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The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study

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Dwight Newman*

The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study

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I. INTRODUCTION

Legal and economic scholars have increasingly drawn attention to the impact of property rights issues on economic prosperity for Indigenous communities around the world.¹ Topics addressed by such scholarship have included inadequate formalization of Indigenous property rights with resulting disincentivization of land improvements and inability to fully utilize land for credit purposes,² impacts of unpredict-

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1. See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000) (discussing *inter alia* how insufficient formalization of property rights may preclude financing arrangements or, more generally, generate insecurities of title that disincentivize investment—in an important work that has had international impact); TOM FLANAGAN, FRASER INST., CTR. FOR ABORIGINAL STUDIES, *CLARITY AND CONFUSION? THE NEW JURISPRUDENCE OF ABORIGINAL TITLE* (2015) (addressing in less detailed form some of the property rights dimensions discussed in this Article and suggesting some possible impacts on transaction costs—in a Canadian context specifically). Some have also considered other economic issues in this context. See also Dwight Newman, *Indigenous Title and Its Contextual Economic Implications: Lessons for International Law from Canada's Tsilhqot'in Decision*, 109 AM. J. INT'L L. UNBOUND 215 (2015) (considering some economic implications of the court's recent Aboriginal title decision while putting forth an argument challenging overly universalized statements of international law on Indigenous rights); Harry Swain & James Baillie, *Tsilhqot'in Nation v. British Columbia: Aboriginal Title and Section 35*, 56 CAN. BUS. L.J. 264 (2015) (alluding to some possible economic consequences of recent Aboriginal title decision, albeit in relatively undetailed form).
 2. See, e.g., Terry L. Anderson & Dean Lueck, *Land Tenure and Agricultural Productivity on Indian Reservations*, 35 J.L. & ECON. 427 (1992) (showing empirical evidence in the context of different tenure systems on different American Indian reservations). See generally SELF-DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS (Terry L. Anderson et. al. eds., 2006); UNLOCKING THE WEALTH OF

able governance regimes on property rights,³ and the complex variety of economically inefficient land-holding systems imposed on Indigenous lands in various countries.⁴ Property rights have impacts on Indigenous communities through effects on the possibilities for investment within the community,⁵ and they have impacts on possibilities for Indigenous communities or individuals to contract with business entities outside the community on matters like resource development.⁶ When things are not set up right, uncertain systems of property rights make it difficult to use land and invite opportunities for increased governmental control.⁷

INDIAN NATIONS (Terry L. Anderson ed., 2016) [hereinafter UNLOCKING THE WEALTH].

3. See, e.g., Terry L. Anderson & Dominic P. Parker, *Sovereignty, Credible Commitments and Economic Prosperity on American Indian Reservations*, 51 J.L. & ECON. 641 (2008) (showing empirical evidence of different economic development as between American Indian reservations subject to different legal systems that offer greater or fewer guarantees of security to investment); Terry L. Anderson & Dominic P. Parker, *Economic Development Lessons from and for North American Indian Economics*, 53 AUSTL. J. AGRIC. & RESOURCE ECONS. 105 (2009) (offering further evidence on economic development issues); REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT (Mariam Jorgensen ed., 2007) (discussing impact of governance on economic development); TOM FLANAGAN & KATRINE BEAUREGARD, FRASER INST., CTR. FOR ABORIGINAL STUDIES, *THE WEALTH OF FIRST NATIONS: AN EXPLORATORY STUDY* (2013) (showing the impact of rule of law variables on the economic prosperity of different First Nations in Canada).
4. See, e.g., FLANAGAN & BEAUREGARD, *supra* note 3 (showing impact of private property variables on economic prosperity of different Canadian First Nations); Jessica A. Shoemaker, *No Sticks in my Bundle: Rethinking the American Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383 (2015) (discussing the complex variety of landholding systems on American Indian reservations and showing how some imposed systems generate significant irrationality and incoherence) [hereinafter Shoemaker, *No Sticks in my Bundle*]; see also STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005) (showing accumulation of legally constructed processes of destruction of effective property rights for American Indians); Eric Kades, *The Dark Side of Efficiency: Johnson v M'Intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000) (showing how early American case law functioned to support putatively "efficient" expropriation that neglected externalities borne by Indigenous communities).
5. See, e.g., Shoemaker, *No Sticks in my Bundle*, *supra* note 4.
6. Cf. MALCOLM LAVOIE & DWIGHT NEWMAN, FRASER INST., *MINING AND ABORIGINAL RIGHTS IN YUKON: HOW CERTAINTY AFFECTS INVESTOR CONFIDENCE* (2015) (showing tangible effects on mining-sector investor confidence of uncertainties on scope of Indigenous rights).
7. Cf., e.g., Terry L. Anderson, *Sovereign Nations or Reservations? An Economic History of American Indians 14–15* (1995) (explaining that divided systems of property rights have provided space "for bureaucrats to expand their domains"); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 685–87 (1998) [hereinafter Heller, *The Tragedy of the Anticommons*] (noting the division of Indian land ownership ends up creating an anticommons); Steven E. Eagle, *Private Property, Development and Freedom: On Taking Our Own Advice*, 59 SMU L. REV. 345, 352 (2006)

These impacts are in the context of compelling, urgent needs to grow Indigenous economies, with forward-thinking Indigenous scholars like Robert J. Miller having recently highlighted, once again, the ongoing poverty on the reservation and the ways this poverty fundamentally constrains Indigenous options.⁸ These limitations often come from constraints on Indigenous institutions that have undermined their prior economic standing and success.⁹ They also often come from the sort of problem Jessica Shoemaker is exploring in her important and innovative work detailing the deep-seated complexities in the nature of land ownership on American Indian reservations.¹⁰

The focus of this Article will be on Aboriginal title rights held by Canadian Indigenous communities, but the impacts reflect more general economic theory that has implications for communities elsewhere. They also have direct practical relevance to Canadian, American, and other international resource companies hoping to invest in Canada, which is almost uniquely positioned as a Western democratic state with truly enormous future resource potential.¹¹ At the same time, there is a significant current scholarly interest in Indigenous rights at an international level¹² such that ongoing developments may well not

(noting the need for clear laws on property rights to permit individuals to build their assets); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (discussing the importance of standardized bundles of property rights so as to limit information costs in transactions).

8. See ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY (Bruce E. Johnson ed., 2012).
9. See *id.*; see also UNLOCKING THE WEALTH, *supra* note 2 (containing various authors showing economic logic of previously existing Indigenous institutions, with examples including Bruce E. Johnson showing complex economic functions of the potlatch in Pacific Northwest cultures).
10. See, e.g., Jessica A. Shoemaker, *Emulsified Property*, 43 PEPP. L. REV. (forthcoming 2016); Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729; Shoemaker, *No Sticks in My Bundle*, *supra* note 4; see also Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. (forthcoming 2017) (engaging the complexity of the area somewhat more schematically while seeking to try to find means toward reform that overcome some of the complexity).
11. See, e.g., Dwight Newman et al., *Arctic Energy Development and Best Practices on Consultation with Indigenous Peoples*, 32 B.U. INT'L L.J. 449 (2014) (noting at several points literature highlighting Arctic resource potential generally or Canadian resource potential specifically).
12. See, e.g., S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004); MAURO BARELLI, SEEKING JUSTICE IN INTERNATIONAL LAW: THE SIGNIFICANCE AND IMPLICATIONS OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2016); KAREN ENGLE, THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY (2010); SHERYL LIGHTFOOT, GLOBAL INDIGENOUS POLITICS: A SUBTLE REVOLUTION (2016); BEN SAUL, INDIGENOUS PEOPLES AND HUMAN RIGHTS: INTERNATIONAL AND REGIONAL JURISPRUDENCE (2016); REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Ste-

be confined to any one locale.¹³ As a result, there is additional reason for attention to significant developments in a jurisdiction like Canada.

In the particular context that will be the focus of this Article, Canadian courts—and, ultimately, the Supreme Court of Canada—have been making decisions about the shape of various Indigenous property rights in recent years. Perhaps most prominently, after a lengthy series of issues in the lower courts,¹⁴ the Supreme Court of Canada rendered a major Aboriginal title judgment in June 2014 in favor of the Tsilhqot'in Nation in central British Columbia,¹⁵ thus making the first-ever judicial declaration of Aboriginal title to specific demarcated lands in a Canadian court.¹⁶ Like some other recent Aboriginal rights decisions from Canada,¹⁷ this decision has already received some international attention¹⁸—although it deserves more for reasons including those articulated in this Article.

phen Allen & Alexandra Xanthaki eds., 2011); THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY (Marc Weller & Jessie Hohmann eds., forthcoming 2017); ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND (2007); Kirsty Gover, *Settler-State Political Theory, 'CANZUS' and the UN Declaration on the Rights of Indigenous Peoples*, 26 EUR. J. INT'L L. 345 (2015).

13. See generally P.G. MCHUGH, ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF TRIBAL LAND RIGHTS (2011) [hereinafter MCHUGH, ABORIGINAL TITLE] (tracing interactions between different common law states on Aboriginal title); P.G. MCHUGH, ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS, AND SELF-DETERMINATION (2004) (offering a further historical examination that points to transnational dimensions of discourse).
14. See generally Dwight G. Newman, *Tsilhqot'in Nation v. British Columbia and Civil Justice: Analyzing the Procedural Interaction of Evidentiary Principles and Aboriginal Oral History*, 43 ALTA. L. REV. 433 (2005) (discussing some of the early decisions on evidentiary issues during the trial proceedings); Dwight Newman & Danielle Schweitzer, *Between Reconciliation and the Rule(s) of Law: Tsilhqot'in Nation v. British Columbia*, 41 U. B.C. L. REV. 249 (2008) (discussing a number of aspects of the trial judgment).
15. *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256 (Can.).
16. See, e.g., KEN COATES & DWIGHT NEWMAN, MACDONALD LAURIER INST., THE END IS NOT NIGH: REASON OVER ALARMISM IN ANALYZING THE TSILHQOT'IN DECISION 5 (2014) (noting that it was the first ever declaration of Aboriginal title in a Canadian court and documenting Aboriginal reactions).
17. See, e.g., Tom Clynes, *Victory for Yukon Wilderness is a "Game-Changer": Historic Ruling Protects Much of Pristine Peel River Watershed*, NAT'L GEOGRAPHIC (Dec. 6, 2014), <http://news.nationalgeographic.com/news/2014/12/141206-peel-watershed-yukon-canada-ruling-land-use-planning/> [https://perma.unl.edu/BM8U-AKV7] (example of widespread interest by major media sources in some Aboriginal rights determinations in Northern Canada); see also NAOMI KLEIN, THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE (2014) (making repeated arguments at various points in the book that Indigenous rights are one of the main legal mechanisms to be used by environmental activists concerned with issues such as climate change, thus foreshadowing major future significance to debates about these Indigenous rights issues).
18. See, e.g., Paul Viera, *Canada's High Court Grants Exclusive Property Rights to Aboriginal Group: Tsilhqot'in Nation Wins Title to Disputed Land in British Co-*

Perhaps less obviously, Canadian courts have also been making decisions about other matters such as the form of water rights held by Indigenous communities,¹⁹ traditional harvesting rights and other property rights held as Aboriginal rights or as modern treaty rights,²⁰ and the duty-to-consult doctrine and associated claims to accommodations such as resource revenue sharing.²¹ Thus, there are a range of Indigenous property rights issues at stake; this Article focuses on the key title determination from the *Tsilhqot'in* decision.

The Canadian courts render these decisions in the context of a particular constitutional provision adopted as part of Canada's major 1982 constitutional amendments.²² The 1982 amendments include various new constitutional provisions, including an amending formula,²³ clarifications regarding provincial (as opposed to federal) ownership and jurisdiction over natural resources,²⁴ and the *Canadian Charter of Rights and Freedoms* (*Charter*), which is a written bill of rights contained in sections 1 through 34 of the new Constitution

lumbia, WALL STREET J. (June 26, 2014), <http://www.wsj.com/articles/canadas-high-court-grants-exclusive-property-rights-to-aboriginal-group-1403795319> (example of coverage in top echelons of financial press); John Borrows, *Aboriginal Title in Tsilhqot'in v. British Columbia*, [2014] SCC 44, MAORI L. REV. (August 2014), <http://maorilawreview.co.nz/2014/08/aboriginal-title-in-tsilhqot'in-v-british-columbia-2014-scc-44/> [<https://perma.unl.edu/6LP5-JASC>] (example of early publication on the decision in a New Zealand journal).

19. See, e.g., *Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154 (Can.) (pronouncing explicitly or implicitly on a number of water rights issues in parts of the judgment), *leave to appeal denied*, 2015 CarswellBC 2965 (S.C.C. Oct. 15, 2015).
20. See generally CLAUDIA NOTZKE, *ABORIGINAL PEOPLES AND NATURAL RESOURCES IN CANADA* (1994) (discussing a number of different contexts in which Aboriginal rights or treaty rights might be thought to bear on different resources, discussing some of the earlier case law and some gaps in this case law).
21. See generally DWIGHT G. NEWMAN, *THE DUTY TO CONSULT: NEW RELATIONSHIPS WITH ABORIGINAL PEOPLES* (Donald Ward ed., 2009) [hereinafter NEWMAN, *THE DUTY TO CONSULT*]; DWIGHT G. NEWMAN, *REVISITING THE DUTY TO CONSULT ABORIGINAL PEOPLES* [hereinafter NEWMAN, *REVISITING THE DUTY TO CONSULT*] (discussing at length the development of the "duty to consult" jurisprudence and its tendencies to foster such discussions as those on resource revenue sharing).
22. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) [hereinafter Constitution Act, 1982].
23. *Id.* pt. V, §§ 38–49; see also JAMES ROSS HURLEY, *AMENDING CANADA'S CONSTITUTION: HISTORY, PROCESSES, PROBLEMS AND PROSPECTS* (1996) (detailing the lengthy multi-decade quest for an amending formula).
24. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), *reprinted in* R.S.C. 1985, app II, no 5 (Can.), pt. VI, § 92A [hereinafter "Constitution Act, 1867"] (adding section to adjust division of powers with clearer recognition of provincial authority over natural resources); see also J. PETER MEEKISON ET AL., *ORIGINS AND MEANINGS OF SECTION 92A: THE 1982 CONSTITUTIONAL AMENDMENT ON RESOURCES* (1985) (offering a historical perspective on the section); DWIGHT NEWMAN, *NATURAL RESOURCE JURISDICTION IN CANADA* (2013) [hereinafter NEWMAN, *NATURAL RESOURCE JURISDICTION*] (offering an integrated account of section 92A along with other constitutional provisions affecting management of natural resources in Canada).

Act, 1982.²⁵ Immediately following the *Charter*, section 35(1) of the Constitution Act, 1982 contains a further rights provision, with the statement that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”²⁶

Section 35, the Aboriginal rights provision, is not detailed and therefore leaves a great deal of room for judicial interpretation.²⁷ In the context of determinations on Indigenous property rights, the Canadian courts have increasingly used constitutional reasoning about the purposes of section 35 in articulating the scope and limits of these property rights.²⁸

The main claims of this Article are threefold: First, that the Indigenous property rights created by Canadian courts in recent years have a variety of economic characteristics that may undermine their value compared to rights that might have simply been differently articulated. Second, that the way in which these particular property rights are developed in the courts differs from traditional common law methodologies in particular ways that lead the courts to attain these outcomes rather than an economically efficient design of property rights. And, third, that there are a variety of policy routes forward that could help to promote the development of more economically functional property rights for Canadian Indigenous communities.

Although the particular claims are developed in terms of the Canadian jurisprudence of Indigenous rights, the concluding section will also try to show that this study has wider implications on several different issues—notably, questions related to appropriate engagement

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25. Constitution Act, 1982 pt. I, §§ 1–34. *See also* CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Errol Mendes & Stéphane Beaulac eds., 5th ed. 2013) (significant collection of essays on different aspects of the *Charter*); GUY RÉGIMBALD & DWIGHT NEWMAN, THE LAW OF THE CANADIAN CONSTITUTION (1st ed. 2013) (treatise offering integrated account of the *Charter* as part of Canadian constitutional law generally).
 26. Constitution Act, 1982 pt. II, § 35(1). *See generally*, Kiera Ladner, *An Indigenous Constitutional Paradox: Both Monumental Achievement and Monumental Defeat*, in PATRIATION AND ITS CONSEQUENCES: CONSTITUTION MAKING IN CANADA 267 (Lois Harder & Steve Patten eds., 2015) (tracing some of the aspirations and results of section 35).
 27. *Cf.* PATRICK MACKLEM, INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA 13–23 (2001) (putting a number of arguments for theory-influenced approaches to interpretation of constitutional Aboriginal rights).
 28. *See, e.g.*, Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, para. 1 (Can.) (explaining that purposes of reconciliation are central to interpretation of various aspects of Aboriginal rights); FELIX HOEHN, RECONCILING SOVEREIGNTIES: ABORIGINAL NATIONS AND CANADA (2012) (trying to show paradigm shifts in theoretical concepts animating interpretation); JAMIE D. DICKSON, THE HONOUR AND DISHONOUR OF THE CROWN: MAKING SENSE OF ABORIGINAL LAW IN CANADA (2015) (showing the Supreme Court of Canada organizing its jurisprudence around particular purposive concepts, such as honour of the Crown).

with Indigenous property rights in other contexts and questions related to when there are exceptions to the general proposition that common law judicial interpretation of property rights leads to economically well-structured rights.

II. THE NATURE OF ABORIGINAL TITLE WITHIN THE CANADIAN JUDICIAL INTERPRETATION

A. Background

As noted, the 1982 constitutional provision “recognizes and affirms” specifically “existing aboriginal and treaty rights.”²⁹ Whether or not the drafters realized it at the time, this provision would come to encompass a right to Aboriginal title in areas where Indigenous communities had not surrendered land through treaties, in the way that the doctrine of Aboriginal title has grown in common law jurisdictions around the world.³⁰

In a 1973 case brought by the Nisga’s community, *Calder v. British Columbia*, the Supreme Court of Canada recognized, in principle, the idea of Aboriginal title being part of the common law.³¹ Although six of the seven justices sitting in the case recognized Aboriginal title in principle, the Nisga’a lost on the facts of the case from a combination of three of the seven justices holding their title to have been extinguished by past government action and one further justice holding the case to have procedural defects such that it was unnecessary to rule on the substantive issues.³²

The case did not result in any declaration of Aboriginal title for the Nisga’a, but it set the stage for negotiations with them and other Aboriginal communities on the basis of recognized rights: the Nisga’a ultimately concluded a treaty under which they have self-governmental powers and forms of land ownership, including the ability to create individualized property rights and even to establish a Torrens land-registry system.³³

29. Constitution Act, 1982 pt. II, § 35(1).

30. See, e.g., KENT McNEIL, COMMON LAW ABORIGINAL TITLE (1989) (articulating common law foundations for Aboriginal-title doctrine); MCHUGH, ABORIGINAL TITLE, *supra* note 13 (tracing the jurisprudential history of the development of the doctrine of Aboriginal title); ULLA SECHER, ABORIGINAL CUSTOMARY LAW: A SOURCE OF COMMON LAW TITLE TO LAND (2014) (tracing a shift in some jurisdictions in the conception of the origins of Aboriginal title to root it in Indigenous legal systems’ property rights).

31. *Calder v. British Columbia*, [1973] S.C.R. 313 (Can.).

32. *Id.* (Judson, J., writing for three justices holding extinguishment and Pigeon, J., writing alone on technical points, together outnumbering the three justices for whom Hall, J., wrote).

33. Justine Hunter, *Land Ownership Changes Mark New Chapter in Nisga’a History*, GLOBE & MAIL (May 14, 2010), <http://www.theglobeandmail.com/news/british-columbia/land-ownership-changes-mark-new-chapter-in-nisga-a-history/article4353>

More broadly, the *Calder* case concerning the title claim of the Nisga'a showed that Aboriginal title continued to exist, in principle, in areas where land had not been surrendered through historic treaties—which included most of British Columbia as well as most of the three Northern territories, much of Quebec, and the Maritime provinces.³⁴ The result was that Aboriginal title became a constitutionalized property right across significant parts of Canada in 1982,³⁵ with Aboriginal title claims having been settled in only some of these regions since then and outstanding Aboriginal title claims remaining over most of British Columbia and the Maritimes, along with some smaller claims elsewhere.³⁶

Subsequent Aboriginal title cases analyzed Aboriginal title, to some extent, through that constitutional lens, with the next major Aboriginal title case at the Supreme Court of Canada, the 1997 *Delgamuukw* decision,³⁷ seeking to develop an Aboriginal title test that consisted of a specific application of the broader Aboriginal rights test that the court had developed the prior year in its 1996 *Van der Peet*

118/ [https://perma.unl.edu/99S2-PAJS] (discussing private ownership of homes within Nisga'a territory); Tristin Hopper, *B.C. First Nation Leads Historic and Controversial Move Toward Aboriginal Private Home Ownership*, NAT'L POST (Nov. 8, 2013), <http://news.nationalpost.com/news/canada/b-c-first-nation-leads-historic-and-controversial-move-toward-aboriginal-private-home-ownership> [https://perma.unl.edu/C5TP-RVGM] (describing titling of first three homes); cf. Diane Cragg, *Best Practices in First Nations Land Title Systems: Considerations for Improving Land Title Certainty on First Nations Lands*, FIRST NATIONS TAX COMMISSION (2007) (land registrar of Nisga'a Nation exploring benefits of Torrens system). *But see* Jack Woodward, *Converting the Communal Aboriginal Interest into Private Property: Sarnia, Osoyoos, the Nisga'a Treaty and Other Recent Developments*, in BEYOND THE NASS VALLEY: NATIONAL IMPLICATIONS OF THE DELGAMUUKW DECISION 93 (Owen Lippert ed., 2000) (raising complications if parts of the Nisga'a lands are still subject to claims by other Aboriginal communities for joint title).

34. See THOMAS ISAAC, *ABORIGINAL LAW: COMMENTARY AND ANALYSIS* 144, 161–86 (noting treaties in Maritimes did not explicitly extinguish title and discussing areas where modern treaties had to be negotiated or continue under negotiation).
35. *Id.* at 86 (“[p]rior to 1982, Aboriginal rights, including Aboriginal title, could be extinguished by a clear federal legislative act; however that is no longer possible . . . since 1982, Aboriginal title can no longer be unilaterally extinguished by the federal Crown”); *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, para. 39 (Can.) [hereinafter *Marshall and Bernard*] (stating similarly that “[p]rior to constitutionalization of aboriginal rights in 1982, aboriginal title could be extinguished by clear legislative act (see *Van der Peet*, at para. 125). Now that is not possible. The Crown can impinge on aboriginal title only if it can establish that this is justified in pursuance of a compelling and substantial legislative objective for the good of larger society: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1113. This process can be seen as a way of reconciling aboriginal interests with the interests of the broader community.”).
36. ISAAC, *supra* note 34, at 144, 162–65 (discussing claims in the Maritimes and British Columbia).
37. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.).

decision.³⁸ The essentially public-law nature of the court's reasoning is worth highlighting, as it sets the stage for the reasoning in the subsequent jurisprudence. The *Van der Peet* decision, which considered a claimed Aboriginal right in respect of certain fishing activities, saw the court articulate a general test for the identification of constitutionally entrenched Aboriginal rights.³⁹ Essentially, this test was a cultural-rights test that looked for specific practices and activities that were culturally distinctive to a particular community and had commenced in some form prior to contact with European settlers.⁴⁰ The protection, as confirmed by later case law, extends to logical evolutions from those historical practices,⁴¹ but the test does focus in certain respects on evidence of historical cultural practices and activities.⁴² The test came from theoretical reasoning about what kinds of practices could reasonably be thought to be legal rights that survived the application of European sovereignty. Specifically, the court focused on these rights as "Aboriginal" rights flowing from prior presence⁴³ and what legal rights advance the purpose of the constitutional Aboriginal-rights guarantee, which the court increasingly characterizes in terms of "reconciliation."⁴⁴

The *Delgamuukw* decision on Aboriginal title was essentially an application of the *Van der Peet* theory and test to the specific context

38. R. v. Van der Peet, [1996] 2 S.C.R. 507 (Can.).

39. *Id.*

40. *Id.* para. 45 (explaining the "integral to a distinctive culture" test).

41. Lax Kw'alaams Indian Band v. Canada (Attorney General), [2011] 3 S.C.R. 535 (Can.).

42. See generally Russell L. Barsh & James Youngblood Henderson, *The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand*, 42 MCGILL L.J. 993 (1997) (characterizing the test and identifying its tendencies to freeze rights based on their historical form); Avigail Eisenberg, *Reasoning About Identity: Canada's Distinctive Culture Test*, in DIVERSITY AND EQUALITY: THE CHANGING FRAMEWORK OF FREEDOM IN CANADA 34 (Avigail Eisenberg ed., 2006) (exploring the test from a philosophical standpoint).

43. See *Van der Peet*, [1996] 2 S.C.R. at paras. 111–12 (offering basic explanation of the survival of Aboriginal title claims and Aboriginal rights generally as based on historical occupation and use of lands) (drawing on André Émond, *Le sable dans l'engrenage du droit inherent des autochtones à l'autonomie gouvernementale*, 30 REVUE JURIDIQUE THÉMIS 89 (1996)).

44. See *Van der Peet*, 2 S.C.R. at para. 31 (stating that "the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown"). See generally Dwight G. Newman, *Reconciliation: Legal Conception(s) and Faces of Justice*, in MOVING TOWARD JUSTICE: LEGAL TRADITIONS AND ABORIGINAL JUSTICE 80 (John D. Whyte ed., 2008) [hereinafter Newman, *Reconciliation: Legal Conception(s)*] (charting growing and shifting use of concept of reconciliation in Supreme Court of Canada jurisprudence on Aboriginal rights).

of Aboriginal title.⁴⁵ Where a particular community had exclusive occupation of particular territories prior to the assertion of sovereignty by European settlers,⁴⁶ rather than just a non-exclusive use of land that translated into an Aboriginal right,⁴⁷ the exclusive occupation now survived as Aboriginal title.⁴⁸ In other words, Aboriginal title ends up translating a prior cultural community's exclusive occupation into a modern property right, based on a cultural-rights approach adopted within broad constitutional purposes of reconciliation.⁴⁹

The broad doctrinal features of the *Delgamuukw* decision continue forward in the 2014 *Tsilhqot'in* decision,⁵⁰ with the main test in *Tsilhqot'in* being based on *Delgamuukw*.⁵¹ However, *Tsilhqot'in* also implicitly responds to an intervening decision, the Supreme Court of Canada's 2005 *Marshall and Bernard* decision.⁵² That specific decision was seen by some to say that historically mobile Aboriginal communities could not meet the terms of the Aboriginal title test.⁵³ In its very result, the *Tsilhqot'in* decision makes clear that they can.

B. The Aboriginal Title Test

What is interesting now is the shape of the Aboriginal title test that emerges from *Tsilhqot'in*, which actually requires significant doctrinal exposition and analysis for a proper understanding of a number of elements of the test. As in *Delgamuukw*, the basic test looks to whether an Aboriginal community had sufficient, exclusive occupation of land prior to the assertion of European sovereignty in the pertinent

45. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 142 (Can.) (referring to the case as engaging in “[t]he adaptation of the test laid down in *Van der Peet* to suit claims to title . . .”).

46. *Id.* para. 143.

47. *Id.* para. 159 (“[I]f aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish aboriginal rights short of title.”).

48. *Id.* para. 155 (explaining the relationship between exclusive Aboriginal occupation and title today in the following terms: “Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right.”).

49. *Marshall and Bernard*, [2005] 2 S.C.R. 220, para. 58 (Can.) (“It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law”).

50. *See Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256 (Can.); *Delgamuukw*, [1997] 3 S.C.R. 1010.

51. *Tsilhqot'in*, [2014] 2 S.C.R. 256.

52. *Marshall and Bernard*, [2005] 2 S.C.R. 220.

53. *See, e.g., Kent McNeil, Aboriginal Title and the Supreme Court: What's Happening?*, 69 SASK. L. REV. 281 (2006) [hereinafter McNeil, *Aboriginal Title*]; RÉGIMBALD & NEWMAN, *supra* note 25, at 791–94.

part of Canada.⁵⁴ In addition to sufficiency of occupation and exclusivity of occupation, the test can involve looking to continuity of occupation if present occupation is used as part of the evidence for past occupation.⁵⁵

The test also looks implicitly to whether a current Aboriginal community is the valid successor to a particular Aboriginal title claim. Although that matter has tended to be less discussed, it became a question in an interesting way in *Tsilhqot'in*. While the issue did not continue to be a matter for discussion at the Supreme Court of Canada level, in the lower courts there was an issue as to whether the title claim should be pursued by the Tsilhqot'in Nation as the claimant, which had initially been commenced by one of the member groups within the Tsilhqot'in, the Xení Gwetin. The Tsilhqot'in claim amalgamated six legal First Nations, the modern legal entities, back into a historically rooted group and thereby also avoided the problem of overlapping claims by these modern legal entities.⁵⁶ The lower courts were ready to recognize the Tsilhqot'in Nation as the rights-bearing community for the purposes of the title claim.⁵⁷ This aspect of the case may highlight strategic considerations pertinent in other Aboriginal rights claims. It also highlights the possibility of questions being raised about whether the particular claimant to appear before the courts is the proper successor to a title-holding group.

Returning to the key components of the test, the *Tsilhqot'in* decision, while applying *Delgamuukw*, does not simply restate it. In its result, it makes clear the appropriateness of a particular application of *Delgamuukw*, being one that makes it possible for historically mobile Aboriginal communities to succeed in title claims. It does so through its reading of the sufficiency and exclusivity requirements. In respect of sufficiency of occupation, the court in *Tsilhqot'in* actually appears to respond to some criticisms of its past decision in the intervening case of *Marshall and Bernard*.⁵⁸ *Marshall and Bernard* had been an application of *Delgamuukw* in the context of an unsuccessful

54. *Tsilhqot'in*, [2014] 2 S.C.R. at para. 25 (working to apply the past test, stating that “the *Delgamuukw* test for Aboriginal title to land is based on ‘occupation’ prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.” (emphasis in original)).

55. *Id.* para. 46 (“Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case.”).

56. See Newman & Schweitzer, *supra* note 14 (discussing this aspect).

57. *Id.*

58. *Marshall and Bernard*, [2005] 2 S.C.R. 220 (Can.). See, e.g., McNeil, *Aboriginal Title*, *supra* note 53 (offering significant criticism of cases as blocking possibility of claims by historically mobile communities).

Aboriginal title claim in Nova Scotia. When analyzing the combined sufficiency and occupation branches, the court had ended up looking for “regular and exclusive”⁵⁹ occupation to meet the common law standards, specifically suggesting that seasonal use of land for hunting or fishing would most plausibly ground an Aboriginal hunting or fishing right rather than full ownership of the land.⁶⁰ The court did not engage in a separate discussion of the requirements of sufficiency but used the sufficiency aspect to lead in to the exclusive occupation discussion.⁶¹ In discussing sufficiency, it referenced some past case law trying to show the flexibility of the idea of sufficiency, but with some of that past case law referencing the adverse possession context.⁶²

In *Tsilhqot'in*, presumably aware of criticisms of the substance or at least the optics of equating Aboriginal possessors to adverse possessors, the court is concerned that the sufficiency standard not be equated with the standard at Canadian common law for proof of adverse possession.⁶³ Indeed, it actually turns explicitly to one of the judgments from the Nova Scotia Court of Appeal in *Marshall and Bernard*⁶⁴ whose standard it had previously rejected in its own judgment in that case:

59. *Marshall and Bernard*, [2005] 2 S.C.R. at para. 58.

60. *Id.*

61. *Id.* paras. 54–58.

62. *Id.* para. 54 (“One of these rights is aboriginal title to land. It is established by aboriginal practices that indicate possession similar to that associated with title at common law. In matching common law property rules to aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed: *Powell v. McFarlane* (1977), 38 P. & C.R. 452 (Ch. D.), at p. 471. For example, where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession: *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798 (Eng. C.A.). The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically: *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 (C.A.), *per* Wilson J.A. Finally, the common law recognizes that exclusivity does not preclude consensual arrangements that recognize shared title to the same parcel of land: *Delgamuukw*, at para. 158.”)

63. *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, para. 38 (Can.) (“To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.”)

64. *R. v. Marshall; R. v. Bernard*, [2003] 218 N.S.R. 2d 78 (Can.), *rev'd*, [2005] 2 S.C.R. 220 (Can.).

In *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78, at paras. 135–38, Cromwell J.A. (as he then was), in reasoning I adopt, likens the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law. A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain.⁶⁵

As an aside, Justice Cromwell later sat on the Supreme Court of Canada panel unanimously supporting Chief Justice McLachlin's *Tsilhqot'in* opinion.

Canadian property law scholars consider the standard of common law general occupation poorly defined.⁶⁶ Perhaps with knowledge of that issue, the court went on to adopt, through Justice Cromwell's Court of Appeal opinion, some of the statements by Kent McNeil on the expected standard of occupation. First of all, it references Justice Cromwell's explicit adoption of a passage from McNeil's seminal book, *Common Law Aboriginal Title*:

What, then, did one have to do to acquire a title by occupancy? . . . [I]t appears . . . that . . . a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts "being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider." There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred. Significantly, the acts and intention had to relate only to the occupation—it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the vacant estate, for the law cast it upon him by virtue of his occupation alone

Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. Generally, any acts on or in relation to land that indicate an intention to hold or use it for one's own purposes are evidence of occupation. Apart from the obvious, such as enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used.⁶⁷

There are some interpretive challenges with this description. While the early lines of the passage suggest that mere travel across land would never be sufficient to amount to occupation, the later passage underlined by the Supreme Court of Canada refers to "even perambulation" as potentially grounding sufficient occupation, and dictionary definitions of "perambulation" make clear that it consists simply of travelling across, perhaps especially by walking in some official act of

65. *Tsilhqot'in*, [2014] 2 S.C.R. at para. 39.

66. See, e.g., Alex M. Cameron, *The Absurdity of Aboriginal Title After Tsilquot'in*, 44 *Advoc. Q.* 28 (2015). I am grateful for discussions with Bruce Ziff on this point.

67. *Tsilhqot'in*, [2014] 2 S.C.R. at para. 39 (emphasis added by Supreme Court of Canada) (quoting McNEIL, *supra* note 30, at 198–200).

demarcation⁶⁸—admittedly potentially distinguishable from the “riding over land to hunt or hawk” that serves as the image in the early lines, but only by the drawing of hairline distinctions that begin to break down common sense. That said, the idea that the acts could depend on the nature of the land is fully sensible, and one could thus read the judgment as explicitly adopting the common law general occupation standard.

However, it is frankly not clear that either of the judgments in question actually adopted that standard. No sooner does one see that first McNeil passage as an explanation of general occupation (with the peculiar perambulation paradox, as referenced) than both judgments reference further statements from McNeil:

Cromwell J.A. in *Marshall* went on to state that this standard is different from the doctrine of constructive possession. The goal is not to *attribute* possession in the absence of physical acts of occupation, but to define the quality of the physical acts of occupation that demonstrate possession at law (para. 137). He concluded:

I would adopt, in general terms, Professor McNeil’s analysis that the appropriate standard of occupation, from the common law perspective, is the middle ground between the minimal occupation which would permit a person to sue a wrong-doer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they would be if dealing with enclosed, cultivated land. Perhaps most significantly, . . . it is impossible to confine the evidence to the very precise spot on which the cutting was done: Pollock and Wright at p. 32. Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant. [para. 138].⁶⁹

The standard is now not said to be the ill-defined general occupation standard but the potentially even more challenging standard of “the middle ground between the minimal occupation which would permit a person to sue a wrong-doer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner.”⁷⁰ All of this is of course technical, but the court sets out to define the common law standard technically and, quite simply, fails to do so in one coherent, cohesive way. So, the judgment probably gives a general sense of what might be “sufficient” common law occupation, but it does not do so particularly precisely at all. That may be just as well, as any common law description would be complicated by the con-

68. See, e.g., *Perambulate*, OXFORD ENGLISH DICTIONARY (3d ed. 2005) (including “[t]o travel through and inspect (a territory) so as to measure it, divide it, or determine its ownership; to survey by passing through; . . . to walk in procession around the boundaries of (a forest, manor, parish, etc.) for the purpose of formally determining or preserving them”).

69. *Tsilhqot’in*, [2014] 2 S.C.R. at para. 40.

70. *Id.*

sideration that it must also be considered in light of weight also given to Aboriginal perspectives.⁷¹

The result in the case is that the court is ready, in at least some circumstances, to consider even seasonal hunting, fishing, or trapping sufficient use of land to ground an Aboriginal title claim.⁷² That claim seems to contradict its suggestion in *Marshall and Bernard* that seasonal use of land for hunting or fishing would more likely ground an Aboriginal hunting or fishing right but not title.⁷³ The natural reading is that the court implicitly overturned *Marshall and Bernard*—the court denies that it did so,⁷⁴ but *sub silentio* overturning of precedents has been part of the *modus operandi* of the Supreme Court of Canada as of late.⁷⁵ Although on its face the Aboriginal title test has remained stable, there is reason to think that the underlying meaning of the test has actually been changing, with that conclusion surely implying a degree of legal uncertainty for those seeking to apply it in any sensible way or to predict its future application.

The exclusivity component of the test is to be “understood in the sense of intention and capacity to control the land,”⁷⁶ and there has always been agreement that such intention is not disturbed by a consensual passage onto the land by others when permission is granted

71. *Id.* para. 41 (“The common law test for possession—which requires an intention to occupy or hold land for the purposes of the occupant—must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.”).

72. *Id.* para. 42 (“There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is ‘sufficient’ use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.”).

73. *Marshall and Bernard*, [2005] 2 S.C.R. 220, para. 58 (Can.).

74. *Tsilhqot’in*, [2014] 2 S.C.R. at paras. 43–44 (claiming that *Marshall and Bernard* did not create a territorial approach to title and did not preclude title claims by nomadic or semi-nomadic groups). *But see also Marshall and Bernard*, [2005] 2 S.C.R. at para. 110 (LeBel, J., concurring) (warning the court that its statement of the law was apt to be read as precluding title claims by nomadic or semi-nomadic groups and arguing for a different statement of the test); Dwight Newman, *Aboriginal Rights, Collective Rights and Adjudicative Virtues*, in *THE DIGNITY OF LAW: THE LEGACY OF JUSTICE LOUIS LeBEL* 285 (Dwight Newman & Malcolm Thorburn eds., 2015) [hereinafter Newman, *Aboriginal Rights, Collective Rights*] (discussing Justice LeBel’s foresight on this and other points in his Aboriginal law jurisprudence).

75. *See, e.g.*, Dwight Newman, *Judicial Method and Three Gaps in the Supreme Court of Canada’s Assisted Suicide Judgment in Carter*, 78 SASK. L. REV. 217 (2015).

76. *Tsilhqot’in*, [2014] 2 S.C.R. at para. 48.

for such passage.⁷⁷ In *Tsilhqot'in*, the Supreme Court of Canada appears to rely on facts found in this respect by the trial judge, stating quickly that:

The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding.⁷⁸

Those findings are far less clear in the trial judgment than implied in this statement. The trial judge found that the Tsilhqot'in made seasonal use of certain lands prior to the assertion of European sovereignty,⁷⁹ and he referenced general military encounters with other Indigenous communities outside the claim area and the Tsilhqot'in repelling European settlers from some spots in the last few years prior to the 1846 assertion of sovereignty.⁸⁰ However, it is not clear that the trial judge's findings rise to the challenge posed by *Marshall and Bernard* to show that seasonally used sites could not have been used by others in between the seasonal uses.⁸¹ The result is that the court must be read as also having accepted some shift in the demands in the exclusivity branch.

The *Tsilhqot'in* decision has made Aboriginal title claims viable for historically mobile Aboriginal communities. Despite first appearances of it being an application of the *Delgamuukw* test, it has not done so, however, without changing the law. It must be understood as having effected a significant shift in the sufficiency standard and at least some shift in the exclusivity standard as compared to the way the Supreme Court of Canada regarded these standards in its last Aboriginal title decision, one decade ago. It may amount simply to a retreat from what it now regards as an erroneous application of *Delgamuukw* in *Marshall and Bernard*. In any event, it has effected a significant shift.

One could frame an argument that shifting standards within the test for establishing Aboriginal title themselves pose a form of economic problem through the legal uncertainty that they create. That claim might not be misplaced in that they undermine an assessment of whether the circumstances of a particular community do or do not ground a significant property right for that community. Admittedly

77. *See id.*; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 56 (Can.).

78. *Tsilhqot'in*, [2014] 2 S.C.R. at para. 58.

79. *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 948 (Can.).

80. *Id.* paras. 219–54.

81. *Marshall and Bernard*, [2005] 2 S.C.R. 220, para. 58 (Can.) (“[A]boriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.”).

with this, as with some other aspects, it is also fair to recognize that the judges deciding these cases are in a challenging position of trying to develop a doctrine with highly complex features in a highly charged environment. So, these shifting standards without a doubt undermine certainty, but it is not clear whether judges could easily do better or whether they are ultimately subject to institutional limitations and constraints that make this dimension of uncertainty practically unavoidable.

C. The Contents of Aboriginal Title

As has developed within the international jurisprudence on the doctrine of Aboriginal title,⁸² the Canadian approach to Aboriginal title sees it as a burden on the radical or underlying title that the Crown acquired at the moment of the assertion of sovereignty.⁸³

Aboriginal title [then] confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.⁸⁴

This statement comes immediately after a restatement of the court's long-standing position that Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts."⁸⁵ The inherent tension between the two statements—one analogizing to fee simple and the other denying any equation with fee simple—manifests the court's challenge in describing the concept of Aboriginal title, which it sees as arising out of the relationship between the new State and pre-existing Aboriginal societies after the assertion of European sovereignty.⁸⁶ However, the

82. See generally McHUGH, ABORIGINAL TITLE, *supra* note 13 (comprehensive account of international development of Aboriginal title jurisprudence); SECHER, *supra* note 30 (more argument-oriented account on place of Indigenous legal traditions in shaping title, but with extensive comparative work figuring within her discussion).

83. *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, para. 69 (Can.).

84. *Id.* para. 73.

85. *Id.* para. 72 ("Analogies to other forms of property ownership—for example, fee simple—may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title 'is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts.'").

86. *Id.* para. 72; cf. Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. BAR REV. 727 (1987); R. v. Van der Peet, [1996] 2 S.C.R. 507, para. 19 (Can.) (stating that "Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are *aboriginal*.").

court's adopted position does appear to see the property right dimension of Aboriginal title as having much of the content of fee simple ownership, albeit also containing both more and less than fee simple.

Fee simple, in its origins, refers via the term "fee" to the "use of land," and via the term "simple" to that use being unconstrained in terms of unrestricted inheritance by heirs and in terms of alienability through unrestricted transfer of ownership.⁸⁷ Although there are senses in which the fee simple owner "manages" the land, the term referring to "the right to pro-actively use and manage the land"—distinct from "the right to decide how the land will be used"—arguably sits more naturally as a description of the powers of a government. For instance, the term "manage" appears in the constitutional description of the legislative powers of provincial governments in relation to non-renewable natural resources⁸⁸ and of the legislative powers of provincial governments in relation to public lands.⁸⁹ Indeed, on a close attention to the text of the judgment, there is an argument to be made that the description of the incidents of Aboriginal title actually encompasses an implicit suggestion as to a public-style jurisdiction as opposed to only a private ownership of the lands in question.⁹⁰ Thus, in some respects, it may go well beyond the contents of fee simple, although understanding its contents is not straightforward and may give rise to significant further uncertainties. At the same time, the expansive enumerated contents of Aboriginal title mask the next dimension of the court's opinion, which imposes a number of limits on Aboriginal title that make its contents less than those of fee simple ownership.

D. Inherent Limits on the Scope of Aboriginal Title

The extended discussion of Aboriginal title in the *Delgamuukw* decision included the elaboration of an "inherent limit" on the scope of Aboriginal title.⁹¹ As explained in that decision, this inherent limit consists of a sort of irreconcilability test: "lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place."⁹² In the lead opinion in that case,

87. See, e.g., J.J.S. Wharton, *Dictionary of Jurisprudence* 267–69 (2d ed. 1860).

88. Constitution Act, 1867, pt. VI, § 92A(1)(b) ("development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom").

89. *Id.* pt. VI, § 92(5) ("The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.").

90. See, e.g., Brian Slattery, *The Constitutional Dimensions of Aboriginal Title*, 71 SUP. CT. L. REV. 45 (2015).

91. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 128–32 (Can.).

92. *Id.* para. 128.

Chief Justice Lamer went on to apply this principle to somewhat idiosyncratic examples, suggesting that title established over a traditional hunting ground would not permit strip mining of the land and that title based on ceremonial uses of certain land would not permit the development of parking lots.⁹³ More significantly, in terms of significantly restricting the characteristics of Aboriginal title as a property right, Chief Justice Lamer also used this inherent limit aspect to explain and thus maintain a long-standing limit on Aboriginal title, that of its inalienability to anyone other than the government.⁹⁴

There is an idiosyncratic aspect to the *Tsilhqot'in* case on this point as well, though, in that it did not seem to make clear whether it preserves this inherent limit on the scope of Aboriginal title and supplements it, or whether it replaces it. In her judgment, Chief Justice McLachlin references *Delgamuukw* and the idea of an “inherent limit” but does not describe it in precisely the same terms:

As we have seen, *Delgamuukw* establishes that Aboriginal title “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes” (para. 117), including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group’s attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits (para. 166).⁹⁵

Her judgment goes on to describe the restrictions on Aboriginal title in somewhat different terms altogether, in a manner focused on the preservation of land for future generations.⁹⁶ That language picks up on a

93. *Id.* (“For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).”)

94. *Id.* para. 129 (“It is for this reason also that lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it. I have suggested above that the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy ‘to ensure that Indians are not dispossessed of their entitlements’: see *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 133. What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.”)

95. *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, para. 67 (Can.).

96. *Id.* para. 74 (“Aboriginal title, however, comes with an important restriction—it is collective title held not only for the present generation but for all succeeding

brief reference in para. 166 of *Delgamuukw*, the paragraph she cited, which states that “aboriginal title encompasses *the right to choose* to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples.”⁹⁷ But what was a briefer reference there has now shifted into a larger description that operates in her judgment without reference to the inherent limit on Aboriginal title as described in *Delgamuukw*.

The challenging interpretive point here is whether her description of restrictions on Aboriginal title replaces or supplements the *Delgamuukw* statement of the inherent limit. The language in the middle of her reference to *Delgamuukw* does pick up the *Delgamuukw* reasoning, as *Delgamuukw* explained its inherent limit in terms of the ongoing relationship of the group to the land.⁹⁸ But nowhere does the *Tsilhqot’in* judgment, which seems in some respects to be framed as a relatively complete statement of the Canadian law of Aboriginal title, actually reference the nature of the inherent limit in the same terms as *Delgamuukw*. One could read it as implicitly altering *Delgamuukw* on this point, or one could read it as not saying anything on the point and therefore leaving *Delgamuukw* undisturbed. Frankly, it is unfortunate that a major Aboriginal title judgment could not be more precise on this point.

There is, effectively, a new inherent limit on Aboriginal title in the *Tsilhqot’in* judgment. Here, Chief Justice McLachlin reasons about the nature of Aboriginal title as being collective title. She writes as follows:

Aboriginal title, however, comes with an important restriction—it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes—even permanent changes—to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to

generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes—even permanent changes—to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.”).

97. *Delgamuukw*, [1997] 3 S.C.R. at para. 166.

98. *Id.* para. 127 (“The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.”).

benefit from the land will be a matter to be determined when the issue arises.⁹⁹

This reasoning offers a specific explanation of the inalienability dimensions of Aboriginal title, which may be consistent with the view that this restriction replaces the more broadly stated inherent limit of *Delgamuukw*. Whether it does or not, though, it imposes significant—and complicating—constraints on the nature of the property right that Aboriginal title represents. In particular, the suggestion that uses of the land must be measured against the test of non-substantial impact on future generations having the benefit of the land would arguably have unpredictable implications. The suggestion that the permissibility of a particular use can be determined “when the issue arises” is not reassuring. It is not clear who even has standing to assert the claims of future generations and whether this grounds claims by members of a community dissenting from a particular development or even outside groups like environmental non-governmental organizations (NGOs).¹⁰⁰

The citation chains on this restriction get complicated. In the *Tsilhqot'in* trial judgment, Justice Vickers wrote that “[s]uch inherent limits [as articulated in *Delgamuukw*] prohibit those uses that would destroy the ability of the land to sustain future generations of Aboriginal peoples: *Delgamuukw*, para. 128.”¹⁰¹ Such language concerning future generations does not appear in the cited paragraph of *Delgamuukw*,¹⁰² so the trial judge appears implicitly to have engaged in an interpretation of the purposes of the inherent limit in *Delgamuukw*

99. *Tsilhqot'in*, [2014] 2 S.C.R. at para. 74.

100. COATES & NEWMAN, *supra* note 16, at 15.

101. *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 539 (Can.); *cf. Tsilhqot'in*, [2014] 2 S.C.R. 256.

102. *Delgamuukw*, [1997] 3 S.C.R. at para. 128 (“Accordingly, in my view, lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place. As discussed below, one of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group’s distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put. For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).”).

and adopted principles going beyond those articulated in the main discussion of the inherent limit in *Delgamuukw*. As referenced earlier, a later paragraph of *Delgamuukw*, in passing, had made reference to the possibility of future generations having relevance, with the statement that “[t]he only limitation on this principle [that historic uses might have changed] might be the internal limits on uses which land that is subject to aboriginal title may be put, i.e., uses which are inconsistent with continued use by future generations of aboriginals.”¹⁰³ That statement, in turn, appears to have received no particular explanation or citation in *Delgamuukw* but simply to have been one isolated line. So, there is the possibility that a passing reference in *Delgamuukw* offered the *Tsilhqot’in* trial judge and, in turn the Supreme Court of Canada, a means of rearticulating the nature of the inherent limit on the scope of Aboriginal title. As a result, there is now articulated an element of control over the land in the hands of “future generations.”

There is arguably a salience between the Supreme Court of Canada’s description and prominent definitions of the notion of “sustainable development,” such as the Brundtland Commission’s statement that “[s]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁰⁴ To the extent that Aboriginal title lands are uniquely subject to a restriction on their use that imposes an actual legal rule of sustainable development, the court has arguably turned them into a unique, experimental form of property regardless of the potential wishes of Aboriginal communities themselves who might or might not wish to use their lands in accordance with these notions of “sustainability.” Thus, these property rights are subjected to unique limitations.

E. The Security and Insecurity of Aboriginal Title

Aboriginal title rights are also uniquely both more and less secure than other property rights in Canada. On the one hand, Aboriginal title rights receive constitutional protection, unlike other property rights in Canada. Although many campaigned for constitutional protection for property rights more generally, a variety of historical reasons led to them being excluded from protection in the *Charter*.¹⁰⁵ Though there are ongoing efforts to secure constitutional protection for property rights generally, and there may be constitutional means of accomplishing that in part without the full rigours of the general

103. *Id.* at para 154.

104. Rep. of the World Comm’n on Env’t and Dev., *Our Common Future*, U.N. Doc. A/42/27 (1987).

105. See Dwight Newman & Lorelle Binnion, *The Exclusion of Property Rights from the Charter: Correcting the Historical Record*, 52 ALTA. L. REV. 543 (2015).

amending formula,¹⁰⁶ those efforts have not been successful to this point in time. Thus, Aboriginal property rights, unlike other property rights, are uniquely subject to constitutional protection in Canada, and since the 1982 constitutional amendments, such rights are no longer subject to legislative “extinguishment.”¹⁰⁷

At a constitutional level, this also means that Aboriginal property rights are uniquely subject to judicial development and no longer subject to simple legislative change.¹⁰⁸ Perhaps partly in response to the challenging institutional features of this dynamic, the courts have developed ways in which Aboriginal property rights are actually uniquely insecure relative to other property rights in so far as they are subject explicitly to the constitutionalized possibility of infringement or override.¹⁰⁹

Although less prominent in some of the early discussions of the case, the *Tsilhqot’in* judgment actually discussed the justified-infringement or override test at some length.¹¹⁰ The first statement of the requirements actually appears relatively minimalist:

To justify overriding the Aboriginal title-holding group’s wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental ac-

106. See Dwight Newman, *The Bilateral Amending Formula as a Mechanism for the Entrenchment of Property Rights*, 21 CONST. F. 17 (2013).

107. See *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 28 (Can.) (“Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*, *supra*.”); Marshall and Bernard, [2005] 2 S.C.R. 220, para. 39 (Can.) (stating similarly that “[p]rior to constitutionalization of aboriginal rights in 1982, aboriginal title could be extinguished by clear legislative act (see *Van der Peet*, at para. 125). Now that is not possible. The Crown can impinge on aboriginal title only if it can establish that this is justified in pursuance of a compelling and substantial legislative objective for the good of larger society: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1113. This process can be seen as a way of reconciling aboriginal interests with the interests of the broader community.”); see also Jeremy Webber & Kirsty Gover, *Proprietary Constitutionalism*, in ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 361 (Mark Tushnet et al. eds., 2013) (discussing different constitutional protections of different types of property in different states).

108. *But see* Newman, *Aboriginal Rights, Collective Rights*, *supra* note 74 (discussing the possible use of the bilateral amending formula to alter Aboriginal or treaty rights within a province without the use of the full amending formula).

109. See generally, Dwight Newman, *The Limitation of Rights: A Comparative Evolution and Ideology of the Oakes and Sparrow Tests*, 62 SASK. L. REV. 543 [hereinafter Newman, *The Limitation of Rights*] (examining judicial development of limits on Indigenous rights without textual basis for such limits).

110. *Tsilhqot’in Nation v. British Columbia*, [2014] 2 S.C.R. 256, paras. 77–88, 119–27 (Can.) (discussing override of Aboriginal title generally) (discussing infringement in context of provincial regulation or legislation affecting Aboriginal title lands, with some reference back to the test from the earlier discussion and some further discussion).

tion is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.¹¹¹

The first two requirements simply reflect the broader duty-to-consult doctrine as well as a requirement of a compelling reason for the override, but neither is especially difficult. The fiduciary obligation requirement is where justification will be principally at issue, based on its two requirements. One is a standard proportionality analysis,¹¹² similar to that for limitation of other constitutional rights.¹¹³ There may be challenging aspects in meeting this test in terms of showing minimal infringement of the title right relative to other ways of achieving the same compelling objective, but those will be fact-contingent.

More puzzling is the further requirement the court states as part of the fiduciary obligation branch, which is that

the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.¹¹⁴

The phrasing that is essentially *ad idem* with a restriction on the community's ownership of the land introduces a complex dynamic. Aboriginal title lands seem to be rendered uniquely incapable of certain types of development since it cannot be pursued either by the community voluntarily or by the government through use of its override powers. At the same time, those within a community who want full use of their lands and governments and who do not want greater limits on their override powers are now rendered into allied positions since both will presumably urge narrow interpretations of this wording. However, if Aboriginal communities push for legal interpretations that give them less restricted forms of land ownership, they end up with less secure forms of land ownership since government override powers then seem to be readily applicable pursuant to some procedural requirements and a standard proportionality analysis.

111. *Id.* para. 77.

112. *Id.* para. 87.

113. *Id.* (using the terms of the *Oakes* test on proportionality in the *Charter* context and thus making the analogy clear); see also Newman, *The Limitation of Rights*, *supra* note 109 (older article articulating this parallelism); Dwight Newman, *Canadian Proportionality Analysis: 5 1/2 Myths*, 73 SUP. CT. L. REV. 93 (2016) (discussing application of proportionality test here not based on constitutional text, but on judicial analogies to the *Charter* context).

114. *Tsilhqot'in*, [2014] 2 S.C.R. at para. 86.

F. The Implications of Unsettled Aboriginal Title Claims

One important further dimension relates to the presence of numerous ongoing Aboriginal title claims in jurisdictions like British Columbia that will not be quickly settled or litigated. The *Tsilhqot'in* decision effectively makes more of these claims viable, or even strong. In particular, it says that the type of land use engaged in by historically mobile Aboriginal communities can support successful title claims and that the tracts at issue are likely to be more continuous territories rather than sites of specific, intensive use. As a result, it effectively strengthens various title claims.

Canada's modern duty-to-consult doctrine, developed since a trilogy of Supreme Court of Canada cases in 2004–2005,¹¹⁵ is essentially a requirement that governments contemplating administrative decisions that may have an adverse impact on an Aboriginal or treaty right, even in the face of uncertainty on the scope of that right, have a duty to consult the potentially impacted Aboriginal community and potentially accommodate their interests.¹¹⁶ The depth of that consultation—or the extent of what governments are expected to do under the doctrine—varies based on the two factors of the degree of adverse impact and the prima facie strength of the claim.¹¹⁷ As a result, to the extent that *Tsilhqot'in* strengthens Aboriginal title claims, one of its immediate impacts in the context of outstanding Aboriginal title cases is to expand the scope of consultation obligations applicable in various contexts.

The duty to consult, in principle, is a duty owed by governments to Aboriginal communities.¹¹⁸ At a practical level, a common implication of the duty to consult for Aboriginal communities has been to reward the presence of uncertainty and even perhaps to incentivize the creation of uncertainty, with uncertainty of the results of consultation processes or their timing giving reason for third-party resource development proponents to enter into agreements directly with Aboriginal communities.¹¹⁹ Agreements such as Impact Benefit Agreements (IBAs) will include a “support clause” under which an Aboriginal community agrees to support a project in the context of consultation discussions in return for various benefits, which may include direct

115. See *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 (Can.); *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (Can.); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (Can.).

116. See generally NEWMAN, THE DUTY TO CONSULT, *supra* note 21; NEWMAN, REVISITING THE DUTY TO CONSULT, *supra* note 21.

117. *Haida*, [2004] 3 S.C.R. at paras. 43–44.

118. *Id.* paras. 52–56 (rejecting any suggestion of a duty to consult owed by third parties, though permitting the government to delegate elements of the duty to consult to industry).

119. See NEWMAN, REVISITING THE DUTY TO CONSULT, *supra* note 21, at 82–84.

financial compensation, but may also include economy-building provisions like contracting provisions, training provisions, or employment provisions.¹²⁰

Such agreements may also include environmental-governance provisions, with these negotiated directly between Aboriginal communities and resource-development companies, thus securing environmental governance in a privatized form, albeit potentially subject to not including all interests that may be affected by that environmental governance. There is, nonetheless, an interesting Coasean dimension here that would itself warrant further study insofar as the context provides precisely for transactions related to the protection of environmental considerations.

In some of its language about the implications of unresolved Aboriginal title claims, the *Tsilhqot'in* judgment tends to weigh supportively for these sorts of agreements, albeit with language that also generates some concerns. Two paragraphs in particular offer comment on the concept of consent in the context of uncertain Aboriginal title claims.¹²¹ These are, of course, to be distinguished from consent in the context of an established title claim, where the usual rule applies that there cannot be development on an owner's land without that owner's consent, subject to the override possibilities outlined earlier.¹²²

Here, though, in the face of calls by some interveners to the litigation to move strongly toward their interpretation of the international standard on consent embodied in the United Nations Declaration on Indigenous Rights,¹²³ the court carefully avoided citing the Declaration, but some see its language on consent as having been influenced by it.¹²⁴ The court suggested, first of all, that agreement with an Ab-

120. *Id.*; see also NEWMAN, NATURAL RESOURCE JURISDICTION, *supra* note 24 (discussing support clauses in IBAs).

121. *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, paras. 92, 97 (Can.).

122. *Id.* para. 76 (“The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.”).

123. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 7, 2007); see also NEWMAN, REVISITING THE DUTY TO CONSULT, *supra* note 21, at 142–53 (discussing legal status of the Declaration and its provisions related to consent). See generally S. J. ROMBOUTS, HAVING A SAY: INDIGENOUS PEOPLES, INTERNATIONAL LAW AND FREE, PRIOR AND INFORMED CONSENT (2014); CATHAL M. DOYLE, INDIGENOUS PEOPLES, TITLE TO TERRITORY, RIGHTS AND RESOURCES: THE TRANSFORMATIVE ROLE OF FREE PRIOR AND INFORMED CONSENT (2015) (discussing developing concepts on free, prior, and informed consent).

124. See, e.g., *Special Legal Update: Tsilhqot'in Nation v. British Columbia: Considering the Implications*, MILLER TYTERLE, June 30, 2014, at 6 (stating that “[i]n *Tsilhqot'in*, while the Court stopped short of requiring FPIC for project development on Aboriginal title lands, it paved the way for FPIC to become a practical

original community is sufficient to avoid later difficulties concerning justified infringement or the duty to consult: “I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.”¹²⁵

Second, the court suggested that there could be serious consequences to not obtaining consent:

Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.¹²⁶

This statement contains a potentially frightening dimension that expands legal uncertainty in so far as it bandies the prospect that the remedy for a mistaken infringement might be cancellation of a project. If one wanted language to discourage multi-billion dollar investments, language speaking of retroactive cancellation of the projects would be good language to employ.

In the context of unsettled Aboriginal title claims, some of this language of the court appears to have tendencies to expand uncertainty rather than to assist with its management. That said, it certainly incentivizes resource-development companies to enter into consensual agreements with Aboriginal communities, although with the standards for that agreement potentially uncertain in the context of claims by future generations. At the same time, it may perpetuate incentives for Aboriginal communities to expand uncertainty so as to foster better incentives for agreements, a consequence that does not seem closely geared to the purposes of encouraging negotiation and reconciliation.

III. THE PROPERTY RIGHTS CHARACTERISTICS OF ABORIGINAL TITLE

A. Theoretical Characteristics of Title

As Part II has already begun to highlight,¹²⁷ there are some characteristics of Aboriginal title as a property right that differ from those associated with models of an economically ideal form of property rights. In particular, there are unusual characteristics to Aboriginal title insofar as it exhibits uncertainties of scope and incentivization of

norm in Canada”); *cf.* COATES & NEWMAN, *supra* note 16, at 17–18 (expressing nuanced view on these points).

125. *Tsilhqot'in*, [2014] 2 S.C.R. at para. 97.

126. *Id.* para. 92.

127. *See supra* Part II.

attempts to create further uncertainty, simultaneous imposition of roles to multiple decision makers on uses of the property and of surprisingly fragmented ownership characteristics, and significant restrictions on alienability of property rights. As will become apparent, these characteristics risk significant, negative economic consequences both in the context of contracting with outsiders, such as with resource-development proponents, and in the context of members' own use of the land.

First, there are various uncertainties associated with the scope of Aboriginal title and there are, in fact, some incentives to perpetuate these uncertainties. These uncertainties—some of them probably not entirely avoidable in the developmental phase of a new doctrine—are present in the test for the establishment of Aboriginal title,¹²⁸ in the doctrine on both the contents of Aboriginal title and the inherent limits on Aboriginal title,¹²⁹ and even in the doctrine on the possibility of overrides of Aboriginal title.¹³⁰ Many property rights are subject to some legal uncertainties or some degree of insecurity,¹³¹ but the present state of Aboriginal title doctrine seems to make uncertainty an all-pervasive characteristic.

Some might try to see the court as exercising prudent restraint in not settling all matters on the scope of Indigenous property rights and suggest that it has tried to strike a balance in providing what certainty it can while avoiding making determinations with longer term consequences. However, its record is less positive than that in many respects. The court has, rather, lurched between seemingly more settled positions. In *Marshall and Bernard*, it made some statements that seemed to weigh against Aboriginal title for historically mobile communities, even as the separate opinion of Justice LeBel warned of this very issue.¹³² Now, it has moved back toward a position that his-

128. See *supra* section II.B.

129. See *supra* section II.C.

130. See *supra* section II.D.

131. See, e.g., Maurice Schiff, *Uncertain Property Rights and the Coase Theorem*, 7 RATIONALITY & SOC'Y 321, 326–27 (1995) (suggesting that many property rights are not entirely certain *a priori*, but that Pareto gains are then possible through their clarification).

132. *Marshall and Bernard*, [2005] 2 S.C.R. 220, para. 126 (Can.) (LeBel, J., concurring) (“Although the test for aboriginal title set out in the Chief Justice’s reasons does not foreclose the possibility that semi-nomadic peoples would be able to establish aboriginal title, it may prove to be fundamentally incompatible with a nomadic or semi-nomadic lifestyle. This test might well amount to a denial that any aboriginal title could have been created by such patterns of nomadic or semi-nomadic occupation or use: nomadic life might have given rise to specific rights exercised at specific places or within identifiable territories, but never to a connection with the land itself in the absence of evidence of intensive and regular use of the land.”); see also Newman, *Aboriginal Rights, Collective Rights*, *supra* note 74 (discussing various elements of Justice LeBel’s foresight in the Aboriginal law context).

torically mobile communities can meet the standards for sufficient, exclusive prior occupation and thus meet the title test.¹³³ In a past treaty-rights case, the court had seemed to imply reasonably clearly that provinces (as opposed to the federal government) could not justifiably infringe on treaty rights due to division-of-powers considerations.¹³⁴ However, weeks after the *Tsilhqot'in* judgment, the court relied upon it as if it were a long-established precedent that weighed in the other direction on the point without ever engaging with the contrary precedent.¹³⁵ The very possibility that the law continues to be in constant motion actually introduces a further uncertainty on the scope of property rights in this context.

Moreover, whereas most property rights owners would typically be incentivized to try to clear up uncertainties with respect to the scope of their property rights, there are complex counterincentives present with Aboriginal title. Because of the duty-to-consult doctrine and the fact that it essentially creates significant benefits associated with uncertainty,¹³⁶ Aboriginal title with uncertain scope can actually be relatively beneficial in at least some circumstances for some communities.¹³⁷ Thus, there are significant short-term incentives to maintain uncertainties.

Ultimately, as with property rights generally, uncertainties on the scope of property rights increase transaction costs, elevate risk premiums, undermine the possibility of transactions associated with those property rights, or all of the above.¹³⁸ In the case of Aboriginal title, communities themselves may be uncertain on what they can do with their own land, with such uncertainties disincentivizing economically optimal uses of their land that they would choose. Additionally, outsiders attempting to transact with Aboriginal communities are potentially uncertain on the scope of rights that communities can convey in certain respects. These features create an economically problematic characteristic on the Aboriginal title property right.

133. See *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256 (Can.).

134. *R. v. Morris*, [2006] 2 S.C.R. 915 (Can.).

135. *Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014] 2 S.C.R. 447, para. 53 (Can.) (“The doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256). While it is unnecessary to consider this issue, this Court’s decision in *Tsilhqot'in Nation* is a full answer.”).

136. NEWMAN, REVISITING THE DUTY TO CONSULT, *supra* note 21, at 82–84, 171–72.

137. *Id.*; see also Dwight Newman, *The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector*, MACDONALD-LAURIER INST. ABORIGINAL CAN. & NAT. RESOURCES ECON. SERIES, May 2014, at 12 [hereinafter Newman, *The Rule and Role of Law*] (discussing how uncertainty turns the duty to consult into an effective lever with industry).

138. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 4, 621 (9th ed. 2014) (discussing some consequences of uncertain property rights).

Second, perhaps counterintuitively relative to the main assumptions one might make about a collective property right, there are significant anticommons issues with respect to Aboriginal title.¹³⁹ In the context even of established Aboriginal title, collective ownership on behalf of both present and future generations complicates decision making about the property, especially in the context of complex challenges on governance structures. The Tsilhqot'in Nation itself needs to function as an amalgam of six legal First Nations or "bands" that are legally structured entities. More generally, it is not clear whether present elected leadership of a community can legitimately make decisions concerning uses of the land or whether these decisions are subject to challenges from hereditary leadership and those supporting hereditary leadership structures, dissenting members whose position is reinforced by their being imprecisely defined limits on the use of the land, or others who purport to represent the interests of future generations, potentially including outside environmental NGOs. Challenging interactions with NGOs arise in the case of communities that are actually enthusiastic about development rather than fitting NGOs' models of the "ecological Indian."¹⁴⁰

Moreover, the insecurity of title associated with specific governmental override powers, albeit not totally distinct from the possibility of expropriation or eminent domain with other lands, introduces another possible decision-maker with respect to the lands, particularly because there may seem to be overlapping Aboriginal and provincial rights to "manage" the lands. What is framed as an inherently collective title, in the way in which it has been developed by the court's reasoning, may actually display characteristics more commonly associated with fragmented ownership. Fragmented ownership gives rise to anticommons problems where transaction costs make it impossible to unify the necessary property rights to carry out a particular project even though some project along those lines would be desirable from the standpoint of at least many of the various owners,¹⁴¹ and that fate may await Aboriginal title lands in some instances. Multiplicity of de-

139. See generally James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1 (2000) (discussing how fragmentation of ownership gives rise to an anticommons problem); Heller, *The Tragedy of the Anticommons*, *supra* note 7 (discussing anticommons issues with fractionated ownership of American Indian lands).

140. See COATES & NEWMAN, *supra* note 16, at 15 (discussing some of these challenges). See generally, SHEPARD KRECH III, *THE ECOLOGICAL INDIAN: MYTH AND HISTORY* (1999) (controversial book on degree of environmental sensitivity in traditional Indigenous practices).

141. Buchanan & Yoon, *supra* note 139.

cision makers and jurisdictional uncertainties in regards to property control all give rise to the same sort of anticommons problem.¹⁴²

Third, what the court deems to be the inherently collective aspect of Aboriginal title could also pose more traditional commons problems or other problems associated with an absence of private property rights. It is unclear whether the decision would permit a community holding Aboriginal title to establish private property rights held by individual members.¹⁴³ That lack of clarity stems significantly from uncertainty on whether such internal alienation would be considered to deny the benefit of the land to future generations of the group. There could be some arguments each way on the present phrasing of the judgment, but there is at least a meaningful possibility that the judgment precludes alienation to individuals within the group, which may preclude the most effective form of landholding in respect of certain possible uses of the land.

It is clear that the judgment uses the inherently collective aspect of Aboriginal title to maintain restrictions on alienation to outsiders, other than through surrender of land to the government. This sort of restriction on alienation has been a long-standing restriction on Indigenous communities in various states. It has sometimes been portrayed as a protection of Indigenous communities from swindling settlers,¹⁴⁴ and to that extent it would amount to a policy embodying some degree of light paternalism, potentially serving some regulatory functions. However, there is expanding scholarly work that suggests that the policy also served as one that empowered governments as monopolistic purchasers and thus maintained lower land prices for Indigenous lands that were surrendered.¹⁴⁵

If one were searching for a plausible and more acceptable justification for the restriction on alienation, a significant emerging scholar, Malcolm Lavoie, has offered a potentially promising explanation that the policy addresses certain public choice problems present if leadership are empowered to alienate land too readily.¹⁴⁶ However, he finds even these explanations to break down relative to the economic benefits that might be available to communities from limited alienations of land, subject to some important protections for the cultural interests at stake that may require meaningful ongoing landholding.¹⁴⁷ In any

142. See generally Michael A. Heller, *The Boundaries of Private Property*, 108 *YALE L.J.* 1163, 1187–88 (1999) (describing jurisdictional uncertainty as giving rise to anti-commons issues).

143. Tom Flanagan & Ravina Bains, *Aboriginal Title's True Meaning: Billable Hours*, *GLOBE & MAIL* (July 16, 2015); COATES & NEWMAN, *supra* note 16.

144. See, e.g., Malcolm Lavoie, *Why Restrain Alienation of Indigenous Lands?*, 49 *U. B.C. L. REV.* (forthcoming 2016) (referencing this traditional explanation).

145. *Id.*; Kades, *supra* note 4.

146. Lavoie, *supra* note 144.

147. *Id.*

event, as has famously been the case with Indigenous property, the Supreme Court of Canada maintains restrictions on alienation that, as with any such restrictions, may preclude transactions that are economically beneficial to all participants.

In several different respects then, the form of property right embodied in Aboriginal title after the *Tsilhqot'in* judgment contains characteristics that economic theory strongly suggests will give rise to certain dysfunctions and thus undermine the potential prosperity of Indigenous communities. Even when succeeding in their land claims, Indigenous communities are not receiving the kind of property right that could be most beneficial to them.

Some Canadian Aboriginal communities may have recognized this point already and have arguably been clear that they would prefer forms of landholding other than Aboriginal title that is subject still to potentially unknown restrictions and unstable judicial interpretations. For example, in *Delgamuukw*, the Gitksan and Wet'suwet'en communities actually litigated in the first instance to try to claim fee simple ownership, with Aboriginal title as an alternative.¹⁴⁸ In modern treaties negotiated in the shadow of the Aboriginal title jurisprudence, there is no treaty that entrenches Aboriginal title over land, with those negotiating the treaties preferring instead to replace Aboriginal title with more certain property rights concepts, including fee simple landholdings, resource royalty rights over further territory, and so on.¹⁴⁹ Indeed, in a negotiation subsequent to the *Tsilhqot'in* decision, the accord between British Columbia and the *Tsilhqot'in* Nation pertains to the transfer of further land in fee simple rather than in Aboriginal title, no doubt offering much greater legal clarity on this further land claim.¹⁵⁰ A possible reading is that the ongoing jurisprudential development of Aboriginal title as a unique property right continues to develop a property right that has economically dysfunctional characteristics, and that Aboriginal communities are avoiding as their form of landholding when they can, other than when they consider litigation for their property to be their only viable option.

B. The Real Costs of Uncertain Economic Characteristics of Aboriginal Title: Examples of Practical Consequences for Mining Development

The ways in which these economic characteristics of Aboriginal title could play out problematically for an Aboriginal community are ap-

148. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 110 (Can.) (discussing plaintiffs' claim to an inalienable fee simple as their land right).

149. See generally ISAAC, *supra* note 34, at 161–86 (outlining key contents of modern treaties).

150. Nenqay Deni Accord: The People's Accord, British Columbia-Tsilhqot'in Nation, Feb. 11, 2016.

parent if one considers a hypothetical community with potential Aboriginal title claims to traditional territories that contain mineral resources. Such a community is not especially hypothetical, but arguably representative of many communities in British Columbia.¹⁵¹ There are several ways in which the judicial choices that have been made that bear on the economic characteristics of Aboriginal title make the community's Aboriginal title claim less beneficial to the community than could have been the case.

The courts have not directly ruled on whether Aboriginal title encompasses subsurface mineral rights, and there are strong arguments that that question actually remains unresolved.¹⁵² So, even in the event of a determination that a community holds Aboriginal title, there is an immediate uncertainty in the scope of a pertinent property right. Importantly, it is not even immediately clear whether an Aboriginal community that holds Aboriginal title, and thus surface rights to the land, would be permitted to allow mineral development activities on that land. The "inherent limit" on Aboriginal title has been explicitly held to preclude strip mining,¹⁵³ and whether other mining development is consistent with the constraint on the use of Aboriginal title land to maintain its value for future generations is not clear. An Aboriginal community that is favorable to mining development may or may not be legally authorized to undertake it, and any arrangements with it on mining development are thus subject to uncertainty and, at a minimum, enhance transaction costs in light of this uncertainty. Clearer rulings on the scope of Aboriginal title rights could have avoided this diminishment of its value to the community.

Beyond the uncertainty related to the scope of title, there will be further challenges that come from the presence of multiple decision makers in respect of any uses of the Aboriginal title lands that would be potentially legally permissible. The possibility of a legal challenge to a present decision based on a future generation's stake in the Aboriginal title land leads to some fracturing of decision-making authority, as it will become safer to proceed with a particular development only with clearer broader-based support to minimize the possibility of legal challenges. This spreading of authority may be in the very com-

151. See ISAAC, *supra* note 34, at 162.

152. See Robin M. Junger, *Aboriginal Title and Mining in Canada: More Questions than Answers*, PROC. 61ST ANN. ROCKY MTN. MIN. L. INST. (2015).

153. *Delgamuukw*, [1997] 3 S.C.R. at para. 128 ("For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).").

mon context of a community with a division between legally recognized governing authorities under Canada's Indian Act¹⁵⁴ (Canada's principal statutory regime for First Nations, much hated for its paternalistic elements, but not being subject to any simple abolition without the development of some substitute identification of legally necessary structures for First Nations to function as legal entities in Canada) and the hereditary leadership within the community. Which representatives speak on behalf of the rights-bearing community may be a complex matter, and judicial choices that have tended to fracture decision-making authority concerning Aboriginal title lands have further diminished communities' abilities to use their land in the productive ways that they might choose.

A further complication to decision-making authority comes from the possibility that the pertinent rights-bearing community for the purposes of the Aboriginal title claim does not correspond to current legal entities but to differently constituted historic entities, as was the case in the *Tsilhqot'in* decision itself.¹⁵⁵ Although the judicial reasoning is an attempt to respond to who validly has a property claim, it nonetheless gives rise to further problems of fractionated decision-making authority. The same may be said of the matter of overlapping Aboriginal title claims, a widespread phenomenon in British Columbia, where Aboriginal title claims add up to more than the entire land mass of the province.¹⁵⁶ If a community has established Aboriginal title, that issue may perhaps be presumed away, but the reality before title is established is that there are in fact a further array of potential claims to decision making concerning the potential Aboriginal-title territory.

In many property rights contexts, there would be strong incentives on parties to seek to resolve issues concerning these sorts of uncertainties.¹⁵⁷ In the context of a potential mining development, communities that could benefit from the development would have incentives on them to resolve issues within and between them so as to enable an economically productive development to proceed and for it to be reasonably possible to identify situations in which other economically productive developments could proceed. However, the judicially developed doctrine of consultation generates various, more complex incentives here. Uncertainties on Aboriginal rights, including Aboriginal title, can be used to extract agreements under the duty-to-

154. Indian Act, R.S.C. 1985, c. I-5 (Can.).

155. See *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256 (Can.).

156. See generally BC TREATY COMMISSION, ANNUAL REPORT RECOMMENDATION 8 (2014) (discussing various issues associated with overlapping claims).

157. See generally Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285 (2008) (discussing social and private incentives related to resolving uncertainties on property rights generally).

consult doctrine even in areas where an Aboriginal title claim would not legally succeed.¹⁵⁸ The duty to consult arises based on asserted rights, and the legal challenges it can create often give resource project proponents sufficient incentive simply to enter into a variety of side deals with communities.¹⁵⁹ In the case of a potential mining development, these might be with each of several communities asserting overlapping title claims and, perhaps, even with others with claims to other Aboriginal rights claimed to be potentially affected by development in an area to which those rights claimants recognize that they do not have title. Although, in principle, the duty to consult applies to governments and not to industry,¹⁶⁰ governments have tried to delegate it to industry, even sometimes in informal ways by effectively shirking governmental responsibilities and leaving industry to sort matters out via agreement.¹⁶¹

A reader who identifies a challenging situation for mining development reads the situation correctly. This uncertainty undermines the prospects for mining development. In the context of Aboriginal communities with limited economic opportunities, there might have been Pareto-preferable outcomes that have been blocked by transaction costs and uncertainties that the parameters of court decisions have ended up generating.

The judicial recognition of the possibility of Aboriginal title, of course, makes Aboriginal communities better off than they would have been without it, as does the possibility of claims by communities under the duty-to-consult doctrine. Indeed, there might be more general reasons to prefer this form of private property ownership over ongoing ownership of the resource by the provincial government—so-called “Crown ownership”—which is the usual situation on lands and resources through much of British Columbia.¹⁶² But the point is that particular parameters of the decisions may have undermined the value to Aboriginal communities of the property right courts were recognizing. Because courts, including the Supreme Court of Canada in *Tsilhqot’in*,¹⁶³ approach Indigenous title rights in terms of public law

158. Cf. NEWMAN, REVISITING THE DUTY TO CONSULT, *supra* note 21, at 82–83; Newman, *The Rule and Role of Law*, *supra* note 137.

159. Cf. NEWMAN, REVISITING THE DUTY TO CONSULT, *supra* note 21, at 82–83; Newman, *The Rule and Role of Law*, *supra* note 137.

160. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 53 (Can.).

161. See, e.g., *Wahgoshig First Nation v. Ontario* (2012), 120 O.R. 3d 782 (Can. Ont. Sup. Ct. J.) (granting leave to appeal from injunction issued in favor of First Nation against industry stakeholder where no formal delegation of consultation obligations from provincial government and government just hoping negotiations would sort out issues).

162. See generally NEWMAN, NATURAL RESOURCE JURISDICTION, *supra* note 24 (discussing prevalent provincial ownership of lands, particularly in the West).

163. *Tsilhqot’in Nation v. British Columbia*, [2014] 2 S.C.R. 256 (Can.).

analyses based on reasoning about abstract values of “reconciliation” and mysterious ideas of *sui generis* rights, they are not necessarily attuned to the practical, private law outcomes of their constitutional theory deliberations. In the process, they seem to have made choices that undermine the property rights of Indigenous communities.

IV. WHY COMMON LAW JUDICIAL DEVELOPMENT MAY NOT WORK WITH ABORIGINAL PROPERTY RIGHTS

The idea that the common law develops in a manner consistent with economic efficiency is found particularly as a central claim in the seminal law and economics scholarship of Richard Posner,¹⁶⁴ although scholars working in his wake have arguably significantly advanced his argument and even led him to alter his own articulation of it.¹⁶⁵ Law and economics scholarship has gradually moved toward showing the efficiency of particular common law rules, broadly sustaining at an empirical level the claim that the common law has developed in economically efficient forms.¹⁶⁶ However, some have gone further in trying to explain an underlying mechanism for why the common law has developed in this manner,¹⁶⁷ moving beyond what early Posnerian writings seemed at times to regard as something simply emerging from the attitudes of judges¹⁶⁸ toward something grounded in the nature of the common law system and the incentives

164. See, e.g., POSNER, *supra* note 138 (discussing this claim and explaining it in terms of judges considering economic efficiency of their results). This claim appeared differently at different stages of Posner’s career. See also GUIDO CALABRESI, *THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION* 14–18 (2016) (discussing Posner’s approach to economic analysis of law).

165. Cf. Posner, *supra* note 138 (showing generally different approach to explanation of how judges arrive at economically efficient results).

166. See, e.g., Anthony Niblett et al., *The Evolution of a Legal Rule*, 39 J. LEGAL STUD. 325 (2010) (discussing empirical findings across different areas of commercial law, with some mixed results).

167. See, e.g., Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977) (starting to grapple with the development of a theory on a mechanism for why the common law would develop in this way, suggesting that currently inefficient rules are more likely to be taken to court and thus replaced); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977) (similarly beginning engagement with the question). Cf. Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT’L L.J. 287, 294 (2011) (arguing that such a mechanism is needed to give credibility to the original Posnerian hypothesis).

168. See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); cf. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Mark DeWolfe Howe ed., 1963) (arguing that common law judges reflect on public policy issues and respond to public policy concerns out of being representatives of the community, although not arguing on economic efficiency *per se*); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2005) (arguing within positive political theory that judicial ideology does have some impact).

it maintains around litigation.¹⁶⁹ More recently, scholars have also rightly identified limitations on these mechanisms and possible ways in which deficiencies in versions of the common law system could undermine its attainment of economic efficiency.¹⁷⁰ Aside from any outright claim of perfect economic efficiency in the common law, in the real world of choices that each have opportunity costs and in which public-choice dynamics may have significant implications, there are also important scholarly approaches that more simply identify the common law's relative efficiency as compared to the alternative of statutory law, with the latter especially often subject to various sorts of public choice-based distortions that undermine its regulatory choices.¹⁷¹

Given this variety of scholarship, it is not a straightforward matter to put a claim as to why a particular area of property rights jurisprudence would depart from the main dynamics of common law efficiency, because, although there is significant agreement on the efficiency of the common law, there is some mix of differentiation between the mechanisms by which that efficiency is said to be obtained. A full case for an exception would require argument in terms of all of the different accounts. So, the present argument is aimed simply at making an exception plausible.

Accounts of the efficiency of the common law suggesting that efficiency derives from deliberate judicial efforts to devise economically beneficial rules have always been questioned on the basis that one seldom finds judges making any explicit reference to such considerations. However, the area of Aboriginal title jurisprudence sees judges actively describing specifically different aims in their development of the

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169. See, e.g., John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978) (emphasizing assessment of likelihoods of litigation victory); Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980) (arguing evolutionary approach); Paul H. Rubin, *Micro and Macro Legal Efficiency: Supply and Demand*, 13 SUP. CT. ECON. REV. 19, 20–27 (2005) (discussing the application of evolutionary models to the common law); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551 (2003) (exploring various implications of supply-side theory); FRANCESCO PARISI & VINCY FON, *THE ECONOMICS OF LAWMAKING* (2009).
170. See, e.g., Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007) (showing how some past features of judicial compensation led to a pro-plaintiff inclination in parts of the law); Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 GEO. L.J. 583 (1992) (showing potential problems with unrepresentative subset of cases being litigated); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641 (raising a variety of issues related to path dependence as complicating factors on possibility of law developing efficiently).
171. See, e.g., *THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW* (Roger E. Meiners & Andrew P. Morris eds., 2000).

jurisprudence. Indeed, on Aboriginal title, the overall trajectory of the concept's development has overwhelmingly supposed that the courts would develop Aboriginal title as a *sui generis* concept rather than seeking to identify if prior Aboriginal possession could reasonably ground a right to an established, certain, and efficient form of property right. Judges analyzing rights in this context have done so in terms of more public law concepts, or concepts like the *sui generis* nature of Aboriginal rights, rather than in terms of the necessary private law characteristics of Aboriginal property rights.

The discussion above of the potential jurisdictional dimension of Aboriginal title potentially illustrates why—because courts have seen Aboriginal title as on a border between private law and public law. The Canadian constitutional environment enhances these tendencies in so far as Aboriginal title becomes explicitly a constitutional right, rather than simply a common law property right, and then it is subjected to forms of reasoning applicable to constitutional rights.

For example, in *Delgamuukw*, the analysis of Aboriginal title is subjected to a general Aboriginal rights test grounded in cultural considerations and to analysis for whether a particular doctrine on Aboriginal title furthers such constitutional purposes as reconciliation.¹⁷² In *Tsilhqot'in*, Chief Justice McLachlin continues to emphasize how Aboriginal title flows from unique constitutional processes,¹⁷³ rather than simply seeing it as flowing from prior possession of land that gives rise to property rights. Thus, the judicial discourse on Aboriginal title specifically orients itself to cultural goals and constitutional goals, which suggest that economic characteristics of the property right at issue simply will not loom large.

However, on accounts that see the economic efficiency of the common law as arising more from mechanisms related to the litigation process, central role of the parties, and *stare decisis*, there are further reasons why Aboriginal property rights may develop differently than property rights within the common law. A first distinguishing factor is a relatively limited amount of case law. Lower court cases of any consequence in this area are likely to be appealed, so it is principally the Supreme Court of Canada's decisions that will have any impact on the developing doctrine. But, for instance, there have been only a

172. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.).

173. *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 256, para. 72 (Can.) (“The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is—the unique product of the historic relationship between the Crown and the Aboriginal group in question.”).

handful of Supreme Court of Canada cases on Aboriginal title.¹⁷⁴ As discussed earlier in the Article, these cases have seen meaningful shifts in the doctrine, whether or not acknowledged by the court.¹⁷⁵ There have simply not been enough cases to build up a stable doctrine that is consistent from one case to the next.

A second distinguishing factor is the different incentives on the parties compared to a standard common law context. Precisely because of the substantial nature of the shifts in the law over time in this area, there may well be reasons for a potential litigant to wait to bring a case in the hopes of having more favorable law—with the same dynamics also delaying negotiation based on the law in some instances. Frankly, the costs of an Aboriginal title suit are massive, and any such suit is essentially a one-time opportunity that has a massive impact on the future of a particular community. There are simply not incentives for parties to litigate repeatedly in the face of an economically inefficient rule as there are in other areas of common law property rights litigation.

A third factor is that such litigation may simply not be possible. In respect of many areas of common law, cases present themselves that enable testing of small, incremental aspects of various rules. In respect of Aboriginal title jurisprudence, every case is likely to engage all of the issues, and no case in particular allows precise testing of one particular facet of one rule. There will not readily be a case that enables testing the specific parameters of the doctrine without engaging all issues at the same time, thus opening the scope for the courts to engage in their generalized constitutional-reasoning processes that could yet open more unpredictability.

If these sorts of factors do distinguish Aboriginal property rights as not likely to be developed in an economically optimal way through the courts, some other sorts of policy interventions become necessary. Part V turns to some policy responses that could help to promote the development of more economically useful property rights for Canadian Indigenous communities.

V. POTENTIAL POLICY APPROACHES TO FURTHER MORE ECONOMICALLY FUNCTIONAL INDIGENOUS PROPERTY RIGHTS

If this Article ended with Part IV, it would offer only a pessimistic argument. But there are, arguably, ways to try to move beyond the dysfunction in which the shape of Aboriginal property rights, notably

174. *Id.*; Marshall and Bernard, [2005] 2 S.C.R. 220 (Can.); Guerin v. The Queen, [1984] 2 S.C.R. 335 (Can.) (not being about Aboriginal title but containing some discussion of it); Calder v. British Columbia, [1973] S.C.R. 313 (Can.).

175. *See supra* section III.A (discussing some of the shifts in precedent).

Aboriginal title appears to remain trapped at present. A variety of different actors have potentially accessible ways of attempting to shift matters.

One proposed approach that has been floated recently by Canadian scholar Tom Flanagan is for courts to take judicial notice of basic economic principles when adjudicating Aboriginal property rights cases.¹⁷⁶ This idea is interesting, and it might be accessible to the courts. Given that courts at least often seek to develop other common law principles with regard to economic efficiency, asking them to consider economic principles in this context does not ask them to do something radical, but to incrementally introduce certain considerations into an area of jurisprudence that are currently relatively absent from that context.

At the same time, one might ask why courts should take judicial notice of basic economic principles, and whether they might be better to receive argument or even expert evidence on the economic impacts of developing the law in particular ways. But there is a plausible argument for courts to realize that they are inevitably enmeshed in policy making in this area, partly *because* their determinations on the scope of property rights will then become constitutionally entrenched, and that they should then take account of economic principles that properly bear on the policy-making task in which they are engaged.

Flanagan seems to offer that approach as a suggestion to judges in the hope that they will take it up, and that raises the question of how to deal with the possibility that they will not do so on their own initiative in response to the suggestion. A statutorily mandated requirement of this sort could be legislatively possible, but it would likely be controversial and would arguably differ from other evidentiary rules currently prescribed for judges in seeming to mandate a particular mode of thinking, on which some might thus raise judicial-independence concerns. So, this policy approach likely needs to be left to the judges and thus to fate.

A second possible approach would consider some of the factors in Part IV and seek to break up some of the reasons why adjudication is not leading to economically useful property rights. To the extent that one of the problems is simply legal uncertainty from matters not yet being decided, an obvious response is to try to force the courts to consider those matters. More generally, getting the courts to consider further cases on the scope of Aboriginal property rights might also be a vehicle for putting before them policy and economic arguments on why what they have currently done raises problems and then seeking to offer some solutions in terms of accessible legal paths by which they

176. FLANAGAN, *supra* note 1.

could move from their current legal position to legal positions with more economically functional property rights.

In Canada, one important way in which matters can be put to the courts is via the so-called “reference power.” The federal government has the statutory ability to refer a legal question to the Supreme Court of Canada for decision,¹⁷⁷ and the provinces have the statutory ability to refer a legal question to their respective Courts of Appeal, with an appeal possible from such a reference decision.¹⁷⁸ Governments could choose to send reference decisions to the courts to require adjudication on some of the uncertain elements of Aboriginal title, and because of their somewhat distinctive method of ending up before the courts, any such cases would likely engage the various stakeholders affected by the polycentric questions at play. Governments could then take steps to push for resolution of some of the outstanding legal questions, while also engaging courts with more of the policy consequences of the decisions they are making in this area. However, that approach would also have the effect of further promoting judicial power in this area.

In terms of a third possibility that may be emerging, there is also arguably an increasing possibility for private parties to push matters forward. Some recent cases that have been pursued by Aboriginal communities directly against corporations have led to interesting judicial decisions that Aboriginal communities can sue private parties on the basis of previously unproven Aboriginal title claims where they can establish a common law tort against the private party, such as nuisance, that arises from an impact on the potential Aboriginal title lands.¹⁷⁹ Such cases, the courts have held, can be litigated without the government being a party on the Aboriginal title issue,¹⁸⁰ although they have not precluded the companies from later seeking to have governments added. This basic possibility exists because Aboriginal rights and title “pre-exist the declaration of their existence” and a cause of action based on them thus “may exist before a declaration of aboriginal title is made.”¹⁸¹

177. See Supreme Court Act, R.S.C. 1985, c. S-26, § 53 (Can.).

178. See, e.g., Courts of Justice Act, R.S.O. 1990, c. C.43, § 8 (Ont.) (with § 8(1) stating that “[t]he Lieutenant Governor in Council may refer any question to the Court of Appeal for hearing and consideration” and § 8(7) stating that “[t]he opinion of the court shall be deemed to be a judgment of the court and an appeal lies from it as from a judgment in an action.”).

179. See *Saik’uz First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154 (Can.); *Ominayak v. Penn W. Petroleum*, 2015 ABQB 342 (Can.).

180. *Saik’uz*, 2015 BCCA 154; *Ominayak*, 2015 ABQB 342.

181. *Ominayak*, 2015 ABQB at para. 39; see also *Saik’uz*, 2015 BCCA at para. 66 (“As any other litigant, they should be permitted to prove in the action against another party the rights that are required to be proved in order to succeed in the claim against the other party.”).

This is an interesting development because it opens some prospect of direct litigation between Aboriginal communities and resource-development companies on a more widespread basis even during the interim phase of uncertainty about final rights, thus moving away from the duty to consult as the principal legal tool managing that interim phase. The result could well be that more companies could end up with standing to litigate on Aboriginal property rights issues where those affect their developments, and litigation might thus be pushed further along in more of a traditional common law model. The presence of corporate litigants in the case—typically not a feature in the leading title cases—would also help highlight to the courts the economic impacts of their decisions; however, it should be noted that many of those have been on Aboriginal communities themselves and it is in some respects unfortunate if it takes the presence of corporate litigants to awaken courts to these considerations.

Lawsuits by companies seeking, for instance, declaratory relief to clarify the scope of Aboriginal property rights that affect their operations are just one possible mode of corporate litigation that might ensue, and others have actually already begun to be realized. Companies like Northern Superior have sued the Ontario government for allegedly not meeting its consultation obligations and attempting to download them informally onto industry.¹⁸² Cassiar Gold has filed a claim against the British Columbia government for trading away land on which the company held mineral rights to a First Nation under a modern treaty without any notice to the company.¹⁸³ Depending on the outcome of these types of lawsuits, corporate entities may be able to generate additional pressures toward better definition of Aboriginal property rights.

These are thus three reasonably accessible ways in which efforts could be made to get Canadian courts to reconsider the economically problematic characteristics of Aboriginal property rights as they have developed them thus far. In doing so, economic theory would suggest that the courts could enhance the economic prosperity of Canadian Indigenous communities, quite possibly not at any expense to anyone, but rather in achieving a Pareto gain. Thus far, out of a mix of reasons, litigation has not worked to develop a doctrine of Aboriginal title with economically, fully functional characteristics. Aboriginal title has developed with problems related to uncertainty, anticommons

182. See generally Dwight Newman, *The Canadian Resource Sector's Messy Duty to Consult*, FIN. POST (Oct. 29, 2015), <http://business.financialpost.com/fp-comment/the-canadian-resource-sectors-messy-duty-to-consult> [https://perma.unl.edu/B6BH-DX99] (discussing the Northern Superior lawsuit).

183. Derrick Penner, *Gold Prospector Sues B.C. Over Transfer of Property Over Mineral Claims*, VANCOUVER SUN (Feb. 1, 2016), <http://www.vancouversun.com/life/gold-pro prospector+sues+over+transfer+property+over+mineral+claims/11690876/story.html> [https://perma.unl.edu/A5L5-G68F].

problems associated with the imposition of multiple decision makers, and commons problems related to the supposedly inherently collective form of the property right and imposed inalienability of the property right. These characteristics have grown out of courts' assumptions about the form of right they should be creating and the lack of attention to private law considerations. The ways suggested to engage with these problems try to find ways to challenge those underlying features of the jurisprudence and to get it on a potentially different path.

Indigenous rights jurisprudence is both a tremendously challenging area of law and a tremendously important one. Questions of justice in respect of the historic wrongs done to Indigenous communities call for sincere and rigorous efforts at appropriate responses. At the same time, the design of those responses affects greatly the future prospects for Indigenous communities and Indigenous individuals, as well as broader economic prospects and natural resource strategy. If judicial approaches in this area are designed in ways that are not attentive to property rights dimensions and economic dimensions, the design of those responses can play out in economically suboptimal ways that deprive Indigenous communities of the benefits of their property rights.

These issues extend beyond Canada as well. Canada's Aboriginal title jurisprudence is part of a larger transnational jurisprudential conversation on Indigenous property rights,¹⁸⁴ which is also manifesting in very significant litigation on Indigenous rights and resource development in such other resource-rich states as Australia and Chile. So, there are broader lessons to draw and other cases to study in future research. Some of the other states facing these issues have notably different constitutional contexts. For example, after early common law Aboriginal title decisions, Australia developed a statutory framework on Aboriginal title without constitutionalizing it,¹⁸⁵ and the question could be pursued as to whether non-Indigenous legislators did any better than judges in terms of the economic characteristics of Aboriginal title, and why or why not.

The larger judicial conversation present on these topics is, in turn, part of a broader effort to face up to historical legacies of colonialism. Legal decisions that undermine the value of rights assigned to communities harmed by colonialism perpetuate further and entirely unnecessary wrongs. The long history of colonialism has been one of restrictions on the economic activity of Indigenous communities and on economic uses of Indigenous lands.¹⁸⁶ Aspects of the decisions of

184. *See generally* MCHUGH, ABORIGINAL TITLE, *supra* note 13.

185. *See generally* RICHARD H. BARTLETT, NATIVE TITLE IN AUSTRALIA (3d ed. 2015).

186. *See, e.g.*, BANNER, *supra* note 4; TOM FLANAGAN ET AL., BEYOND THE INDIAN ACT: RESTORING ABORIGINAL PROPERTY RIGHTS (2010); MILLER, *supra* note 8.

well-meaning, progressive judges may now tragically be extending and expanding upon those colonial legacies.

From the standpoint of new scholarly directions, there needs to be much more economic analysis of developing approaches to Indigenous property rights and related matters. Such analysis has real potential to contribute to Pareto preferable, or “win-win,” outcomes. The economic characteristics of Indigenous property rights matter to Indigenous communities and to the degree to which their property rights are being respected through the approaches that courts are adopting. Those who care about Indigenous communities need to care about economics. They also need to recognize the limitations of certain approaches to adjudication in grappling with the economic characteristics of Indigenous property rights.