The Kenneth MacGregor Lecture

The Supreme Court and the Evolution of Indigenous Rights and Title

S b

The Supreme Court and the Evolution of Indigenous Rights and Title

2(.3#45#6.&' #67.)3#, &13(/3#3%0#, &1)373-37&1#8/3#:; <=#

#

ļ

AI dc Id R adId T

 $!\,!\#\$\%!\&'\;((\%\&)^*+\%!\$^*,\;-)\,.\,!)\,-\#)!/('\;O!/\$'\;1\,!23'\;\$^*,\;^*4\#("!5\%'\;5(\%.\,6!)))$

"ļ

T -#)!\$%1#*4.!.7\$5\$*.*4,!*.!)-#)!)-%!Y#)*!-#.!4%+%\$!\$%5%#(%8!)-%!]'&)\$*4%!
'/!]*.&'+%\$;!8%.5*)%!'4,'*4,!5\$%..7\$%.!'4!X'5%!?\$#4&*.!/\$'1!F#4#8#6.!C48*,%4'7.!

ļ

a!

ļ

C4!#88*)*' 4N) -%!5\$' +*.*' 4!) -#)!) -%!?*\$.)!@#)*' 4.!!&%8%!(#48!' 4(;!)'!>\$*)#*4!K#48!3;!

%E)%4.*' 4N!(#)%\$!)'!F#4#8#!#.!) -%!%13'8*1%4)!'/!) -%!F\$' O40!(%#8.!)'!) -%!Q4#)*' 4D)' D

&\$' O4R!'\$!Q4#)*' 4D)' D4#)*' 4R!&-#\$#&)%\$*.)*&!'/!) -%!(#)%\$!)\$%#)*%.!#48!)'!) -%!1 #44%\$!*4!

O-*&-!1'.)!'/!) -%!?*\$.)!@#)*' 4.!)%48!)'!+*%O!) -%*\$!\$%(#)*' 4.-*5!O*) -!F#4#8#9!C*+%4!

)-*.!\$' (%!#.!) -%!, 7#\$#4)'\$!'/!C48*#4!(#48!)*)(%N!#48!) -%!/#&)!) -#)!) -*.!*.!%13\$#&%8!*4!

.%&)*' 4!"a!'/!!"#\$

\$\##&' ()*' !#+\$&' !#*,-!) -%!W'; #(!X\$' &(#1#)*' 4!*.!

'/)%4!+*%O%8!#.!) -%!QC48*#4!>*((!'/!W*, -).R!#48h'\$!) -%!QC48*#4!`#, 4#!F#\$)#R9!

Pa The Constitution Act, a d Canadian Charter of Rights and Freedoms

i)-%!)-#4! #..*, 4*4,! <7\$*.8*&)*' 4! '+%! C48*#4.!)'!)-%! /%8%\$#(!, '+%\$41%4)A!)-%!
!O#.!(#\$, %(;!.*(%4)!*4!)%\$1.!' /!5\$' +*.*' 4.!\$%(#)*4,!)' !C48*, %4' 7.!

X%' 5(%.9!V' O%+%\$A!)-*.!O#.!#4;)-*4,!37)!)-%!&#.%!/' \$!)-%!

9!?\$' 1!.9''a!' /!)-%!F-#\$)%\$e!

 \mathbf{H}

ļ

'4(;!8*8!U%&)*'4.!"a!#48!Sa!%4.-\$*4%!%E*.)*4,!23'\$*,*4#(!\$*,-).!K%9, M!)-'.%!/('O*4,!/\$'1!)-%!W';#(!X\$'&(#1#)*'40!37)!)-%;!4'O!#\$%!)'!#55(;!5\$'.5%&)*+%(;!*4!)-%!.%4.%!)-#)!4%O!#48!%4.-\$*4%8!23'\$*,*4#(!\$*,-).!#48!)*)(%!O*((!/('O!/\$'1!/7)7\$%!(#48D&(#*1!

?' 748#)*' 4.!0%3.*)%!&!

ļ

9!?\$' 1!)-%!C48*, %4' 7.!

N!

-#8!3%%4!4%*)-%\$!%E)*4, 7*. -%8!3;!)\$%#);!4'\$!.75%\$. %8%8!3;!(#O9!: -7. A!)-%!/%8%\$#(!, '+%\$41%4)!3%, #4!)-%!('4,!5\$'&%..!'/!4%, ')*#)*4,!
&' 15\$%-%4.*+%!.%))(%1%4).!'/!23'\$*, *4#(!)*)(%A!%+%4)7#((;!&'4&(78*4,!1'8)*408#;!)\$%#)*%.!*4!4'\$)-%\$4!q7j3%&A!)-%!g7J'4A!)-%!/'\$1%\$!

ļ

! ML!

0)\$%#)*%.!#48!.)#)7)%.!\$%(#)*4,!)'!C48*#4.!.-'7(8!3%!(*3%\$#((;!&'4.)\$7%8!#48!
74&%\$)#*4)*%.!\$%.'(+%8!*4!/#+'7\$!'/!)-%!C48*#4.9_!U5%&*/*&#((; A!)-%!&'7\$)!*4)\$'87&%8!
4)'!F#4#8#4!<7\$*.5\$78%4&%!#!5\$*4&*5(%!#8'5)%8!/\$'1!#!M[)-D&%4)7\$;!\$7(*4,!*4!)-%!
P4*)%8!U)#)%

M''

ļ

! MS!

MZ

ļ

!		

O#.!%+*8%4&%!)-#)!5#\$).!'/!)-%!: .*(-H')6*4!^#48!O%\$%!\$%, 7(#\$(; !7. %8!3; !)-%! : .*(-H')6*4!! .755' \$)*4,! #! /*48*4,! '/! 0. 7//*&*%4)! '&&75#)*' 4R9!!=E&(7.*+*);!'/!(#48!7.%!*4!)-*.!&#.%!O#.!5\$' +%4!3;!)-%!/#&)!)-#)!"LL!; %#\$.!#, '!)-%!: .*(-H')6*4!\$%5%((%8!')-%\$.!/\$' 1!)-%*\$!(#48!#48! 8% 1 #48%8! 5%\$ 1*...*' 4!/\$' 1!'7).*8%\$.! O-'! O*..-%8!)'!5#..!'+%\$!*)9! F'4)*47*);!O#.!%.)#3(*..-%8!3;!5\$''/!'/!)-%!/#&)!)-#)!75!)'!M[[[M)-%!(#48! O#.!'&&75*%8!3;!)-%!: .*(-H')6*49*!!

C4!)%\$1.!'/!)-%!\$*,-).!)-#)!/('O!/\$'1!#3'\$*,*4#(!)*)(%A!\$%/(%&).!#.!/'(('O.e!

ļ

: -%! *15(*&#)*' 4.! '/!)-*.! U75\$%1%! F' 7\$)! 8%&*.*' 4! #\$%! 5')%4)*#((;! %4' \$1' 7.9!2.!F-*%/!07.)*&%!>%+%\$(;!` &^#&-(*4!4')%8!*4!-%\$!\$7(*4, ll0)-*.! *.! 4')! 1%\$%(;!#!\$*,-)!' /! /*\$.)! \$%/7.#(! O*)-! \$%.5%&)!)'! F\$' O4! (#48! 1#4#, %1%4)!' \$!7.#, %!5(#4.!f'!\$#)-%\$!*)!*.!#!\$*,-)!)'!5\$' #&)*+%(;!7.%!#48! 1#4#, %!)-%! (#48\mathbb{R}! >*((! C#((#, -%\$\mathbb{N}! #! /' \$1%\$!) \$\%#);! \$*,-).! 4%, ')*#)' \$\mathbb{N}! \ 4')\%8!)-#)!)-%!?*\$.)!@#)*' 4.!)-#)!-#+%!4')!&\%8\%8!)-%*\$!)\%\$*')' \$;!0-#+%! 3\%4! 1#...*+\%(;!\%15' O\%\$\%8!3;!)-*.!\$7(*4,!f!#48!)-\%*\$!\%E5\%&)#)*' 4.!-#+\%!<7.)!*4&\%#.\%8!\%E5' 4\%4)*#((;\mathbb{R}"!\V\%!/7\$)-\%!4')\%.!)-#)!17&-!'/!)-\%! 74\%E5('*)\%8! \$\%.' 7\$&\%.! (*\%!*4!)-\%!)\$\\$***)' \$\\$**\.!'/!)-\%! 1'.)!

i 4%!.-'7(8!4')%A!-'O%+%\$A!)-#)!)-*.!\$7(*4,!#55(*%.!'4(;!)'! e!
)-'.%!?*\$.)!@#)*'4.!)-#)!-#+%!)\$%#)*%.!#\$%!4')!#//%&)%8!3;!)-*.!<78, 1%4)!.*4&%!)-%!
%..%4&%!'/!#!)\$%#);!O#.!)'!&%8%!&(#*1!)'!#((!)%\$*)'\$;!%E&%5)!)-#)!Q\$%.%\$+%8R!)'!)-%19#\$!
V%4&%!)-%!/7((!*15#&)!O*((!3%!/%()!*4!5\$'+*4&%.!(*J%!>\$*)*.-!F'(713*#!#48!q7%3%&!O-%\$%!
)-%\$%!#\$%!/%O!)\$%#)*%.9!:-*.!*.!%.5%&*#((;!)-%!&#.%!.*4&%!)-%!\$%&%4)!.%\$*%.!'/!&'7\$)!
\$7(*4,.!1#J%.!*)!17&-!%#.*%\$!/'\$!?*\$.)!@#)*'4.!)'!&(#*1!&'4)\$'(!'+%\$!)-%*\$!)\$#8*)*'4#(!
(#48.9!i 4&%!#3'\$*,*4#(!)*)(%!*.!%.)#3(*.-%8M!)-%!,'+%\$41%4)!!'4(;!,'!#,#*4.)!#!?*\$.)!
@#)*'46.!O*.-%.!*/!*)!5\$'+%.!)-#)!*)!*.!<7.)*/*%8!)'!8'!748%\$!)-%!F'4.)*)7)*'49!!

! 2\$,7#3(;!)-%!1'.)!5\$'1*4%4)!'/!)-'.%!)-#)!+*%O!:.*(-H')*4!#.!7.-%\$*4,!*4!#!
8\$#1#)*&!\$%'\$*%4)#)*'4!*4!23'\$*,*4#(DF#4#8#!\$%(#)*'4.A!%.5%&*#((;!#.!*)!\$%(#)%.!)'!
\$%4%O#3(%!#48!4'4D\$%4%O#3(%!\$%.'7\$&%!8%+%('51%4)A!#\$%!UO#*4!#48!>#*((*%!K"LMa0!
#48!UO#*4!K"LMI09!c*+%4!)-#)!#3'\$*,*4#(!)*)(%!4'O!/('O.!/\$'1!.7//*&*%4)A!%E&(7.*+%!#48!

! Md!

&' 4)*47' 7.!' &&75#)*' 4!'/! (#48!.*4&%! 5\$%D&' 4)#&)!)*1 %H) -%! F\$' O4!*.! (%/)! O*)-! #!

/*87&*#\$;!87);!#48!)-%!\$*,-)!)'!%4&\$' #&-!' 4(;!*/!.' 1 %!3\$' #8%\$!573(*&!*4)%\$%.)!<7.)*/*%.!

)9!:-%!-'(8%\$.!'/!23'\$,*4#(!)*)(%!-#+%!')-%\$O*.%!/7((!8*.&\$%)*'4!#3'7)!)-%!7.%!#48!

3%4%/*).!'/!)-*.!(#489!UO#*4!\$%/%\$.!)'!)-*.!#.!0/%%!.*15(%!5(7.R!3%.%!*)!*.!4')!'4(;!#!

&' ((%&)*+%!)*)(%!37)!#.!O%((!'4%!)-#)!!3%!.7\$\$%48%\$%8!'4(;!)'!)-%!F\$' O4!#48!)-#)!

: -%!F' 4, \$%..!' /!23' \$*, *4#(!X%' 5(%.!KF2X0#%!

<u>!</u> 56!

:;01<'0=>!3#-*1!1\$'('?<.'**@!<0.\$%'=%!?/%!0-(A%\$!#B!C

. #**%.?<E%!A' =<=!?/\$#-D/!\$%)\$%=%O?'?<E%=!#B!?/%<\$!./#<. %:!\$%=)%.?<OD!'**!
?/%<\$!\$<D/?=:!<O?%\$%=?=!'O1!O%%1=!'=!CA#\$<D<O'*!)%#)*%=9!
!

;O!)'\$'D\$')/!\K!#B!<?=!1%. <=<#O+!?/%!R, ,!O#?%=V!:W/%!B<\$=?!1%.*'\$'?<#O!=/#-*1!999!A%!
D\$'O?%1!'=!\$%]-%=?%19!F#ON=?'?-=!;O1<'O=!'O1!H1?<=!'\$%!:;O1<'O=>!-O1%\$!=96547L8!
'O1!<?!<=!?/%!B%1%\$'*!D#E%\$O(%O?!?#!3/#(!?/%@!.'O!?-\$O9>!W/%!R, ,!\$%.#DO<^%=!?/'?!
?/<=!\$-*<D!!\$%1\$%==%=!?/%!-O.%\$?'<O!)#=<?<#O!?/'?!?/%!H1?<=!'O1!O#ON=?'?-=!;O1<'O=!#B?%O!B#-O1!?/%(=%*E%=9!"\$#(!)'\$'D\$')/=!5Y!'O1!5L!#B!?/%!1%.<=<#OV!!!!!

ļ

G#?/!?/%!B%1%\$' *!D#E%\$0 (%0?!' 01!?/%!) \$#E<0.<' *!D#E%\$0 (%0?=!/' E%! 1%0<%1!/' E<0D!*%D<=*' ?<E%!' -?/#\$<?@!#E%\$!0#ON=?' ?-=!;01<' 0=!' 01!HI?<=9! C=!?/%!?\$<' *!M-1D%!B#-01+!3/%0!HI?<=!' 01!0#ON=?' ?-=!;01<' 0=!/' E%! '=P%1!?/01111 (@!1.90501625.488-564Tm/TT481T24000.405.24060E) -0-1#!-0.1 ((#) 0.

75!

Y9!!!C...%)?'O.%!A@!?/%!(#1%\$0!HI?<=!.#((-O<?@9!))

ļ

?#!?/%! F'?<#0'*!d0%\$D@!G#'\$19!"#!\$/%!'))\$#)\$<'?%0%==!#B!?/<=!1%*%D'?<#0!?/%!!!!R, ,! \$%B*%.?%1!'=!B#**#3=V#)!

W/%!, \$#30!('@!<01%%1!\$%*@!#0!=?%)=!?'P%0!A@!'0!'1(<0<=?\$'?<E%!A#1@!

.'=%=9!W/<=!<=!?/%!R,,!=?'?%(%O?!'?!)'\$'D\$')/!L5!#B!?/%!,/<))%3'=!.'=%+!O'(%*@!?/'?\! :\W/\%!1-?@!?\#!.\#O=-*?!<=!O\#?!?\\$<\DD\\\$\%1!A@!/<=?\#\\$<.'*!<()'.?=\9!;?!<=!O\#?!?\\%!E\%/<.*\! ?\#!'11\\$\%==!/<=?\#\\$<.'*!D\\$<\%E'O.\%=>\9!

;?!<=!O#?!.*%'\$!?#!(%!M-=?!3/'?!(<D/?!A%!'?!=?'P%!/%\$%9!!H<D/?!<?!(%'O!?/'?!?/%!.*'<(!#B!'!*'.P!#B!:B\$%%!)\$<#\$!'O1!<OB#\$(%1!.!M-A

7\

ļ

;O!?%\$(=!#B!?/%!)#?%O?<'*!.#O=%]-%O.%=!#B!?/%!R,,!1%.<=<#O=H?/%!B#.-=!/%\$%!

3<**!A%!*<(<?%1!?#!?/%!?3#!.'=%=!?/'?!'\$%!\$%B%\$\$%1!?#!'A#E%!'=!:D'(%!./'OD%\$=>!i!

O'(%*@!?/%!W=<*/]#?J<O!'O1!a'O<%*=!1%.<=<#O=9!W-\$O<OD!B<\$=?!?#!?/%!*'??%\$H?/%!

O-(%\$<.'*!<()*<.'?<#O=!'\$%!.*%'\$*@!1\$'('?<.!'O1!?/%!<O=?<?-?<#O'*!<()*<.'?<#O=!'\$%H'?!

?/%!E%\$@!*%'=?H*<P%*@!?#!A%!1%*<.'?%H%E%O!1<=\$-)?<E%9!;O!?%\$(=!#B!?/%!B#\$(%\$HB\$#(!.#*-(O!Y!#B!W'A*%!5!#B!./'))?%\$!7!#B!(@!B#\$?/.#(<OD!A##P!4

8!?/%!=?'?-=!;O1<'O!)#)-*'?<#0!#0!'O1!#BB!?/%!\$%=%\$E%=!<O!
7K5Y!3'=!656+cL\+!3/<*%!?/'?!#B!O#ON=?'?-=!;O1<'O=!3'=!75Y+6KK!'O1!?/'?!#B!?/%!
H1?<=!3'=!L5e+eYK!B#\$!'O!#E%\$'**!?#?'*!#B!5+\\7+K7\!;O1<D%O#-=!.<?<^%O=9!;O!?-\$O+!?/%!
=/%%\$!O-(A%\$=!=-DD%=?!?/'?!?/%!\$#*%!'O1!=?'?-\$%!#B!;2C,!4<%%+!?/%!;O1<D%O#-=!

?\$' 1<?<#0' *!?%\$\$<?#\$@!' O1+!?/%\$%B#\$%+!A%!' A*%!?#!%&%\$?!(#\$%!<OB*-%O. %!#E%\$!\$%=#-\$. %! 1%. <=<#0=!<O. *-1<OD!?/#=%!\$%*' ?<OD!?#!\$%E%O-%!' **#. ' ?<#0+!<O. *-1<OD!\$#@' *?<%=9!

 $G\%@\#01!?/\%!\%E\%O-\%!<=-\%\#!?/\%\%\%!=\%\% (=!?\#!A\%! (-./!.\#O.\%\$O!?/'?!W=<^*/]\#?J<O! (\#1\%^!3<^**!=^*\#3!1\#30! ('M\#\$!\$\%=\#-\$.\%!) \$\#M\%.?=9!W/<=!<=!'!?/\% (\%!<O!?/\%!) ') \%\$!A@!$

! 7c!

BIBLIOGRAPHY!

, /\$<=?<\hdot41#0!47KK\8!:, /' **%OD%=!?#!_\$A' O!CA#\$<D<O' *!f#E%\$O' O. %>!<0!H<. /' %*! H -\$) /@!4%1#8! !4m<OD=?#O+!;O=?<? -?%!#B! ;O?%\$D#E%\$O (%O?' *!U%*' ?<#O=8!6LN55\9!!

 $!f\#1*\%3=P'\#, /\$<=?<0'!'01!T\%\$\%(@!S\%AA\%\$!47KKc8!:W/\%!, '*1\%\$!a\%. <=<\#0\#CA\#\$<0<0'*!W<?*\%\#W\$\%'?<\%=\#'01!?/\%!F<=D'J'>#<0!O'('$!''#=?\$#0\%'?/\$$!U'E\%O\#'01!T\$\$(@!S\%AA\$\$!4\1=\$!$

4n' O. #-E%\$V!_G, !2\$%==8+!5NYh9!

f\$' ((#01#RIA' =?<%0!47K5Y8!Terms of Coexistence: Indigenous Peoples and Canadian Law (Toronto: Carswell).!