

The Top Ten Uncertainties of Aboriginal Title after *Tsilhqot'in*

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Executive summary

In 2014, the Supreme Court of Canada rendered a historic decision on Aboriginal title in the *Tsilhqot'in Nation* case. For the first time, a Canadian court made a declaration that an Indigenous community owned specifically defined lands in Aboriginal title. Amid all the commentary about the case, there has not been enough attention to date, though, to the legal uncertainties that remain after the decision—and that have even been perpetuated and expanded by the Court's decision.

Legal uncertainties are often most harmful to the most vulnerable and marginalized within society. The legal uncertainties after the *Tsilhqot'in Nation* decision include uncertainties for Indigenous communities themselves on how they are permitted to use their own land. By not reaching more certainty, the decision may well have caused harm to fledgling Indigenous economies.

Legal uncertainty is of course also highly damaging to investment that would build economic prosperity for all, Indigenous and non-Indigenous British Columbians alike. The present paper tries to assess some of the key legal uncertainties left after the *Tsilhqot'in Nation* decision. Using a risk analysis, it considers the degree of uncertainty left on a number of points in the law and the impact of uncertainty on that point for investment in British Columbia. The key uncertainties are these:

- ❖ restraints imposed on Indigenous communities' use of their own lands through cultural assumptions by the courts;
- ❖ the potential effects of the United Nations Declaration on the Rights of Indigenous Peoples on Canada's approach to Aboriginal title;
- ❖ remedies applying if a project is commenced on land later subject to Aboriginal title;
- ❖ ownership of subsurface rights on Aboriginal title lands;
- ❖ requirements of the Aboriginal title test;
- ❖ land claims to land previously occupied;
- ❖ scope of justified limits on Aboriginal title;
- ❖ restrictions of Indigenous communities' use of their own lands through court-imposed rules about future generations' potential use of the land;
- ❖ impact of Aboriginal title on fee simple (privately owned) land;
- ❖ impact on sovereignty.

By using a risk-analysis approach to these uncertainties, the paper is able to rank them so as to highlight those that have the most significance and thus to establish a top ten list of uncertainties on Aboriginal title. Many of these uncertainties have very significant implications for British Columbia. Many have major implications for Indigenous communities themselves. Yet, the *Tsilhqot'in Nation* decision has left many issues unresolved. In some ways, it illustrates the limitations on any hopes of having the courts settle these matters and demonstrates once again the need for political leadership.

The concluding part of the paper highlights several options for policy steps that would be legally permissible if political leaders were ready to use them to resolve these uncertainties. There are advantages and disadvantages of simply continuing to press ahead on the treaty negotiation process, of referring some questions back to the courts, or of using an often under-discussed part of the constitutional amending formulae to legislate on some of the issues in ways that would work for governments and Indigenous communities.

There are many reasons people do not talk about these issues. Some wish to offer reassuring words to the business community. Some want to assess each step as either a progressive step forward or further colonialism. This is an area of policy beset by ideologies to a greater degree than any other. What is needed is sophisticated discussion of tough issues. This paper tries to contribute to the conversation by highlighting a number of ways in which legal uncertainties after the *Tsilhqot'in Nation* decision imply ongoing problems, imply ongoing threats to fledgling Indigenous economies, and imply challenges with which all British Columbians and Canadians should be concerned.

Introduction

On June 26, 2014, the Supreme Court of Canada rendered a historic decision in the *Tsilhqot'in Nation* case.¹ Media attention was captivated as the Court announced that it was, for the first time in Canadian history, granting a declaration of Aboriginal title to a specific area of land.² This meant that the land was owned by the *Tsilhqot'in Nation* rather than by the British Columbia Crown as may have been previously assumed within the Canadian legal system. In that decision, the Court adjudicated a dispute over particular areas of land. In doing so, as it has many times before, it stepped into a policy vacuum left by an ongoing lack of leadership by public officials on some of the most important policy questions in Canada. Unfortunately, as it has done before, it also created further legal uncertainties.

Many of these uncertainties directly harm Indigenous communities themselves. The contents of Aboriginal title continue to be unclear in ways that wreak ongoing harm on fledgling Indigenous economies. And the uncertainties pose ongoing problems for negotiated solutions that could further reconciliation in ways that court decisions never can. Make no mistake. We are in a deep mess. There are historic elements to what the courts have done. There are historic opportunities present in the wake of Canadians paying attention to Indigenous issues and in positive things many Indigenous communities are achieving. But there are historic challenges here too, and court decisions may be making those worse.

The uncertainties coming from the line of Aboriginal title cases of recent decades are one of the greatest threats to the Canadian economy and to prosperity for Indigenous and non-Indigenous Canadians alike. Focusing particularly on British Columbia, the present paper explains why that is the case by highlighting key uncertainties and their implications. To get there, some background is necessary, and the final section of the paper gestures toward some solutions, but the bulk of the analysis is focused squarely on those uncertainties.

1. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in SCC*].

2. On a terminological point, the present paper follows the preferred contemporary convention of using the term “Indigenous” where possible. However, the terms “Aboriginal title” and “Aboriginal rights” are legal terms, so those names continue to be used.

Background—Uncertainty and Ambiguity

In the three years since the Supreme Court of Canada rendered its 2014 *Tsilhqot'in* decision, there have been a variety of comments on the decision. An initial wave of enormous media coverage eventually gave way to longer think-tank pieces and academic commentary. Much of the academic commentary has continued to focus on the historic nature of the decision and discussed ways of extending its conclusions further, some of which will be discussed below. However, some commentary has also discussed the possibly complex and even problematic consequences of the decision. Examples include the following:

- ❧ A paper by Ravina Bains for the Fraser Institute noted the possibly significant economic consequences for resource development in British Columbia in light of parts of the judgment referring to the possibility of projects needing to be cancelled.³
- ❧ Former Deputy Minister of Indian Affairs Harry Swain and leading business lawyer James Baillie published a co-authored case comment in the *Canadian Business Law Journal* exploring a number of possible implications of the judgment.⁴
- ❧ A think-tank piece by Ken Coates and Dwight Newman referred to a number of uncertainties after the judgment, such as those arising from the judgment's references to limits on use of Aboriginal title lands arising from the interests of future generations.⁵
- ❧ Cambridge law professor Paul McHugh wrote of the potential of the judgment, given its wording, to revive historic claims to areas far from any presently occupied land.⁶

3. Ravina Bains (2014), *A Real Game-Changer: An Analysis of the Supreme Court of Canada Tsilhqot'in Nation v. British Columbia Decision*, Research Bulletin (Fraser Institute).

4. Harry Swain and James Baillie (2015), *Tsilhqot'in Nation v. British Columbia: Aboriginal Title and Section 35*, 56 *Cdn. Bus. L.J.*: 265.

5. Ken Coates and Dwight Newman (2014), *The End Is Not Nigh: Reason over Alarmism in Analysing the Tsilhqot'in Decision* (Macdonald-Laurier Institute).

6. P.G. McHugh (2015), *Aboriginal Title: Traveling from (Or to?) an Antique Land?*, 48 *U.B.C. L. Rev.*: 793.

- ∞ An internationally published law review article by Dwight Newman warned of a number of challenging aspects of the decision for Indigenous communities seeking to make use of their own Aboriginal title land.⁷

What some of these publications have hinted toward—but even now not made totally explicit—is that the post-*Tsilhqot'in* law of Aboriginal title in Canada continues to be filled with many uncertainties. Although there would be some legal academics who think that the law is relatively clear and can be described more clearly without difficulty,⁸ this is not the understanding amongst practising lawyers.

There is no doubting that some aspects of the *Tsilhqot'in* decision simply applied past decisions.⁹ But that point does not take away from the reality of the ambiguity left on a very significant number of important issues. Some have always been ambiguous and were not resolved. Some were actively made worse by the layering of the *Tsilhqot'in* decision onto the existing body of law. In many ways, the uncertainty on various points of the law after *Tsilhqot'in* is an open secret. Panels of experts from various sides of litigation have agreed that there are indeed dozens of important uncertain points in the law of Aboriginal title.¹⁰ In conference settings, Crown lawyers from some provinces have been reported as having said that what is needed now to understand the law is another thirty to forty Aboriginal title cases.¹¹ This latter statement was invoked in a statement of despair at very litigious processes and their effects on reconciliation, something that has challenging financial implications when the litigation of a case like *Tsilhqot'in* runs into the tens of millions of dollars. That said, the consequences of a number of the points of legal uncertainty are enormous multiples of this figure.

There might be ways of developing more certainty on some of the issues in some different way. To some degree, sound legal scholarly work on the decision might help to answer some of the questions, if approached in a manner in

7. Dwight Newman (2016), The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study, 95 *Nebraska Law Review*: 501.

8. A number of articles by Kent McNeil, for example, have tended to refer to the doctrine of Aboriginal title as if it had a relatively determinate content and have suggested that anything in court judgments suggesting otherwise is simply a sort of judicial misunderstanding.

9. See, e.g., Robin Junger (2014), Why the Supreme Court's *Tsilhqot'in* Land Title Decision Is No Game Changer, *Financial Post* (10 July).

10. There was, for instance, agreement on this point at a panel on *Tsilhqot'in* containing a variety of experts at the Canadian Institute for Administration of Justice (CIAJ) conference in Saskatoon in October 2015.

11. Jean Teillet conveyed this comment from a Crown lawyer in her remarks at the Pacific Business Law Institute conference on “The Daniels Case at the Supreme Court of Canada: Recognition of Métis and Non-Status Aboriginal Peoples” (Ottawa, June 23–24, 2016).

keeping with appropriate legal methodology as opposed to being simply about what legal academics might wish were the law. However, there are limits to what that can do. And what of the suggestion that all that is needed is another 30 to 40 cases? Such an idea represents decades of devastating legal battles and heart-breaking litigiousness. And if three or four major Aboriginal title decisions have left matters where they are, will 30 or 40 be better? It may well be time for political leadership to act. The last section of the paper will describe some ways in which that might be legally possible.

As things stand, in the context of British Columbia's complicated political transition in 2017, Indigenous issues feature as an area of significant policy importance for the next government. In a province with two hundred First Nations that is still subject to outstanding overlapping Aboriginal title claims that add up to an area larger than the entire land mass of the province, the law of Aboriginal title has significant implications. The implications should not, of course, be exaggerated—the claims are for larger areas than will ultimately be awarded in the courts or assigned through negotiated agreements.¹² But they should not be understated either.

For various historical reasons, other than a few treaties on Vancouver Island and Treaty 8 in part of northeastern British Columbia, treaties were not negotiated in British Columbia in the 1800s as in much of the rest of Canada. The result is outstanding land claims across the province, many of which overlap with each other and some of which overlap with areas resolved under those treaties that do exist. The British Columbia government faces an immensely challenging situation on these issues.

Uncertainties on land ownership in a province that has an economy based significantly on resource development and other uses of land—including uses like ecotourism—affect that economy. This paper will not rehearse all of the arguments on the effects of legal uncertainty, but these have been explored at some length in a recent Fraser Institute paper on the effects of legal uncertainty on Yukon mining development.¹³ In brief, however, uncertainty undermines many aspects of how business moves forward, with negative effects for all—the Indigenous and the non-Indigenous alike. Uncertainty is often most harmful for the most vulnerable communities. Fledgling Indigenous economies struggle in part because the rules in which they are to operate are not clear. Indigenous

12. On this point, see Frank Cassidy & Norman Dale (1988), *After Native Claims? The Implications of Comprehensive Claims Settlements for Natural Resources in British Columbia* (Oolichan Books): 17.

13. Malcolm Lavoie & Dwight Newman (2015), *Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence* (Fraser Institute).

communities who gain title to their lands are finding they may not be able to use the land in contemporary ways in the context of the present legal system.¹⁴ Uncertainties are harming Indigenous Canadians along with everyone else.

The object of the present paper is to delve into legal depth on the uncertainties within the post-*Tsilhqot'in* law of Aboriginal title while continuing to present this information in an accessible form. The object is not to create alarm, but it is to draw attention to a range of very serious issues that have not received full attention, that are unresolved, and that have major implications for Indigenous and non-Indigenous British Columbians—and ultimately for the future of the province. To do so, the next section of the paper offers a brief reminder of the background to, and contents of, the *Tsilhqot'in* judgment and briefly references some of the key developments since. The following section, the core of the paper, goes through ten ambiguities in the law of Aboriginal title after the *Tsilhqot'in* decision, ranking these ten ambiguities on the basis of two factors: the degree of uncertainty on a legal issue; and the scope of the implications of uncertainty on that issue for British Columbia's economy. That section goes through each issue and explains why those factors are estimated as they are.¹⁵

Setting out those uncertainties and their implications must serve as a wake-up call. There are complex, creative legal mechanisms for furthering certainty on these points. Although space limitations mean that this paper must be mainly about setting out the issues that have not received the attention they deserve, the last section will briefly reference some of the legal paths forward toward solutions. One of the central conclusions will be that it is time for legislators to take steps to achieve things in ways that courts cannot.

This paper seeks to contribute to a better understanding of a key policy arena on points that have gone too often ignored. Ongoing legal uncertainties on Aboriginal title are causing major harm to all, including to Indigenous communities themselves. It is time to pursue novel policy making in ways that face up to these challenges. The conclusions here are not going to be comfortable. Some commenting on Indigenous issues try to downplay the effects of the sorts

14. Some of the issues uncertainty generates for Indigenous communities themselves are the topic of a recent article, Newman, “The Economic Characteristics of Indigenous Property Rights,” *supra* note 7.

15. This paper bases its top-ten list on the author's individual expert assessment. A slightly different methodology could answer different questions. For example, an opinion poll on the same questions, whether of the general public or of some particular group (such as investors), could offer a measure of perceived uncertainties for that group. A poll of a larger group of experts might be used for other purposes yet again, such as trying to average out individual differences in expert opinion on some issues. But the present paper presents an objective expert take for present purposes on a set of issues that have not received enough attention, even three years on from a ground-breaking decision.

of uncertainties described here so as to provide reassurance to the business community. Some advocates of Indigenous sovereignty describe every court decision either as if it favoured their position or was yet another example of colonialism. Ideology affects discussions in this context almost more than in any other. The result is that too many accounts going out to the public and to policy makers present distorted or oversimplified pictures of what is actually happening.

What is needed are careful, thoughtful considerations by experts ready to engage with the complexity of the area in sophisticated ways while not being pulled into the—frankly unacceptable—status quo. The present paper will no doubt have its flaws that some will latch onto, but it is a sincere attempt to engage with some tough issues and, ultimately, to find ways of improving the well-being of Indigenous and non-Indigenous Canadians relative to what it will be in the absence of worthwhile changes to present paths.

Reviewing the *Tsilhqot'in* Decision

The Aboriginal title decision in the *Tsilhqot'in* case came after a long prior process. The underlying dispute concerned forest licences that the Province of British Columbia issued in 1983, with some of the communities in the *Tsilhqot'in* region objecting. Years of discussions ensued. Eventually, Indigenous communities that had historically been part of the *Tsilhqot'in* Nation filed together an Aboriginal title suit; the lead plaintiff was initially Roger William, Chief of the Xeni Gwet'in First Nation.

This Aboriginal title suit involved massive evidentiary issues, and the trial court ultimately sat for 339 trial days over a five-year period from 2002 to 2007, with taxpayer-funded litigation costs running up to \$30 million. The trial decision was lengthy: hundreds of pages, containing over 1,300 paragraphs of complex legal reasoning and application to the facts. It ultimately offered an opinion in favour of Aboriginal title but not over precisely the area claimed within the pleadings, with the result that the judge did not make a declaration of Aboriginal title. Rather than seeing proceedings commence again over a technicality of pleadings, he urged the parties to negotiate based on the opinion rendered.¹⁶

There was, then, an attempt at negotiation, but this broke down, and both sides ultimately appealed aspects of the decision to the British Columbia Court of Appeal. It rendered a decision in 2012 that effectively rejected the Aboriginal title claim.¹⁷ It did so based on its application of the law as it understood it. In 2005, the Supreme Court of Canada had rendered an Aboriginal title decision in a case called *Marshall and Bernard*,¹⁸ in which the Supreme Court had referred to Aboriginal title being established only over lands that had been intensively occupied. Thus, Aboriginal title might be established where there had been permanent settlements, but on the dominant reading of the case it would not be established over areas that had been subject to only transitory use.¹⁹ The British Columbia Court of Appeal

16. *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700.

17. *William v. British Columbia*, 2012 BCCA 285.

18. *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 SCR 220.

19. There are some complexities to how the case should be read, with some paragraphs seeming to leave open the possibility that nomadic or semi-nomadic communities might sometimes have a title claim (*ibid.* at paras. 54, 66), but with some members of the Court itself reading the majority decision's focus on regular and intensive use as precluding this (*ibid.* at paras. 110ff.) and scholars writing about the case agreeing with that latter reading (see, e.g., Kent McNeil (2006), *Aboriginal Title and the Supreme Court: What's Happening?*, 69 *Sask. L. Rev.*: 281).

applied what it thought to be the rule on required intensity of use of land as part of what is needed to establish an Aboriginal title claim, and it concluded that there could have been Aboriginal title only over isolated sites within the claim area.

The Tsilhqot'in Nation appealed from this decision, suggesting that the Court's approach amounted to a "postage stamp" theory of Aboriginal title. This appeal led to proceedings before the Supreme Court of Canada. In June 2014, the Supreme Court of Canada rendered the historic *Tsilhqot'in Nation* decision. This decision was the first-ever judicial declaration of Aboriginal title in Canada to a specific area of land. The Court awarded the Tsilhqot'in Nation more than 1,700 square kilometres of land in the middle of British Columbia.

Without taking anything away from the significance of the outcome to the parties, the reasoning behind a judicial decision—especially at the Supreme Court of Canada—is often as important as the actual outcome because the reasoning has the potential to determine the results of future cases. In its reasoning in *Tsilhqot'in Nation*, the Supreme Court of Canada explicitly affirmed that a historically mobile Indigenous community could have a legally enforceable Aboriginal title claim today. That reasoning matters to many other Aboriginal title claims in a province like British Columbia where many Indigenous communities made seasonal use of certain lands or were historically mobile in other ways. Frankly, it mattered to the Tsilhqot'in community itself. Although the community was awarded 1,700 square kilometres in the decision, the community had claimed only 5% of what it considered its traditional territory, and it received only 40% of what it claimed. It had possible claims to other parts of its traditional territory, and the court decision has guided subsequent negotiations between the British Columbia government and the Tsilhqot'in Nation. But the same principle could apply with many other Indigenous communities throughout British Columbia, and to some extent elsewhere in Canada as well.

In determining that a historically mobile community could establish Aboriginal title over intermittently used lands, the Supreme Court of Canada suggested that the British Columbia Court of Appeal had misunderstood the 2005 *Marshall and Bernard* decision. However, in setting out the rules, the Supreme Court also drew upon one of the opinions from a lower court in the *Marshall and Bernard* proceedings. Specifically, it drew from a judgment of Justice Cromwell when he was not yet on the Supreme Court of Canada, whose approach had previously been rejected by the Supreme Court in the *Marshall and Bernard* case.²⁰ This shift in reasoning is just the first of many examples one may offer of how the *Tsilhqot'in Nation* decision has actually given new indications on the law of Aboriginal title, although often without enhancing clarity.

20. *Tsilhqot'in SCC*, *supra* note 1 at para. 39 (adopting the reasoning of Cromwell J.A., as he then was).

The Supreme Court of Canada has actually engaged directly with the law of Aboriginal title only four times in the last 50 years. In 1973, it first adopted the concept in principle in the historic *Calder* decision.²¹ The Nisga'a community, however, lost in that case on procedural grounds, and their land claim ultimately had to be resolved through a treaty some two decades later. In 1997, the Supreme Court rendered the much-discussed *Delgamuukw* decision. That decision, rejecting the title claim of the Gitksan and Wet'suwet'en on technical grounds, nonetheless went on to set out the rules of Aboriginal title at length. Although the Court had touched briefly on some aspects of Aboriginal title indirectly in one 1984 decision,²² the *Delgamuukw* decision was really its first pronouncement on Aboriginal title in the context of Aboriginal title as constitutionalized in 1982 through the adoption of section 35 of the *Constitution Act, 1982*.²³ It has subsequently applied *Delgamuukw* in two cases: *Marshall and Bernard* in 2005,²⁴ and *Tsilhqot'in Nation* in 2014.²⁵

Although it is subject to many more complexities, the basic legal rule on Aboriginal title as stated in *Delgamuukw* and as applied in *Tsilhqot'in Nation* is that Aboriginal title is established where an Indigenous community occupied a particular area of land in an exclusive and sufficient manner prior to the establishment of European sovereignty.²⁶ The two elements of exclusivity and sufficiency make up the mandatory components of the Aboriginal title test as now stated by the Supreme Court of Canada. A third component, continuity between past occupation and present occupation, now appears to be only an optional means by which a community can prove the other elements.²⁷

This test does not describe all of the characteristics of Aboriginal title as described in the case law. It sets out the basic requirements for its establishment. Apart from its historic declaration, another important determination in the *Tsilhqot'in Nation* decision is that a historically mobile community could have sufficiently occupied land relative to the expectations for sufficient occupation and could have exclusively occupied land if it was the sole user of particular areas of land and/or others seeking to use that land did so with the permission of the community. But many other details matter, and many of them are frankly uncertain within the present state of the law.

21. *Calder v. British Columbia (Attorney General)*, [1973] SCR 313.

22. *Guerin v. The Queen*, [1984] 2 SCR 335.

23. *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010. For a set of discussions of *Delgamuukw*, see Owen Lippert, ed. (2000), *Beyond the Nass Valley: National Implications of the Delgamuukw Decision* (Fraser Institute).

24. *Marshall and Bernard*, *supra* note 18.

25. *Tsilhqot'in Nation SCC*, *supra* note 1.

26. *Ibid.* at para. 25.

27. *Ibid.*

Interaction with the Duty to Consult

This paper is actually about a set of substantive issues on the law of Aboriginal title, which is a legal doctrine concerning when historic Indigenous occupation of certain lands today grounds Indigenous ownership of those lands. It is not principally about the “duty to consult”, a legal doctrine about when governments must consult Indigenous communities concerning the potential negative impacts of certain government decisions on section 35 Aboriginal rights (including but not limited to title) or treaty rights even in the face of uncertainty about those rights.¹

The “duty to consult” doctrine has understandably received a great deal of media interest in the past dozen years, when the Supreme Court of Canada first elaborated it in this form in a series of three decisions in 2004 and 2005—*Haida Nation v. British Columbia*, *Taku River Tlingit v. British Columbia*, and *Mikisew Cree First Nation v. Canada*.² This doctrine has had and continues to have significant effects on resource development projects, where the degree of prior consultation may determine whether the project can proceed. Two contrasting examples underline this point.

First, the *Gitxaala* decision of the Federal Court of Appeal overturning the Harper government’s approval of the multi-billion dollar Northern Gateway project (which was ultimately not appealed by the proponent and set the stage for the Trudeau government’s rejection of the project) was based on certain imperfections in the last stage of governmental consultation relative to the demands of the “duty to consult” doctrine.³ Given the way things played out from there, that decision ended up ending a multi-billion dollar project and rendering worthless the equity stakes taken in the project by over 30 Indigenous communities.

Second, the final Supreme Court of Canada leave decisions in June 2017 on two First Nations’ challenges to British Columbia’s Site C project saw an affirmation of a prior decision that there had been fully adequate consultation attempted in good faith, thus permitting the multi-billion dollar project to proceed, at least in the absence of political decisions now determining otherwise.⁴

However, the duty to consult is a doctrine or set of rules about a procedural obligation of governments that arises from underlying rights. Aboriginal title is a substantive, underlying right. So, they are quite different topics.

That said, changes on the law on an underlying right affect the duty to consult in particular circumstances. One of the factors in the depth of consultation that must be undertaken in a specific context is the *prima facie* strength of a section-35 Aboriginal right at issue. Changes in the law of Aboriginal title thus also change the depth of consultation that must be undertaken in a variety of settings where there are unresolved Aboriginal title claims. So, although the duty to consult is a separate topic, it is actually another mechanism by which some of the uncertainties that this paper discusses have yet further effects.

1. This doctrine was developed initially in *Haida Nation v. British Columbia*, 2004 SCC 73, [2004] 3 SCR 511. For explanation, see Dwight G. Newman (2009), *The Duty to Consult: New Relationships with Aboriginal Peoples* (Purich); Dwight G. Newman (2014), *Revisiting the Duty to Consult Aboriginal Peoples* (Purich).

2. *Haida Nation*, *ibid.*; *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 73, [2004] 3 SCR 511; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

3. *Gitxaala Nation v. Canada*, 2016 FCA 187.

4. *Prophet River First Nation v. Canada*, 2017 FCA 15, leave to appeal to SCC denied 29 June 2017. A pair of contrasting conclusions also came from the Supreme Court of Canada in two cases released on July 26, 2017, with differing factual circumstances and degrees of effort at consultation leading to different results, but with a solid reaffirmation of the possibility of consultation being upheld where conducted properly: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41.

Ranking the Top Ten Uncertainties in the Law of Aboriginal Title

As indicated in the Introduction, this paper provides a ranking of the significance of a number of uncertainties in the law of Aboriginal title based on the author's considered expert assessment of the underlying factors, with reasoning explained in a manner that would allow the testing of that assessment by others. In considering the economic impact of uncertainty in various aspects of Aboriginal title, we consider two factors: first, the degree of uncertainty on an issue; and second, the prospective effects of uncertainty about that issue on the British Columbia economy.

The degree of uncertainty on an issue may be thought of as the degree to which dispassionate, objective lawyers forecasting the legal outcome of a series of future cases involving that issue would or would not be in agreement on the probable outcome. On each of these ten issues, this degree of uncertainty is ranked as moderate (meaning some disagreement amongst legal views, given the score of 1), high (meaning more disagreement than agreement, given a 2), or extreme (meaning a virtually complete unpredictability on the legal issue, given a 3).

The implications that uncertainty on an issue would have for British Columbia's economy may be thought of as the degree to which uncertainty on the issue would affect an investor or businessperson contemplating the initiation of a new enterprise in British Columbia where that investment involved areas of land subject to viable Aboriginal title claims. These degrees of implications are ranked as moderate (causing some element of concern about a risk factor, score of 1), major (causing sufficient concern about the risk factor as to raise meaningful questions about the wisdom of proceeding with an investment that would be likely to cause the investor to seek legal or consulting advice on the issue, score of 2), or extreme (making it meaningfully less likely that the investor would proceed with the investment if that particular issue had bearing on the specific investment, score of 3). Only issues having at least moderate effects made the list and, in practice, only major and extreme implications were amongst those issues actually on the list.

The scores for the two factors were then multiplied to come up with a cumulative index for the issue, and any ties were then broken via a discretionary choice

informed by the expert assessment. Obviously, there could be arguments for other factors or other functions derived from these factors, but these factors seek simply to break down the economic effects of uncertainty into the two components logically constituting that concept—the degree of uncertainty on an issue and the effects of uncertainty—with these together making up the actual effects of uncertainty on that particular issue.

Based on this methodology, the top ten uncertainties remaining in the law of Aboriginal title three years after the *Tsilhqot'in* judgment, ranked from that having the least impact to that having the greatest impact, are as follows.

MODERATE
UNCERTAINTY



MAJOR
IMPLICATIONS



10. Application of cultural limits on use of Aboriginal title lands

Reasons for uncertainty

In its 1997 decision in *Delgamuukw*, the Supreme Court of Canada developed the doctrine of Aboriginal title as a specification of the broader doctrine of Aboriginal rights that it had developed the prior year in its decision in *Van der Peet*.²⁸ Because Aboriginal title is a full ownership of particular areas of land, rather than simply a right to carry on a practice or tradition, certain adaptations of the broader rights doctrine were necessary. However, the broader doctrine of Aboriginal rights nonetheless fundamentally shaped Aboriginal title. One result was that Aboriginal title, like other Aboriginal rights, was subject to a sort of cultural limit.

As a result, as put by the Court in *Delgamuukw*, “[t]he content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands.”²⁹ The Court went on to make the point more specific, with somewhat quirky examples that did not relate to anything in the case: “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).”³⁰

28. *R. v. Van der Peet*, [1996] 2 SCR 507.

29. *Delgamuukw*, *supra* note 23 at para. 125.

30. *Ibid.* at para. 128.

This inherent limit always had some uncertainty arising from the difficulty of interpreting it in particular circumstances. What *Tsilhqot'in* makes less clear, though, is whether this rule on inherent limits even continues to apply. The *Tsilhqot'in* decision largely restates all elements of the Aboriginal-title test from *Delgamuukw*. However, its references to limits on Aboriginal title (which will be explained further on one of the subsequent points) are all framed differently than the inherent-limit approach from *Delgamuukw*. The question would be whether what it says in fact fully replaces this aspect of *Delgamuukw*, or whether this aspect of *Delgamuukw* survives without having been repeated. There is an ambiguity about the law on this point.

Implications of uncertainty

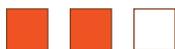
This uncertainty creates an uncertainty on the rules applying to the ways in which title-holding communities are permitted to use their lands. That has major implications for communities that may come to hold recognized title. They do not know the rules on their uses of their lands, nor do outside investors who might enter into arrangements with the community around certain developments. The Court’s decision was unfortunate in managing to be ambiguous on this point in a manner that diminishes the value of Aboriginal title lands for those communities that hold them.

This aspect of the decision directly harms Indigenous communities. The Court drew this limit from abstract legal reasoning, with no particularly strong roots. The practical effect is to tell Indigenous communities that they may or may not be able to develop their lands in certain ways, and they will have to wait to find out in the context of some future dispute. The Court did not mean it this way but, if one were trying to find a way to make Aboriginal lands of less value to Indigenous communities themselves, this would have been a good way to do so. Uncertainties like this are not an idle abstract concern but hit hard the most vulnerable communities in Canada.

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9. Effects of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on Aboriginal title

Reasons for uncertainty

Some are clearly of the view that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has significant implications for Aboriginal title. Amnesty International, for example, has argued that position in a number of cases and would presumably not do so unless it thought the position had legal merit. Moreover, announced endorsements of the UNDRIP by governments—by

Alberta, by the federal government, and likely in a fulsome way by British Columbia soon—might make some think that UNDRIP will begin to alter jurisprudence.

However, UNDRIP is not a treaty and does not have any automatic legal effects domestically, even with indications of governmental support—governments that wish to “implement” it still need to do so through the tough work of legislative and policy choices. And although Amnesty International put arguments based on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) before the Supreme Court of Canada in *Tsilhqot'in Nation*, the Court did not even say anything about these arguments. In a different case, the Federal Court of Appeal has actually made rather skeptical comments about the potential irrelevance of some such arguments to the specific context of Canada’s law on section 35.³¹ Although there is clearly some differing opinion on whether UNDRIP effects changes in Canadian law on the doctrine of Aboriginal title, the courts have to this point effectively rejected that view. There is no legal reason for that to change based on governmental support for the document so, although some will urge the courts to begin “implementing” UNDRIP themselves, the possibility that they will do so remains limited.

Implications of uncertainty

If the courts did in some way apply principles from UNDRIP to expand some aspects of Aboriginal title, this would spell more change in the test. The implications would be highly unpredictable were this to occur. The resulting uncertainty raises further complexities for those contemplating trying to invest in British Columbia in the context of existing law.

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8. Remedies if a project is commenced on land later subject to a successful Aboriginal title claim

Reasons for uncertainty

Almost the entirety of British Columbia remains subject to outstanding title claims. Thus, with some limited exceptions, construction of almost any land-based project takes place on land potentially subject to a later determination of Aboriginal title. In this context, the Supreme Court of Canada’s judgment in *Tsilhqot'in* did much to raise risks in relation to development in British Columbia with one particular paragraph of the judgment. In paragraph 92, the Court stated as follows:

³¹. See the intervention decision in *Gitxaala Nation v. Canada*, 2015 FCA 73.

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. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.³²

The word “may” is significant here. It is not necessarily going to be the case that every project on which construction has commenced would need to be cancelled after a determination of Aboriginal title. But some might be. Although one might assume the courts would attempt to devise remedies practically and in ways that did not cause harm to third parties, the Supreme Court of Canada managed to write here a particularly non-reassuring paragraph about the remedies applicable in such situations. It offered no further explanation. Clarity may need to await some very high-stakes situations.

Implications of uncertainty

Although it would be fair to suggest that courts have typically tried to devise remedies in ways that are practical, the uncertainty deliberately generated by this aspect of the *Tsilhqot'in* judgment immediately elevated risks for developments on most of the land within British Columbia. It is reasonable to conclude that there are implications today for the risk premium that investors seek in the context of projects in British Columbia. This legal uncertainty will have affected British Columbia’s economic prospects, all based on an arguably unnecessary paragraph of the Court’s judgment.

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7. Ownership of subsurface mineral rights on Aboriginal title lands

Reasons for uncertainty

Aboriginal title is a form of ownership of land. However, it is a form of ownership whose characteristics have been developed only in recent decades in the courts. As a result, it does not necessarily share the same characteristics with

32. *Tsilhqot'in Nation SCC*, *supra* note 1 at para. 92.

other forms of ownership, such as *fee simple*, which is the usual form of ownership in English and Canadian common-law jurisdictions. One major difficulty is that not all of its characteristics have been delineated by the courts.

One important element on which the courts have not spoken directly concerns the ownership of subsurface mineral rights on Aboriginal title lands, though some commentators take the view that the Court has in fact done so. In *Tsilhqot'in*, the Court indicates that “Aboriginal title 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.”³³

In *Delgamuukw*, there had been a paragraph suggesting that certain statutes seemed to presume that Aboriginal title included mineral rights.³⁴ However, some commentators have explained the sheer peculiarity of that paragraph in *Delgamuukw* and why its reasoning cannot properly support its conclusion.³⁵ And *Tsilhqot'in* does not say anything directly on mineral rights in the context of a major restatement of the law of Aboriginal title. If the argument is that it analogizes Aboriginal title to fee simple, the question is whether it is comparing to fee simple as in an historic era (when it included mineral rights) or as it functions in contemporary Canadian society (in which the Crown holds mineral rights and derives royalties and lease payments from them for the benefit of the population as a whole).³⁶ Though the point is disputed by some, there simply has not been a ruling squarely specifying whether Aboriginal title includes subsurface mineral rights.

Implications of uncertainty

This issue has enormous implications for the ownership of mineral rights across British Columbia. If Aboriginal title applies to a significant part of British Columbia and includes full ownership of subsurface mineral rights, then the Province has a resource base that is significantly less than may currently be assumed. That would have resulting implications for the Province’s fiscal capacity.

³³ *Ibid.* at para. 73.

³⁴ *Delgamuukw*, *supra* note 23 at para. 122. Some argument to this effect is present in Karen Drake (2015), *The Trials and Tribulations of Ontario’s Mining Act: The Duty to Consult and Anishinaabek Law*, 11 *J. Sustainable Dev. L. & Pol’y* 183 at 201–202.

³⁵ See Robin M. Junger (2015), *Aboriginal Title and Mining in Canada—More Questions than Answers*, 61 *Rocky Mt. Min. L. Inst.* 17A-1. See also the discussion on the issue in Dwight Newman (2013), *Natural Resource Jurisdiction in Canada* (LexisNexis).

³⁶ See Junger (2015), *Aboriginal Title and Mining in Canada*.

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6. Requirements of the Aboriginal title test

Reasons for uncertainty

In one sense, the *Tsilhqot'in* decision sets out to restate the test for Aboriginal title, largely basing its account on the prior decision in *Delgamuukw*. It might initially appear, then, to provide an authoritative, clear statement of the legal test to be met to establish Aboriginal title and thus to promote clarity for all parties. However, two factors actually mean that it leaves some meaningful uncertainty on the test to be applied to establish Aboriginal title.

First, the Court itself expresses some uncertainty about the test. While stating a legal test based on sufficient and exclusive occupation at the time of assertion of European sovereignty, along with a possible use of continuity as a third component, and thus seeming to express a clear test, the Court explicitly says that the test may not actually be a test. As the Court puts the point:

In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.³⁷

Legal tests within most areas of law are composed of mandatory components or otherwise of factors to be considered. The use of mandatory components, or so-called “bright-line rules,” promotes legal certainty. In *Tsilhqot'in*, the Court actually goes out of its way to add language that undermines the definitiveness of the legal test it states. It does so, obviously, with an eye to complex considerations of the intercultural nature of the issue. But the effects are nonetheless to undermine certainty as to the components of the test, which are instead “useful lenses”—whatever that might be understood to mean.

Second, the very fact that the test for Aboriginal title has shifted in the ways that it has undermines certainty on whether the components would be understood in the same way in future decisions. In its 2014 decision in *Tsilhqot'in*, the Court moved away from its own past approach in its 2005 decision in *Marshall and Bernard*, preferring instead the approach on aspects of the main test of one of the judges from the Nova Scotia Court of Appeal judgment in the case who

³⁷. *Tsilhqot'in* SCC, *supra* note 1 at para. 32.

had incidentally moved up to the Supreme Court of Canada in the interim.³⁸ And this was just one of a number of technical aspects on which the *Tsilhqot'in Nation* decision subtly shifted away from past precedents without clearly explaining that it was doing so.³⁹ The difficulty is that the value of precedent itself is subtly undermined: what makes it possible to assume that the rules in *Tsilhqot'in* will remain unchanged when it changed some of the prior rules?

Implications of uncertainty

The details of legal tests do not necessarily strike non-lawyers as especially interesting. However, the exact shape of the legal test to establish Aboriginal title has fundamental implications for determining over which areas it will be possible for communities to establish successful Aboriginal title claims in court if they had to go there and thus for over which areas governments will be willing to negotiate. That the *Tsilhqot'in* decision purports to restate and clarify the test while managing to generate new uncertainties is a bitter irony that has practical implications. Some of the immediate implications concern the difficulties in applying the test in a predictable way. Some of the deeper implications are about whether judicial decisions can ever resolve matters in a predictable way or if governments and Indigenous communities must take back control of this arena and find some solutions.

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5. Aboriginal title claims to previously occupied lands no longer occupied

Reasons for uncertainty

One long-standing assumption concerning Aboriginal title claims has been that they pertain to land where Aboriginal communities are present. Of course, Aboriginal title claims might extend beyond the exact area subject to intensive occupation by Indigenous communities today particularly where the forces of colonialism have resulted in communities being penned into smaller areas than in the past. But there would always have been a sense that they related in some way to lands that a present community occupies or to areas in close geographic proximity.

In its 1997 decision in *Delgamuukw*, the Supreme Court of Canada articulated the legal rule that Aboriginal title claims would be to those lands occupied

³⁸. *Tsilhqot'in* SCC, *supra* note 1 at para. 39 (adopting the reasoning of Cromwell J.A., as he then was).

³⁹. For discussion of several others, see Coates and Newman (2014), *The End Is Not Nigh*.

at the time of assertion of European sovereignty. This was a specific adaptation as compared to the general Aboriginal rights test: “whereas the time for the identification of aboriginal rights is the time of first contact, the time for the identification of aboriginal title is the time at which the Crown asserted sovereignty over the land.”⁴⁰ In that case, the way in which the Court wrote about continuity with past occupation did allow for some flexibility, but it also seemed to reflect the assumption that the lands claimed would relate to the lands over which the community has continued to exercise occupation. It wrote of ongoing relationships to land in a way that fit with this assumption.⁴¹

However, the language in *Delgamuukw* also potentially permitted a reading that saw the establishment of continuity of relationship to the land as an optional means of proving Aboriginal title, and the *Tsilhqot'in* decision arguably makes this reading even more explicit. The phrasing of the continuity “requirement” in *Tsilhqot'in* is now entirely conditional on whether that continuity is being used for evidentiary purposes: “Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises—continuity between present and pre-sovereignty occupation.”⁴² Although the language of the decision on this point has not shifted dramatically, a leading scholar of Aboriginal title has now read the language of the case as explicitly reviving historic claims to areas far from any presently occupied land.⁴³ That argument reads the element of continuity as an entirely optional component of the test. The judgment does not make that point totally clear, but it is a very plausible reading of it.

Implications of uncertainty

This particular uncertainty has the effect of potentially reviving Aboriginal title claims in very unexpected locales. Some communities have migrated significant distances since the pertinent moment in time for the establishment of Aboriginal

40. *Delgamuukw*, *supra* note 23 at para. 142.

41. See, for example, *Delgamuukw*, *ibid.* at para. 126 (“the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.”); at para. 152 (“an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. What is required, in addition, is a continuity between present and pre-sovereignty occupation, because the relevant time for the determination of aboriginal title is at the time before sovereignty.”).

42. *Tsilhqot'in*, *supra* note 1 at para. 45.

43. P.G. McHugh (2015), *Aboriginal Title: Traveling from (or to?) an Antique Land?*, 48 *U.B.C. L. Rev.* 793.

title, and the test as now stated would imply that they could reclaim prior lands far from where they now are, sometimes giving rise to new overlapping claims with other First Nations. This wrinkle to the new test has some very significant, albeit delicate implications.

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4. Scope of permitted or justified limitations on Aboriginal title

Reasons for uncertainty

In principle, the Supreme Court of Canada has affirmed repeatedly that governments may place justified limits on Aboriginal rights generally or on Aboriginal title rights specifically and has articulated a legal test for such justified limits.⁴⁴ However, the test in *Tsilhqot'in* has shifted from that in *Delgamuukw*, thus raising questions of how stable the legal test is. Moreover, governments have very seldom been ready to indicate that particular steps are being taken as justified limits on Aboriginal rights or title. So, the scope of what limits they actually can or cannot impose remains largely untested in the courts.

Implications of uncertainty

This uncertainty means that the basic shape of Aboriginal title is left much less clear than it could otherwise be. A full understanding of the effects of Aboriginal title rights would also require an understanding of its limits. This is a meaningful uncertainty in terms of the effects of Aboriginal title.

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3. Effects of future generations' rights on uses of Aboriginal title lands

Reasons for uncertainty

In the course of its latest articulation of the law of Aboriginal title in the *Tsilhqot'in* decision, the Supreme Court of Canada went over various aspects of the nature of Aboriginal title. Among the elements it discussed were the collective nature of Aboriginal title. Here, it described a resulting limitation on the use of Aboriginal title lands that had not loomed as large in past decisions, even it was potentially implicitly there: it indicated that Aboriginal title lands must be managed in a way that preserves their use and value for future generations. As the Court phrased the point:

⁴⁴. See *R. v. Sparrow*, [1990] 1 SCR 1075; *Delgamuukw*, *supra* note 19; *Tsilhqot'in SCC*, *supra* note 1.

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.⁴⁵

Several commentators on the decision have already highlighted the uncertainties resulting from this limit. It is arguably not clear whether Indigenous communities holding Aboriginal title lands can carry out certain sorts of resource development that might develop the land in particular ways; it is similarly not clear whether Aboriginal title can be subdivided into private landholdings by an Aboriginal community that chose to do so.⁴⁶ The result is that the current members of Indigenous communities face a restriction on the use of their Aboriginal title lands not applying to anyone else's lands and, frankly, do not know how they are legally permitted to use their own land.

The Supreme Court of Canada effectively chose to leave this point unclear. Within the *Tsilhqot'in* judgment, the Court wrote as follows: “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.”⁴⁷ The Court has explicitly left uncertainty on what particular uses of Aboriginal title land are permissible and suggested that this can be resolved issue by issue.

Implications of uncertainty

The Supreme Court of Canada's decision not to provide any further guidance effectively sets matters up for this issue to return in future to the Court. Given the significance of the issue, it is unlikely any lower-court decision would simply be accepted by all parties, so the issue will have to return to the Supreme Court of Canada. That leaves a lingering period of uncertainty—presumably, at least a decade, if not more—on what uses are permitted for Aboriginal title lands. The implications for Indigenous communities themselves are frankly devastating.

A major implication of this situation is that Indigenous communities who wish to do so do not know what development projects they legally can or cannot pursue. Those contemplating investments in Aboriginal title lands do not know if

45. *Tsilhqot'in* SCC, *supra* note 1 at para. 74.

46. See discussion in Coates and Newman (2014), *The End Is Not Nigh*.

47. *Tsilhqot'in* SCC, *supra* note 1 at para. 74.

the developments those investments fund might actually be illegal uses of the land, subject to future challenge by dissenting community members or even by environmental non-governmental organizations (ENGOs) that might claim to represent the interests of future generations. Obviously, this is a challenging investment climate for Indigenous communities who might wish to use some of their Aboriginal title lands in contemporary ways while pursuing Indigenous economic growth.

Let this point be very clear. This uncertain aspect of the decision harms Indigenous economic growth and harms Indigenous communities. Uncertainties in the law matter to everyone, including—and perhaps especially—the most vulnerable.

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2. Possibility of Aboriginal title claims to private property

Reasons for uncertainty:

The Tsilhqot'in Nation strategically carved out of their title claim certain spots otherwise within the claim area that are occupied by individuals claiming private ownership of those lands based on past grants from the Crown. In doing so, their claim avoided putting the Supreme Court of Canada in the position of having to answer how to handle a clash between such claims. At the same time, an opportunity was missed to gain clarity on this question. One lower-court decision in Ontario has wrestled with the question to a limited degree.⁴⁸ More generally, it has not been answered in the courts, and scholars commenting on it have offered some dramatically different viewpoints on how to approach the question.⁴⁹ It is a question on which there is significant uncertainty.

Implications of uncertainty

Some of the extremely significant implications of this issue are apparent on the face of it. In the context of the widespread Aboriginal title claims across British Columbia, whether private land is carved out of those claims or not has dramatic implications for third-party private landowners. Some First Nations may well put those to the test. The British Columbia government recently avoided one such legal case by buying out a private landowner who had provoked an Aboriginal title claim by proposing to make uses of his land in a manner desecrating a First

⁴⁸. *Chippewas of Sarnia Band v Canada (Attorney General)* (2000), 51 OR (3d) 641, 195 DLR (4th) 135 (CA), leave to appeal refused, 2001 CarswellOnt 3952 (SCC).

⁴⁹. See Kent McNeil (2010), *Reconciliation and Third-Party Interests: Tsilhqot'in Nation v British Columbia*, 8 *Indigenous LJ* 7; John Borrowes (2015), *Aboriginal Title and Private Property*, 71 *SCLR* 91; Malcolm Lavoie (forthcoming), *Aboriginal Title Claims to Private Land and the Legal Relevance of Disruptive Effects*, in Dwight Newman, ed., *Business Implications of Aboriginal Law* (LexisNexis).

Nation's traditional cemetery that was within the privately owned land.⁵⁰ But the provincial government cannot afford to buy out every landowner, especially when it manages to generate financial incentives for landowners to threaten such conduct. Aboriginal title claims have been filed in the context of other privately owned sites in British Columbia, including the proposed site of the Ajax Mine at Kamloops.⁵¹ What the law is on what happens as between an Aboriginal title claim and private land ownership will have specific implications in the context of such claims, as well as in British Columbia generally.⁵²

One of the prominent Indigenous scholars who has commented on this issue, John Borrows, has effectively said that, although he recognizes that uncertainties on whether private property must be surrendered to Indigenous communities may produce some anxiety, the resulting suffering is less than what Indigenous communities have faced in Canadian history.⁵³ Although he made those comments in an academic article, the airing of such sentiments will likely only increase the more this issue is discussed, and some advocates will put the point in even less moderate ways than Borrows has. Ongoing uncertainty on the point arguably raises risks of great harm to prospects for reconciliation between Indigenous and non-Indigenous Canadians at the level of how individual citizens get along.

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1. Governance aspects of Aboriginal title

Reasons for uncertainty

In *Tsilhqot'in*, the Court indicates that “Aboriginal title 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

50. This incident is described in Borrows (2015), *Aboriginal Title and Private Property*.

51. The Tk'emlups and Skeetchestn First Nations recently brought this claim to Aboriginal title that includes private property. See *Global News* (2016), B.C. Government Opposes Aboriginal Group's Land Claim near Kamloops, *Global News* (January 16), <<http://globalnews.ca/news/2459010/b-c-government-oppose-aboriginal-groups-land-claim-near-kamloops>>.

52. There will also be significant effects elsewhere, notably in the Maritime Provinces where the Peace and Friendship treaties of the 1700s did not include a land surrender clause. For a discussion of prospects for Aboriginal title claims the Maritimes, see Robert Hamilton (2016), *After Tsilhqot'in Nation: The Aboriginal Title Question in Canada's Maritime Provinces*, 67 *U.N.B.L.J.* 58. A title claim has recently been filed to around a third of the province of New Brunswick, almost all of it private land (Paul Cormier (2016), Mi'kmaq First Nation Files Land Claim for Vast Portion of New Brunswick, *Global News* (November 9), <<http://globalnews.ca/news/3057843/mikmaq-first-nation-files-land-claim-for-vast-portion-of-new-brunswick/>>, and other title claims are being considered by other First Nations in the province.

53. Borrows (2015), *Aboriginal Title and Private Property*.

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.”⁵⁴ The reference to rights to “decide how the land will be used” and to “pro-actively use and manage the land” has been interpreted by some commentators as implicitly including governance rights.⁵⁵ This interpretation fits with a longer-standing view of some academics that Aboriginal title includes self-government or jurisdictional rights.⁵⁶

At the same time, though, the passage in question includes these rights in a list of “ownership rights similar to those associated with fee simple.” It is actually far from clear that the Court intends through these words to recognize rights of self-government—something it explicitly declined to do in *Delgamuukw*,⁵⁷ and something on which judicial decisions from the Supreme Court of Canada have been much less favourable than they have often been portrayed as being.⁵⁸ Although some Canadian federal governments have recognized an “inherent right to Aboriginal self-government,”⁵⁹ they have done so by their own choice rather than under judicial compulsion. What is legally required remains debated.

Were any self-government rights to be implicit in Aboriginal title, further questions would actually follow. In her recent presentation as part of the July 2017 Cambridge Lectures of the Canadian Institute for the Administration of Justice, federal Minister of Justice Jody Wilson-Raybould offered her interpretation, along the lines of the view that the judgment recognizes self-government, that the *Tsilhqot'in* decision showed “that the bench [...], having apparently made up its mind on the proven Aboriginal title area, was clearly moving on to the next big question, which is ‘what laws will apply to the title lands so proven.’” She suggested that the decision itself implied the role of *Tsilhqot'in* law in some combination

54. *Tsilhqot'in SCC*, *supra* note 1 at para. 73.

55. See, for example, Brian Slattery (2015), *The Constitutional Dimensions of Aboriginal Title*, 71 *SCLR* (2d) 45.

56. See, for example, Kent McNeil (1998), *Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty*, 5 *Tulsa Journal of Comparative and International Law* 253. Strangely, he made this claim outside Canada shortly after Supreme Court of Canada decisions that effectively rejected claims to Aboriginal self-government framed in terms of Aboriginal rights generally and in terms of Aboriginal title: *R. v. Pamajewon*, [1996] 2 SCR 281; *Delgamuukw*, *supra* note 19.

57. *Delgamuukw*, *ibid.*

58. *Pamajewon*, *supra* note 56.

59. The Chrétien government adopted a policy recognizing the inherent right of Aboriginal self-government in 1995, prior to any judicial decision requiring that policy: Canada, Department of Indian Affairs and Northern Development (1995), *Federal Policy Guide, Aboriginal Self-Government: The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, Minister of Indian Affairs and Northern Development. The Trudeau government's recent “ten principles” also reiterate the principle of Aboriginal self-government as the first principle: Government of Canada (2017), *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (July 17).

with federal and provincial law, and she went on to indicate that “the relationship between laws will have to be addressed through discussions and agreements among the parties or if necessary ultimately determined by the courts.”⁶⁰ As this last part of her statement notes, there would continue to be a number of significant uncertainties even if the judgment were considered to recognize self-government.

Implications of uncertainty

This uncertain aspect significantly affects the shape of governance in British Columbia. There are potential visions for the province that involve the recognition of a large number of Indigenous governments as having particular areas of jurisdiction—and such has already occurred under some modern treaties, such as the Nisga’a Agreement. The federal and provincial governments may be quite prepared to recognize self-government through negotiated agreements, although decades of work have produced only a handful of treaties thus far. If Aboriginal title carries with it also legally entrenched powers of self-government, then each of the large number of outstanding Aboriginal title claims also implies a conclusion about governance, in whatever form the courts decide they will recognize that right, with further legal decisions no doubt arguing about various details of it. The courts would be much more in the driver’s seat in giving shape to Aboriginal self-government, potentially removing the issue from negotiation toward win-win solutions and instead placing it within the purview of judicial determination.

The judicial determinations in themselves would generate a complicated process. To draw from comparative experience, American courts have faced immensely challenging questions in trying to elaborate jurisdictional questions related to a concept “inherent tribal sovereignty.” They are doing so even without the effect of their determinations being immediately constitutionalized, as would result in Canada as a result of such rights becoming s.35 rights. So, the stakes here would be even higher, and courts would make effectively unchangeable determinations about the very shape of sovereignty in Canada.

At the same time, without getting to those prospects and merely because some uncertainty already exists, there are already practical implications. The past reluctance of the Supreme Court of Canada in *Delgamuukw* to rule on the self-government questions raised there appears to have actually stymied negotiation processes.⁶¹ Where different parties make very different assumptions about what they would receive if matters were to go back to litigation, that legal uncertainty can actually undermine current prospects for negotiated agreements.

60. Address by Hon. Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada (2017), *Realizing a Nation-to-Nation Relationship with the Indigenous Peoples of Canada*, Cambridge Lectures, University of Cambridge (July 3).

61. See Gordon Gibson (2009), *A New Look at Canadian Indian Policy* (Fraser Institute), at 57–58.

Conclusions

The *Tsilhqot'in Nation* decision was the first Supreme Court of Canada judgment on Aboriginal title in over a decade, and that is about how often such decisions have been released. That reality generates a major problem when one looks to court decisions to provide legal certainty in this area of law. There are simply not enough cases litigated, and there possibly never can be, to get answers from the courts to the range of significant detailed questions that arise.⁶²

At the same time, many of the legal uncertainties that remain present after the *Tsilhqot'in* judgment imply fundamental uncertainties in the shape of Aboriginal title, how Aboriginal title lands may be used by communities themselves or in the course of development in conjunction with outside investors, or in relation to broader effects of Aboriginal title. The presence of outstanding Aboriginal title claims across British Columbia accentuates the difficulties of the law in this context being unclear and even undecided.

British Columbia's new government formed in 2017 has indicated its intent to seek resolution of many issues through a reinvigorated treaty negotiation process. The good will attaching to a new government may facilitate that in part. But unless solutions are found that satisfy all communities and all individuals within them—a challenge in actual human life—there will always be the possibility of legal challenges asking the courts to provide communities with their minimum expectations based on the law of Aboriginal title. On the other hand, an approach that immediately ceded to the full claims of communities would actually have massive distributive implications that would be difficult to reconcile with the public interest of British Columbians as a whole.

Given that there are profound differences about how to interpret much of what may be expected from the law of Aboriginal title, the presence of legal uncertainties severely complicates negotiation processes seeking to resolve land claims and other outstanding claims. Because each side has a very different perception of what the law is, they have very different ideas of what their alternative is if negotiations do not succeed. The result is that they may or may not be able even to find common ground.⁶³ That, in itself, is no reason not to try, but nobody can deny that treaty negotiations have proven challenging in British Columbia and may well continue to do so.

⁶². See Newman (2016), *The Economic Characteristics of Indigenous Property Rights*, for discussion of how this context does not fit traditional models of common law adjudication.

⁶³. For a further discussion on such points, see Dwight Newman (2006), *Negotiated Rights Enforcement*, 69 *Sask. L. Rev.* 119.

Other options may exist for routes forward in resolving some of the legal uncertainties identified, thereby facilitating resolutions. First, under the so-called “reference power,” the provincial government has the option of sending legal questions to its Court of Appeal for resolution, and these could then reach the Supreme Court of Canada relatively quickly—or the federal government can refer questions directly to the Supreme Court of Canada. Legal uncertainties could be sent back to the courts for resolution, although the courts would then be in the position of weighing on them in the abstract. Moreover, this approach would send issues back to the same institutions that failed to resolve them in the first place and that have managed to generate legal uncertainties when they should have been settling them. There would thus be some quite undesirable features to going this route, but it would be one legal option that could be contemplated.

Second, politicians exercising leadership could resolve some of the questions at issue through legislation. That is, in some ways, what Australia did in the face of major uncertainties over “Native title” after early common law court decisions.⁶⁴ There are many aspects to the Australian experience from which it would be possible to learn and hopefully to do better on some issues. But the idea, then, is not unprecedented, and there would be various ways in which legislation could be framed.

Some might raise the issue of whether such an exercise of leadership would be legally possible in Canada, given that the courts’ approach to Aboriginal title becomes immediately constitutionally entrenched due to section 35 of the *Constitution Act, 1982*. There are two responses. First, legislators can take steps that pass the test for justified infringements, and balancing between various complex dimensions of Aboriginal title in sorting out uncertainties arising from the test would surely be an objective that would have the potential of meeting this test.

Second, in a lesser-known but actually meaningfully used clause that is part of the constitutional amending formula, constitutional amendments that affect only one province, even in relation to the Constitution of Canada as a whole, can be effected through a special amending procedure often called the “bilateral amending formula.” This formula, contained in section 43 of the *Constitution Act, 1982*, permits these sorts of amendments based on a resolution of the provincial legislature and of the federal Parliament, without the need for other provinces’ consent. When this formula was under discussion during the constitutional patriation discussions, specific reference was made to the possibility of using it to amend Aboriginal title in a particular province.⁶⁵

64. On Australian Native title law, see generally Richard Bartlett (2015), *Native Title in Australia*, 3rd edn., LexisNexis Butterworths Australia.

65. For discussion, see Dwight Newman (2016), Understanding the Bilateral Amending Formula, in Emmett Macfarlane, ed., *Constitutional Amendment in Canada* (University of Toronto Press): 147–163.

Although it would not be appropriate to use this formula simply to impose decisions, its use to overcome impasses following broad consultative processes might have potential. If the province of British Columbia decided it could address some questions through legislation that had the effect of overriding possible judicial determinations on Aboriginal title uncertainties—whether actually putting in place substantive resolutions on general issues or specific cases or whether putting in place a dispute resolution system—it could do so with the consent of the federal government by using this amending formula.

There is actually more room for creative resolutions than may first be apparent. Resolving some of the legal uncertainties on Aboriginal title that continue to have significant implications for British Columbia could have the prospect of enabling constructive paths forward together. Doing so could support economic opportunities for non-Indigenous and Indigenous British Columbians. It could face up to a set of some of the biggest policy dilemmas facing British Columbia. Nobody can say there are easy paths forward. But there are legal uncertainties that are having enormous effects, and there are options available to the government to face up to the challenges if political leaders are ready to exercise leadership.

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