

Table of Contents

	PAGE
<i>Preface</i>	iii
<i>Biographies</i>	v
<i>Table of Cases</i>	xv
Called to Action: Impact of the National Inquiry into Missing and Murdered Indigenous Women and Girls on the Resource Extraction Sector 1	
<i>Emilie N. Lahaie and Grace Wu</i>	
Introduction	1
Connection between the MMIWG Epidemic and the Resource Extraction Sector	2
Background on the National Inquiry	3
Findings of the National Inquiry	4
Transient Workers	4
Workplace Environment	5
Rotational Shift Work	5
Substance Abuse and Addictions	6
Economic Insecurity	6
Industry Culture	7
Narrow and Short-Sighted Decision-Making	7
Calls for Justice from the National Inquiry	7
Evolution of the Project Assessment Process	9
Previous Regulatory Regime	9
<i>Canadian Environmental Assessment Act, 2012</i>	9
<i>National Energy Board Act</i>	12
Introduction of Bill C-69	13
<i>Impact Assessment Act</i>	14
<i>Canadian Energy Regulator Act</i>	16
Implications for the Resource Extraction Sector	17
Gender-Based Analysis Plus	17
Increased Engagement with Indigenous Peoples	21
Conclusion	23

**Indigenous Litigation, the Rule of Law and the Public Interest
in Reconciliation** 25

Paul E. Yearwood

Introduction.	25
Government's Obligation to Seek Reconciliation	26
The Role of the Attorney General	29
The Role of the Courts	31
Conclusion.	35

**A Framework for the Law of Aboriginal and Treaty Rights:
The Duty to Negotiate and Overlapping Traditional
Territories** 37

Richard Raffai

Part One: The Framework of the Modern Law of Aboriginal and Treaty Rights	38
The Honour of the Crown and Reconciliation	38
Constitutional Obligations.	40
Part Two: The Honour of the Crown, the Duty to Negotiate, and Treaty Interpretation	42
The Process	42
Purpose and Contents	44
Triggering the Duty to Negotiate	46
The Role of the Court	47
Part Three: The Negotiation of Aboriginal Title and Rights.	49
The Nature and Content of Aboriginal Title.	49
The Constitutional Dimensions and Aspects of Aboriginal Title.	49
The Constitutional Test for Aboriginal Title	51
Policy and Political Assumptions underlying Negotiation of Aboriginal Title	51
Replacing Aboriginal Title Through Extinguishment	52
Transforming Aboriginal Title Through Continuity and Modification	53
The Implications of Judicial Declarations on these Assumptions	55
Extinguishment Approach	55
Continuity and Modification Approach	57
The Need to Reconcile this Disconnect in Future Aboriginal Rights Negotiations	58
Aboriginal Rights Negotiations under the Framework	58
Unforeseen Complications	60

Conclusion	64
----------------------	----

Indigenous-Led Projects Under the Impact Assessment Act 67

Jeremy Barretto and Viviana Berkman

Introduction	67
Indigenous-Owned Energy Projects	67
Muskowekwan Potash Mine Project – Saskatchewan	67
East Tank Farm – Alberta	69
Fort McMurray West 500-kV Transmission Project – Alberta	69
Trans Mountain Expansion Project – Alberta and B.C.	70
Eagle Spirit Energy Resource Corridor – Alberta and B.C.	70
Coastal GasLink Pipeline – B.C.	71
The Act and Indigenous Participation in the Impact Assessment Process	71
The Impact Assessment Process as a Collaborative Process	72
Spectrum of Indigenous Engagement	72
Indigenous Participation in the Impact Assessment Process	73
Planning Phase	73
Impact Statement Phase	73
Impact Assessment Phase	74
Decision-Making Phase	74
Post-Decision Phase	75
Impact Assessment Process for Indigenous-led Projects	75
Indigenous Governing Bodies	75
Constraints on the Exercise of Powers by Indigenous Proponents	76
Streamlined Impact Assessment Process	77
Preliminary Steps	77
Planning Phase	78
Impact Statement Phase	78
Impact Assessment Phase	79
Decision-Making Phase	79
Post-Decision Phase	80
Conclusion	80

The Regulation of Retail Cannabis on First Nation Reserves and the Right to Self-Determination 81

David Hansford and Forrest Finn

Introduction	81
The Tobique Raid	81

The Legalization of Recreational Cannabis	82
The Canadian Cannabis Regime	82
Federal Regulation under the Cannabis Act	82
Provincial Regulation	82
Does Provincial Cannabis Regulation Apply to First Nation Reserves?	83
Aboriginal Regulation.	83
Self-Determination and the Retail Sale of Cannabis.	84
Self-Determination as a Contestable Concept	84
Self-Determination in Canadian Aboriginal Law.	85
The Van der Peet Test	86
The First Stage: Identifying the Precise Right at Issue	87
The Second Stage: Integral to the Distinctive Culture.	89
The Justification Test	89
Part 1: Infringement.	90
Part 2: Justification	90
The Legislative Purpose of the Cannabis Act	91
Conclusion.	92

Anishinabek Nation Governance Agreement: Pros and Cons 95

William Taggart

What the ANGA Does	95
Positives:	97
1. Recognition of First Nation Jurisdiction over Citizenship, Culture and Language, and Internal Governance	97
Control over Citizenship	97
Preservation and Protection of Culture and Language	98
Internal Governance	98
2. Paramountcy of ANG and FNG Laws	98
3. New Financial Support for ANG and FNG's	99
4. First Nations to Have all the Powers of a Natural Person.	99
5. First Nations to Have Powers Relating to Penalties and enforcement	99
6. No Effect on Constitutionally-protected Aboriginal or Treaty Rights	100
7. Further Negotiations to Expand Self-government	100
Potential Negatives	100
1. All ANG and FNG Laws and Decision-making Subject to Rights of Appeal or Review	100
2. New Rights of Citizens and Non-citizens who Reside on Reserve to Participate in Governance	102

TABLE OF CONTENTS

xiii

3. Limits on Paramountcy of ANG and FN Laws:	102
4. Broad Applicability of the <i>Canadian Charter of Rights and Freedoms</i>	103
5. ANG and FNG's Required to Defray Governance Costs with Own Source Revenue	103
6. No funding for Expanded Citizenship and Non-citizens Who Reside on reserves	104
7. Enforcement Costs and Administrative Inefficiencies	105
8. FNG's Blocked from Enacting Additional Laws Based on Customary Law or Inherent Jurisdiction	105
May be Pros or Cons, Depending on Perspective	105
1. Limited Bundle of Self-government Powers	105
2. FN Authority will not be Based on the Inherent Right of Self-government	106
3. Creation of a Level of Anishinabek Government above First Nations' Governments	106
4. Division of Federal Transfer Payment Among ANG and FNG's	107
5. No Role for Treaty Organizations	107
Summary and Commentary	107

Injunctions and Blockades: “Self-Help Remedies” and the Centering of the Canadian Legal Perspective.

Nikita Rathwell

Introduction.	109
Alton Natural Gas Storage Inc. v. Poulette	109
Test for an Interlocutory Injunction	110
Application of the Interlocutory Injunction Test	111
Taseko Mines Limited v. Tsilhqot'in National Government	112
Legal History of the Taseko Project	113
Application of Interlocutory Injunction Test	114
Coastal GasLink Pipeline Ltd. v. Huson	116
The Role of Indigenous Law	117
Application of Interlocutory Injunction Test	119
The Treatment of Blockades in Injunction Cases	120
The Centering of the Canadian Legal Perspective and System	121
Conclusion.	122

**British Columbia's Enactment of the Declaration on the
Rights of Indigenous Peoples Act: A Step Towards
Reconciliation? 123**

Thomas Isaac and Grace Wu

Introduction.	123
Background	124
UNDRIP	124
Evolution of Canada's Position on UNDRIP	128
DRIPA: Effects and Implementation Challenges	132
Effects of DRIPA	132
Implementation Challenges of DRIPA	134
Section 3 of DRIPA.	134
The Duty to Consult and the Principle of Free, Prior and Informed Consent	137
Strength of the Duty	139
Limitation of Rights	143
Concept of "Consent"	145
Evaluating DRIPA's Role in the Process of Reconciliation	148
Process of Reconciliation	148
Evaluation of DRIPA	149
Conclusion.	150
<i>Index</i>	151