Preface

Advocacy is not restricted to the courtroom. We’ve put together this volume of essays as part of our commitment to the ongoing public discussion of Indigenous Peoples’ rights in Canada. It is intended to highlight developments in the law in 2014, not as a definitive guide to Aboriginal law decisions.

We have also included essays written by two of our Ontario clients (Shoal Lake #40 First Nation and Webequie First Nation) on issues that were at the forefront of their ongoing efforts to defend and advance their constitutional rights in 2014.

We hope that you find this collection informative, engaging and encouraging.

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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.

Indigenous people are now able to seek recognition of their territorial claims to Aboriginal title.

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 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 shutting 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.
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.
The Provinces are now liable for the heavy burden of justifying infringements of Treaty rights.
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.
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.
The decision is important for two main reasons. First, it is yet 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.
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.
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.
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.

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 Aboriginal people. This is much more than deciding the project is in the public interest. The project must be necessary, it must be designed to minimally affect Aboriginal rights and the benefits for the general public cannot be outweighed by the adverse effects on First Nations.

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.

...there is another path to reconciliation—it is based on consent.
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.
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.
We have heard a lot in the news recently about whether resource development in the Ring of Fire in Ontario will ever become a reality. Newspapers are filled with discussion about why progress has not been faster, of companies abandoning development projects, and of concerns that Ring of Fire development may never be achieved.

These discussions focus on the wrong questions.

If the Ring of Fire development is to be successful, the question should not be whether the development is happening fast enough. It should be whether the process is taking place based on a foundation of recognition and respect for Webequie First Nation and the other Indigenous nations who call this land home.

Despite all the words written and spoken about the Ring of Fire, Webequie and our Indigenous neighbours remain invisible to most of the boosters, pundits and speculators. We are the unnamed “First Nations” or “Aboriginal people.” It is time people learned more about who we are and our vision for our lands and future.

We have always lived here. We are not going anywhere. We have our own laws separate from Canadian laws. Our laws were given to us by the Creator. We are the stewards of our lands. We are responsible to the Creator, our ancestors and our children to ensure that our lands are healthy and protected.

CHIEF CORNELIUS WABASSE, Webequie First Nation

Making the Ring of Fire a Reality
We believe that all things in creation are connected. As part of our responsibilities to the Creator, we work to protect and nurture these connections and relationships. Our language is filled with words that capture the interconnectedness of all things and our obligations to all things. There are no equivalent words in English or French.

There is only one road to the Ring of Fire—it is the road that leads to respect and recognition for Webequie and our Indigenous neighbours. It is the road to respect and recognition of our laws, our Treaty and our inherent right to self-determination. All other roads, regardless of how simple and straight they may appear, lead to stagnation and frustration.

The Supreme Court of Canada recently issued its landmark decisions in *Grassy Narrows* and *Tsilhqot’in*. Government should look to these decisions for guidance on how to proceed on Ring of Fire development. The Supreme Court was clear that Ontario is responsible for meaningfully engaging with us about any decision that has the potential to affect our Treaty rights. The Court also affirmed that the best path for dealing with Indigenous peoples on resource development issues is to seek our consent.

We believe there is a clear direction for success in the Ring of Fire. It will not be through rushing through permits or the announcement of economic development corporations. It will be through government treating us in a spirit of partnership and through the honourable implementation of our Treaty. In order for this to happen there are three main things that must be done.

First, agreements are required with Webequie and other First Nations that reflect a true, deep and enduring partnership. Agreements must respect and recognize Indigenous peoples’ role in every aspect and dimension of development in the Ring of Fire. We are not talking about pragmatic partnerships of convenience. These agreements must be grounded in the reality that we either do this together or we don’t do it at all. They must be comprehensive in providing for the meaningful and ongoing sharing of decision-making, revenue and benefits.

Second, development in the Ring of Fire must be part of the ongoing process of Treaty implementation. No longer can our Treaty be ignored and violated. New agreements cannot be reached while existing ones are treated as if they don’t exist. A plan for the comprehensive implementation of our Treaty needs to be developed parallel to the negotiation of agreements about the Ring of Fire.

Third, because our Treaty has been ignored and our laws violated, our people have suffered economically and socially. Disrespect and neglect have left us with limited capacity to direct, respond to and benefit from the potential for development in our territory. The provincial and federal governments must respond to our need for strategic human, social and economic investments in our community and the similar needs in neighbouring Indigenous communities.

The Ring of Fire can be a reality. Our children can prosper and raise their own children who respect and protect the Creator’s gifts. Whether the promise becomes reality depends on whether government and our non-Indigenous neighbours join us on the road to respect and recognition.
New Human Rights Museum a Monument to Contradiction

The Canadian Museum of Human Rights opened with fanfare in Winnipeg but we were not in the mood to celebrate. For our two communities, the museum is a towering shrine to hypocrisy.

While the $350-million national museum showcases the ideal of human rights, Aboriginal people suffer the deprivation of basic rights every day. As a stark example of this contradiction, the very operation of the museum—its use of water and electricity—infringes directly on our right to exist as viable communities in our homelands.

The water that will pour from the museum’s taps and fill its “reflection pools” will come—like all of Winnipeg’s water—from Shoal Lake, where members of Shoal Lake 40 First Nation were relocated to make way for Winnipeg’s aqueduct and have lived under a boil water advisory for 17 years.

Unlike politicians, museum staff recognize the tragic irony that we, the people of Shoal Lake, face. During a visit to our community in July, a shaken Clint Curle, head of stakeholder relations for the museum, told the Kenora Daily Miner of “a whole cascade of human rights issues” faced by Shoal Lake 40, including “the rights to health, personal security, freedom of movement and association, and even the right to life.”

In 1919, our community was moved to make way for an aqueduct to Winnipeg, 160 kilometres to the west. Later, a channel was dug to redirect swampy water away from the aqueduct intake. That turned the peninsula to which we had been moved into a man-made island, increasing our isolation.
Starting in the 1950s, Manitoba Hydro constructed a northern hydroelectric system that has profoundly affected roughly 35,000 Aboriginal people, including Pimicikamak, a nation of 8,000 Cree people and their lands, some 500 kilometres north of Winnipeg.

Like the people of Shoal Lake, we as Pimicikamak people live with loss. The dams permanently flood 65 square kilometres of land and destabilize hundreds of kilometres of critical shoreline habitat. This undermines land-based industries and traditional practices.

The dams also create unpredictable ice conditions in winter and submerged wood debris (from shoreline erosion) in summer, which have caused fatal snowmobile and boating accidents, respectively.

We have received some compensation and Manitoba Hydro has taken some measures to mitigate the damage, but still, our once-beautiful and bountiful homeland is a mess. The dams are a wound on the land and in our hearts. Each light in the museum will plug directly into this wound.

We recognize these are harsh stories. We deliver them with an open spirit, inviting Canadians to join us in healing the broken relationship between us.

We are glad the museum will raise the profile of values such as respect and equality. We are glad the exhibits will be well-lit and will include healing waters. At the same time we want Canadians to know that for many Aboriginal people, the grandiose structure is a bitter reminder of what we do not have.

We do not want to have to take our kids to a museum to learn about human rights, we want them to experience it at home.
First Peoples Law