comment provides an overview of the decision in Tsilhqot'in and

had only modest success, except in Quêbec in the 1970s and in the Territories, where far-reaching arrangements were concluded in the 1990s. In Tsilhqot'in, the Supreme Court of Canada rejected the argument of the federal and provincial governments for a restrictive test of Aboriginal title. The decision constituted the first legally binding recognition of Aboriginal title in Canada and will likely have a significant impact on negotiations relating to unceded land even where Aboriginal title is asserted without having been formally established. The present commentators hope that, over time, the confluence of a number of factors will increase the success rate of negotiations, a topic returned to below. Perhaps the most cogent consideration motivating parties to negotiate rather than litigate is the extraordinarily time-consuming and expensive nature of litigation in this area.

Those costs are demonstrated by some common elements in the long line of cases of which Tsilhqot'in is one. Almost invariably, the trial is extraordinarily lengthy, involving evidence of kinds unknown in other cases.[10] The trial is followed by a Court of Appeal hearing that produces a complex decision, often by a divided court. Then there is a Supreme Court of Canada decision, often also by a divided court, that addresses the specific dispute before the court while adding further threads to an ever-developing legal tapestry answering some questions but usually producing lacunae to be filled by subsequent decisions after equally tortuous processes.

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to proceed to litigation and to settle their dispute through the courts. As was said in Sparrow, at p. 1105, s. 35(1) ªprovides a solid constitutional base upon which

Tsilhqot'in followed this pattern. A 339-day trial having its genesis with preliminary motions in 1989 resulted in a 2007 decision of 1,387 paragraphs.[11] The legal costs of the Aboriginals were paid by the province.

amendable only by a constitutional amendment, unless modified by subsequent Supreme Court of Canada decisions. We know of no evidence indicating that the statesmen involved in 1982 anticipated the impact of s. 35(1).

3. Proving Aboriginal Title and its Characteristics

Tsilhqot'in considers Aboriginal title to land. That is the highest and best form of Aboriginal entitlement developed in this area of judge-made law. But it is far from the only one. In Delgamuukw, referring to the prior Supreme Court of Canada decision in R. v. Adams,[14] Lamer C.J.C. said:[15]

> [T]he aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land" (at para. 26 (emphasis in original)). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. . . .
>
> . . . . .
>
> At the other end of the spectrum, there is aboriginal title itself. . . . What aboriginal title confers is the right to the land itself.

Each of these entitlement levels has generated a separate line of judicial decisions of high complexity. Those analyzing Tsilhqot'in should remember that even where Aboriginal title is not found to exist, one of the lesser entitlement levels described by Lamer C.J.C. may be present.

Since Tsilhqot'in resulted in the first Canadian recognition of Aboriginal title, it contains more detail about the attributes of that title, although many important issues remain. The most salient elements of the Supreme Court of Canada's decision can be briefly summarized. Aboriginal title can be established only by court order or by agreement between the group concerned and the Crown. It applies to land under Aboriginal occupation prior to

14. (1996), 138 D.L.R. (4th) 657 (S.C.C.), at para. 30.
15. Delgamuukw v. British Columbia, supra, footnote 3, at para. 138. The quotation does not reference treaty or reserve lands, although they too are protected by s. 35.

that it held the land for its own purposes[o23] Ð as the prime criterion for occupation was comparatively readily met. The court's conclusion affirming Aboriginal title was, even so, reached

Primarily because this litigation had its genesis in a challenge to forestry licences issued by the province, the Supreme Court of Canada commented on the enforceability of governmental initiatives affecting Aboriginal title land. It prescribed tests to be met where governmental action would over-ride "the Aboriginal title-holding group's wishes on the basis of the broader public good."[26] This passage of the court's decision seems to us unfortunately widely worded. We believe it was intended to be focussed on specific land-related interventions such as forestry licences (those in issue here were invalidated). But the Aboriginal group might object to much other legislation. The sentencing provisions of the Criminal Code,[27] gender roles in property rights and collective decision-making, elements of human rights legislation and even the Constitution itself[28] could be examples. We consider it unlikely that the restrictive comments by the court

industrial forestry might not, as the impact on game and future use would be much greater. Bitumen mining on an Albertan scale is another instance of initiatives that we suppose would fail this test. Incidentally, if the bitumen facility was found to erode the collective benefit of the land for future generations, a judge might well invalidate a consensual agreement for the development between a resource developer and the Aboriginal title holder.

Second, the court stresses the fiduciary duty owed by the Crown to Aboriginals (itself a development of judge-made law) which ªinfuses an obligation of proportionality into the justification process.º[32] This means there must be a rational connection between the incursion and the government's goal, that the incursion must go no further than necessary to achieve the goal, and that the benefits from attainment of the goal not be outweighed by adverse effects on the Aboriginal interest.[33] The question may revolve around the meaning of ªgoal.º Suppose a transmission line connecting a hydroelectric scheme to a major market were proposed to cross Aboriginal title land. A wide clear-cut maintained by herbicides would be normal practice. Might a court find that the goal was not transmission but the supply of electricity to the city, and hence decide that a nuclear or gas-fired plant close to market would be a lesser incursion Ð regardless of cost?

Cumulatively, these tests impose a high threshold. And they electricitwithou-2510 -25152nitiat5(goal)-2-24ry-25151l titlethp25151ls-fi25nt'(thp-3122-tewith2515

order or equivalent),[36] subject to personnel changes, with limited authority and frequently amended instructions. The personal incentives applying to government and Aboriginal negotiators and their advisors may not conduce to celerity. The Aboriginal teams may be deeply distrustful of the government teams because of well-founded historical grievances; sometimes the groups even distrust their own leaders. Effective governance implies a scale or size of community appropriate to the subjects in question, but governments often select Aboriginal counterparties too small to exercise the wide powers accorded to self-governing entities in comprehensive claims negotiations and fail to adapt their negotiating mandates adequately to the circumstances of the particular group. And the governments, which are legally necessary parties to the negotiations, are sometimes fronting for private sector investors, with resultant communication problems. It is a wonder negotiations ever succeed.

Tsilhqot'in further reinforces the desirability of negotiated agreements and the undesirability of litigation as an alternative. Yet we are concerned that, at least in the short term (which could be lengthy) while negotiating cultures evolve, Tsilhqot'in could prove to be a serious impediment to the development of portions of Canada that have significant tracts of unceded land. Investors confronted with the decision-making environment created by Tsilhqot'in might well decide at the threshold not to proceed, favouring some other jurisdiction with their time and money. In any event, substantial delay is predictable with any project involving unceded land where Aboriginal title exists or might credibly be asserted and a negotiated agreement proves elusive.

We might move to a new paradigm, with Aboriginal groups rather than governments or distant corporations having a much

5. Recommendations and Conclusion

While Canadian governments are effectively powerless to change the substantive law enunciated in Tsilhqot'in and like cases (section 35(1) is not subject to the so-called "notwithstanding clause" in the Constitution), they have power to alter the playing field, establishing an environment in which the negotiating process can bear fruit. Perhaps the most significant Canadian effort in this regard is the British Columbia Treaty Commission (BCTC), established in 1992 by agreement among Canada, British Columbia and First Nations in British Columbia. Guided by that agreement and the 1991 Report of the British Columbia Claims Task Force,[37] a helpful report on the negotiating process published by a committee with representatives of all sides, the BCTC is not a party to negotiations except as a mediator. It helps to determine whether an Aboriginal group qualifies for negotiations, in terms of governance and other attributes. It attempts to advance the negotiations and facilitate fair and durable treaties. It has had some success. Its annual reports make a significant contribution. We hope more such initiatives will emerge, including imaginative action by Parliament.[38]

One such action could be legislation establishing Canada's policy for negotiating Aboriginal title and the related issue of self-government. Part could be procedural: a new body to lead the federal side, headed by a credible Order-in-Council appointee, reporting to Cabinet through the Minister of Aboriginal Affairs. It is too much to expect an agreed joint design for such a body, but credibility and respect from Aboriginal groups is attainable. The legislation might also:

- lay out ground rules and priorities for negotiations;
- define the characteristics of groups to be negotiated with, perhaps along the lines of the wise description of Vickers J.[39]

37. See The First Nations of British Columbia, The Government of British Columbia, and The Government of Canada, "The Report of the British Columbia Claims Task Force" (June 28, 1991), online: 5www.fns.bc.ca/pdf/BC_Claims_Task_Force_Report_1991.pdf4.

38. In Haida (supra, footnote 3) the Supreme Court of Canada commented "It is open to governments to set up regulatory schemes to address the procedural requirements . . . thereby strengthening the reconciliation process . . . " (para. 51).

39. "First Nations are not nation states; they are nations or culturally homogenous groups of people within the larger nation state of Canada, sharing a common language, tradition, customs and historical experiences": Xeni Gwet'in First Nations v. British Columbia; Tsilhqot'in Nation v. British Columbia, supra,

rather than the paternalistic and colonial approach of federal legislation which uses an inadequate definition of ªbandº in the Indian Act[40] as the basis for an even less adequate definition of ªFirst Nationº;

- specify that negotiations are to take place within the ambit of the Constitution (and with respect for Charter rights, despite s. 25);
- set out an initial list of subjects open for negotiation, as well as those not open (defence, foreign affairs, and banking are examples);
- provide for procedures for turning Aboriginal title into fee simple on request of the entitled Aboriginal group. The availability of such a procedure could be a significant attraction for groups that object to the collective nature of Aboriginal title and the concomitant restrictions on land use.

What remedy the courts will dictate for pre-1982 actions found now to have infringed Aboriginal title[41] is not yet known. If they decide on a drastic remedy such as reversing the original Crown grants of the land, the legislation might provide for an alternative compensation remedy the parties could elect. Subsurface including groundwater rights might be made subject to negotiations, but flowing or tidal waters, as opposed to the fishes within them, might not. And so on. The idea would be that, within the law as laid down by the court, the government has policy and procedural choices available, and that setting out its own rules of engagement would accelerate progress. We believe that some imaginative planning in concert with co-operating Aboriginal groups could result in federal legislation that would improve what now seems to us a bleak situation.[42] Enactment of such legislation would end the decades-long neglect by Parliament of this increasingly important

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footnote 10, at para. 458. Of course, the problem of governance commented on above would need to be addressed. Perhaps as a condition to negotiation the First Nation that lacks a governance process would be required to develop one.

40. R.S.C. 1985, c. I-5.
41. See supra, footnote 17.
42. The federal government has ventured some way down the path we suggest. The Department of Aboriginal Affairs and Northern Development Canada has a policy of negotiating treaties and has a comprehensive policy governing treaty negotiations; see ªRenewing the Federal Comprehensive Land Claims Policyº, online: 5http://www.aadnc-aandc.gc.ca/eng/1405693409911/14056936172074. The comment period on proposed revisions to the treaty negotiations policy

area. While that neglect continues, the necessary dialogue between the judicial and legislative branches cannot occur nor can the court be properly criticized for lack of deference.

Aboriginal title vividly illustrates the authority which s. 35(1) conferred on the courts. The inefficiencies involved in having such an important topic addressed on a piece-meal, case-by-case basis through immensely complex, expensive and protracted court proceedings with no room for intervention by Parliament can hardly be overstated. In this context, the court's decision is remarkable. It carries very great weight, as a unanimous decision delivered by the Chief Justice herself. As it relates to the principal ingredients of the decision, such as exclusivity being the test for Aboriginal occupation to establish Aboriginal title, the tone is didactic: explaining the court's conclusions as if they were established law, requiring only the necessity for clear communication. Yet, on the topic of exclusivity, the previous law was far from settled, as evidenced by the British Columbia Court of Appeal decision in favour of a site-specific test for Aboriginal occupation.

On questions other than those essential to the decision, the court's conclusions are far less specific. Indeed, as noted throughout this case comment, the issues left outstanding are far-reaching and seem to us almost certain to lead to further forays into this area by the courts, including the Supreme Court of Canada. We share the hope of the court that these issues can be effectively addressed by negotiation, but we mention above our concern that a negotiating culture sufficient to deal with them may take a long time to develop. Perhaps governmental interventions to improve the negotiating environment can improve the situation.[43]

One final comment. Because of s. 35(1), the Supreme Court of Canada is the ultimate adjudicator on these issues. It is called on to

perfectly appropriate given this enormous responsibility that considerations such as economic implications and political outcomes should be relevant to the judicial process, even if not determinative. It is troubling to us that no reference is made in the court's decision to such possible implications. The decision reads as a technical treatise on the law, with didactic overtones. Just as we hope that the constituencies affected by the court's decision are in the process of adaptation to a negotiating mode, we also hope that the court itself is on a learning curve towards more clearly taking into account the far-reaching consequences of its decisions.

Harry Swain and James Baillie*

* Harry Swain is a former Deputy Minister of Indian Affairs, and of Industry Canada. James Baillie is a Senior Counsel at Torys LLP. We are grateful to Professor Peter Hogg for discussing with us some of the constitutional and policy implications of the Tsilhqot'in decision. He carries no responsibility for any of the analysis or opinions in this case comment. We are also grateful to a number of