaty partner, the country and the constitution has moved on since 1873 and the province now has complete responsibility for treaty promises.

This raises the second major concern with the Court of Appeal's decision. Twice in the last seven years the Supreme Court of Canada has confirmed the continuing relevance of Canada's exclusive legislative responsibility under the constitution for "Indians, and lands reserved for the Indians"—a federal responsibility that prohibits a provincial government from doing anything that has more than an insignificant effect on a treaty right. It is difficult to reconcile the Supreme Court's view on this issue with the Court of Appeal's decision in *Keewatin*.

The First Nations involved in *Keewatin* are likely to ask the Supreme Court to consider these important issues. First Nations across Canada will be anxious to find out whether the federal government really is no longer responsible for honouring historical treaties.

Ontario must administer 'Crown' lands subject to the terms of the Treaty and First Nations' interest in the land.

CASE COMMENT

Grassy Narrows v. Ontario (Natural Resources), 2014 SCC 48

JULY, 2014

Provinces Burdened with Responsibility for Fulfilling Treaty Promises

The Supreme Court's *Grassy Narrows* decision places a heavy legal burden on provincial governments when they seek to exploit Indigenous lands covered by the historical treaties of Canada. The challenge now is for First Nations to hold the provinces to account.

What it is about

Between 1871 and 1923, Canada negotiated 11 numbered treaties with First Nations across the country, including the Anishinaabe of Treaty 3 in northwestern Ontario and eastern Manitoba. With slight variations, each treaty allowed for the 'taking up' of lands for non-Indigenous settlement, mining, lumbering and other purposes. The primary issue in *Grassy Narrows* is what limits exist on Ontario's ability to exercise the taking up clause in Treaty 3.

After one of the longest and most thorough treaty interpretation trials in Canadian history, Justice Sanderson of the Ontario Superior Court of Justice confirmed the Anishinaabe understanding that Treaty 3 was made with Canada, not Ontario. This, coupled with Canada's exclusive responsibility for "Indians, and lands reserved for the Indians" under the Constitution, meant that only Canada can issue forestry authorizations that significantly affect the exercise of treaty rights.

A unanimous Ontario Court of Appeal disagreed. Relying heavily on the Privy Council's 1888 decision in *St. Catherine's Milling*, the Court held that Ontario's ownership of Crown lands in Treaty 3 left no role for the federal government in land-use decisions affecting treaty rights. To involve Canada, said the Court, would create an "unnecessary, complicated, awkward and likely unworkable" process.

Grassy Narrows First Nation and Wabauskang First Nation both appealed to the Supreme Court. They argued that the Court of Appeal erred by failing to confirm the federal government's role in implementing Treaty 3 based on both the specific wording of the treaty and Canada's exclusive responsibility for First Nations under the Constitution.

What the Court said

The Supreme Court confirmed Ontario's unilateral authority to take up lands in the Keewatin area of Treaty 3 without federal government supervision.

The Court also confirmed Ontario has all the constitutional obligations of the Crown, is bound by and must respect the Treaty, must fulfill Treaty promises and must administer 'Crown' lands subject to the terms of the Treaty and First Nations' interest in the land.

Consequently, Ontario's exercise of its powers must conform with the honour of the Crown and is subject to the Crown's fiduciary duties when dealing with Aboriginal interests.

When lands are intended to be taken up by Ontario, the province must consult, and if appropriate accommodate, First Nation interests beforehand. Ontario must also deal with First Nations in good faith and with the intention of substantially addressing their concerns. It cannot exclude the possibility of accommodation from the outset.

As explained in the Supreme Court's 2005 *Mikisew* decision, if a taking up were to leave the First Nation with no meaningful right to hunt, trap or fish, a potential action for treaty infringement will arise.

Finally, relying on its recent decision in *Tsilhqot'in*, the Court held that if a taking up amounts to an infringement of the treaty, it is open to the province to attempt to justify the infringement under the test laid down in *Sparrow* and *Badger*.

Why it matters

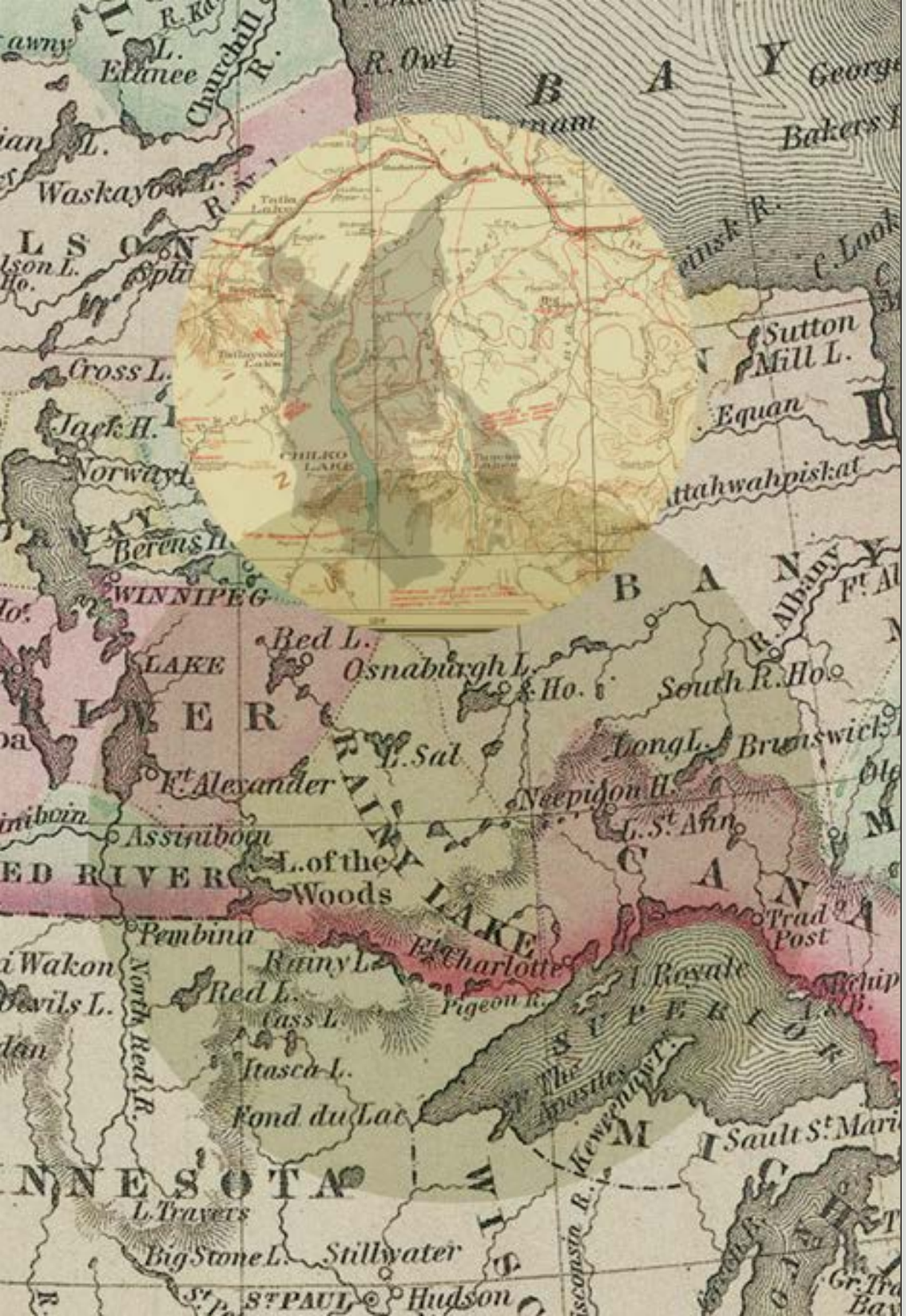
While technically a 'loss' for Grassy Narrows and Wabauskang, the decision will most likely prove a powerful tool for ensuring that Ontario, and other provinces, respect treaty rights.

The Court was unequivocal that while Ontario can exercise its interests in Crown lands, its authority is subject to Treaty and is burdened by the Crown's constitutional obligations, including fiduciary obligations.

The decision should be read as a companion case to *Tsilhqot'in*. There the Court confirmed that unless they can obtain First Nation consent, the provinces must justify infringements of Aboriginal title—an extremely heavy legal burden.

Except for instances where lands are being taken up, i.e. put to a visibly incompatible use, based on *Grassy Narrows* it is now arguable that the provinces must also obtain First Nation consent or justify infringements of treaty rights.

Ontario's 'win' in *Grassy Narrows* has come at a high cost. Ontario, and other provinces, can now expect to be held to higher standards when seeking to develop Indigenous lands. Where before they were able to argue that their obligations were restricted to the less onerous duty to consult, they are now liable for the heavy burden of justifying infringements of treaty rights.



JANUARY, 2015

What *Tsilhqot'in* and *Grassy Narrows* Mean for Treaty First Nations

Commentators and governments continue to downplay the significance of the Supreme Court of Canada's *Tsilhqot'in* decision for Treaty First Nations. Below we summarize both *Tsilhqot'in* and the Supreme Court's *Grassy Narrows* decision from the perspective of treaty rights. We then explain how together the two decisions lay the foundation for a new age of respect and recognition for Treaty First Nations.

Tsilhqot'in

In *Tsilhqot'in* the Court addressed two main issues. First, can Indigenous peoples advance Aboriginal title claims on a territorial basis or is Aboriginal title confined to dots on a map? Second, if Aboriginal title exists, can provincial legislation apply to Aboriginal title lands?

On the first issue the Court put to rest the dots-on-a-map theory of Aboriginal title. Regular use of definite tracts of land on a territorial basis for hunting, fishing and otherwise exploiting resources is sufficient to establish Aboriginal title.

On the second issue, the Court held that as a general rule, provincial laws of general application apply to Aboriginal title lands subject to the Crown's obligation to justify an infringement of Aboriginal title, its fiduciary obligations and s. 91(24) of the *Constitution Act, 1867*.

When Aboriginal title is established, the Crown must do more than fulfil its duty to consult. The Crown must either obtain the consent of Indigenous peoples to use Aboriginal title lands or meet the legal requirements for justifying an infringement.

Finally, the need to preserve Aboriginal title lands for the use and benefit of future generations is an inherent limit on Indigenous peoples' use of Aboriginal title lands as well as any attempt by the Crown to justify an infringement of Aboriginal title.

Grassy Narrows

In *Grassy Narrows* the Supreme Court also answered two questions. First, when lands are 'taken up' under Treaty 3, did the Treaty Commissioners intend there to be a two-step authorization process involving the federal government? Second, can provincial legislation apply so as to infringe the exercise of the treaty rights?

The Court concluded that the trial judge's overriding error in *Grassy Narrows* was her finding that the 'taking up' of lands under Treaty 3 requires a two-step authorization process involving Canada. The Court concluded that the right to take up lands attaches to the level of government with the beneficial interest in the land and the necessary constitutional, legislative and administrative powers.

The Court also held that both the federal government and provinces are responsible for fulfilling treaty promises. Consequently, Ontario is bound by the Crown's treaty obligations, the honour of the Crown and the Crown's fiduciary obligations to Indigenous peoples.

Finally, based on *Tsilhqot'in*, the Court held that the division of powers doctrine of interjurisdictional immunity does not apply to limit a province's legislative authority to interfere with the exercise of treaty rights. Ontario has the power to take up lands without the federal government's supervision but must fulfil the duty to consult. If it takes up so much land that there is no meaningful ability left to exercise treaty rights, it may be liable for infringement of the treaty.

What now for Treaty First Nations?

Together, *Tsilhqot'in* and *Grassy Narrows* will have far-reaching effects for Treaty First Nations. Here we highlight two of the most important effects.

First, in many situations provincial governments will have to do more than fulfil the duty to consult. This is because not all government action that affects treaty rights constitutes a 'take up' under treaty. Taking up land is generally considered to be putting the land to a use visibly incompatible with the exercise of a treaty right, e.g. a farm yard, a mine site, etc.

Many provincial decisions that affect treaty rights, e.g. the enforcement of wildlife and fishery laws or the development of forest management plans, are not a take up of land under treaty. In those instances, provincial governments would need to meet the requirements for justifying the infringement of the treaty right.

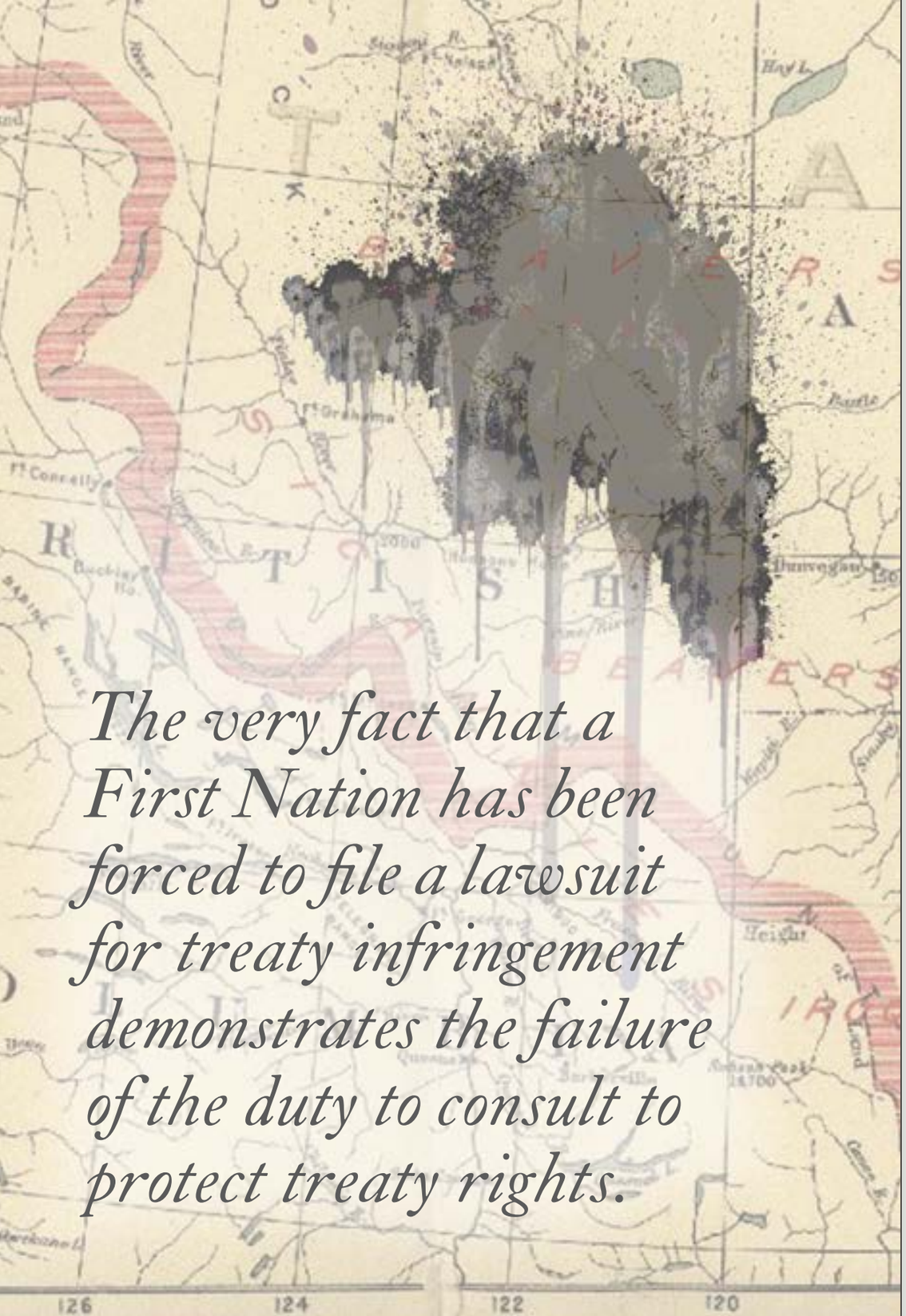
The basic requirements for justifying the infringement of Aboriginal title and for justifying the infringement of a treaty right are the same. First, the Crown must establish a compelling and substantial objective consistent with the Crown's fiduciary obligations to Indigenous peoples. For a government objective to be compelling and substantial, it must be considered from both the public and the Aboriginal perspective. It must also further the goal of reconciliation of Indigenous peoples' rights and interests with the Crown's assertion of sovereignty over Indigenous lands.

In addition, the Crown must establish that the infringement of the treaty right is necessary to achieve the compelling and substantial objective. It must demonstrate that the infringement minimally impairs the treaty right and that the benefits to the general public are not outweighed by the negative impacts on the First Nation.

As with Aboriginal title, the provinces should be expected to seek First Nations' consent for infringement of treaty rights. Without consent, authorizations may be quashed and damages awarded.

The second major issue that should be emphasized is that *Tsilhqot'in* and *Grassy Narrows* call into question governments' assumption that the historical treaties were cede, release and surrender treaties under which First Nations agreed to give up their Aboriginal title. Given that both Indigenous peoples and the Crown are constrained by the necessity of preserving Aboriginal title lands for the use and benefit of future generations, can the *common* intention of the treaties have been to extinguish Aboriginal title? Also, interpreting the treaties as extinguishment documents would be inconsistent with the Supreme Court's discussion in *Tsilhqot'in* and *Grassy Narrows* of the Crown's fiduciary obligations and the honour of the Crown.

As with most Supreme Court Aboriginal law decisions, it remains to be seen how lower courts will interpret and apply *Tsilhqot'in* and *Grassy Narrows,* especially in relation to treaty rights. While together the decisions provide the basis for renewed respect for the spirit and intent of historical treaties, the Supreme Court may eventually be called on to clarify the extent of the provinces' obligations and the limits on their authority.



CASE COMMENT

Yahey v. British Columbia, 2015 BCSC 1302

AUGUST, 2015

The Piecemeal Infringement of Treaty Rights

During the early years of the development of modern Aboriginal law in Canada, First Nations with so-called 'numbered treaties' could argue that governments were obligated to justify any infringement of their treaty rights.

This changed with the Supreme Court's 2005 *Mikisew* decision. The Court held that when governments exercise their right to 'take up' land under the numbered treaties (including exploiting Indigenous lands for forestry, mining, etc.) their obligations are limited to consultation and perhaps accommodation. Governments will only be liable for treaty infringement if they take up so much land as to leave a First Nation with no meaningful ability to exercise their treaty rights.

For many treaty First Nations this has meant the slow erosion of their treaty rights by a thousand cuts—no one decision fatal by itself, but the cumulative effect devastating nonetheless. Blueberry River First Nations in Treaty 8, for example, estimates that two-thirds of its traditional territory has been developed for industrial purposes or is within 250 metres of industrial development. At the current rate of development by 2060 all of its lands will have either been developed or be within 250 metres of development.

...it is bitter irony that a court would invoke a piecemeal argument in rejecting an injunction to stop development.

What it is about

Blueberry River is fighting back. In March, 2015 it filed a lawsuit against British Columbia alleging the province had breached Treaty 8 because the cumulative effect of development in its territory (including forestry, mining, hydroelectricity and oil and gas) would soon make it impossible for its members to meaningfully exercise their treaty rights.

Following the filing of the lawsuit, Blueberry River sought an injunction to prevent British Columbia from selling 15 timber sale licences pursuant to forestry plans approved in 2010 and 2011. Blueberry River alleged that the sale of the licences would contribute to the cumulative effects of development in its territory and therefore should not be allowed until its lawsuit for treaty infringement was heard.

What the Court said

The Court concluded that the 'balance of convenience' did not favour the First Nation and so denied the injunction application.

In doing so, the Court considered the relationship between the specific logging activities which Blueberry River sought an injunction against and the wider alleged treaty breach which it characterized as the cumulative effect of numerous developments due to continued unchecked development in the First Nation's territory.

The Court emphasized that the area intended for logging under the timber sale licences was less than a tenth of one percent of Blueberry River's territory and that about 90 percent of ongoing development complained of by the First Nation would be unaffected by the injunction. It concluded that the proposed logging was not the 'tipping point' beyond which a First Nation might not be able to meaningfully exercise its treaty rights.

A central concern for the Court was that if Blueberry River succeeded on the application there might be a series of applications against discrete development proposals which could effectively put a stop to all development in Blueberry River's territory without its approval.

The Court left open the possibility that the First Nation might come back to court and obtain a general injunction against all development in its territory, but concluded that the public interest would not be served by a piecemeal, project-by-project approach to protecting the First Nation's treaty rights.

Why it matters

Given that the piecemeal limitation of treaty rights is one of the greatest challenges First Nations face in their ongoing struggle to defend their treaty rights, it is bitter irony that a court would invoke a piecemeal argument in rejecting an injunction to stop development.

Government's refusal to seriously consider cumulative effects and support First Nation-driven land use planning undermines effective responses to the steady erosion of treaty rights. Instead, governments invoke the duty to consult as they undermine treaty rights one decision at a time.

Properly applied, the duty to consult and accommodate has the potential to meaningfully address the issue. But all too often governments—and companies—pour their energies and resources into the procedural aspects of consultation and avoid seriously engaging with First Nations on issues of real concern. The very fact that a First Nation has been forced to file a lawsuit for treaty infringement demonstrates the failure of the duty to consult to protect treaty rights.

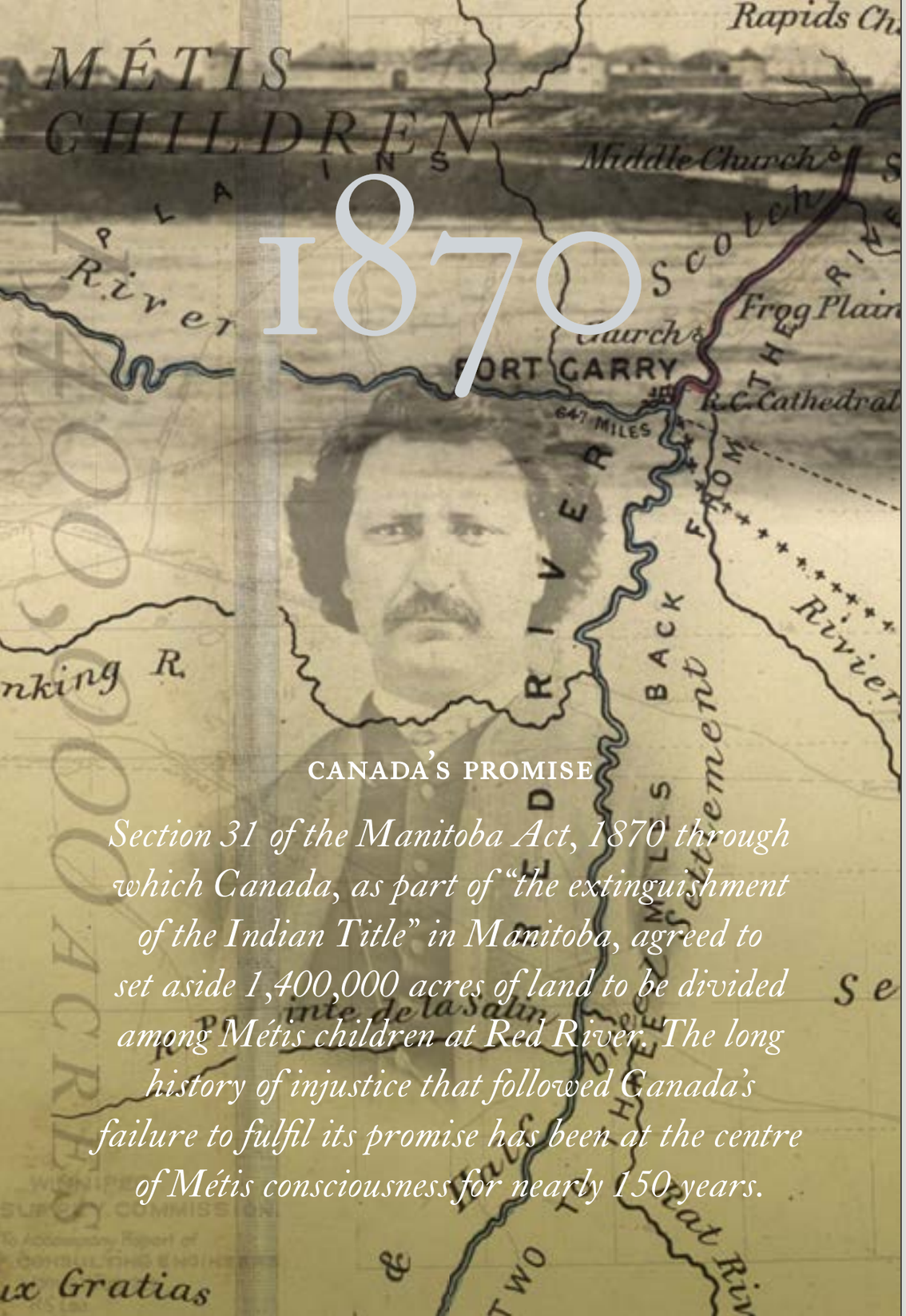
While the 'tipping-point' may not yet have been reached, it is definitely in sight for many treaty First Nations. Governments must recognize that it is in everyone's interests, Indigenous and non-Indigenous alike, to work with First Nations to find real solutions. If not, frustration will grow, lawsuits will be filed, risk will increase and opportunities will be lost.

ADDENDUM

Subsequently, Blueberry River did seek a general injunction which was also denied by the Court. See *Yahey v. British Columbia*, 2017 BCSC 899.

PHOTO: BARRY POTTLE

THE MÉTIS



CASE COMMENT

Manitoba Métis Federation v Canada, 2013 SCC 14

MARCH, 2013

A New Legal Remedy for Indigenous People

The Supreme Court of Canada's decision in *Manitoba Métis Federation v. Canada* is a classic example of the Court going off in its own direction instead of following the parties' specific arguments. As a result, we now have a new legal remedy available to all Indigenous people seeking to enforce the Crown's constitutional obligations. How effective this new remedy will be in providing justice is an open question.

What it is about

The case raised numerous historical and legal issues surrounding Canada's promise in 1870 to set aside lands for the Métis at Red River. The main issue was a consideration of section 31 of the *Manitoba Act*, *1870* through which Canada, as part of "the extinguishment of the Indian Title" in Manitoba, agreed to set aside 1,400,000 acres of land to be divided among Métis children. The long history of injustice that followed Canada's failure to fulfil its promise has been at the centre of Métis consciousness for nearly 150 years.

In 2010 the Manitoba Court of Appeal held that, among other things, even if Canada did owe a fiduciary duty to the Métis based on section 31, the duty was not breached, and that any claim for breach of a fiduciary duty was now barred by statutory limitations and the Métis' delay in bringing their claim.

What the Court said

The Supreme Court rejected the Métis' argument that Canada breached a fiduciary duty to the Métis children based on section 31 of the *Manitoba Act, 1870* because the Métis could not meet the requirements for establishing a fiduciary duty. As part of its reasons on this question, the Court held that the Manitoba Métis could not make out a claim for Aboriginal title because theirs was an individual, not a communal, interest in land, and they had historically been willing to sell their interest to others. Both these facts, according to the Court, were contrary to the meaning of Aboriginal title.

But the Court did not stop there. Instead it ultimately found for the Métis based on an argument none of the parties had specifically made. The Court held that while the Métis had not proven that Canada had breached a fiduciary duty, Canada had failed to act honourably in fulfilling its constitutional promise to provide lands for the Métis children. And, because constitutional obligations to Aboriginal people are solemn promises intended to foster reconciliation, the Métis were entitled to a declaration from the Court that Canada had failed to act honourably in providing lands under section 31 of the *Manitoba Act, 1870*.

Finally, the Court held that Manitoba and Canada could not rely on limitations statutes or arguments about delay to stop the Court from issuing a declaration that Canada's conduct was dishonourable. The Court concluded that it is the protector of the constitution and when a constitutional promise to Aboriginal people is at stake, it cannot be muzzled by mere legislation.

Why it matters

After over 100 years of denial by Canada that it had done wrong by the Métis, the importance of the highest court in the country calling Canada to account should not be underestimated. The Court's decision is a powerful vindication of Métis history and an acknowledgement that the outstanding wrong should be remedied, to the extent that it can, through present-day, good faith negotiations.

Of importance to all Indigenous people, the Court has solidified the principle of the honour of the Crown in Canadian common law and has created a new legal remedy available whenever the Crown fails to act diligently to fulfil the purpose of a constitutional promise to Indigenous people. Canada's ongoing failure to live up to the specific promises embedded in the historical treaties is just one area where First Nations are likely to seek declarations from the courts based on this new remedy.

The unanswerable question is how effective this new type of court declaration will prove. In the case of the Métis, the Court obviously expects Canada to enter into negotiations to right the wrong done to them. But the Court's declaration does not demand any particular type of resolution. It may be that negotiations, at least in the eyes of the Métis, will prove unsatisfactory.

Ultimately, a court declaration that Canada has failed to act honourably to fulfil a constitutional promise to Indigenous people may prove most valuable on the international stage. Such a declaration, especially if from the Supreme Court, combined with the United Nations *Declaration on the Rights of Indigenous People*, may ultimately shame Canada into fulfilling outstanding constitutional obligations to Indigenous people.

1874

The Powley test was not designed to favour a highly mobile society with few documentary records.

CASE COMMENT

Enge v. Mandeville et al, 2013 NWTSC 33
and *R. v. Hirsekorn*, 2013 ABCA 242

JULY, 2013

The Duty to Consult —A Second-Best Alternative

Asserting an Aboriginal right and proving an Aboriginal right are very different things and lead to very different legal obligations. Recent court decisions from the Northwest Territories and Alberta on Métis Aboriginal rights demonstrate the differing legal requirements for asserting versus proving an Aboriginal right and why they are important.

The Decisions

Enge v. Mandeville et al, 2013 NWTSC 33

The size of the Northwest Territories' Bathurst caribou herd plummeted between 2006 and 2009. As an emergency conservation measure the Tlicho Government and the Government of the Northwest Territories (GNWT) limited the 2010-2011 harvest to 300 caribou divided between the Tlicho and the Yellowknives Dene First Nation. The North Slave Métis Alliance argued that the GNWT had breached its duty to consult and accommodate by not allocating part of the harvest to the Métis.

In its reasons for decision, the Court emphasized that even dubious or weak claims of Aboriginal rights will trigger the duty to consult. Once the duty is triggered, the Crown must prepare a preliminary assessment of how strong the unproven claim is and the potential impact of the pending decision on asserted Aboriginal rights. This assessment, which should be shared with the Aboriginal people claiming the right, guides the scope

and content of consultation. The Court concluded that the GNWT had breached its obligation to consult with the Métis because even though the Métis had a credible (though as-yet unproven) claim to an Aboriginal right to hunt the Bathurst caribou herd, the GNWT did not prepare the necessary preliminary assessment and did not consult meaningfully and reasonably with the Métis.

R. v. Hirsekorn, 2013 ABCA 242

In 2007 Garry Hirsekorn killed a mule deer near the Cypress Hills in southeastern Alberta. When he was charged by the Province for hunting out of season and without a licence, he defended himself by asserting an Aboriginal right to hunt as a Métis person.

The Alberta Court of Appeal concluded that Hirsekorn did not have to prove the existence of a historic Métis community in the vicinity of the location where he shot his deer or that the specific hunting location was integral to Métis culture. But, the Court held, it wasn't sufficient for Hirsekorn to rely on the fact that historically the Métis had hunted in central and southern Alberta or generally throughout the plains. Instead, Hirsekorn had to prove that his ancestors frequented the Cypress Hills so that it was part of their 'ancestral lands' or 'traditional territory' for hunting before the arrival of the Northwest Mount Police in 1874. Because Hirsekorn had failed to prove this, he could not establish an Aboriginal right to hunt in the Cypress Hills.

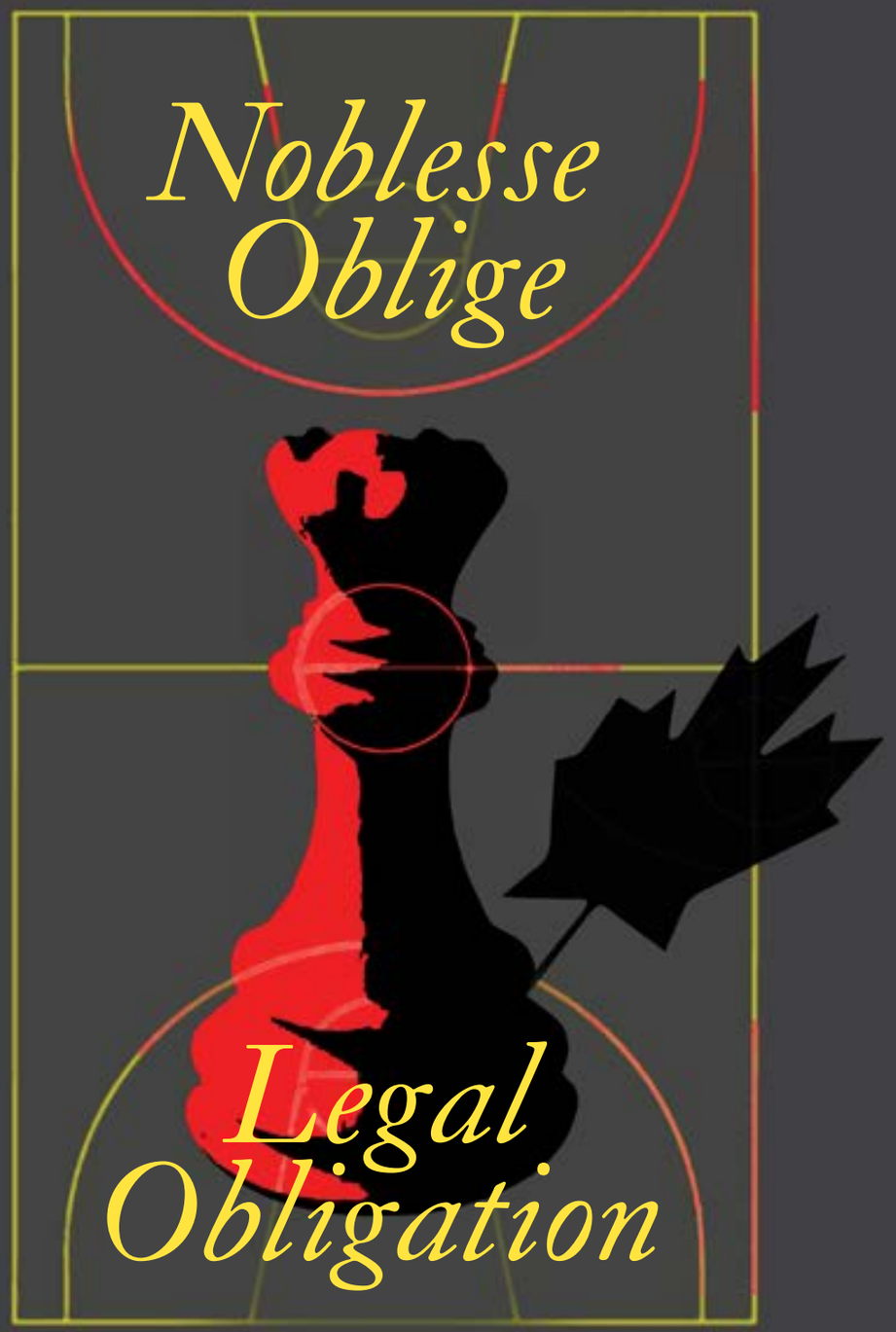
...Indigenous people with recognized Aboriginal and Treaty rights should be cautious about agreeing to processes which require no more than consultation and, perhaps, accommodation.

Why it matters

As the decision in *Enge* exemplifies, the threshold for triggering the Crown's duty to consult is relatively low. While the Métis have to point to evidence that fits the Aboriginal rights test laid down by the Supreme Court in *Powley* to trigger the Crown's duty, a credible claim will do, even if it might be unlikely to succeed in court. In contrast, the decision in *Hirsekorn* demonstrates how difficult it can be to establish an Aboriginal right in court, especially for the Métis of the prairies. The *Powley* test was not designed to favour a highly mobile society with few documentary records.

One reason it is much more difficult to prove an Aboriginal right than it is to trigger the duty to consult is that the legal consequences are very different. Once triggered, the duty to consult doesn't necessarily lead to accommodation. If a claim is weak or the potential effects minimal, the legal obligation on the Crown may not be particularly onerous. But if an Aboriginal right is proven in court or otherwise recognized, or a First Nation has established Treaty rights, governments may be required to do more than simply consult and perhaps accommodate. Depending on the circumstances, they may have to show that there is a valid reason to infringe the right, that they have infringed the right as little as necessary and that they have given priority to the Indigenous people in exercising their right.

The differing requirements for triggering the duty to consult and for proving an Aboriginal right, and the different legal obligations on government that flow from each, underscore why Indigenous people with recognized Aboriginal and Treaty rights should be cautious about agreeing to processes which require no more than consultation and, perhaps, accommodation. Recognized Aboriginal and Treaty rights deserve respect—governments shouldn't diminish them by treating them the same as unrecognized or unproven Aboriginal rights.



CASE COMMENT

Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12

APRIL, 2016

What Does the *Daniels* Decision Mean?

The *Daniels* decision is likely one of the most misunderstood decisions ever released by the Supreme Court of Canada.

What it is about

The Supreme Court was asked to made three declarations:

- that the Métis and non-status Indians are 'Indians' under s. 91(24) of the Constitution;
- that the federal government owes a fiduciary duty to the Métis and non-status Indians; and
- that the Métis and non-status Indians have a right to be consulted and negotiated with in good faith by the federal government on a collective basis through representatives of their choice, respecting all rights, interests and needs as Aboriginal peoples.

The first declaration required the Court to interpret s. 91(24) of the Constitution.

A Short Primer on the Division of Powers

Sections 91 and 92 of the Constitution identify subjects which either the federal government or the provincial governments have the exclusive jurisdiction to make laws about.

For example, the federal government has the exclusive jurisdiction to make laws about the postal service. On the provincial side of the ledger, the provinces have exclusive authority to make laws about the management and sale of public lands.

This doesn't mean that one level of government can't make laws that affect topics under the jurisdiction of the other level of government. They can and often do.

What it means is that they can't pass a law that intentionally affects a subject under the exclusive jurisdiction of the other level of government or indirectly affects its 'core', whatever that might be.

This is why the provinces can't pass a law specifically about Indian reserves—Indian reserves are 'lands reserved for the Indians' under s. 91(24) and, therefore, only the federal government can pass laws about them.

THE DECISION DOES NOT OBLIGATE THE FEDERAL GOVERNMENT TO NEGOTIATE TREATIES WITH THE MÉTIS.

Importantly, just because a subject matter isn't listed under either section 91 (federal powers) or section 92 (provincial powers) doesn't mean neither level of government can pass a law relating to that subject. By default, the federal government has the legislative authority for any subject not mentioned. This is why the federal government's argument that it couldn't legislate regarding the Métis was always self-serving and disingenuous.

What the Court said

The Court made the first declaration. Based on the findings of fact of the trial judge, the Court held that when used in s. 91(24) of the Constitution, 'Indians' was intended to include the Métis and non-status Indians.

The Court declined to make the second and third declarations. The existence of a fiduciary relationship and the possibility of a duty to consult was already settled law. A declaration of an overarching, non-specific fiduciary duty to the Métis or duty to consult the Métis would have been a significant change in the law.

What the Court did not say

The Court did not order the federal government to do anything.

The decision doesn't make Métis and non-status Indians 'Indians' under the Indian Act.

The Court's declaration does not affect any specific individuals or groups of Métis or non-status Indians. The specifics of who the declaration might apply to is a matter for a future court decision.

The Court's decision is not about Métis constitutional rights. These rights are protected under a different section of the constitution (section 35). The test for establishing them was set out in the Court's *Powley* decision—the test has not changed.

The decision does not mean provincial laws don't apply to the Métis and non-status Indians. The application of provincial laws is a different question for a different day.

The decision does not obligate the federal government to negotiate treaties with the Métis. This was always and remains a possibility. The argument that the federal government couldn't because of s. 91(24) was a red herring.

The decision does not mean the Métis have an additional argument for revenue sharing. Section 91(24) is not about rights or interests. It's about the federal government's exclusive legislative powers.

Why it matters

Courts aren't in the business of making declarations. They only do so when they believe a declaration will have the practical effect of settling a 'live controversy'.

In this case, the Court concluded that granting a declaration assigning constitutional authority to make laws affecting the Métis and non-status Indians to the federal government would have "enormous practical utility" for the two groups who until now had been left to rely on government's noblesse oblige.

According to the Court, the federal government's and the provinces' disagreement over legislative authority over the Métis and non-status Indians had resulted in them being deprived of much needed programs and services.

The Court acknowledged that its declaration would not force the federal government to pass any laws directly affecting the Métis and non-status Indians.

Instead, the Court concluded that granting the declaration would create certainty and accountability as to which level of government the Métis and non-status Indians should turn to for policies to address their historical disadvantages—they should turn to the federal government.

What does the *Daniels* decision mean? Put simply, the Métis and non-status Indians should look to the federal government in the hopes of negotiating improved programs and services, but there's no legal obligation on the federal government to do anything specific.

What I think

Hopefully the decision will lead to better programs and services for the Métis and non-status Indians. If so, it will prove to be an important victory.

Personally, the decision leaves me cold.

Historically, s. 91(24) was understood as a shield—it was intended to stop the provinces from passing laws that directly interfere with 'Indians and lands reserved for the Indians'. The benefit of the Métis and non-status Indians now being granted this 'protection' is likely a lot less than it once would have been because in 2014 the Supreme Court in *Tsilhqot'in* and *Grassy Narrows* significantly narrowed the scope of the protection.

In *Daniels* the Court emphasized a different purpose for s. 91(24)—the control of Aboriginal people.

As the Court explained, assigning the Crown's law-making authority to the federal government facilitated Canada's westward expansion, including the development of laws and policies intended to stop Aboriginal people, including the Métis, from resisting non-Indigenous settlement of their lands.

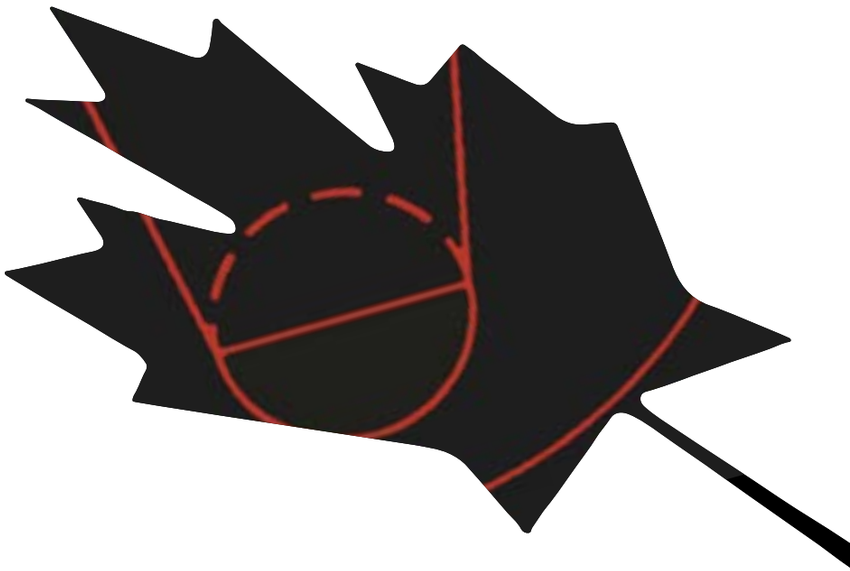
Section 91(24) was, and is, an instrument of colonization.

As a Métis person whose ancestors were deprived of their land at Red River I take no satisfaction in the Supreme Court confirming the federal government's exclusive authority to make laws about me, my children or the Red River Métis.

At a wider level, the decision is out of step with the aspirations of most Indigenous Peoples in Canada and around the world. Rather than seeking confirmation of the Crown's jurisdiction over them, Indigenous Peoples are striving to achieve recognition of their own jurisdiction.

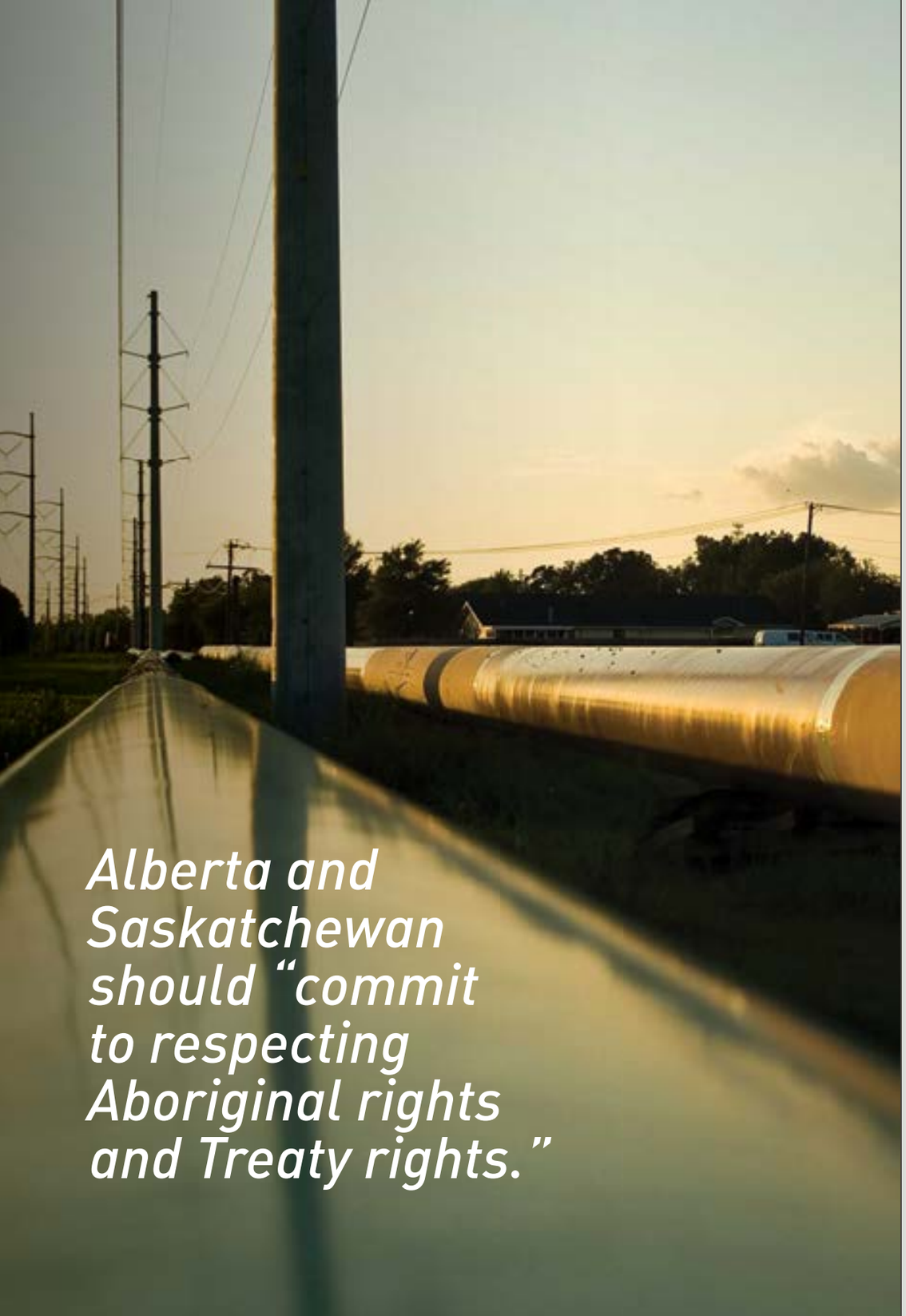
In the end, I'm left wondering what the Métis who fought and died resisting Canada's exercise of jurisdiction over them would make of the *Daniels* decision.

... MÉTIS AND NON-STATUS INDIANS SHOULD LOOK TO THE FEDERAL GOVERNMENT IN THE HOPES OF NEGOTIATING IMPROVED PROGRAMS AND SERVICES...



... but there's no legal obligation on the federal government to do anything specific.

THE DUTY TO CONSULT



Alberta and Saskatchewan should "commit to respecting Aboriginal rights and Treaty rights."

DECEMBER, 2014

Provinces Have Every Right to Set Conditions on Pipelines

Beginning with the British Columbia government's position on Enbridge's Northern Gateway project, provincial governments have announced conditions, including meaningful consultation with First Nations, which must be met before they will allow pipelines carrying petroleum products from western Canada to be built in their provinces. Ontario and Quebec recently announced similar conditions for Transcanada's proposed Energy East Pipeline.

In an essay in the Toronto *Globe and Mail*, Prof. Dwight Newman of the University of Saskatchewan argues that, like the transcontinental railways of the 19th century, these pipelines are projects of national importance within the federal government's exclusive jurisdiction. According to Newman, Ontario's and Quebec's conditions on the Energy East Pipeline are "shameful" and "unconstitutional". The other provinces, he says, have no right to impose conditions on pipelines which will allow Alberta and Saskatchewan to get their products to foreign markets.

Newman's argument is surprisingly out of touch with the legal and political reality of modern Canada. It is based on the discredited 'watertight compartments' theory of federalism where the federal and provincial governments exercise their legislative powers without regard for each other's interests. Rather than this imperial version of Canada

where projects of supposedly national importance override minority rights and local concerns, the Supreme Court has endorsed cooperative federalism where the federal and provincial governments work to reconcile differences for the common good.

Newman's attack on provincial powers is particularly ironic given that at the Supreme Court Alberta and Saskatchewan have led the legal charge against federal monopolies and in support of cooperative federalism. The most recent examples are the Supreme Court's *Tsilhqot'in* and *Grassy Narrows* decisions. With urging from the provinces, including Alberta and Saskatchewan, the Court decided that provincial laws can apply to Aboriginal title lands and Treaty rights, which up until then had been understood to be under exclusive federal jurisdiction.

The *Grassy Narrows* decision is particularly relevant in the context of the Energy East Pipeline. In *Grassy Narrows* the Supreme Court confirmed that the provinces are fully responsible for ensuring that Treaty rights are respected and constitutional obligations to Aboriginal peoples, including the duty to consult, are fulfilled. By insisting on meaningful consultation with First Nations as a condition of the Energy East Pipeline proceeding, Quebec Premier Couillard and Ontario Premier Wynne are not, as Newman accuses them, "playing a dangerous game"—they are hopefully signalling their governments' intention to fulfil their constitutional obligations to Aboriginal peoples.

Instead of being led astray by Newman's anachronistic vision of a federal government overriding local interests and minority rights to build projects of national importance, Alberta Premier Jim Prentice and Saskatchewan Premier Brad Wall should follow Ontario's and Quebec's example and commit to respecting Aboriginal rights and Treaty rights.

JANUARY, 2017

A Pipeline Too Far: How to Stop Kinder Morgan

Despite a wealth of smarts and determination, it's going to be difficult for Indigenous people to stop the Kinder Morgan pipeline.

Ever since the 2004 *Haida Nation* decision, the duty to consult and accommodate has proven a powerful tool in the struggle for greater respect for Aboriginal rights and title. Courts have handed Indigenous Peoples numerous significant victories—they have also created a blueprint for overriding Indigenous Peoples' inherent and constitutional rights.

The 2016 *Gitxaala* decision is a case in point. While the Federal Court of Appeal quashed the decisions authorizing the Enbridge pipeline, it also provided the federal government with a simple recipe for approving it—discuss new information with First Nations, consider further conditions and provide reasons for its decision.

The *Gitxaala* decision, and the federal government's justification for approving the Kinder Morgan pipeline, underscores the limitations of the duty to consult and accommodate as the basis for reconciliation. All too often, the courts' message to government has been that as long as you follow the script and your decision is within the realm of possible outcomes, we'll defer to your decision.

Kinder Morgan is an opportunity for a different ending. It's an opportunity for the courts to acknowledge the duty to consult's downward spiral towards procedural oblivion and to take a stand in the name of recognition and respect.

There are two basic elements to stopping the Kinder Morgan pipeline. First, there's a requirement for the courts to acknowledge the obvious. The pipeline will exponentially increase tanker traffic through the Salish Sea. The risk of an oil spill will increase.

However remote the possibility, a major spill will have catastrophic effects on the Indigenous Peoples of the Salish Sea. A major spill runs the risk of extinguishing the very basis for their recognition as distinct Aboriginal Peoples under the constitution.

Second, the courts must acknowledge that in some cases deference, procedural consultation and a 'balancing of interests' simply will not do. The very core of Indigenous Peoples' identity as distinct nations protected by section 35 of the constitution is at stake. There is a limit to government's authority to endanger the continued existence of Indigenous Peoples. There is a line that cannot be crossed.

The Supreme Court confirmed the underlying principle in 1997 in *Delgamuukw* and restated it in 2014 in *Tsilhqot'in*. The importance of an Aboriginal right combined with the potential serious impact of the government decision on the right creates circumstances where a project cannot proceed without Indigenous consent.

The Ktunaxa ski-hill case, heard in December 2016 by the Supreme Court, is based on the same principle in the context of the constitutional protection for religious freedom. A project that would destroy an Indigenous People's identity attracts more than a duty to consult. Such a project cannot be countenanced because it would breach the Crown's fiduciary obligations to Aboriginal people and the fundamental promise of section 35 to protect and perpetuate distinct Aboriginal Peoples into the future and forever.

Kinder Morgan can be stopped through an act of affirmation. The pending legal challenges provide the courts with an opportunity to confirm that while constitutional rights may not be absolute, the promise of section 35 is inviolate. There are interests that cannot be balanced, risks that cannot be mitigated and lines that cannot be crossed—there are promises that cannot be broken.

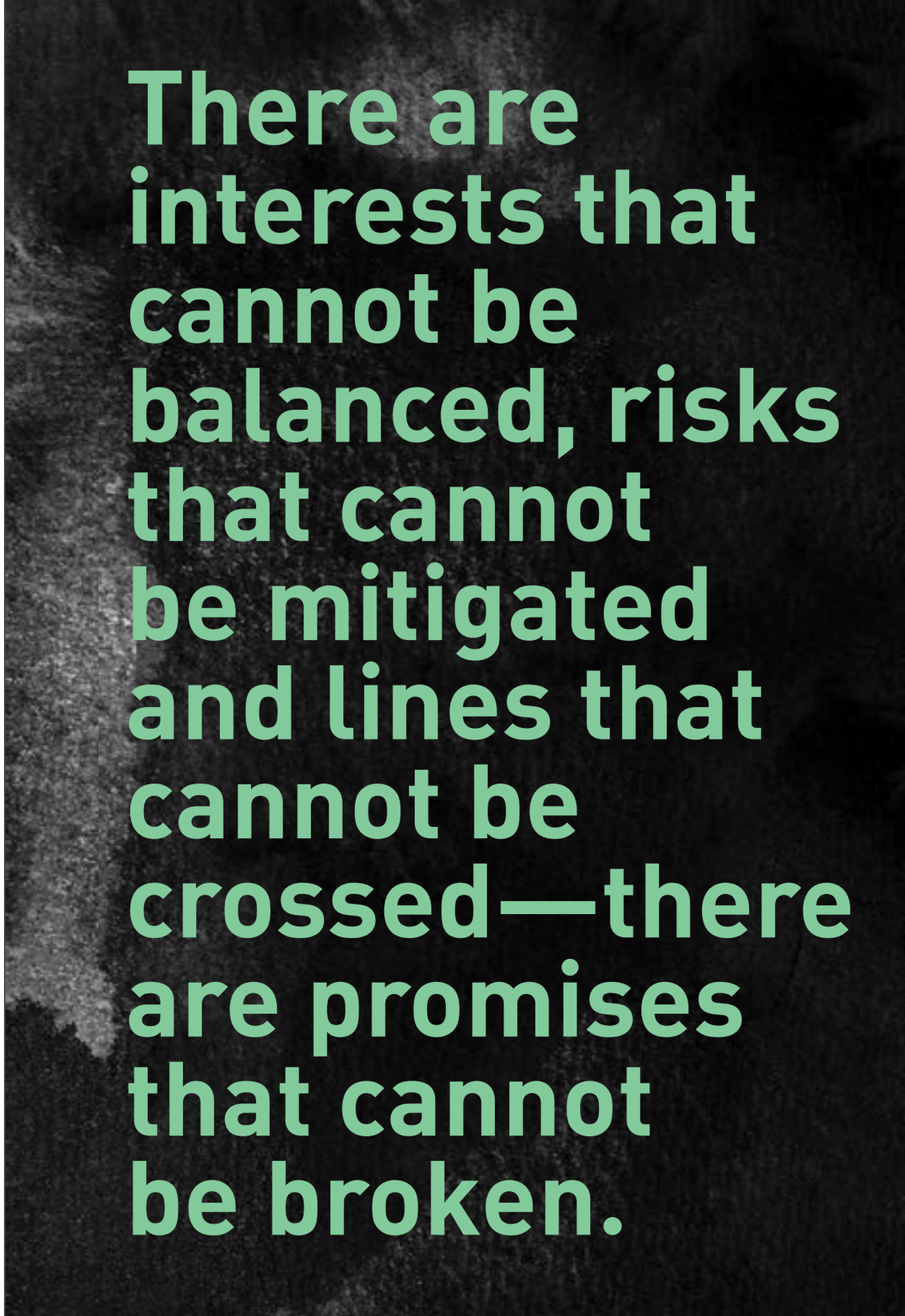


PHOTO: STAN WILLIAMS

MAY, 2013

The Inadequacy of Environmental Assessments

The federal government's attempts to narrow its legal obligations to consult Aboriginal people continue apace. Canada's most recent move is to significantly reduce the number of projects requiring a federal environmental assessment (EA) and, therefore, a government decision requiring consultation and accommodation. This latest step towards the federal government's apparent goal of eviscerating the environmental assessment process is another example of why it is important for First Nations to insist that governments fulfill their consultation obligations whether or not environmental assessments are required.

What it is about

The primary reason a major development project requires a federal environmental assessment is because it is a "designated project" under the *Canadian Environmental Assessment Act, 2012*. The definition of a designated project is determined by regulations. The federal government has issued new draft regulations redefining designated projects to exclude many projects currently subject to an environmental assessment. The government's justification is that it wants to restrict EAs to 'major projects' with the greatest potential to cause significant environmental effects.

Some projects will be excluded from the EA process under the new regulations by virtue of the increased project size threshold. For example, the threshold for liquefied natural gas storage (LNG) facilities will increase by 10%. Similarly, expansion projects will now only require an EA if the existing project is being expanded by at least 50% of its current size.

Other types of projects, including groundwater extraction projects, heavy oil and oil sands processing facilities, potash mines, pulp and paper mills, and smelters will now be excluded all together, regardless of their size. Many projects First Nations might expect to require an EA will continue to fall outside the scope of the regulations, including diamond mines, offshore drilling, wind power projects, bridges, fish farms, and oil and gas fracking projects.

Why it matters

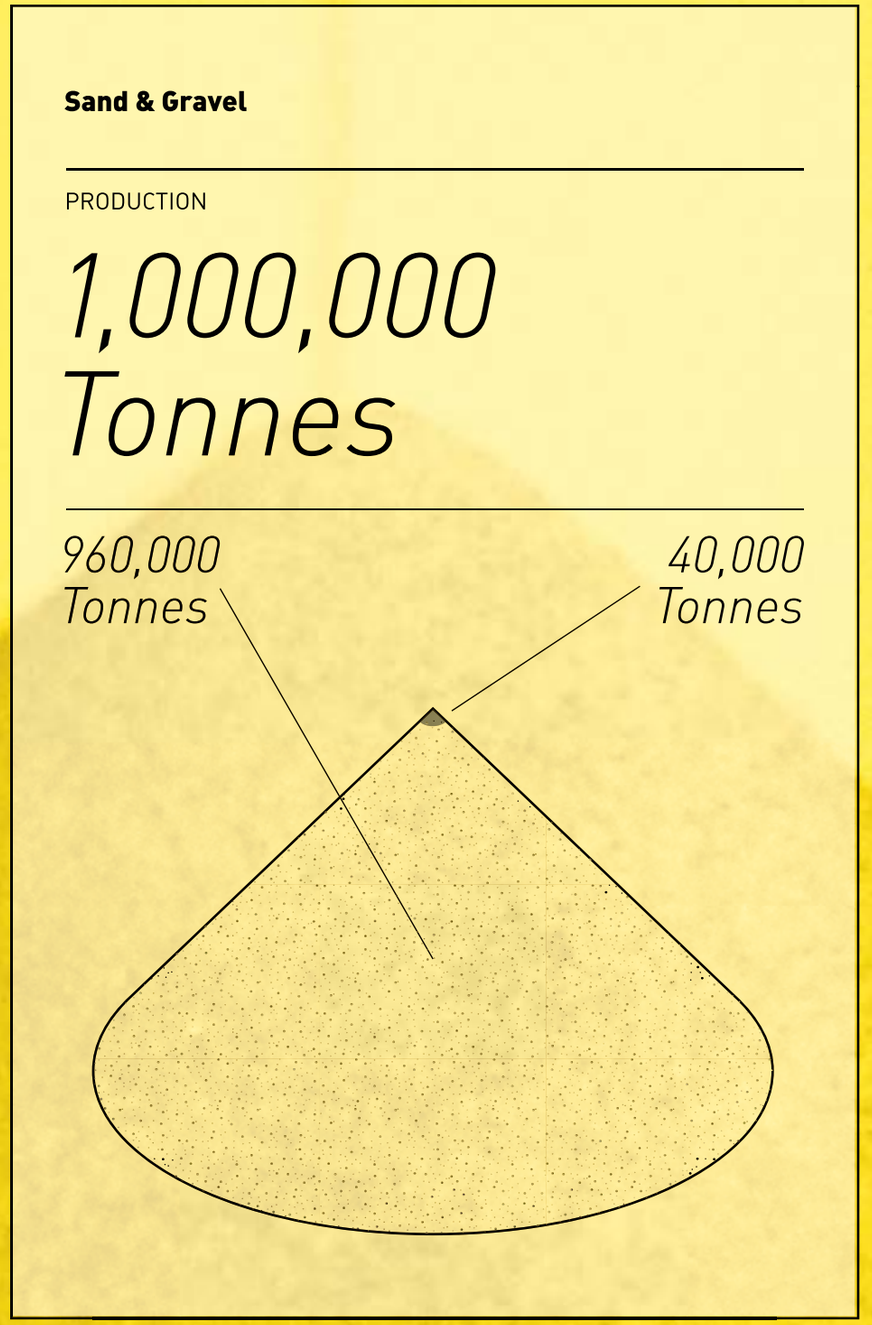
Environmental assessments have always been an inadequate method for fulfilling the Crown's duty to consult and accommodate Aboriginal people. The federal government's narrowing of the range of projects requiring an EA highlights one of the underlying problems. EAs are triggered by a project's potential to cause significant environmental effects—not a project's potential effects on Aboriginal title, rights and treaty rights—and it is all too easy for government to avoid consultation on a project by simply reducing the number of projects requiring an EA. While consultation may still occur for specific permits required for a project that does not trigger an EA, it cannot substitute for consultation on the project as a whole.

There is no easy answer to the overarching problem of the Crown using the EA process as a vehicle for consultation and accommodation. Other than challenging the new regulations themselves for having been enacted without proper consultation and accommodation, First Nations may want to consider focusing on the wide discretion the Minister has to order an EA regardless of whether a project qualifies as a designated project under the regulations.

If a First Nation were to demonstrate that a project that falls below the regulations' threshold for triggering an EA has the potential to infringe its Aboriginal title, rights or treaty rights, it might have an argument that the Minister's decision whether or not to exercise his or her discretion to order an EA attracts the duty to consult. In the case of recognized rights, the First Nation might be able to argue that the Minister's unfettered discretion is in and of itself an infringement of their Aboriginal or treaty rights.

Whether the new regulations are upheld or not by the courts, they stand as a stark reminder to First Nations of the inherent danger in allowing EAs to substitute for a meaningful, First Nation endorsed process, specifically designed to ensure that governments fulfill their constitutional obligations to consult and accommodate.

PHOTO: BOBBY BINGUIS



CASE COMMENT

Fort Nelson First Nation v. British Columbia (Environmental Assessment Office), 2015 BCSC 1180

JULY, 2015

Environmental Assessments and the Duty to Consult

With the approval of the courts, federal and provincial governments often shoehorn the duty to consult and accommodate First Nations into environmental assessment processes. These processes are ill-suited for First Nations' needs and expectations. The recent decision from the B.C. Supreme Court in *Fort Nelson First Nation* exemplifies some of the key shortcomings in relying on environmental assessment processes to fulfil the duty to consult Indigenous Peoples.

What it is about

A proponent sought provincial government approval to develop the Komie North Mine near the City of Fort Nelson as a sand and gravel pit to supply fracking sand to the local oil and gas industry. There were indications that the proponent had plans to develop five more sand and gravel pits. All of these pits would be in the territory of the Fort Nelson First Nation, a member of Treaty 8.

Under the B.C. *Environmental Assessment Act* a new sand and gravel pit requires an environmental assessment if 500,000 tonnes or more of sand and gravel are excavated during one year or if over a 4-year period a total of 1,000,000 tonnes or more are excavated.

The Court concluded that when constitutional rights are involved, the province must be held to a higher standard to protect those rights than when it is considering general issues of environmental protection.

By either setting higher triggering thresholds or favouring industry when deciding on whether a threshold has been met, governments can virtually scope out the duty to consult.

The proponent was planning to excavate much more than 1,000,000 tonnes of sand and gravel over four years from the Komie North Mine. But, according to the proponent, it only intended to sell a small portion of the sand and gravel excavated. The rest would be waste. Therefore the proponent informed the province that the Komie North Mine would have a production capacity of not more than 960,000 tonnes of sand and gravel over a four-year period—40,000 tonnes less than the threshold to trigger a provincial environmental assessment.

Based on the proponent's estimate, and without consulting the Fort Nelson First Nation, the province decided the Komie North Mine proposal did not meet the threshold under the *Environmental Assessment Act* to trigger an environmental assessment.

The Fort Nelson First Nation applied for judicial review of the provincial government's decision on the basis that it was unreasonable and that the province had failed to consult and accommodate.

What the court said

Based on a B.C. Court of Appeal decision which had described provincial environmental assessments as 'proponent driven', the province argued that it was right to accept the proponent's production capacity estimate for Komie North Mine and was not required to look behind the numbers to determine if they were reasonable.

The Court rejected the province's uncritical acceptance of a proponent-driven approach to the issue of whether environmental assessments are triggered. According to the Court, such an approach ran the risk of allowing projects that interfered with Aboriginal and Treaty rights to proceed without environmental assessments. The possibility that a First Nation might subsequently succeed in having a proponent penalized would be of little or no benefit to a First Nation after its Aboriginal and Treaty rights had been infringed or extinguished.

According to the Court, it was unreasonable for the province to interpret its legislation to restrict the calculation of production for new sand and gravel pits to only that portion of the extracted sand and gravel the proponent intended to sell or use.

The Court concluded that when constitutional rights are involved, the province must be held to a higher standard to protect those rights than when it is considering general issues of environmental protection.

The Court also rejected the Province's arguments that the duty to consult was not triggered because the effects on Treaty rights were speculative and because the interpretation of the legislation was a matter of general application and not a strategic, high level decision that would trigger the duty to consult.

The Court noted that by accepting the proponent's limitation on the calculation of the mine's production capacity, the province had set the stage for more mines to proceed without environmental assessments. Consequently, the decision potentially affected all areas in the Fort Nelson First Nation's territory with the potential for fracking sand mining.

The Court held that the province did not meaningfully consult with the Fort Nelson First Nation in good faith and seek to accommodate the First Nation's Treaty rights. It set aside the decision and ordered the province to make a new decision as to whether an environmental assessment was triggered.

Why it matters

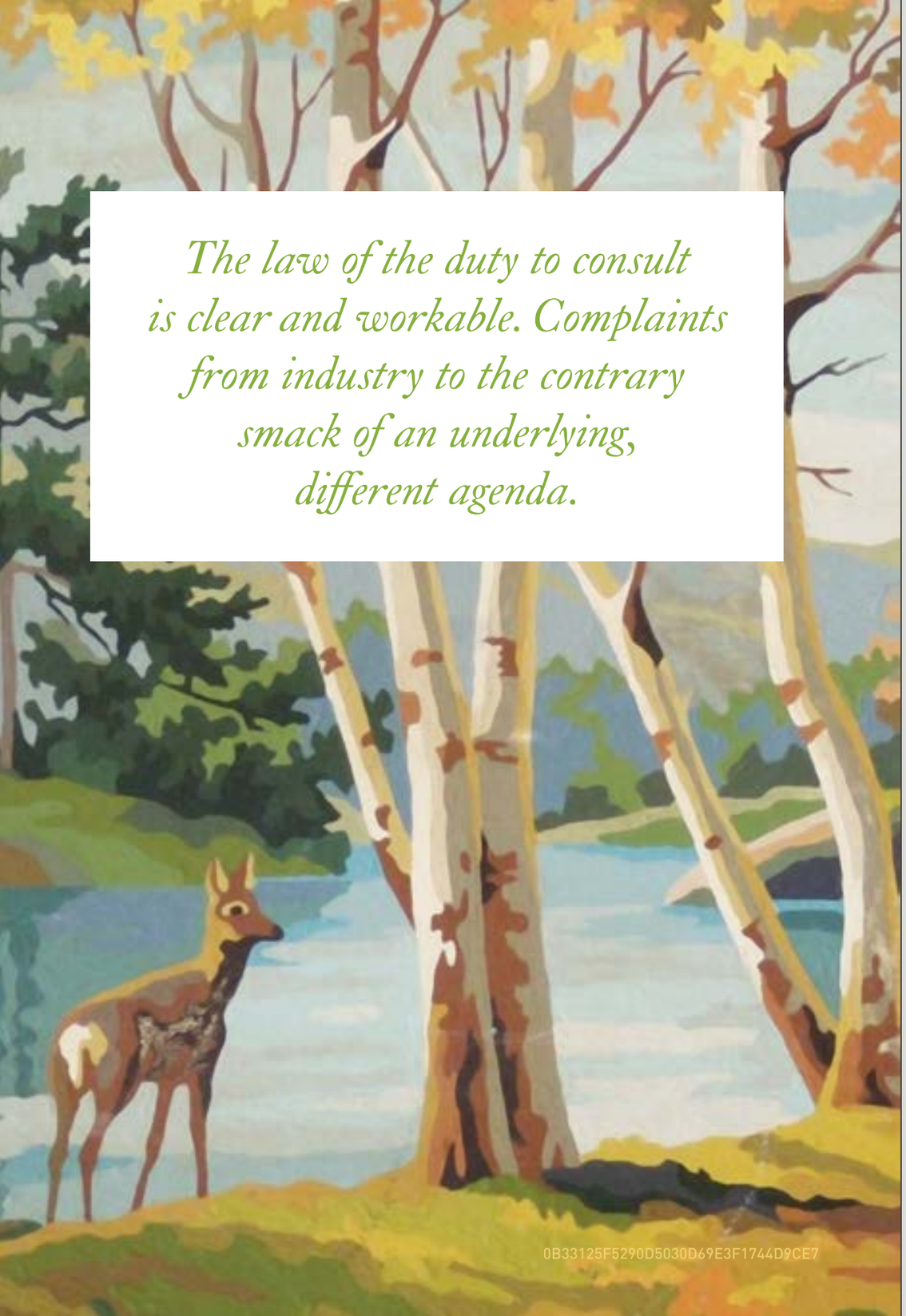
The decision is of general importance for three reasons. First, it is another defeat for government and industry in their ongoing attempts to limit the application of the duty to consult by arguing a decision is not a strategic, high level decision and therefore the duty is not triggered.

Second, the decision is another example of the courts rejecting government's narrow vision of the duty to consult. The fact that there were possibly five more similar sand and gravel pit authorizations in the offing obviously influenced the Court's reasoning. It did not accept that the province could consider one authorization in isolation from the wider context and impacts.

Third, and most importantly, the decision highlights one of the central problems with conflating the duty to consult with environmental assessments. By either setting higher triggering thresholds or favouring industry when deciding on whether a threshold has been met, governments can virtually scope out the duty to consult. The decision is an important example of the courts grappling with the issue and holding governments to a higher, principled standard.

ADDENDUM

On appeal, the decision of the B.C. Supreme court was subsequently set aside.
See *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2016 BCCA 500



The law of the duty to consult is clear and workable. Complaints from industry to the contrary smack of an underlying, different agenda.

NOVEMBER, 2015

Is the Duty to Consult Clear as Mud?

Industry and its supporters complain that the duty to consult and accommodate is a murky mess with the courts failing to provide clarity. If only, they lament, the rules of engagement were clear and stable.

Their complaints are out of touch with reality.

Over ten years ago the Supreme Court set down the principles underpinning the duty to consult in simple and clear language in *Haida Nation*. At the same time, and for the benefit of First Nations, governments and industry, the Court evaluated a specific consultation process in Taku River as an example of what was required to fulfil the duty to consult.

The Court's subsequent decisions have simply clarified when the duty to consult applies. Ten years ago in *Mikisew* the Court explained when it applies to so-called historical treaties. Five years ago, in its last major duty to consult decisions, the Court extended the duty to consult to modern treaties (Beckman) and clarified when and how the duty to consult applies to administrative tribunals and existing infringements (Rio Tinto).

For more than a decade the Supreme Court's requirements for meaningful consultation and accommodation have been clear, known and consistent.

In *Haida Nation* the Supreme Court described its task as "establishing a general framework for the duty to consult and accommodate." It was up to lower courts to "fill in the details."

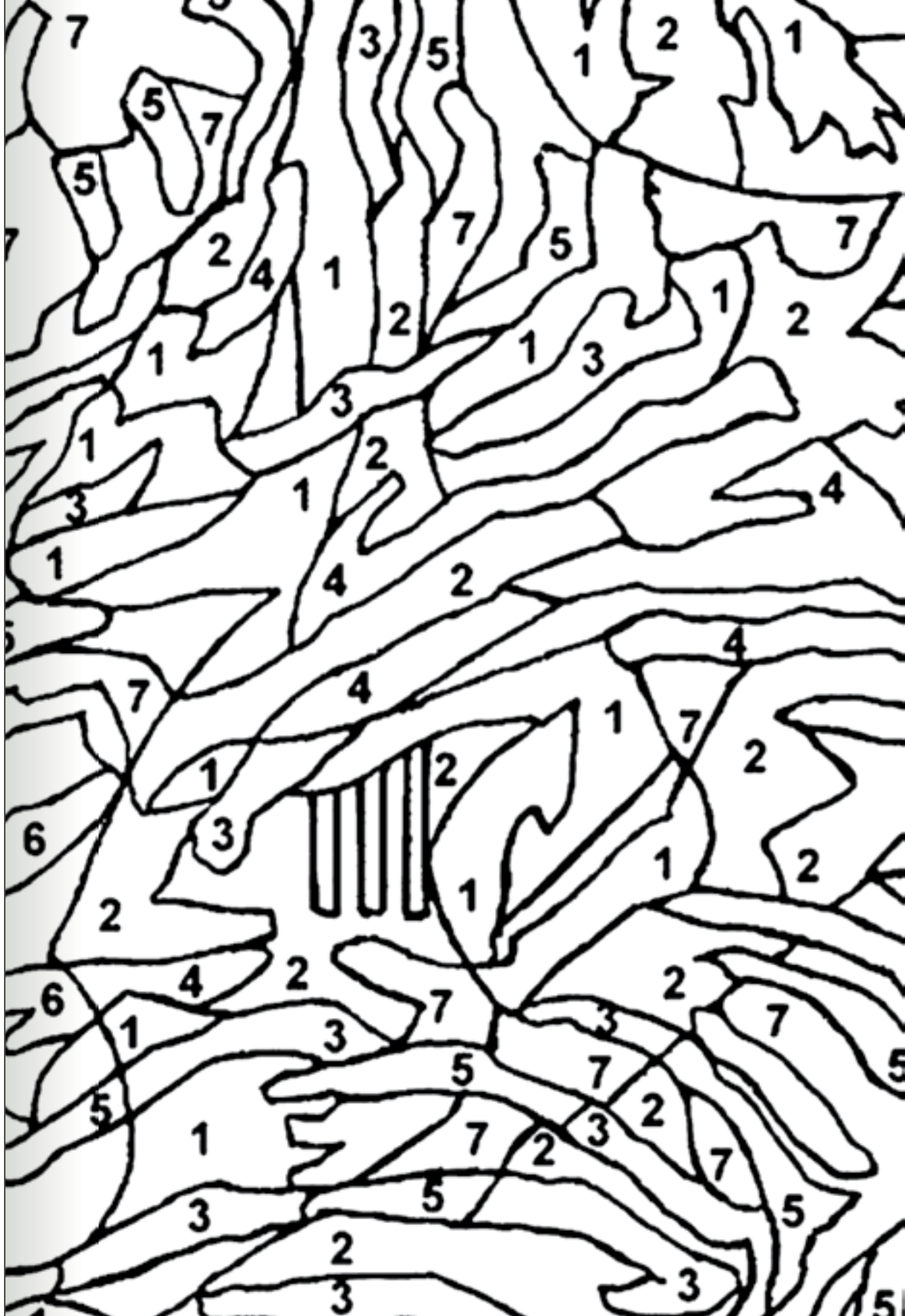
The lower courts have done their work. With literally hundreds of duty to consult court decisions since *Haida Nation*, there is little room left on the canvas for anything new. The picture has been filled in, clarified and sharpened in detail over and over again.

Anyone still unsure when and how the duty to consult is intended to apply has not done their homework.

Importantly, First Nations have borne the disproportionate burden of clarifying the law around the duty to consult and accommodate. Faced with governments that ignore the Supreme Court's clear directions, First Nations have been forced to expend their energy and limited resources on litigation to defend their Aboriginal title, rights and treaty rights. In court they are opposed by governments and companies with comparatively unlimited resources derived in large part from exploiting Indigenous lands.

The law of the duty to consult is clear and workable. Complaints from industry to the contrary smack of an underlying, different agenda. Similar to industry lobbyists' complaints of too much 'red tape', those who grumble that the law of the duty to consult has too much uncertainty likely mean there is just too much of the duty to consult.

Instead of blowing smoke in our eyes with complaints about a lack of clarity surrounding the duty to consult, industry and its sympathizers should be pressing governments to live up to the spirit and intent of their constitutional obligations to Indigenous Peoples.



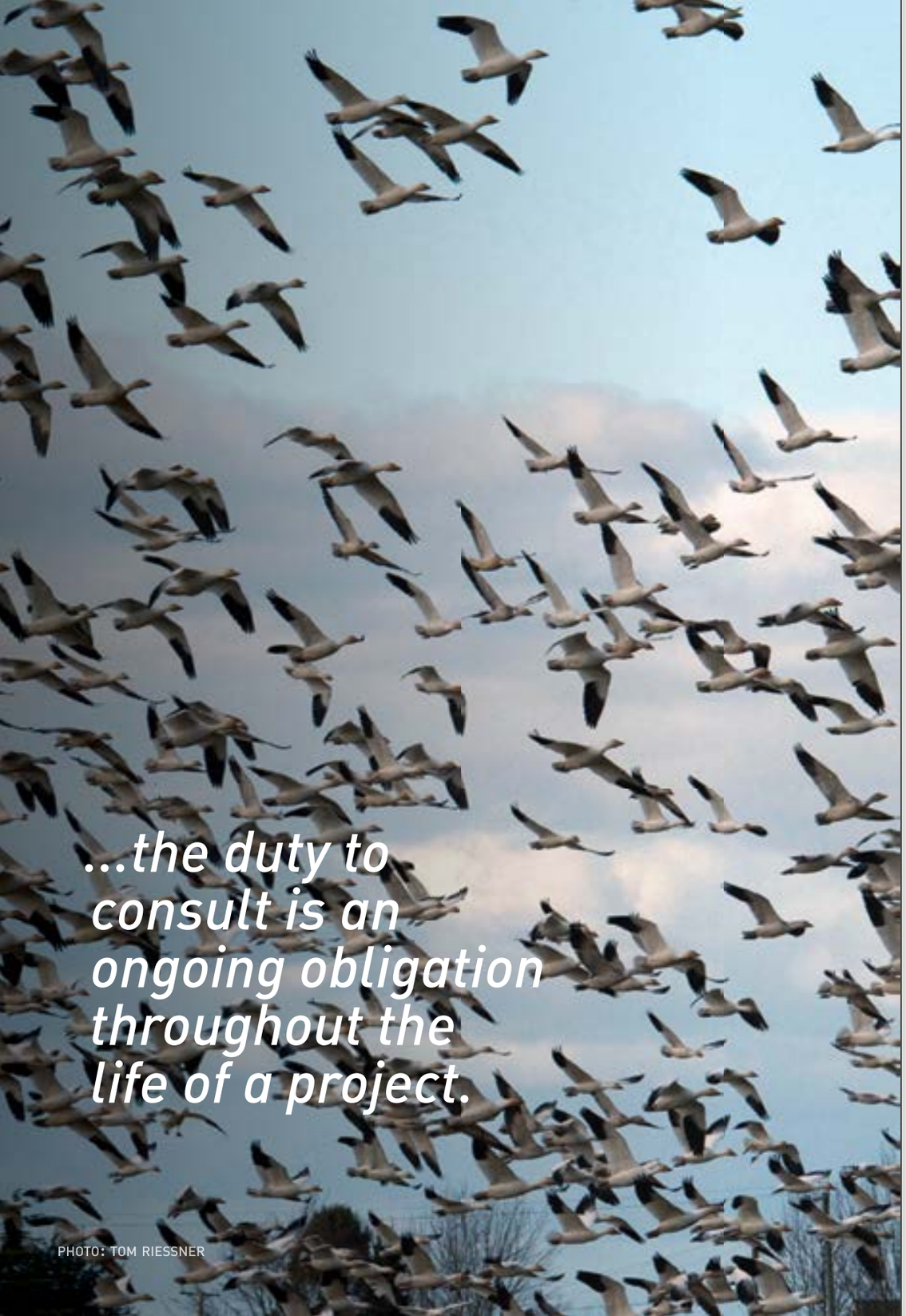


PHOTO: TOM RIESSNER

CASE COMMENT

Taku River Tlingit First Nation v. British Columbia (Minister of Environment), 2014 BCSC 1278

OCTOBER, 2014

The Duty to Consult as an Ongoing Obligation

The B.C. Supreme Court's decision in *Taku* is another example of the courts rejecting attempts by government and companies to narrow the applicability of the duty to consult and accommodate.

What it is about

In 2004 the Supreme Court of Canada in *Taku* (the companion case to *Haida*) held that the Province had adequately consulted the Taku River Tlingit First Nation (TRTFN) before issuing an environmental assessment certificate (EAC) for the Tulsequah Chief Mine in northwestern B.C. Importantly, the Supreme Court assured TRTFN that, as part of the Crown's ongoing duty to consult, they could expect to be consulted throughout the permitting, approval and licensing process for the proposed mine.

Skip ahead six years. By 2010 Redfern, the mine proponent, had gone into receivership and the property had been acquired by Chieftan Metals. The EAC had been renewed for a second and final five-year term and was set to expire in 2012 unless the Province decided the project had been 'substantially started' as required under the provincial *Environmental Assessment Act*. If the project was deemed to have been substantially started, the EAC would be in effect for the life of the project unless cancelled or suspended.

In 2012 Chieftan applied for a determination that the project had been substantially started. Despite the fact that the bulk of the work done on the site consisted of tree clearing and completing a gravel airstrip, the Province agreed with Chieftan. TRTFN filed for judicial review of the Province's decision.

What the Court said

The Court concluded that 'project' under the provincial *Environmental Assessment Act* means physical activities affecting the land environmentally. To be substantially started, a project needs to have been started in its essentials, i.e. in a real and tangible way. In deciding whether a project has been substantially started, the decision-maker should focus on what has been done since the EAC was first issued and especially on whether there have been physical activities that have a long-term effect on the site.

The Court then considered whether the Province had breached its constitutional duty to consult TRTFN. The Province had not consulted TRTFN—in fact, it had not even given TRTFN notice of the pending decision. TRTFN had only found out about the decision by accident months after it had been made.

The Court rejected the Province's argument that the duty to consult had not been triggered because the decision would have no new physical effects. The Court concluded that the decision would directly affect what would happen at the project site. A negative decision would mean that the project would not be built. A positive decision meant the EAC would be in effect for the life of the project, subject only to the Province's supervisory powers. Consequently, the Court concluded that the duty to consult had been triggered and that the Province had breached the duty by not consulting TRTFN.

Finally, the Court also considered TRTFN's natural justice argument and concluded that because of the Province's long history of consulting with TRTFN before decisions were made that might affect their constitutional rights, the Province had violated the doctrine of legitimate expectations by failing to consult about the EAC.

The Court ordered that the decision be made again and that TRTFN have 45-days notice to present whatever written submissions it wanted on the issue of whether the project had been substantially started.

The Court rejected the Province's argument that the duty to consult had not been triggered because the decision would have no new physical effects.

Why it matters

The decision is important for two main reasons. First, it is another example of the courts rejecting the Crown's attempts to evade its constitutional obligations by arguing that a decision was made long ago and there is nothing new to consider. As the Supreme Court of Canada stated in *Taku*, the duty to consult is an ongoing obligation throughout the life of a project. When there is a new decision or conduct that may affect Aboriginal title and rights, the duty to consult is triggered.

Second, ever since the Supreme Court's decision in *Rio Tinto*, governments and proponents have argued that the government decision in question must result in specific physical impacts on the ground. The B.C. Supreme Court's recent decision in *Taku* is another example of the courts rejecting this interpretation of *Rio Tinto*.

CASE COMMENT

Chartrand v. British Columbia, 2015 BCCA 345

AUGUST, 2015

Breathing Life Back into the Duty to Consult

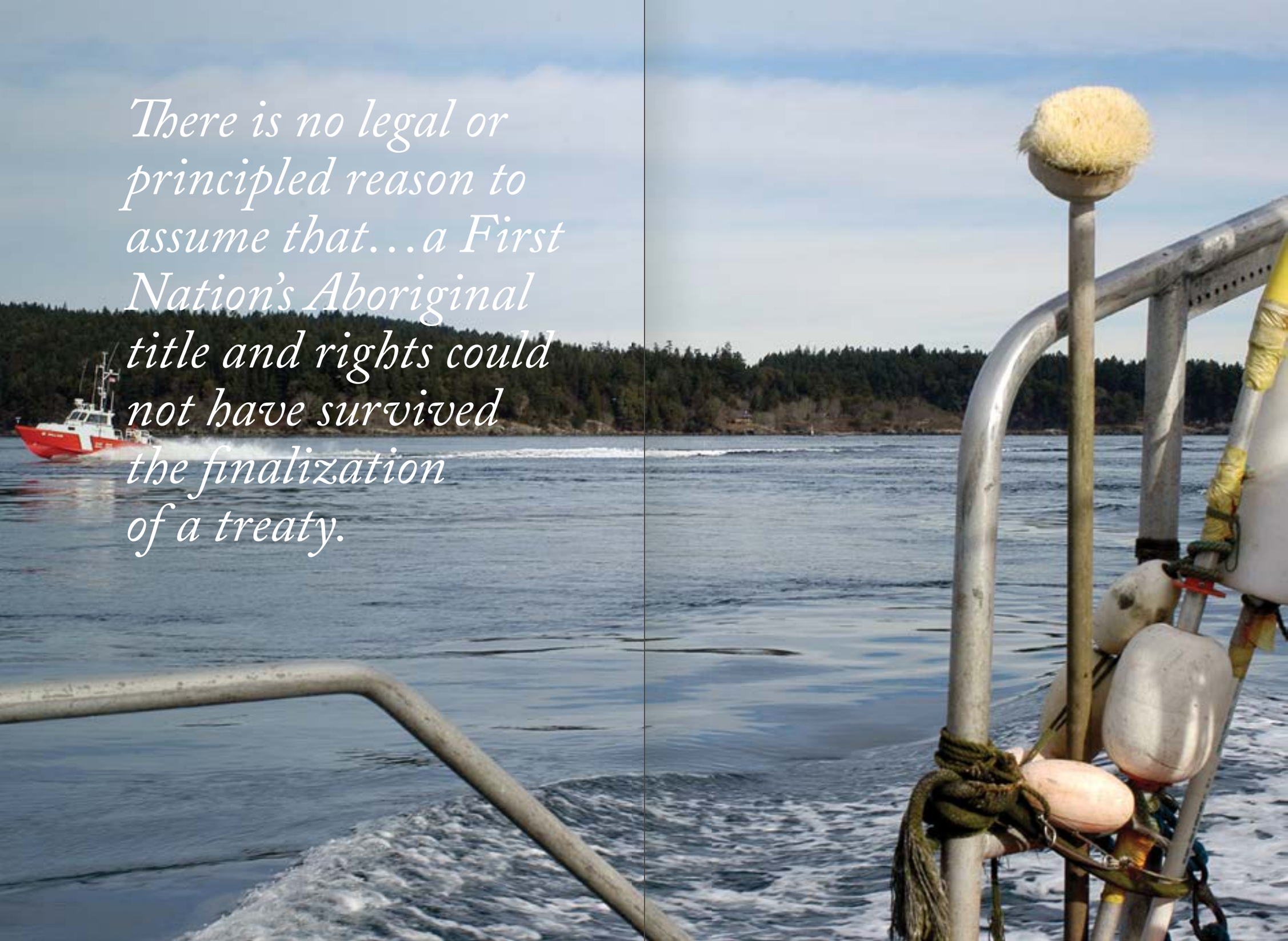
Since the Supreme Court of Canada's *Rio Tinto* decision in 2010 a growing number of court decisions have relied on a narrow interpretation of governments' obligations to consult and accommodate First Nations. In *Chartrand*, the British Columbia Court of Appeal pointedly rejects this approach by reminding everyone of some of the most important duty to consult decisions to come out of British Columbia over the last fifteen years.

What it is about

In the early 1850s Hudson's Bay Company fur traders, on behalf of Britain, negotiated treaties with Indigenous Peoples on Vancouver Island. Two of the treaties were with the predecessors of the Kwakiutl First Nation. They agreed to grant the HBC certain rights to a strip of land extending inland for two miles from the coast excluding their village sites and enclosed fields. They were also guaranteed the right to hunt on unoccupied lands and to carry on their fisheries as formerly.

For over 150 years the Kwakiutl have struggled for recognition of their treaty rights and of their Aboriginal title and rights outside the two-mile wide strip of land covered by their treaties.

In 2007 British Columbia removed private lands owned by Western Forest Products from the company's tree farm licence and approved a new forest stewardship plan in Kwakiutl territory. In 2012 the forest stewardship plan was extended for an additional 5 years.



There is no legal or principled reason to assume that…a First Nation's Aboriginal title and rights could not have survived the finalization of a treaty.

While the province consulted with the Kwakiutl about the effect of the decisions on the First Nation's treaty rights, it refused to consult in regards to the Kwakiutl's claims to Aboriginal title and rights outside the two-mile wide treaty area.

The Kwakiutl filed a judicial review of the decisions on the basis that British Columbia had not properly consulted and accommodated them for the effect of the decisions on their Aboriginal title, rights and treaty rights.

In 2013 the British Columbia Supreme Court decided against the Kwakiutl, concluding that the province's efforts to consult in relation to the forestry decisions had been adequate and that, therefore, it had fulfilled its legal obligations. However, the Court did grant the Kwakiutl a declaration that the province was under an ongoing duty to consult with them in regards to their Aboriginal title and rights.

Both parties appealed to the B.C. Court of Appeal. The Province's position was that the lower court erred in granting the declaration of an ongoing duty to consult in regards to asserted Aboriginal title and rights. The Kwakiutl argued that the lower court erred in not concluding that the province had breached the duty to consult and in not ordering the province to involve the federal government in decisions affecting their Aboriginal title, rights and treaty rights.

What the Court said

On the issue of the declaration granted by the lower court, the Court of Appeal agreed with the province. The Court concluded that the lower court had gone too far in granting the declaration. The Court held that the declaration inappropriately and unnecessarily sought to describe the duty to consult and address issues that were not before the court.

On the question of the adequacy of consultation, the Court agreed with the Kwakiutl. The Court held that the lower court had taken an overly narrow and technical approach to evaluating the adequacy of the province's consultation.

Importantly, the Court differentiated between judicial reviews of run-of-the mill government decisions and judicial reviews of government decisions that trigger the duty to consult Aboriginal peoples. The latter must be informed by the honour of the Crown and the importance of promoting reconciliation. In those situations the courts should not simply ask whether a decision was fair but more fundamentally whether the Crown's constitutional duty to consult and accommodate Aboriginal peoples had been fulfilled.

As an example of the lower court's problematic approach, the Court of Appeal concluded the judge had taken an overly narrow view of the type of impacts required to demonstrate an adverse effect on the Kwakiutl's interests. It was sufficient for the Kwakiutl to demonstrate that the province's decisions affected their ability to participate in decision-making and their ongoing ability to influence government policy that affected their lands and resources.

Similarly, the Court of Appeal held that the lower court erred in concluding that the Kwakiutl were not entitled to 'deep consultation' because there was a shortage of evidence of specific effects on their rights. The Court held that high-level effects on decision-making can be sufficient to trigger government obligations for deep consultation.

Finally, the Court held that the Kwakiutl could not be faulted for failing to participate in a consultation process premised on the erroneous assumption that their interests were limited to their treaty rights because fundamentally inadequate consultation processes do not preserve the honour of the Crown.

Why it matters

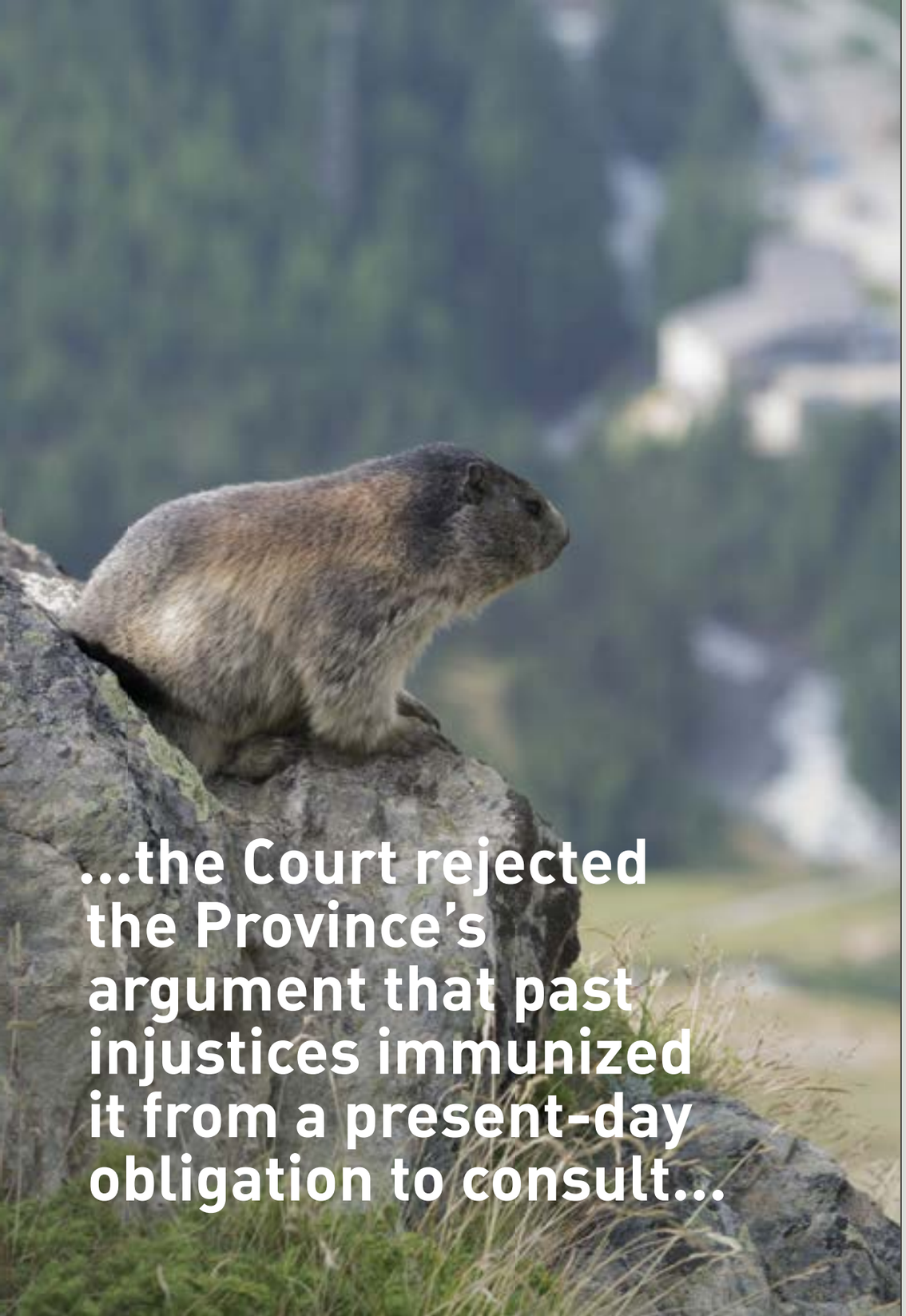
The Court of Appeal's decision is important for several reasons. First, it dispenses with the dubious argument that it is impossible for Treaty First Nations to also claim Aboriginal title and rights. The so-called 'historical treaties' were negotiated at different times, in different places, for different reasons and with different outcomes. There is no legal or principled reason to assume that, given the circumstances, a First Nation's Aboriginal title and rights could not have survived the finalization of a treaty.

Second, the decision is another example of the courts rejecting a site-specific assessment of impacts on Aboriginal title, rights and Treaty rights. The Court confirmed that high-level, strategic decisions can not only trigger the duty to consult but can also necessitate deep consultation.

Third, the decision speaks to First Nation jurisdiction over their lands. The duty to consult includes First Nation participation in decision-making and policy development.

Fourth, the decision is a welcome reminder that when it comes to the duty to consult, not just any consultation process will do. Consultation processes must proceed from the correct basis and must include the possibility of accommodating legitimate Aboriginal concerns. First Nations cannot be faulted for refusing to participate in a bankrupt consultation process.

Last, and perhaps most importantly, the decision is a much needed check to a growing tendency by some courts to take a narrow view of governments' obligations to consult and accommodate Aboriginal peoples. Relying on earlier decisions from British Columbia, the Court reiterated that because the duty to consult is a constitutional obligation, governments must be held to a high standard.



...the Court rejected the Province's argument that past injustices immunized it from a present-day obligation to consult...

CASE COMMENT

Adams Lake Indian Band v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations), 2013 BCSC 877

JUNE, 2013

The Duty to Consult —The Groundhog Day Conundrum

If government had its way, the duty to consult would suffer the plight of Bill Murray in *Groundhog Day*—devoid of a past and a future, doomed to the confines of the present.

With its decision in *Adams Lake*, the BC Supreme Court has made a further contribution to the developing law on whether there are past and future components to the duty to consult with mixed results for government and First Nations.

What it is about

In the 1960s Tod Mountain, an hour northeast of Kamloops, BC, was a local ski hill with one ski run and a rickety lift. In the early 1990s, encouraged by the provincial government's dreams of a series of Whistler-like ski resorts across the province, the Nippon Cable Company took control of the ski hill.

In 1993 the Province approved a Master Development Agreement (MDA) for a phased development over a 4,140 hectare area including numerous ski lifts and runs, a golf course, hiking and mountain biking trails and a 'village' centre with condos, hotels, restaurants and shops—the Sun Peaks Resort was born.

At the time the MDA was approved, the provincial government's position was that Aboriginal title had long ago been extinguished through provincial legislation and that Aboriginal rights were of little consequence until proven in court. Given the Province's position, it is unsurprising that it gave no regard to the Secwepemc Nation's Aboriginal title and rights at the time it approved the MDA.

For nearly 15 years Secwepemc opposition to Sun Peaks, largely led by the Adams Lake Indian Band, has been in and out of the news and the courts. The BC Supreme Court's most recent decision is in regards to a challenge to the Province's decision to allow new ski runs and a ski lift to be built on Mount Morrisey.

What the Court said

The duty to consult arises when the government contemplates conduct or a decision that will potentially affect Aboriginal title and rights. The first issue the Court had to deal with was the Province's argument that there was no duty to consult because the approval of the new ski lift and runs was not really a 'decision'. Instead, the Province was simply issuing approvals it had committed to back in 1993 through its decision to approve the MDA. According to the Province, the Supreme Court of Canada in *Rio Tinto* held that there is no requirement to consult about past decisions (e.g. the 1993 MDA decision), and therefore there was no need to consult about further approvals to expand Sun Peaks.

The Court rejected this argument. The Court held that the 1993 MDA had not authorized Sun Peaks to actually build anything—it still needed further operational approvals. The Court reasoned that while subsequent operational decisions may have a lesser effect on Aboriginal title and rights, and so attract a lower level of consultation, this did not eliminate the requirement for consultation.

The Court also reasoned that since the MDA required Sun Peaks to comply with all laws in force at the time a specific phase of the development proceeded, it now had to comply with the common law duty to consult, even if the duty had not yet been recognized in 1993. The Province could not shield itself from its obligation to consult based on its earlier, long-held assumption that it could issue authorizations to Sun Peaks regardless of First Nation interests.

The Court also concluded that given that there was no substantial consultation with Adams Lake when the MDA was approved in 1993, it would not be consistent with the honour of the Crown to allow the Province to now avoid consultation on operational decisions.

Although the Court rejected the Province's argument that past injustices immunized it from a present-day obligation to consult, it also rejected Adams Lake's argument that consultation had to include possible future impacts of the continued development of Sun Peaks. The Court reasoned that the authorizations for the ski lift and runs were an end in themselves. Any further future impacts would require additional authorizations. Consequently, it was reasonable and correct for the Province to restrict consultation to the effects of the current decisions.

Based on the specific facts of the level of consultation required and the adequacy of the Province's consultation and accommodation efforts, ultimately the Court rejected Adams Lake's argument that the Province had failed to discharge its obligation to consult and accommodate before issuing the authorizations to develop Mount Morrisey.

Why it matters

In the last several years 'past infringements' and cumulative effects have been at the forefront of the unresolved issues surrounding the duty to consult. Governments and companies have read the Supreme Court of Canada's decision in *Rio Tinto* as closing the door on the issue of past infringements. First Nations, supported by Chief Justice Finch's reasons in *West Moberly*, have read *Rio Tinto* as leaving open the possibility of consultation including the effects of past decisions. Likewise, the law remains unsettled as to if and when the cumulative effects of a proposed project must be considered as part of the duty to consult.

The BC Supreme Court's decision in *Adams Lake* does not settle either of these questions. But it does make it more difficult for government to simply ignore the effect of past decisions while also increasing the challenge First Nations face when seeking consultation on the cumulative effects of a series of interrelated government decisions.

PHOTO: STAN WILLIAMS

CASE COMMENT

Louis v. British Columbia (Minister of Energy, Mines, and Petroleum Resources), 2013 BCCA 412

OCTOBER, 2013

Columbus' Ghost: Past Infringements and the Duty to Consult

When it comes to upholding the honour of the Crown, there is no clean slate. As much as governments may wish otherwise, Indigenous peoples throughout Canada continue to demand recognition of and redress for past wrongs. The B.C. Court of Appeal's decision in Louis exemplifies the continuing uncertainty over whether and when the duty to consult and accommodate is the proper forum for addressing unresolved infringements of Aboriginal rights, title and Treaty rights.

What it is about

In 1965 British Columbia authorized an open-pit molybdenum mine in Stellat'en territory about 200 kilometres west of Prince George for an indefinite period. In 2003 the mine operator, Thompson Creek Metals, estimated the mine would close in approximately 10 years. However, in 2007 Thompson Creek Metals decided to extend the life of the mine by expanding and modernizing its operations. Its plans required amendments to its primary mining permit as well as a series of other authorizations.

The Province restricted its consultation efforts with the Stellat'en to the specific new effects of each individual amendment and authorization required for the expansion. The Stellat'en insisted on consultation on the proposed mine expansion as a whole and that it include the effects of the mine's 40-plus year history of operations. The BC Supreme Court endorsed the Province's approach and the Stellat'en appealed.

Whether the duty to consult applies to past, existing and ongoing infringements of these

What the Court said

The Court of Appeal concluded that because there was no high-level or strategic Provincial decision requiring consultation on the project as a whole, the Province was correct to consult with the Stellat'en on a piecemeal basis, considering each permit or amendment application separately. Importantly, the Stellat'en did not identify any potential adverse effects due to the individual authorizations. Therefore, according to the Court, the Province had fulfilled its legal obligation to consult.

While it acknowledged that the practical, cumulative effect of the Province's authorizations was to extend the life of the mine, the Court held that this was not a new adverse impact on Stellat'en Aboriginal title and rights because the mining company had long ago acquired from the Province title to the land and the minerals.

Why it matters

Across Canada, Indigenous peoples endure the accumulated history of the denial of their Aboriginal rights, title and Treaty rights. Whether the duty to consult applies to past, existing and ongoing infringements of these rights is one of the most important outstanding questions in Aboriginal law.

For over a hundred years mines were dug, dams built and roads pushed through without serious consideration for the rights of Indigenous people. Following the Supreme Court's 2004 Haida decision, Indigenous people began to consider whether the duty to consult and accommodate might open the door for addressing these past, existing and ongoing failures to consult and accommodate.

For some, the Supreme Court's 2010 *Rio Tinto* decision appeared to slam shut that door. The decision can and has been read to exclude past, existing and ongoing infringements from the duty to consult and accommodate. But, as the BC Court of Appeal observed in *West Moberly*, this is likely a misreading of the decision.

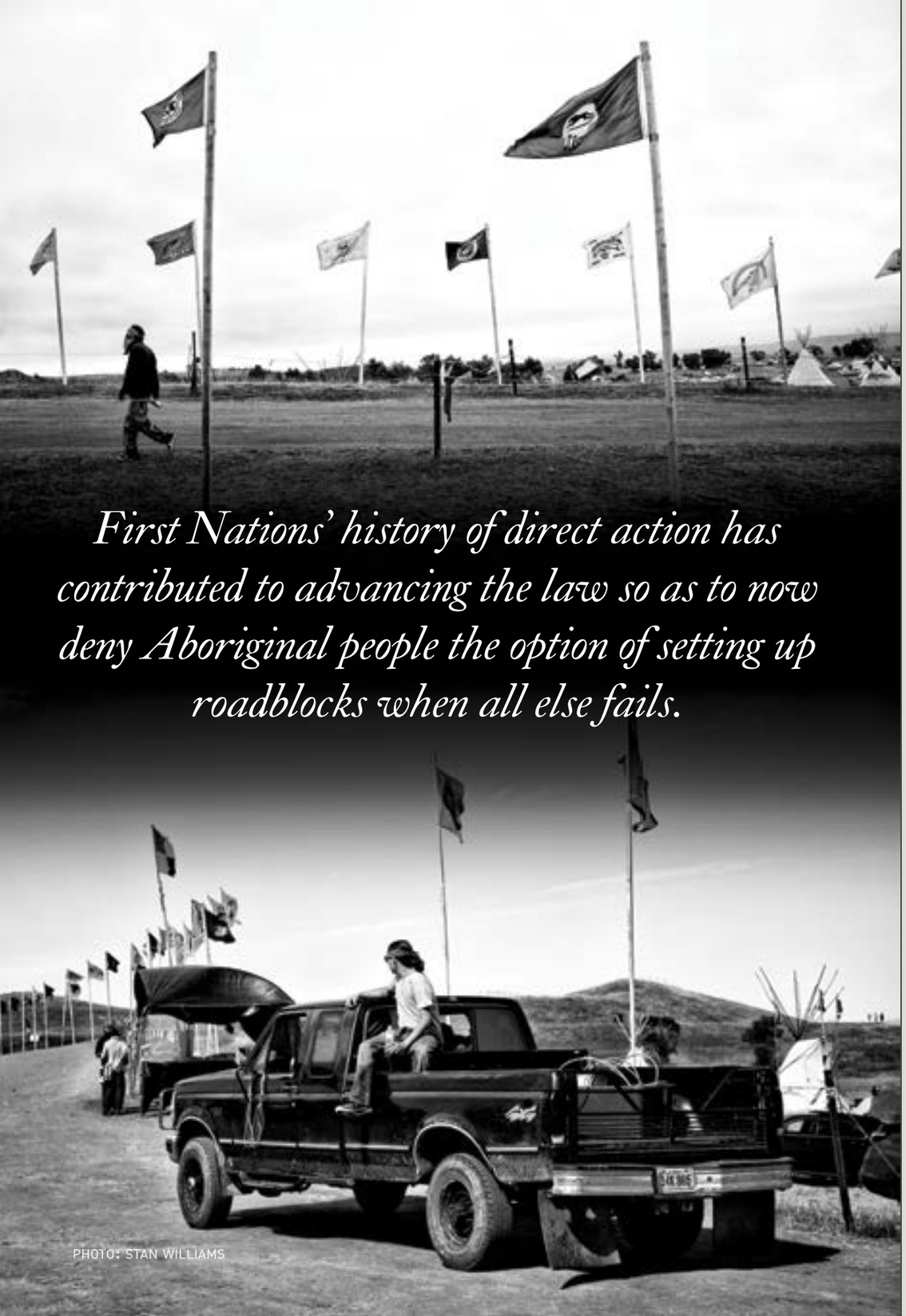
The Supreme Court in *Rio Tinto* was focused on the question of when the duty to consult arises, not the content of consultation once the duty is triggered. The Court held that historic or past infringements, on their own, do not give rise to a fresh duty to consult. For those wrongs, Indigenous peoples' only viable legal option is to sue the government for damages.

But the Court in *Rio Tinto* left the door open on two important issues. First, the Court clarified that it was not answering the question of whether continuing and ongoing infringements might trigger the duty to consult—that was an issue for another day. Second, the Court indicated that if new adverse effects did trigger the duty to consult, a prior or continuing breach of the duty might be part of consultation and accommodation discussions.

Where does this leave the B.C. Court of Appeal's recent decision in *Louis*? The only way to read the decision consistent with *Rio Tinto* and *West Moberly* is to understand it is another case, like *Rio Tinto*, primarily about whether there were new adverse effects on Stellat'en Aboriginal title and rights sufficient to trigger the duty to consult. The Court concluded there were not. When the Court in *Louis* commented that the Province did not have to include past infringements in the consultation process, it must have meant that this was because a fresh duty to consult had not been triggered. Otherwise, the decision is out of line with *Rio Tinto* and *West Moberly*.

The wrongs of colonization are written on the lands of the Indigenous Peoples of Canada. Indigenous people witness and endure them on a daily basis. Whether the duty to consult and accommodate is capable of addressing these wrongs remains an open question.

rights is one of the most important outstanding questions in Aboriginal law.



First Nations' history of direct action has contributed to advancing the law so as to now deny Aboriginal people the option of setting up roadblocks when all else fails.

PHOTO: STAN WILLIAMS

CASE COMMENT

Behn v. Moulton Contracting Ltd., 2013 SCC 26

MAY, 2013

The Duty to Consult —A Roadblock to Direct Action

In British Columbia, civil disobedience and the advancement of Indigenous peoples' legal rights have gone hand in hand. There is a long history of Indigenous people, frustrated with government and business running roughshod over their Aboriginal rights and title, setting up roadblocks to stop resource development, especially logging.

In a bitter twist of irony, First Nations' history of direct action has contributed to advancing the law so as to now deny Indigenous people the option of setting up roadblocks when all else fails.

What it is about

The Behn family of the Fort Nelson First Nation in Treaty 8 have a trapline. The British Columbia provincial government issued forestry licences and a road permit to Moulton Contracting to log trees within the Behns' trapline. In the fall of 2006, the Behns set up a camp on the road to the proposed logging area, effectively stopping Moulton from logging.

Moulton filed a lawsuit against the Behns and the Fort Nelson First Nation seeking damages for interference with its logging operations. In defence to the lawsuit, the Behns wanted to argue that they were not properly consulted about the proposed logging and that it would infringe their Treaty 8 rights to hunt and trap.

The Court's decision raises the possibility, in specific circumstances, of individual First Nation members opposing government activity based on an infringement or breach of their treaty rights.

Moulton successfully argued at the B.C. Supreme Court and the B.C. Court of Appeal that the duty to consult and treaty rights are collective rights of a First Nation and that individual members, such as the Behns, cannot rely on them as a defence when being sued for setting up a roadblock.

What the Court said

The Supreme Court of Canada ruled against the Behns. The Court held that the Crown's duty to consult is owed to a First Nation as a whole, not to individual members. Unless individual members are authorized to represent a First Nation, there is no obligation on government to consult with them.

However, the Supreme Court did leave open the possibility of individuals acting on their own to protect their treaty rights. The Court noted that in certain situations an individual First Nation member might have a special connection to exercising a treaty right in a particular part of a First Nation's territory. On this basis, individual members might be able to demand that government deal with them directly if there is a breach of treaty or infringement of treaty rights.

But in the case of the Behns, the Supreme Court held that even if they could have, as individuals, sought to enforce their treaty rights to hunt and trap, they should have done so by launching their own legal challenge to the forestry licences and road permit issued to Moulton, not through direct action. The Court would not countenance the Behns setting up a roadblock and then defending themselves by relying on their treaty rights because, according to the Court, that would endorse the type of 'self-help remedy' that brings the administration of justice into disrepute.

Why it matters

The decision will cause Indigenous people across the country to think twice before taking the law into their hands to protect their lands and culture by blocking access to resource companies and others who have government authorization to undertake development activities on their lands. But at the same time, the Court's decision starts to open a door that up until now has appeared closed to Indigenous people.

The Court's repeated description of Aboriginal and treaty rights as collective, not individual rights, has created a presumption that individual First Nation members cannot seek to enforce Aboriginal and treaty rights—this could only be done by a representative of the First Nation as a whole. The Court's decision raises the possibility, in specific circumstances, of individual First Nation members opposing government activity based on an infringement or breach of their treaty rights. While it is unclear how many individual First Nation members have both the motivation and the means to act on their own to defend their treaty rights, they now have a legal argument for doing so.

But for the Behn family, and especially patriarch George Behn, the Court's decision must be a cruel irony. Now in his late 80s, George continues to hunt and trap as his ancestors did before him. As the former Chief of the Fort Nelson First Nation, George was part of a generation of First Nation leaders who protested while government and industry refused to respect Aboriginal and treaty rights. These leaders often stood alongside First Nation members who, out of desperation and commitment to principles, erected roadblocks to protest government inaction. This on-the-ground activism played an important role in developing Aboriginal law, including the Crown's obligations to consult and accommodate. Now, the presence of those new legal obligations, and the opportunity for Indigenous people to insist in court that they are enforced, has undermined the Behn family's efforts to defend George's trapline from logging.

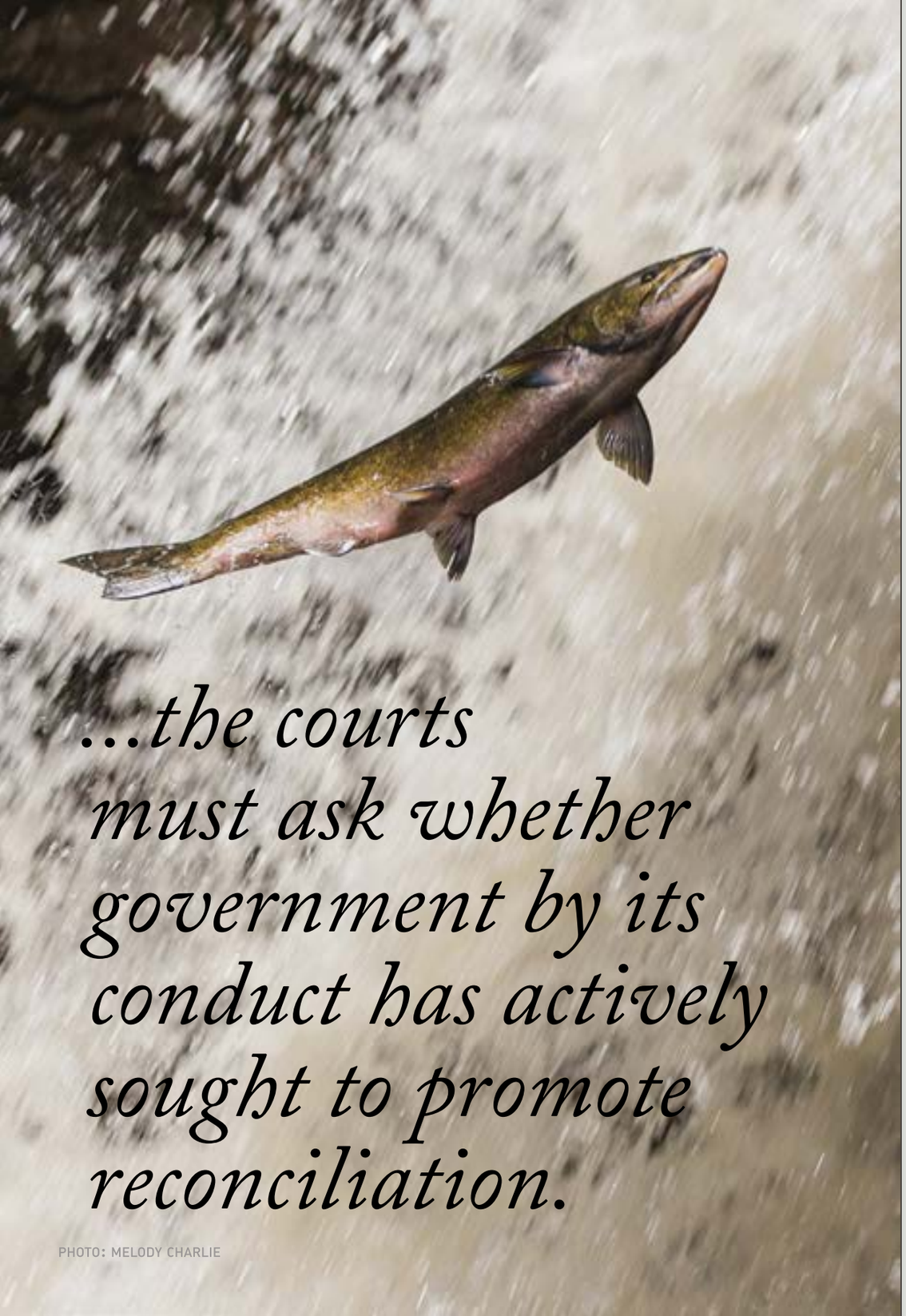


PHOTO: MELODY CHARLIE

NOVEMBER, 2015

Good News for the Duty to Consult

The duty to consult and accommodate isn't a blunt instrument.

For it to work First Nations and government must be willing to participate in an open process of information sharing and honest listening. They must make good faith attempts to negotiate effective and responsive agreements.

Too often governments fail to live up to their end of the bargain.

Instead of meaningful engagement, they smother First Nations with hollow procedural niceties. Rather than work on solutions, they work on developing their consultation logs.

Most First Nations caught in a duty-to-consult house of mirrors have little recourse. They lack the resources to take governments to court. Those that manage to muster a legal challenge often face another obstacle—judges with a restricted view of government's obligations to consult and accommodate First Nations.

Several recent court decisions have offered a welcomed corrective to governments' and judges' often narrow vision of the duty to consult. This can be seen most clearly in decisions focused on the question of what specific government action or decision making triggers the duty.

Skip Ahead if Case Law Bores You

In *Huron-Wendat Nation*, the Federal Court was faced with a challenge to an agreement-in-principle (AIP) between Canada and Innu First Nations. Applying a generous and purposive approach to the question of whether the duty to consult had been triggered by the AIP, the Court concluded it was obvious the AIP had an inevitable impact on the Huron-Wendat and therefore Canada should have consulted them before it was signed.

Similarly, in *Courtoreille*, Mikisew Cree First Nation's challenge to the Harper government's first and second omnibus bills, the Federal Court held that while Mikisew Cree had not demonstrated any actual on-the-ground harm to Aboriginal rights due to the legislation, a reasonable person would recognize the potential risk. This was sufficient to trigger the duty to consult and accommodate.

While the Federal Court of Appeal in *Hupacasath* dismissed a challenge to Canada's foreign investment promotion and protection agreement (FIPA) with China, it endorsed a generous and purposive approach to the question of when the duty to consult arises. The Court emphasized that the duty is intended to prevent a present, real possibility of harm caused by government's dishonourable conduct. If a government agreement, such as a FIPA, raised the prospect of a future decision and it was possible to estimate the probability of that decision adversely affecting Aboriginal rights, the agreement would trigger the duty to consult.

The most pointed recent rejection of a narrow view of the duty consult is found in the British Columbia Court of Appeal's *Chartrand* decision. Faced with the lower court's approval of the provincial government's refusal to consult with the Kwakiutl First Nation about its unrecognized Aboriginal title and rights on Vancouver Island, the Court of Appeal went back to well established principles. It faulted the lower court for taking a restricted view of the duty to consult and reminded the province that to uphold the honour of the Crown its processes must demonstrably promote reconciliation.

The Quebec Court of Appeal's criticism in *Corporation Makivik* of the provincial government's failure to adhere to the spirt and intent of the James Bay Agreement similarly emphasized that the duty to consult cannot be reduced to mindless procedures. For it to be meaningful, government must engage with First Nations with a "sufficiently open mindset."

The Federal Court of Appeal struck a similar note in *Long Plain*, its review of the federal government's process for selling the Kapyong Barracks in Winnipeg. The Court criticized Canada for taking an overly narrow, technical review of its obligations. Government consultation, said the Court, must be imbued by honour, reconciliation and fair dealing.

...the duty to consult

Back to the Interesting Stuff

Too often governments and the courts lose sight of the special place of the duty to consult in Canadian law. Recent court decisions reminding us all of the broader principles and purpose of the duty to consult and accommodate are an important corrective.

As the British Columbia Court of Appeal noted in *Chartrand*, when a government decision is challenged on the basis of the duty to consult, the courts should not simply ask whether the decision was fair. More importantly, the courts must ask whether government by its conduct has actively sought to promote reconciliation.

This demanding standard is necessary because the duty to consult is not simply an administrative requirement—it is a constitutional imperative. The more often government decision-makers recognize this higher obligation, and courts enforce it, the closer we will come to recognizing and respecting Indigenous Peoples' central legal, historical and future place in Canadian society.

COURT DECISIONS REFERRED TO:

Canada v. Long Plain First Nation, 2015 FCA 177

Chartrand v. British Columbia, 2015 BCCA 345

Corporation Makivik c. Québec (Procureure générale), 2014 QCCA 1455

Courtoreille v. Canada, 2014 FC 1244

Hupacasath First Nation v. Canada, 2015 FCA 4

Huron-Wendat Nation of Wendake v. Canada, 2014 FC 1154

...is not simply an administrative requirement—it is a constitutional imperative...

SEPTEMBER, 2015

Negotiate or Litigate?

While Indigenous Peoples across Canada vary widely in their challenges and opportunities, they all have two fundamental objectives in common: to benefit from and exercise jurisdiction over their lands.

With governments often unwilling to address First Nations' real concerns, achieving these objectives increasingly depends on making agreements with industry to share benefits from development and to participate in ongoing decision-making about how these developments will proceed.

Certain proposed developments are simply beyond the pale and the affected First Nation will never consent to them proceeding, regardless of what benefits and decision-making powers are on offer. More often a First Nation will be open to discussing how and on what terms a proposed development might proceed in its territory.

Typically, a First Nation reviews the project with community members and hires consultants to advise on the environmental, social and economic impacts of a proposed development. At the same time, they work on negotiating the best agreement possible with government or the company (or both), one that includes not just financial benefits but also many other provisions including processes for environmental monitoring and protection.

If negotiations are successful, leadership takes the tentative agreement, and all the other information that has been gathered, to the community. They explain how the project is likely to negatively affect the First Nation and its lands, how it will hopefully benefit current and future generations and how the First Nation will be involved in its ongoing operation. It is then up to the community to decide whether or not to give its consent for the project to proceed.

But sometimes First Nations, government and industry are unable to reach a negotiated agreement. That's when the question arises for many First Nations: negotiate or litigate?

The decision to litigate is most often taken because government has failed to meet its obligations to respect Aboriginal title, rights and Treaty rights and the First Nation and the company cannot agree on how to resolve the issues between themselves. First Nations are left with few options. They either grit their teeth and continue to accept the status quo or a subpar agreement, or they go to court.

As much as war analogies proliferate in litigation circles, they are rarely applicable when a First Nation goes to court. This is because even when they win a legal battle, First Nations are not simply handed solutions by the court—as I often explain to my clients, judges are not Santa Claus.

At best, and especially when First Nations are seeking to enforce their Aboriginal title, rights or Treaty rights, the courts will make orders or declarations that will hopefully set the table for negotiated agreements with either government or industry, but they do not mandate an agreement or its terms. For First Nations success in court usually leads to more negotiations.

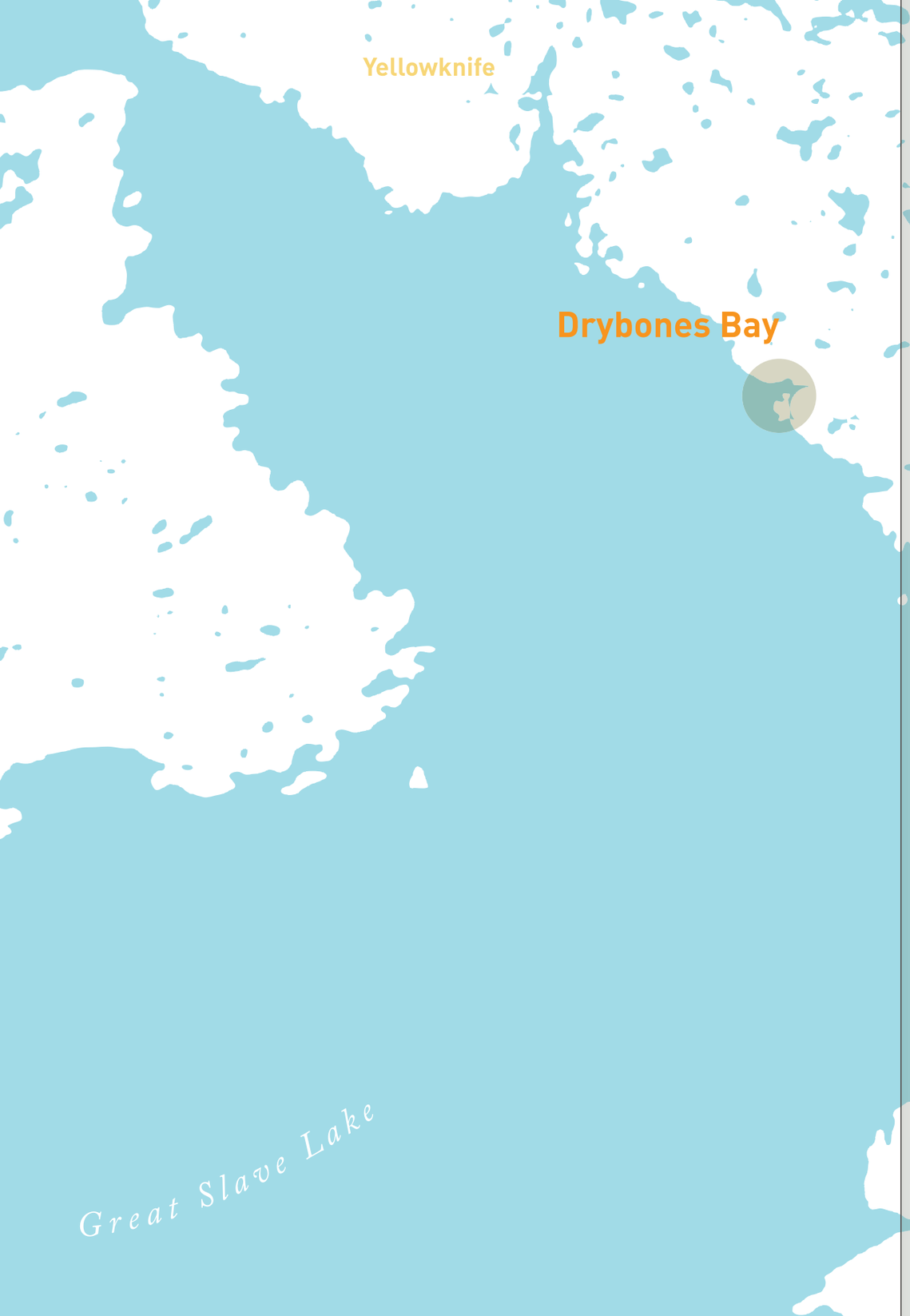
Ironically, it's not just successful court challenges that result in negotiated settlements. When a First Nation loses at the first level of court it often appeals. Before the appeal is heard, government and/or the company often reach a negotiated settlement with the First Nation and the appeal is dropped. This can happen for a variety of reasons.

First, government and the company might worry that the appeal judges will disagree with the lower court's decision. It might be better to reach a settlement and avoid the possibility of a First Nation win on appeal that sets a wider precedent .

Second, even though the First Nation lost the first round, by pursuing the case to court and then filing an appeal it has demonstrated it is in the fight for the long haul. Some governments and many companies decide they do not want the negatives that come with drawn-out litigation, including uncertainty around permits, difficulty raising capital and delays in construction.

The reality is that negotiation and litigation are not mutually exclusive. While most First Nations prefer a negotiated agreement based on their consent to a project that will affect their Aboriginal title, rights and Treaty rights, they also realize that government and industry might simply have a different understanding of what is required.

If the government response is unsatisfactory and it reaches an impasse with the company, a First Nation hopefully has access to other options to defend its constitutional rights. Litigation is often the last recourse to achieving successful negotiations.



CASE COMMENT

Yellowknives Dene First Nation v. Canada, 2015 FCA 148

JULY, 2015

The Duty to Consult —A Narrow Vision

First Nations across Canada are frustrated with a lack of land use planning and consideration for the cumulative environmental effects of development on their lands. This decision from the Federal Court of Appeal exemplifies their concerns and illustrates how difficult it is to get the courts to address them.

What it is about

The Drybones Bay area on the north shore of Great Slave Lake in the Northwest Territories is of great importance to the Yellowknives Dene First Nation. In recent years it has also become the focus of increasing mineral exploration. Local First Nations have repeatedly warned that their Aboriginal and Treaty rights are being eroded due to the cumulative environmental effects of various projects and a lack of land use planning.

While considering an application for an earlier project, the Mackenzie Valley Environmental Impact Review Board recommended to the federal government that a 'Plan of Action' be developed for the area and that it include a cumulative effects assessment and substantial input from First Nations. The federal government rejected the Review Board's recommendation.

...governments across the country are sanctioning the piecemeal infringement and extinguishment of Indigenous Peoples' constitutional rights.

JERICHO DIAMOND MINE PIT
PHOTO: TOM CHURCHILL

Subsequently, the Review Board considered a mining company's application for a five-year diamond exploration program in the Drybones Bay area. The Review Board decided the project would not have significant environmental effects and did not require an environmental impact review.

The Yellowknives Dene First Nation's application for judicial review of the Review Board's decision was dismissed by the Federal Court. The First Nation appealed to the Federal Court of Appeal.

What the Court said

The Court of Appeal rejected the First Nation's argument that the Review Board had failed to consider the cumulative effects of the diamond exploration program. According to the Court of Appeal, the Review Board had considered potential environmental effects, including cumulative effects, and had concluded it would not have significant adverse impacts because it was largely over water and because the lands had already been disturbed by earlier developments. The Court held that the Review Board's findings were not unreasonable because they were supported by the evidence and were within the range of possible outcomes.

The Court of Appeal also rejected the First Nation's argument that the duty to consult and accommodate had not been fulfilled because the Review Board lacked the authority to mandate land use planning in the Drybones Bay area. The Court held that the Review Board's conclusion that the project was unlikely to adversely affect the environment meant that land use planning was not necessary to accommodate the First Nation's concerns.

Why it matters

By refusing to seriously consider cumulative effects as part of the duty to consult and by limiting consultation to discrete decisions without acknowledging overall project impacts, governments across the country are sanctioning the piecemeal infringement and extinguishment of Indigenous Peoples' constitutional rights.

Land use planning that respects Indigenous jurisdiction, knowledge and values would address this serious issue. But, as the *Yellowknives* decision illustrates, without control over their lands First Nations are dependent on government's willingness to support First Nation-driven land use planning. Unfortunately, governments either impose their own narrow, self-serving vision of land use planning (Ontario's *Far North Act* is an example), or they reject land use planning altogether.

The *Yellowknives* decision also illustrates the challenges for First Nations in achieving effective results through the courts. When governments follow the minimum procedural requirements for consultation, even if they do not take meaningful steps to address First Nation concerns that arise from the consultation, it is difficult for First Nations to persuade the courts to intervene.

On questions of fact, the courts defer to government decision-makers. They ask whether consultation was 'adequate,' whether there is any evidence to support a government decision and whether the decision was in the range of possible outcomes. These are relatively low hurdles for governments to overcome.

As the Supreme Court has stated, the duty to consult and accommodate is a constitutional imperative. It includes an obligation on both provincial and federal governments to engage with First Nations in good faith with the intention of meaningfully addressing their concerns. Until lower courts consistently apply these principles, many First Nations will continue to be left frustrated and disappointed with the duty to consult.

NOVEMBER, 2014

How to Fulfil the Duty to Consult

As governments, industry and First Nations continue to disagree on what it takes to fulfil the duty to consult, resource development projects stall and public frustration grows. This is despite that for over ten years, and culminating in the recent *Tsilhqot'in* decision, the courts have established and elaborated on the principles underpinning the duty to consult.

If governments, industry and First Nations are going to trust each other and work together we need to dispel common misconceptions about the duty to consult, agree on basic requirements and outline a path to reconciliation.

Duty to Consult is not Public Consultation

First, the duty to consult is qualitatively different than consultation with the general public. It is a constitutional duty owed solely to Aboriginal people. It exists because Indigenous peoples with their own laws and customs controlled the lands and waters now called Canada before non-Indigenous people arrived. European states bent on colonization recognized that based on their own laws they could not simply ignore the fact of the original inhabitants—Indigenous and non-Indigenous interests had to be reconciled. The duty to consult is part of this ongoing national project.

Minimum Requirements

While specific obligations vary with the circumstances, the courts have identified minimum requirements for meaningful consultation with First Nations. Consultation must begin at the earliest stages of planning and cannot be postponed. Governments must

consult in good faith with an honest intention of substantially addressing Indigenous peoples' concerns. Government officials must have the required powers to change the project because consultation without the possibility of accommodation is meaningless.

Governments must listen carefully to concerns and work to minimize adverse effects on Aboriginal rights and treaty rights. They should be open to abandoning or rejecting proposals. If there is a decision to proceed, governments should demonstrably integrate responses to Indigenous peoples' concerns into revised plans of action. If suggestions for changes to a project are rejected, an explanation is required.

As governments love to remind First Nations, there is no Aboriginal veto. This is likely the most misunderstood statement surrounding the duty to consult. The implication is that because there is no veto, ultimately governments can do what they want and First Nations cannot stop them. That line of thinking is incompatible with the requirements outlined above. It leads to distrust, frustration and litigation.

Importantly, consultation is not addition. You do not add up the number of meetings and comments to determine whether consultation has been adequate. Consultation must be more than an opportunity for Indigenous peoples to blow-off steam.

In sum, consultation requires sufficiently-mandated government officials to enter into good faith negotiations with Indigenous peoples based on flexible proposals, to carefully listen and respond to concerns, and to be open to changing their plans.

...there is another path to reconciliation —it is based on consent.

"Duty to Consult Is Not Public Consultation"

Consultation Plus

And then there are the projects that require more than consultation.

The consultation requirements described above apply to First Nations with Aboriginal rights not yet recognized by government. For First Nations with recognized rights, including treaty First Nations, governments may have to do more than consult. They may have to justify any infringement of those rights. This can be thought of as 'consultation plus.'

When justification is required, in addition to the duty to consult, governments must demonstrate that the project contributes to a compelling and substantial objective consistent with their fiduciary duty to Indigenous Peoples. This is much more than deciding the project is in the public interest. To meet the justification test, governments must demonstrate that the project is designed to minimally affect Aboriginal rights, and that the governments' broader public goal in respect of the project advances the overarching objective of reconciliation.

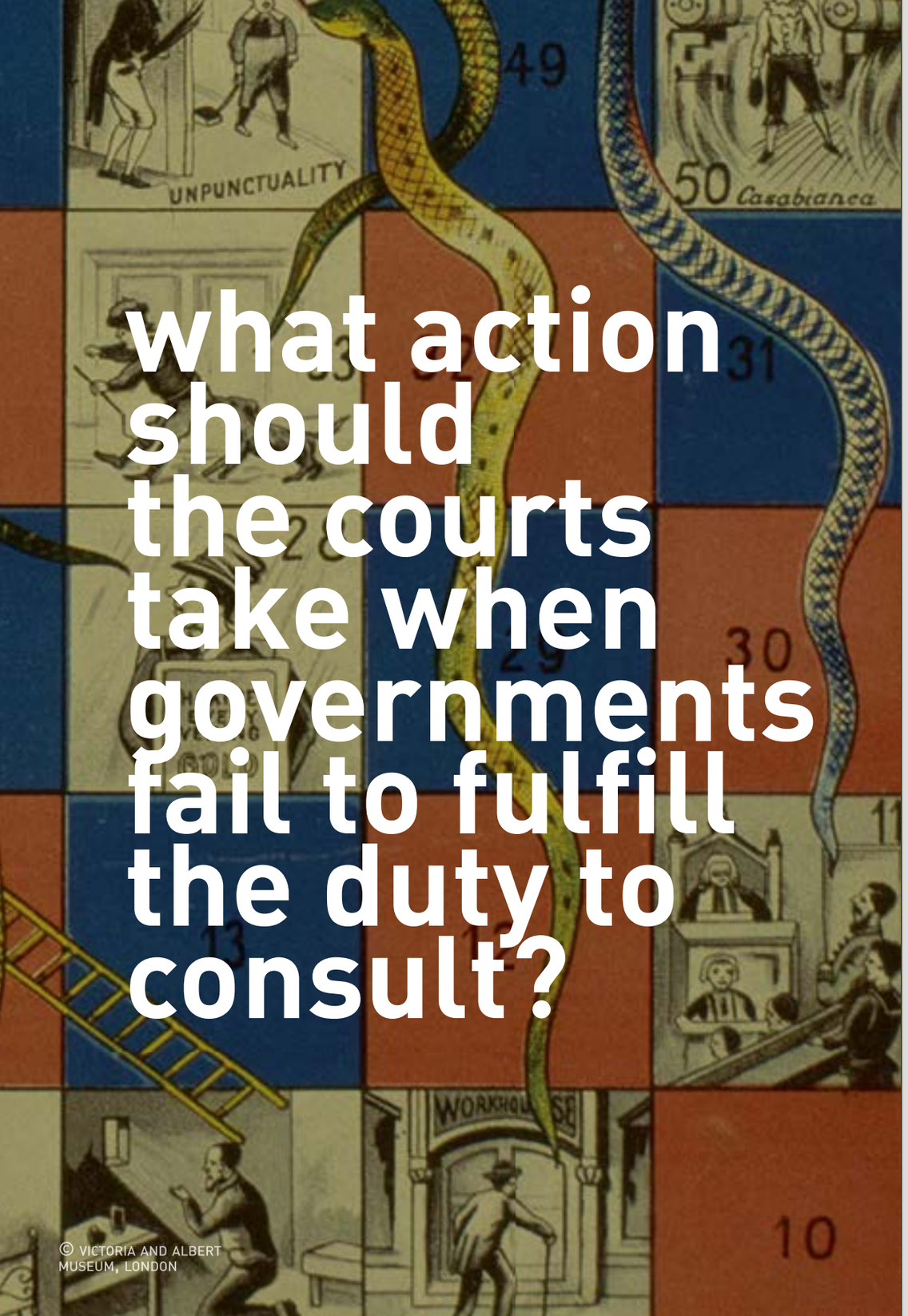
Consent Based Reconciliation

No one suggests these requirements are not onerous. They should be, considering what is at stake—the overriding of constitutionally-protected rights, a protection intended to reconcile newcomers' interests with those of the Indigenous peoples of Canada.

Of course, there is another path to reconciliation—it is based on consent.

Were governments to seriously seek Indigenous peoples' consent they would likely find that in many cases there are respectful and mutually beneficial ways forward. Where no such path exists, it's likely that the project could never have been justified in the first place.

PHOTO: ALLEN TOULOUSE



JANUARY, 2017

The Duty to Consult at the Supreme Court in 2017

In 2017 the Supreme Court released four decisions which elaborated on the substance and application of the duty to consult and accommodate *(Clyde River (Hamlet) v. Petroleum Geo-Services,* 2017 SCC 40; *Chippewas of the Thames First Nation v. Enbridge Pipelines,* 2017 SCC 41; *First Nation of Nacho Nyak Dun v. Yukon,* 2017 SCC 58 and *Ktunaxa Nation v. British Columbia,* 2017 SCC 54).

Based on these four decisions, below I summarize the Court's current thinking on the duty to consult on specific issues and offer my own thoughts on what it means for the present and future of the duty to consult.

DELEGATION

Background on Delegation

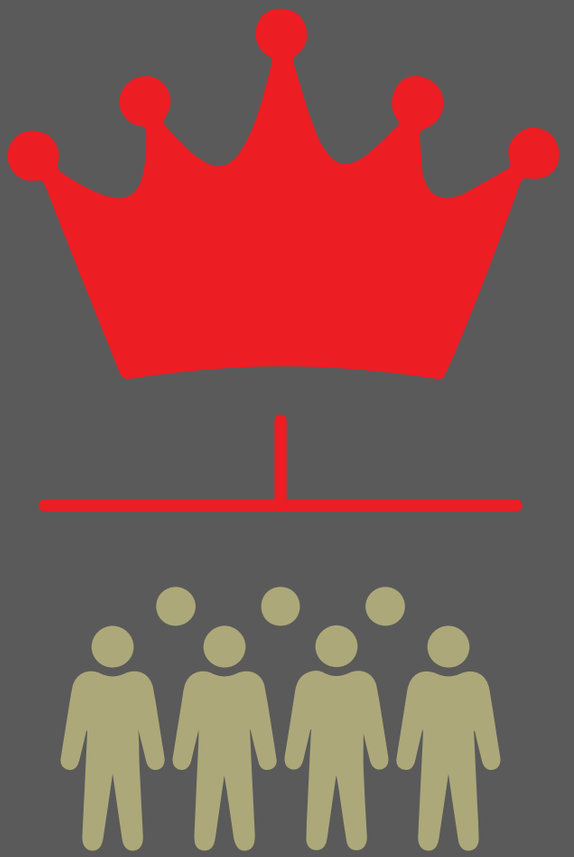
Governments, provincial and federal, delegate many decisions to tribunals which, like courts, consider evidence and hear submissions from applicants and intervenors before rendering their decisions. Soon after the Supreme Court's 2004 *Haida Nation* decision the question arose as what, if any, responsibility did these administrative tribunals have to ensure that the duty to consult is fulfilled.

The first major legal pronouncements on the issue were from the B.C. Court of Appeal in 2009 with *Kwitwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 and *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67. The latter decision was appealed to the Supreme Court and became *Rio Tinto v. Carrier Sekani Tribal Council*, 2010 SCC 43.

Delegation Principles

In *Chippewas* and *Clyde River* the Court, relying on *Rio Tinto*, confirmed established principles, added further detail and answered outstanding questions regarding administrative tribunals and the duty to consult. The Court explained that:

- an administrative tribunal's decision alone may be sufficient to trigger the duty to consult (i.e. a government department's involvement is not necessary) (*Chippewas* 30 & 31);
- the Crown can rely wholly or in part on an administrative tribunal to fulfil the duty to consult (*Chippewas* 2);
- an administrative tribunal can be involved in consultation and accommodation and also decide whether the duty has been fulfilled (*Chippewas* 34)
- it must be made clear to First Nations that the Crown intends to rely on the administrative tribunal's processes as part of fulfilling the duty to consult (*Clyde River* 46);
- if the Crown intends to rely on an administrative tribunal to completely discharge the duty to consult, the tribunal must have the necessary statutory powers to fulfil the duty (*Chippewas* 32);
- the Crown always holds ultimate responsibility for ensuring that consultation and accommodation is adequate (*Clyde River* 22);
- when First Nations who are parties to modern treaties consider that an administrative tribunal's process is inadequate to fulfil the Crown's duty to consult, they should communicate directly with government and request direct Crown engagement in a timely manner (*Clyde River* 22);
- once the duty to consult is triggered an administrative tribunal can only proceed to make a decision if consultation is adequate (*Clyde River* 39);
- the central question is whether the administrative tribunal has the required powers in the specific case to fulfill the duty to consult (*Clyde River* 30);
- if an administrative tribunal lacks the requisite powers to fulfill the duty to fulfil consult, it should suspend its processes or deny a requested authorization until government has stepped in to meet the outstanding obligations (*Clyde River* 32); and
- if the administrative tribunal does not have the necessary powers to fulfil the duty to consult or does not provide adequate consultation and accommodation, the Crown must provide further avenues for consultation prior to any approvals—otherwise the decision can be quashed by the courts (*Chippewas* 32).



Implications

A few thoughts on the above. First, while the Court referred specifically to First Nations with modern treaties and their right to seek direct consultation with the Crown, there is no reason why the same principle would not apply to all First Nations, including those without treaty or with so-called historical treaties.

Also, there is no reason why this principle should not apply in all situations when the Crown delegates the duty to consult, including when the government delegates the procedural aspects of the duty to 3rd party proponents. In the past, lower courts have failed to accept that First Nations have a right to direct consultation with the Crown (see for example *Wabauskang First Nation v. Minister of Northern Development and Mines*, 2014 ONSC 4424). The Court's comments on this issue are important for First Nations across the country who are frustrated with the delegation of the duty to consult and government's unwillingness to become directly involved.

Second, the Court's confirmation that an administrative tribunal cannot proceed to make a decision if it lacks the powers to ensure adequate accommodation confirms a principle from *Rio Tinto* that potentially has wide-ranging application. There is no reason why this principle should not apply in all situations when a government decision-maker contemplates making a decision that triggers the duty to consult. For example, the principle should extend to municipalities which routinely make decisions which trigger the duty to consult. Consequently, the Supreme Court's reasoning in *Chippewas* and *Clyde River* likely undercuts the precedential value of *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379, the leading lower-court decision on the issue of the duty to consult and municipalities.

Finally, the question of whether an administrative tribunal can be involved in fulfilling the duty to consult and ultimately decide whether the duty has been fulfilled has been lurking on the margins of duty to consult law for many years (see for example *An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CARSWELLBC 3637 (B.C.U.C.)). In essence, the Court in Chippewas held that an administrative tribunal can wear both hats because tribunals often carry out overlapping functions while remaining a neutral arbiter. The Court's reasoning is circular and unconvincing. We should not assume that this is the final word on a thorny and important issue.

ACCOMMODATION

Background on Accommodation

Accommodation is the Achilles' heel of the duty to consult. First Nations' frustration with the duty to consult is due to their first-hand experience with endless talk and little action. As long as meaningful accommodation remains elusive and only approached through sustained and dogged effort on the part of First Nations, the duty to consult will continue to sow frustration and cynicism.

Accommodation and Administrative Tribunals

In *Chippewas,* the Court concluded that on the specific facts before it, the National Energy Board had the necessary statutory powers to impose required conditions on the pipeline company as part of accommodation and, therefore, was able to fulfil the duty to consult (*Chippewas* 47-48). The implications of the Court's narrow and specific conclusion on this point is important for companies, the NEB, other administrative tribunals and First Nations.

Contrary to the assumptions of many commentators, *Chippewas* is not a wholesale endorsement of the NEB's processes and ability to discharge the Crown's duty to consult. Depending on the facts of other projects and the required depth of consultation for those projects, the NEB might not have the necessary statutory powers required to accommodate First Nations. When such a case arises, the law is clear: the NEB will not be able to make a decision until the federal government steps in and fulfills the Crown's outstanding constitutional obligations.

This principle applies to all administrative tribunals (and logically to all government decision-makers). Before making a decision they must correctly gauge the required depth of consultation for a specific project, decide on the necessary accommodation measures (if any) and ensure that either they have the statutory powers to realize the required accommodation or that government does so through a parallel process. Until these steps are taken, they cannot decide.

Accommodation and Balancing of Interests

One of the central problems with the duty to consult and accommodate is that all too often the focus is on consultation, not accommodation. With varying success, First Nations fight hard to secure meaningful accommodation through negotiations. One of the challenges they increasingly face is the argument that their rights must be 'balanced' with the wider public interest.

In 2017 the Court reiterated two important points on this issue. First, neither broader economic interests or the public interest trumps the Crown's obligations to consult and

accommodate First Nations. If the duty to consult is not fulfilled, a project cannot be in the public interest. Second, because unproven and unrecognized Aboriginal rights do not give First Nations a veto as part of the duty to consult, the Crown and its agents are under a special responsibility to accommodate First Nations (*Chippewas* 59-60 and *Clyde River* 40.)

In regards to the veto question, in 2017 the Court reiterated an important point it made over 20 years ago in *Delgamuukw* and which governments and companies too often overlook. When consultation is based on a First Nation's unproven, unrecognized claims the First Nation does not have a veto. But, in certain cases First Nation consent might be required when the duty to consult is triggered by proven claims (*Ktunaxa* 80).

Reasonableness and Accommodation

For First Nations who succeed in forcing meaningful accommodation negotiations, the question quickly arises: how strong is their negotiation position? In *Ktunaxa* the Court went further than in any previous decision in emphasizing the importance of First Nations not taking 'unreasonable' positions.

The Court criticized the *Ktunaxa* for taking what it described as an uncompromising and absolute position that left no room for negotiation and accommodation and warned First Nations against taking "unreasonable positions" (*Ktunaxa* 11-43, 80).

There are two obvious problems with the Court's reasoning. First, why should one party in negotiations get to undermine and dismiss the position of the other party by simply labelling it 'unreasonable'?

Second, and most importantly, applying a reasonableness test to a First Nation's demands for accommodation would drastically narrow the scope of the duty to consult. It would exclude the most serious infringements and intractable disputes from the duty to consult and limit the duty to addressing impacts on First Nation rights that can be readily accommodated. This cannot have been the Court's intention in *Ktunaxa*.

A final word on reasonableness. The more the Court narrows the duty to consult by relying on concepts of 'adequacy' and 'reasonableness' the further the Court drifts away from its earlier descriptions of the duty as a constitutional imperative that must be met. By the time duty to consult is twisted and contorted based on 'reasonableness' and 'adequacy', the duty becomes a pale shadow of the Court's lofty rhetoric. If the Court continues to undermine the scope and effectiveness of the duty to consult for unproven and unrecognized rights, First Nations will increasingly choose to litigate to establish their rights instead of wasting their time consulting over unrecognized rights.

EXISTING INFRINGEMENTS

The question of whether the duty to consult and accommodate applies to existing infringements and cumulative effects has been at the centre of many lower court decisions over the last ten years. Governments and companies usually take the view that the duty is limited to new impacts arising from a new decision, while First Nations consistently argue that it is illogical and dishonourable to ignore the wider context.

In *Chippewas* the Supreme Court reiterated and clarified a simple point it first made in Rio Tinto but has since been often lost or misunderstood. While existing infringements on their own do not trigger the duty to consult, once the duty is triggered by new potential impacts, the scope of the ensuing consultation and accommodation may be informed by cumulative effects and the historical context (*Chippewas* 41-42). On this issue the Court cited with approval Chief Justice Finch's reasons in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247.

By reiterating its reasoning from *Rio Tinto* and endorsing the approach taken in *West Moberly*, hopefully the Court has put an end to the simplistic argument that the duty to consult is blind to existing infringements and cumulative effects.

ENVIRONMENTAL ASSESSMENTS

A source of continuing frustration for First Nations has been governments' persistent conflation of duty-to-consult processes with environmental assessments. While governments are free to rely on existing procedures and processes, including environmental assessments, as part of their efforts to fulfill the duty to consult, this should not change the focus and purpose of the engagement. In *Clyde River* the Court criticized the National Energy Board for mistakenly focusing its inquiry on whether the project would cause significant environmental effects. The Court confirmed what First Nations have been saying for years: when the duty to consult is triggered a consideration of environmental effects alone will not do—the Crown must assess potential impacts on Aboriginal and treaty rights (*Clyde River* 45). A standard environmental assessment alone is unlikely to fulfill the duty to consult.

REMEDY

Charles Dickens' Oliver Twist famously pleaded for more gruel. All too often First Nations have found themselves in similar circumstances with the duty to consult. Having expended their limited resources and, against the odds, succeeded in convincing a judge that government failed to live-up to its constitutional obligations, their 'win' too often means another serving of the thin gruel of the duty to consult that left them dissatisfied in the first place.

From a legal perspective, the problem is one of remedy—what action should the courts take when governments fail to fulfill the duty to consult? Beginning with its 2014 decisions in *Grassy Narrows* and *Tsilhqot'in*, the Supreme Court has moved decisively to clarify the law on remedy. A decision that affects Aboriginal and treaty rights and does not comply with the duty to consult should be quashed. Moreover, litigation is not an opportunity for further consultation and, when a government is found to have failed to consult and accommodate, it does not simply get a do-over—there are no mulligans (*Clyde River* 24, 29 and *Peel River* 61).

The importance of the Court's clear direction on this issue should not be lost on governments and proponents. It is no longer acceptable for governments and companies to take a minimalist approach to the duty to consult on the assumption that a First Nation is unlikely to challenge them in court and, even if a court does find against them, they will get a second chance to make it right. They now face the real possibility of a cancelled authorization and all the loss and uncertainty that would result.

SUMMING UP

There were major advancements in duty to consult law in 2017. The Supreme Court's confirmation that the permissible degree of delegation of the duty is limited by the decision-maker's ability to accommodate is important for all decision-makers to be aware of, not just administrative tribunals. Equally important is the Court's endorsement of parallel, direct engagement processes with the Crown, something that First Nations have been demanding for years.

Meaningful accommodation continues to be the thorn in the side of the duty to consult. While the Court in 2017 took an important step forward by confirming that governments don't simply get a do-over and that authorizations should be quashed when they fail to properly consult and accommodate, its emphasis on the 'reasonableness' of First Nations' demands may ultimately be seen as two steps back.

Looking ahead, the Supreme Court recently heard the *Courtoreille* appeal, a case which raises the question of whether the duty to consult extends to the making of laws in Canada. The Court's decision on this issue has the potential to have a far-reaching effect on the development and application of duty to consult and accommodate.

A decision that affects Aboriginal and treaty rights and does not comply with the duty to consult should be quashed... litigation is not an opportunity for further consultation ... when a government is found to have failed to consult and accommodate, it does not simply get a do-over—there are no mulligans.

TOWARDS DECOLONIZATION

The Court's reasoning in the Nadon decision lends support to calls for Indigenous appointments to the Supreme Court.

MAY, 2014

Why Quebec but not Indigenous Appointments to the Supreme Court?

The Supreme Court of Canada's *Reference re Supreme Court Act* decision nullifying the appointment of Justice Nadon to the Court is of importance to Indigenous people seeking justice through the Canadian court system.

Since 1875 there has been a requirement that a certain number of seats on the Supreme Court be reserved for Quebec. There is no equivalent requirement that any seats on the Court be reserved for Indigenous people.

The majority of the Supreme Court in the Nadon decision concluded that Justice Nadon was ineligible for one of the Quebec seats because at the time of his appointment he was not a member of the Quebec bench or the Quebec bar.

Importantly, the Court held that one of the purposes for Quebec seats on the Court was to "ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights."

The Court's reasoning in the Nadon decision lends support to calls for Indigenous appointments to the Supreme Court.

The composition of the Supreme Court rightly recognizes Quebec's special place in confederation. There is no historical, legal or principled justification for not also recognizing the special place of Indigenous people.

Respect for the distinct legal traditions and social values of Indigenous people has been enshrined through section 35 of the Constitution. Persistent government denial of Indigenous rights has forced Indigenous people into the Canadian court system in search of justice with the Supreme Court as the final arbiter of their rights.

To enhance Indigenous people's confidence in the Canadian legal system and to ensure the recognition of the distinct legal traditions and social values of Indigenous people, qualified Indigenous people should be appointed to the Supreme Court.

...qualified Indigenous people should be appointed to the Supreme Court.

PHOTO: TOM RIESSNER

NOVEMBER, 2014

Canada's Misguided Land Claims Policy

In the fall of 2014 the federal government, through its Ministerial Special Representative Douglas Eyford, sought comments on its new *Interim Comprehensive Land Claims Policy*. The Interim Policy sets out Canada's position on negotiating with Indigenous peoples over their Aboriginal title and rights. Unfortunately, the new policy is based on the same misguided objectives which have plagued Canada's approach to reconciliation for decades.

Colonization as Reconciliation

According to the federal government, the objective of its new land claims policy is to reconcile Indigenous peoples' Aboriginal title and rights with the interests of non-Indigenous Canada. From the federal government's perspective, reconciliation is about achieving "certainty" for "economic and resource development."

The focus on reconciliation as a process for non-Indigenous people to exploit Indigenous peoples' lands and resources is an example of what John Ralston Saul has recently described in *The Comeback* as the national narrative of colonialization. Rather than acknowledge Indigenous lands as being integral to the survival of Indigenous peoples as prosperous, self-sufficient societies, successive federal governments have viewed Indigenous lands from the perspective of the country's southern, non-Indigenous society—as "a source of commodities, colonial territories that will make those of us in the south rich." Canada's new land claims policy perpetuates and reinforces the understanding of land claims agreements as mechanisms for removing Indigenous peoples from their lands so that the lands can be exploited by non-Indigenous people.

Extinguishment is not the Answer

Canada's new land claims policy, like all the policies that have preceded it, is focused on the negotiation of treaties that extinguish Indigenous peoples' interests in their lands in exchange for a lesser interest over a fraction of their territory.

Reconciliation does not require extinguishment. The Supreme Court in *Tsilhqot'in* acknowledged that the reconciliation of Indigenous and non-Indigenous interests may be achieved through negotiating agreements that recognize, rather than extinguish, Aboriginal title.

Canada's Flawed Approach

Rather than negotiate agreements that recognize Aboriginal title, Canada has decided to continue with a land claims policy that is incompatible with the fundamental principles of Aboriginal title. As the Court explained in *Tsilhqot'in*, Aboriginal title is a collective title held for the benefit of present and future generations of Indigenous people. Both the use of Aboriginal title lands by Indigenous peoples and the possible infringement of Aboriginal title by the Crown are subject to this inherent limit. Canada's objective of achieving 'certainty' through extinguishment is anathema to the very basis for and purpose of Aboriginal title.

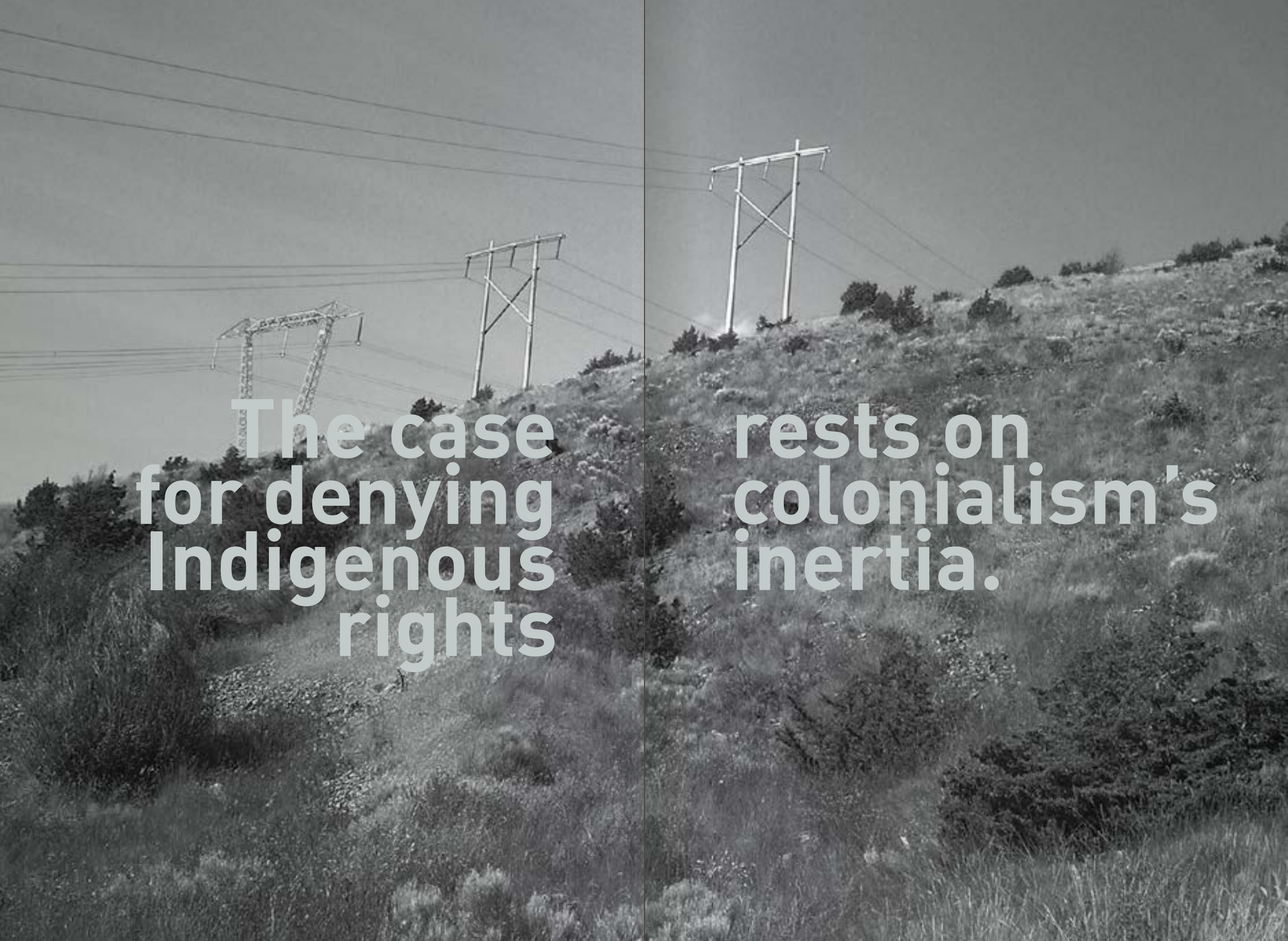
A policy of extinguishment is also inconsistent with the federal government's fiduciary responsibilities to Indigenous peoples. The Court in *Tsilhqot'in* affirmed that when dealing with Aboriginal title, Canada must respect its fiduciary responsibilities to Indigenous peoples. At its core, this means ensuring that the federal government's actions are consistent with the best interests of Indigenous peoples. A land claims policy intended to deprive future generations of Indigenous people of the use and benefit of their traditional lands by extinguishing Aboriginal title is incompatible with Canada's fiduciary obligations.

Reconciliation Based on Recognition

The way out of the narrative of marginalization of Indigenous peoples and the exploitation of their lands is for Canada to adopt a land claims policy consistent with the principles underlying the *United Nations Declaration on the Rights of Indigenous Peoples* and the Supreme Court's *Tsilhqot'in* decision.

At their heart the *UNDRIP* and *Tsilhqot'in* are vehicles for Indigenous peoples to prosper as distinctive societies by regaining control of their traditional lands. They are predicated on the recognition of Indigenous peoples' historical and legal interests in their lands, their right to decide how their lands are developed (or not developed) and their right to benefit from their lands.

For decades the federal government has justified its land claims policy of extinguishment by arguing that we really do not know what Aboriginal title means or that it even exists. *Tsilhqot'in* and the *UNDRIP* have nullified these self-serving excuses for depriving present and future generations of Indigenous people of their lands. It is long past time that Canada jettisoned its colonization objectives and adopted a land claims policy intended to achieve reconciliation through agreements that lead to Indigenous peoples controlling and benefiting from their lands.


The case for denying Indigenous rights
rests on colonialism's inertia.

DECEMBER, 2015

The Case for Denying Indigenous Rights

Denial is cumulative.

It has a beginning. At a certain time in a certain place a decision is made to ignore someone else's existing rights. There's resistance. The true rights-holders fight back. But advantage is taken. Protest is suppressed. Wealth and power grow. For the dominant society, as denials accumulate injustice fades from sight. The *status quo* emerges. Calls for justice are denigrated and ridiculed.

Resistance persists.

Prodded by the children of those who witnessed denial at its conception, the courts assume the role of archaeologists. Layer upon layer of indignity is scraped away. The underlying lie is revealed.

A choice emerges.

Acknowledge the original wrong, apologize and commit to making amends or double-down on denial. As the excavation work continues and politicians slowly respond to the colonizing society's unease with the basis for its comfort and privilege, denial's voice becomes increasingly apocalyptic.

Writing in the *Globe & Mail*, Tom Flanagan, a former Harper advisor, declared that the new Liberal federal government's intention to implement the *United Nations Declaration of Indigenous Peoples* has "great potential for mischief…."

According to Flanagan, recognizing the UNDRIP principle of free, prior and informed consent is a recipe for economic ruin because Indigenous land rights in Canada are poorly defined, some Indigenous People might consider consent to be a veto and because without the threat of expropriation Canadian governments will have a hard time building long-distance corridor projects (e.g. pipelines, railways, highways and power lines).

Flanagan's message is clear: implementing UNDRIP is dangerous because it is contrary to Canada's and the provinces' long established policy of denying Aboriginal title, rights and Treaty rights.

The Fraser Institute, which describes itself as communicating the effects of government policies and entrepreneurship on the well-being of Canadians and is described by others as a propaganda outfit for "well-fed libertarians, conservatives and reactionaries" has also warned of economic disaster on the horizon.

In a report ominously entitled "Economic Development in Jeopardy?", it warns that the recent *Saik'uz* decision from the British Columbia Court of Appeal threatens to open the door for Aboriginal title litigation against private companies.

The report's primary complaint is that the Court's decision extends to First Nations the same legal right that has always been enjoyed by corporations and non-Indigenous people: they can sue others based on an alleged interest in land but have to prove the interest as part of the trial.

Denial's argument is simple.

Having based a national economy on the oppression of Indigenous Peoples' legal rights, the consequences of changing course are potentially catastrophic. Better to damn the torpedoes and count on the resurgence of the denial agenda. Or, at the very least, work to impede the re-establishment of Indigenous rights and jurisdiction until the dams and pipelines are built, the oil extracted and the rivers and lakes destroyed.

The case for denying Indigenous rights rests on colonialism's inertia. Its strength is fear and self-interest. Its weakness is a growing awareness that while Canada preaches the rule of law, justice and fairness abroad, the country's wealth and privilege originates with an overarching historic wrong.

Denial has a beginning. Hopefully, it also has an end.

DECEMBER, 2015

Colonialism's Disciples: How Government Undermines Indigenous People

There are a lot of well-intentioned civil servants. They respect Indigenous people and do their best, within the confines of their positions, to bend government policy to achieve just outcomes. Their work is recognized, appreciated and honoured. This article is not about them.

This is about government employees, federal and provincial, who spend their workdays undermining Indigenous Peoples.

Case in point. On a winter's day I drove the TransCanada highway from Winnipeg to Kenora. It's a car journey loaded with memories, contradictions and hope.

As an undergraduate I spent a summer camped on a small island in Shoal Lake while soil sampling for a junior mining company. Now I represent Shoal Lake #40 First Nation. Close to the Ontario border I pass the "Freedom Road" sign, Shoal Lake #40's statement of defiance and optimism for the future.

Having managed to keep the car on the road for two plus hours despite not being able to get a rental with winter tires at the Winnipeg airport, I check into the Lakeside Inn close to midnight.

Dawn finds me giving thanks for the view of Lake of the Woods from the hotel's 9th floor restaurant. Boats, cornered by the ice, sit motionless, patiently waiting for the sun to regain its strength and set them free.

While I drink coffee and prepare for a meeting with Treaty 3 clients and government officials, a group of four or five settle around the table behind me. There are few people in the restaurant and I can't help but overhear their conversation.

I realize they work for one of those government departments which, despite regular name changes, always has an acronym that sticks in your throat. They are the government employees my clients and I will meet after breakfast.

They too are preparing for the meeting. My first thought is to turn and introduce myself. But then their words settle in my consciousness. They are rehearsing the various ways they intend to say no to my clients.

They are also laughing. Laughing at their own well worn obstructionist tactics. Laughing at my clients' positions and expectations. Laughing at the ultimate meaninglessness of the consultation process they have invited my clients to join.

My hand drifts across the notepad and I find myself scribbling in the margin:

> *The beetles gathered, stuffing their ears with indifference,*
> *stabbing their eyes, filling their mouths with silence.*

My experience at the Lakeside Inn was extreme but not exceptional. It wasn't the first time I've overheard government employees laughing about how they plan to stonewall Indigenous people.

I also believe it is not representative of the majority of civil servants who honestly want to make a positive difference. But it is significant nonetheless, especially when governments pledge a renewed partnership with Indigenous Peoples.

The Supreme Court of Canada has penned inspiring descriptions of the purpose and importance of the Crown's obligations under section 35 of the Constitution. With varying degrees of sincerity, governments have echoed the Court's pronouncements.

Cynicism grinds legal principles and government mandates to dust.

Cynicism grinds legal principles and government mandates to dust.

However small a group they might be, government employees who walk in colonialism's shadow do a disservice to us all.

They undermine the legal and historical relationship between Canada and Indigenous Peoples. They thwart government policy. They make a mockery of the law.

Most importantly, they crush the good faith and optimism of Indigenous people who enter into consultation processes with the hope that government is finally serious about a partnership based on respect.

Legal principles, government promises and cabinet appointments are important. But until Indigenous people are confident that the bureaucrats they meet on a daily basis sincerely believe that their responsibility is to work with, not against, Indigenous people, none of us will be free of Canada's colonial past.

Ignorance is not an absence

Ignorance is a force.

DECEMBER, 2015

How the Canadian Legal System Fails Indigenous People

Clinging to the program
Obviously
Is the obvious lie
The past is more than a memory

– JOHN TRUDELL, *WHAT IT MEANS TO BE A HUMAN BEING*, 2001

Law school is the great revealer. It reveals motivation: greed, social justice, couldn't get into medical school. It reveals ignorance.

Case in point. Sitting in a law school lecture theatre. A law professor is making an earnest effort to convince skeptical students it's important for future lawyers to know at least a little about the history of the Canadian state's relationship with Indigenous Peoples. In the front of the room a hand shoots up.

"Yes, do you have a question?"

"Didn't the Indians kill all the buffalo?"

Years later. On my feet in a courtroom. Facing judges with skeptical faces as I give a quick overview of *Badger, Haida* and *Mikisew* to explain how Treaties between the Crown and Indigenous Peoples give rise to a constitutional obligation to consult and accommodate.

A voice from the front interrupts me.

"Mr. McIvor, this treaty you're talking about, is it part of a statute?"

ignorance

It justifies.
It silences.
It perpetuates.

I'm seldom at a loss for words in court. As every litigator knows, when the moment comes to speak the words tumble out, origin unknown, forming themselves into sentences of varying degrees of coherence.

Not this time. This time I paused. For the judges I faced, and for the government and industry lawyers staring at the back of my head, the pause was likely too short to notice. For me it spanned generations.

Ignorance is not an absence. Ignorance is a force. It justifies. It silences. It perpetuates.

University students become law students. Law students become lawyers. Lawyers become judges. Judges decide.

Judges decide where the boundaries are. The boundaries between the Canada that was and the Canada that will be. To assume they can do their job without a basic understanding of Canadian colonialism and Aboriginal law is more than a failure to appreciate the relationship between knowledge, understanding and justice.

It is to willfully enlist the power of ignorance in an unacknowledged campaign to deny Indigenous Peoples their past, present and future.

Lakehead University and the University of Winnipeg have mandated that every student take at least one Indigenous studies course.

The Truth and Reconciliation Commission recommends that lawyers receive appropriate cultural competency training, including the history of Treaties and Aboriginal rights and that Canadian law schools require students to take a course in Indigenous Peoples and the law which would also include the history of Treaties and Aboriginal rights.

These are important steps towards subduing the power of ignorance. Without these and other policies that ensure lawyers and judges are educated about Indigenous Peoples, history and the law the Canadian legal system will continue to fail Indigenous Peoples.

The past is more than a memory. It can oppress. It can light the way. The choice is ours.

PHOTO: BOBBY BINGUIS

There, is a tree swinging
And voices are
In the wind's singing
More distant and more solemn
Than a fading star.

— T.S. ELIOT, *THE HOLLOW MEN*

NOVEMBER, 2017

Indigenous Identity and Canadian Law: A Personal Journey

The Canadian colonial project intertwines Indigenous identity with the development of Aboriginal law. Oppression and reconciliation partner to classify, legitimize and de-legitimize Indigenous people. Whether they see themselves as part of the "Indian, Inuit, and Métis peoples of Canada" under section 35 of the constitution, status or non-status, 'on-reserve' or 'off-reserve,' for every Indigenous person the law intrudes on, shapes and at times distorts their sense of self. The complex relationship between Canadian law and Indigenous identity is difficult to explain or appreciate in the abstract. As with any powerful historical force, at its core colonialism is personal. This is my story.

With no memories of my father, who died when I was five, my role models growing up were strong, self-reliant women—mother, sisters and grandmother. I saw myself as a take-no-crap farm kid whose parents received phone calls from the local minor hockey league threatening to banish him for fighting and who memorized Shakespeare while picking rocks. My understanding of my family's past was based on snippets of conversation heard around the kitchen table. Slowly I came to understand that we used to live in the bush north of the Peguis First Nation reserve. Now we lived a mile south of the reserve, doing our best to farm scattered bits of land on Manitoba's agricultural fringe. In hindsight,

I did many things as a kid that would now be classified as 'traditional practices': hunting (sweet tea over an open fire), trapping (rows of little pelts hung to dry in my mum's basement), snaring rabbits (my brothers' patience with my clumsy fingers), picking saskatoons (poplar trees singing in the wind above us). These were activities without history—it was what we did, not who we were.

Three incidents complicated my self-identity. The first was a family reunion. My oldest sister, whose energy and optimism are my lodestar, threw herself into researching our family history. The most memorable part of the reunion was the intergenerational jalopy races around hay bales in the field back of my mum's house, but the family tree my sister produced had a more lasting effect. On my mother's side my resentment for being raised Roman Catholic was softened. Church records allowed my sister to trace my mother's family back to two of the earliest French families to arrive in Acadia and New France in the 1630s. My sister had given me a direct, personal relationship with the Acadian Expulsion, the Plains of Abraham and many other famous, and infamous, events in early Canadian history. Her research on my father's side revealed a personal connection with less well understood aspects of Canada's past. My father was descended from Indigenous women (Anishinaabe and Cree) and men (mostly Scots, with the odd Englishman and French Canadian thrown in) who had worked for the Northwest Company and the Hudson's Bay Company. Eventually, they had settled at Red River in what was to become Manitoba.

Initially I was drawn to the men's names on my family tree I was familiar with from Canadian history, those such as James Curtis Bird and John Thomas immortalized with entries in the *Dictionary of Canadian Biography*, the ultimate confirmation of historical significance. These men soon lost their grip on my imagination, their places filled by the Indigenous women from my family's past, some with names—Mary Oo-menahomisk, Louise Serpente, Elizabeth Montour, Robina Hay—many without, whose histories, dreams and accomplishments had disappeared from the record like dry leaves on an autumn wind. Who were these silent ancestors whose stories had been lost to me? In what way was I their descendant? What were my obligations to them?

The second incident was applying for law school. In filling out the form I faced the choice of applying in the general category, the Aboriginal category or both. With a decent grade point average and LSAT score and a Ph.D. in history I was confident I would be accepted. Importantly, I did not want to take a space from those I thought of as truly Aboriginal, so I only ticked off the box for the general category. Then the law school phoned. They had noticed a reference to my Indigenous ancestry in my application and wanted to know if they could slot me in as an Aboriginal student. Again, my family tree swayed to and fro—Mary Oo-menahomisk, Louise Serpente, Elizabeth Montour, Robina Hay—would saying no deny my connection to them? After confirming I was not taking a place from anyone, I agreed. It was one of the most important decisions I have made. Being part of the Aboriginal student body at law school threw me in with the most welcoming, supportive and encouraging group of fellow students I had ever known. Again, mostly women, they accepted me as an Indigenous person and inspired me to strive to be a useful part of a struggle both personal and historical, a struggle that predates us, is bigger than us and will outlive us. My nascent Indigenous identity coalesced into an ambition to make a meaningful contribution.

The third 'incident' has been the development of the law on Métis rights, especially the three most important decisions to date from the Supreme Court of Canada: *Powley, Manitoba Métis Federation* and *Daniels*. The *Powley* decision, which established the test for *Métis* rights under section 35 of the constitution, was a watershed moment for the Métis. The courage, fortitude and skill of those who contributed to the ultimate success

at the Supreme Court must be acknowledged and appreciated. But Supreme Court cases are rarely simply about winning and losing. The three-part '*Powley* test' (ancestry, self-identity and community acceptance) is an example of how long-held government policies of denial force Indigenous people into the courts for recognition. Once there, they become entangled in the history, principles, objectives and compromises of Canada's legal system. At the Supreme Court non-Indigenous judges, with an eye to policy implications and 'workability', create legal tests that define and distort Indigenous identity. *Powley* constitutes the Supreme Court's foray into making and unmaking the Métis.

The Supreme Court's *Manitoba Métis Federation* decision also poses significant challenges for the Métis, but at a personal level it underscored the power and significance of the Court's moral authority. After over 100 years of government denial the Court confirmed that a terrible wrong was done to the Red River Métis by failing to fulfill the promises made to them when Manitoba entered Confederation in 1870. Once again ancestors' names swirled around me—Ann McLennan, James Muir, Isabella Bird—ancestors whose scrip had failed to secure for them, as it had failed hundreds of other Métis children, the rich farm land at Red River that would have bound together the Métis through time and space. While reading the decision I repeatedly paused to think of their children and grandchildren, Colin and Isabella, my grandparents, who were denied their inheritance at Red River and who followed the displaced Peguis First Nation north hoping to carve out a new future between the rocks and swamps of Manitoba's Interlake region.

It was just before 7 a.m. on the west coast when I first read the Supreme Court's decision in *Daniels* by which it confirmed the federal government's jurisdiction over the Métis and non-status Indians. The house was quiet, my family was asleep, including my baby girl leaning against my chest. I understood *Daniels* was a significant victory for the Métis and the potential importance of the decision for the thousands of Métis denied services and programs due to the jurisdictional dispute between the federal and provincial governments. Although I did not need these programs and services now, I knew that thousands of modern-day Métis did and that they would have benefited me and my family when my father died and left my mum living on the fringes of the Peguis reserve, scrambling to provide for eight children.

Daniels closed my personal circle on Indigenous identity and Aboriginal law. It brought home how Canadian law, yesterday and today, circumscribes and oppresses Indigenous people through marginalization and validation. Because of my Indigenous ancestry, based on *Daniels* I'm an 'Indian' under s. 91(24) of the constitution. But that legal, constitutional classification obfuscates more than it illuminates. My life experience is qualitatively different from my family members, friends, colleagues and clients who are status or non-status. Lumping us all together as 'Indian' (or Aboriginal or Indigenous) dishonors the diversity of lived experiences and smooths over Canada's history of racism and oppression.

Under *Powley* and s. 35 of the constitution, I might be able to make out a case for being Métis. I meet the first part of the *Powley* test because I self-identify. My self-identification is not based on wearing a sash or speaking Michif. It is because if I did not self-identify

as Métis I would be denying my Indigenous ancestors. Their distinctive dreams and accomplishments would slip closer to oblivion. I would have failed to fulfil my obligations to them. I would dishonor them and myself. I am unprepared to take that final step in the march of colonialism, so I am Métis.

But under Canadian law self-identification is only the first part of the test for being Métis. I, and tens of thousands of other Canadians, can and do meet this requirement. To be Métis under the constitution I must trace my Indigenous ancestry back in time to a specific, historical Métis community. This aspect of the *Powley* test is too often lost on individuals who claim to be Métis under section 35 of the constitution. Being descended from the Red River Métis I would probably meet this second part of the *Powley* test, but I would still have to establish acceptance by the modern-day Red River Métis community. How do I do this? Although my mother and some of my siblings have migrated back to the Red River, I live over 1000 miles away in Vancouver. What if, for whatever reason, I do not want to be a member of a modern Métis organization? Why should a modern political organization be the gate-keeper to my, or anyone else's, rights and identity? If I

...under Canadian law self-identification is only the first part of the test for being Métis.

did decide to apply to join a Métis organization, which one? Who decides on the rules for membership and oversees their application? If I wanted to join, would I be accepted? My concern was, and continues to be, that through *Powley* the Supreme Court unknowingly sanctioned a replication of the worst aspects of the registration provisions of the *Indian Act*, but this time with Indigenous people bestowing and denying status. Because I have not joined a Métis organization I would likely fail the *Powley* test—in the eyes of Canadian law I am not Métis.

If I did apply and was accepted into an organization purporting to represent the Red River Métis, maybe the Manitoba Métis Federation, would that mean I am Métis under section 35 of the constitution? Maybe not. An aspect of *Powley* that has trailed me like a brooding cloud, is the Court's caution that Métis identity cannot be of 'recent vintage'. The Court's caution neutralizes its repeated recognition that colonialism has disrupted and vilified Indigenous communities. It ignores the Court's role in shaping and legitimizing Indigenous identity. In *Powley* the Court held out the promise of a port of shelter for thousands of Métis scattered on the sea of colonialism. Its caution against recognizing Métis whose self-identification is of 'recent vintage,' has driven many Métis back out to sea, afraid of being labeled opportunists.

Through the workings of Canadian law the Red River Métis diaspora lost their land. Many, especially those with French ancestry, managed to maintain their sense of community, family and history. Others, such as my family, lost their community, their ancestors and their pride in where they had come from and who they were. They were left to remake themselves without a past. It left me as a child with a 95-year-old grandmother, born at St. Peter's Parish on the Red River, living out her final days over 100 miles away in my Aunt's backroom, silent as her grandchildren combed her long, grey hair. Today Canadian law leaves me uncertain how to explain to my children who they are. *Daniels, Powley* and *Manitoba Métis Federation* do not define me or mine. Without the voice, the words, the stories of my ancestors, I am silent.

First Peoples Law

BRUCE MCIVOR
PHOTO: KATHRYN LANGSFORD

First Peoples Law

First Peoples Law is a law firm dedicated to protecting and advancing the rights of the Indigenous Peoples of Canada. We do this through providing the highest quality legal services while actively participating in public debate and education. Our objective is to play a meaningful role in Indigenous Peoples' ongoing struggle for a more respectful and equitable world for themselves and their children.

Dr. Bruce McIvor, lawyer and historian, is principal of First Peoples Law. Bruce represents First Nations across Canada and is recognized nationally and internationally as a leading practitioner of Aboriginal law in Canada. Bruce is a proud Métis from the Red River in Manitoba. He holds a law degree, a Ph.D. in Aboriginal and environmental history, and is a Fulbright Scholar.

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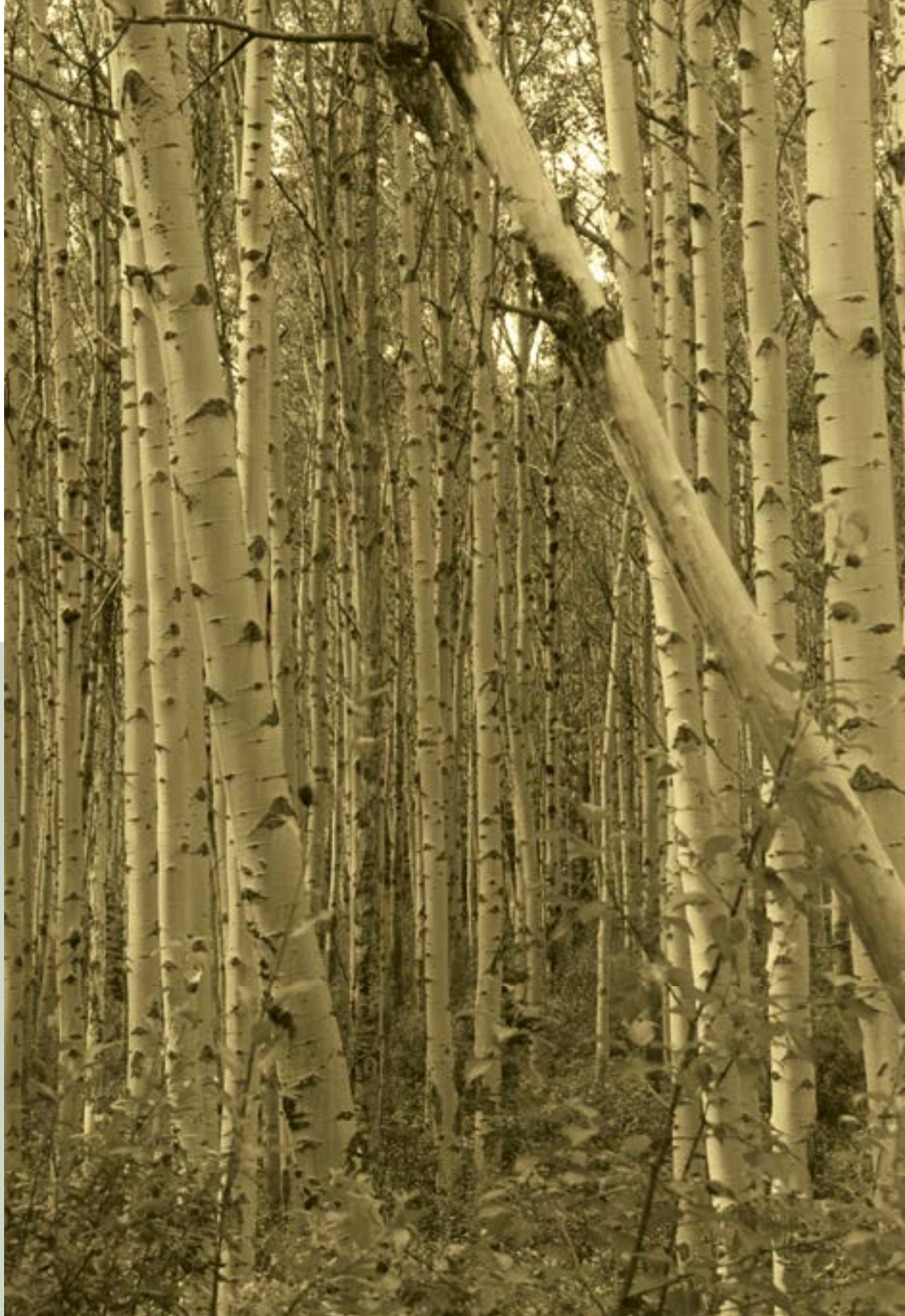

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