ABORIGINAL TITLE ONE YEAR AFTER TSILHQOT’IN

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The pessimists were wrong. The Supreme Court’s decision on Aboriginal title in Tsilhqot’in has increased legal clarity and given new life to negotiated settlements — which is good for everyone.

Most commentators have treated this decision as a zero-sum outcome, with indigenous groups as the winners and non-Aboriginal governments and businesses as the losers. In the year since the ruling, we’ve often been reminded that this decision will make major resource development
ABORIGINAL POLITICS
All Canadians should celebrate the decision.

In the year since the ruling, we’ve already observed these incentives in play. For example, the Kaska Nations of Yukon used the occasion of the ruling to beckon the federal government back to the negotiating table and restart talks, which have foundered since the early 2000s. So by strengthening Aboriginal property rights, Tsilhqot’in could actually jump-start the treaty process.

The popular counterargument is that First Nations will stay away from the treaty process and simply assert their now-stronger Aboriginal title. Many fear that in the absence of treaties, legal and political uncertainty will reign in the new legal environment, stifling economic development.

The opposite may be true. More certainty is precisely what this ruling has provided, by clarifying the duties of the Crown where it or third parties want to use Aboriginal title lands. The old limits that Canadian law had imposed on Aboriginal title were widely repudiated by indigenous peoples. This created regular and intractable conflict. Blockades and occupations occur where indigenous and nonindigenous notions of appropriate, legal land use diverge dramatically.

Last year, the Supreme Court ended this disagreement, to an extent. By telling nonindigenous Canada what First Nations have been saying all along, the Court limited the range of permissible interpretations. In future, governments and businesses will automatically seek First Nations consent early on, rather than encountering blockades later. From Tsilhqot’in emerges a broader consensus about the meaning of Aboriginal title. The playing field may not have been levelled, but both sides are now using the same rule book. In this way, strengthening Aboriginal property rights could very well reduce conflict between indigenous and nonindigenous actors.

The decision also strengthens the property rights of individual citizens of First Nations. The new definition of Aboriginal title establishes that uses of Aboriginal title lands “must be consistent with the group nature of the interest and the enjoyment of the land by future generations.”

The full meaning of this passage will be constructed in time. For now, we take it to mean that First Nations citizens have a legal basis for holding accountable their political leaders on land use decisions. So — for example — if a band council decides to build a casino, community members can challenge that decision in court by arguing that a casino would prevent current and future community members from using those lands for essential community activities like fishing and hunting.

The Indian Act regime is not built to provide community members with tools to hold their political leadership in check. Instead, the lines of accountability are drawn from chiefs and councils up to the minister of Aboriginal affairs and northern development. At the same time, customary practices of community accountability have — in some communities — been badly eroded after more than a century of Indian Act governance.

Canadian courts are obviously not the most appropriate venue for strengthening community accountability of First Nations leaders. This is something that should ultimately be accomplished through internally directed institution building. But in the interim, the decision has provided Aboriginal citizens — who are generally disempowered in the Canadian political system — with a new tool for representing their interests. This is a very good development for indigenous communities in Canada and for all Canadians.