

SYMPOSIUM ON INTERNATIONAL INDIGENOUS RIGHTS, FINANCIAL DECISIONS,  
AND LOCAL POLICY

INDIGENOUS TITLE AND ITS CONTEXTUAL ECONOMIC IMPLICATIONS:  
LESSONS FOR INTERNATIONAL LAW FROM CANADA'S *TSILHQOT'*IN DECISION

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International law on the rights of Indigenous peoples has developed rapidly in recent decades.<sup>1</sup> In the latest phase of this development, international instruments on the rights of Indigenous peoples have increasingly offered universalized statements.<sup>2</sup> However, the reality remains that the implementation of Indigenous rights must take place in particular circumstances in particular states. The form of domestic implementation of Indigenous rights may or may not connect closely to international law statements on these rights, and there may be good reasons for that. This essay takes up a particular example of Indigenous land rights and a significant recent development on land rights in the Supreme Court of Canada.

Although it is simply a General Assembly declaration and may or may not codify various areas of customary international law, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has become a key touchstone on perceived or developing international standards on Indigenous rights, with relatively broad international support, including from states that had initially voted against it.<sup>3</sup> On the land rights of Indigenous peoples, the first two subsections of article 26 of UNDRIP offer strong, universalized statements: "Indigenous

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<sup>1</sup> See, e.g., JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004); ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE, AND LAND (2007).

<sup>2</sup> Cf., e.g., KAREN ENGLE, THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY (2010) (discussing complex pressures on minority communities' self-identification generated by possibility of legal rights based on Indigenous status).

<sup>3</sup> Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, arts. 26(1), 26(2) (Sept. 13, 2007). See generally, REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Stephen Allen & Alexandra Xanthaki eds., 2011) (offering a series of possible views on the international law status of the instrument); MAURO BARELLI, JUSTICE IN INTERNATIONAL LAW: THE LEGAL, POLITICAL, AND MORAL DIMENSIONS OF INDIGENOUS RIGHTS (forthcoming 2016) (offering nuanced discussion of legal status of UNDRIP); Dwight Newman, *Africa and the United Nations Declaration on the Rights of Indigenous Peoples*, in PERSPECTIVES ON THE RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES IN AFRICA 141 (Solomon Dersso ed., 2010) (discussing the complex African engagement with UNDRIP); DWIGHT G. NEWMAN, REVISITING THE DUTY TO CONSULT ABORIGINAL PEOPLES (2014) (tracing the moves of Canada, the United States, New Zealand, and Australia toward endorsements that reversed their votes against UNDRIP, though with more recent developments including the indications of the new Liberal government elected in Canada in 2015 that it intends to implement all of UNDRIP).

peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” and “Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”<sup>4</sup>

As the June 2014 decision of the Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia* will illustrate,<sup>5</sup> the reality of land title claims by Indigenous peoples, though, has to play out differently in different domestic legal systems, partly owing to the nuanced, differing effects of Indigenous title claims in different circumstances.<sup>6</sup> Thus, even as a transnational doctrine of Aboriginal title has developed and spread through common law jurisdictions,<sup>7</sup> that doctrine has developed differently within each jurisdiction, in light of broader considerations within that jurisdiction's legal culture and other circumstances. In the common law world, the transjudicial conversation has been more in the form of networked exchange of ideas across constitutional contexts than in the form of any definitive endeavour to implement international law as a higher order of law.<sup>8</sup> Accordingly, courts in Canada, for instance, have almost never cited UNDRIP, even in cases like *Tsilhqot'in* where intervenor groups offered major argument on it. Outside the common law world, land rights decisions have been different yet again, such as in Latin American states that may be following—or not following—significant decisions of the Inter-American Court of Human Rights on title issues.<sup>9</sup> That there are such contextual variations is necessarily the case, and it has implications for how courts in different jurisdictions engage with Indigenous land claims as they seek to develop pertinent legal doctrine in ways responsive to the aims of recognizing Indigenous title.

The Supreme Court of Canada's landmark *Tsilhqot'in* decision saw the first judicial declaration in Canadian history of Aboriginal title to delimited land in favour of a specific group, and has already received some international attention.<sup>10</sup> It built on past Canadian pronouncements of the law of Aboriginal title in cases where the title claim was ultimately unsuccessful or not directly resolved in the pertinent court proceedings. The Court in *Tsilhqot'in* managed to make a title determination even in the context of a historically mobile community, when such communities had previously appeared potentially ineligible for a title claim under Canadian domestic jurisprudence.<sup>11</sup>

Recognition of Indigenous property rights has the potential to contribute to the flourishing of Indigenous communities that have deep-seated cultural and spiritual links to traditional territories. A recognized land base also has the potential to support significant new economic possibilities for Indigenous communities. Clarity of property rights, particularly, supports this latter objective, while also quite possibly facilitating more possibilities for economic transactions by Indigenous communities. If one read *Tsilhqot'in* as simply a long-overdue recognition of Indigenous property rights and as now offering a clear legal pronouncement on those property rights, one would see it as accomplishing a great deal. However, initial reactions to the decision have given way already

<sup>4</sup> Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, arts. 26(1), 26(2) (Sept. 13, 2007).

<sup>5</sup> *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257 (Can.).

<sup>6</sup> See generally, Karin Lehmann, *Aboriginal Title, Indigenous Rights, and the Right to Culture*, 20 S. AFR. J. HUM. RTS. 86 (2004).

<sup>7</sup> See generally, P.G. MCHUGH, ABORIGINAL TITLE: THE MODERN JURISPRUDENCE OF TRIBAL LAND RIGHTS (2011).

<sup>8</sup> Cf. also, ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (discussing the forms of global governance, including those taking place through analogous sorts of transjudicialism).

<sup>9</sup> Cf. *The Mayaagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 79 (Aug. 31, 2001); JÉRÉMIE GILBERT, INDIGENOUS PEOPLES LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS (2006).

<sup>10</sup> See, e.g., John Borrows, *Aboriginal Title in Tsilhqot'in v. British Columbia*, [2014] SCC 44, MĀORI L. REV. (August 2014).

<sup>11</sup> See generally, *Calder v. British Columbia*, [1973] S.C.R. 313 (Can.); *Delgamuukw v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 1010 (Can.); *R. v. Marshall/Bernard*, [2005] 2 S.C.R. 220 (Can.). See also generally, GUY RÉGIMBALD & DWIGHT NEWMAN, THE LAW OF THE CANADIAN CONSTITUTION (2013) (discussing interaction of Aboriginal title case law and mobile communities).

to more nuanced analyses, with an increasing number of Canadian commentators recognizing the sheer uncertainty the decision creates on a wide range of issues.<sup>12</sup>

On the one hand, the *Tsilhqot'in* decision appeared simply to apply Canada's existing *Delgamuukw* test for Aboriginal title in a manner responsive to the circumstances of historically mobile communities. This test looks for evidence of sufficient, exclusive occupation by an Indigenous community prior to the assertion of European sovereignty, with those circumstances establishing a title claim in areas where such title was not negotiated away or lawfully extinguished, and with continuous occupation of a territory from the past to the present day potentially serving as important evidence to this effect.<sup>13</sup> But what could appear a simple albeit precedent-making application of a test to particular circumstances in *Tsilhqot'in* has actually opened a wide range of new issues, ranging from the potentially altered effects of Aboriginal title on private property to the possibility for Aboriginal title in marine and foreshore areas to the effects of Aboriginal title on subsurface mineral rights—to name but a few of these issues.

Some of these were not before the Court and suffer simply from no direct comment by the Court. But the Court actually eschewed certainty even on matters on which it commented more directly, often in ways that undermine the economic value of Aboriginal title for Indigenous communities themselves. In discussing the basic nature of Aboriginal title, the Court pronounced its inherently collective nature, whereby it is held for a group, and not just for a present group but on behalf of present and future generations.<sup>14</sup> One effect is that Aboriginal title lands are subject to a unique restriction on their use such that they may be used only in ways that do not undermine the value of the land for future generations.<sup>15</sup>

Some might see such a restriction as reflecting a visionary environmental sustainability principle but in practical terms right now, the restriction of the use of Indigenous lands to those compatible with the claims of future generations means that the range of permissible uses of Aboriginal title lands by Indigenous communities that may wish to pursue resource development is unclear. The Court indicates only that such issues can be considered on a case-by-case basis.<sup>16</sup> A community that agrees to a particular economic development might see it challenged down the road by dissenting members of the community, or perhaps even by outside environmental groups who purport to represent the claims of future generations of the community. The broader result of this dimension of the case is that a resource company contemplating entering into an agreement, such as an Impact Benefit Agreement (IBA),<sup>17</sup> with an Indigenous community that involves the use of potential Aboriginal title lands actually faces new uncertainties on whether the community is even legally capable of authorizing a particular use of its claimed lands.

That new problem for negotiated agreements between companies and communities arises even in the wake of parts of the decision that seem geared to encouraging such agreement, even while those same parts themselves ironically create massive further uncertainties through unnecessary language. In areas of Canada where there are substantial outstanding land claims based on Aboriginal title—typically in areas without treaties settling land issues—the Supreme Court's decision has effects not only through the precedent set for how these

<sup>12</sup> See, e.g., Harry Swain & James Baillie, *Tsilhqot'in Nation v. British Columbia: Aboriginal Title and Section 35*, 56 CAN. BUS. L.J. 265 (2014).

<sup>13</sup> *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257, paras. 24ff. (Can.).

<sup>14</sup> *Id.* at paras. 15, 74.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at para. 74 (stating that “[w]hether 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.”).

<sup>17</sup> See generally, Ibrionke Odumosu-Ayanu, *Indigenous Peoples, International Law, and Extractive Industry Contracts*, 109 AJIL UNBOUND 220 (2015).

land claims might proceed in court, but also through the legal effects on unsettled claims in light of other doctrines that received very limited attention in the case. For contexts of ongoing uncertainty—prior to final settlement or adjudication of Aboriginal and treaty rights claims—Canada’s courts have developed over the last decade an intricate, home-grown doctrine of a duty to consult potentially impacted Indigenous communities concerning government administrative decisions that might affect them.<sup>18</sup>

The uncertainties to which this doctrine inherently gives rise offer important levers for the negotiation of IBAs by companies that wish to see potential “duty to consult” issues settled, and thus pressures them to seek IBAs that include “support clauses” under which communities agree to say that consultation requirements have been met.<sup>19</sup> At one level, the *Tsilhqot’in* decision offers a remarkably supportive statement about the effect of such agreements, with the judgment adding a note that “[g]overnments 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.”<sup>20</sup> But several paragraphs earlier, it also creates massive uncertainty with an unnecessary note that “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.”<sup>21</sup> The latter is accompanied by no explanation of the circumstances in which such a remedy might arise, although it may link in some manner to developing requirements of consent in international law to certain severe impacts on Indigenous peoples and thus be informed in future by remedies discussed in those contexts.<sup>22</sup>

Someone seeking to defend the reasoning in the judgment would conceivably argue that the Court is establishing complex balances and deliberately avoiding imposing answers on questions that can be worked out over time. When the Court first established Canada’s modern doctrine on consultation, it alluded to the idea of detailed implications and applications of a common law doctrine being worked out over time through an accumulation of decisions on different facts.<sup>23</sup> Theories of common law approaches to adjudication having a particular systemic tendency to work toward economically efficient outcomes because of such an accumulation of decisions (combined with the incentives on litigation of particular cases) have significant scholarly backing.<sup>24</sup>

However, these tendencies depend upon the possibility of significant numbers of cases being considered over periods of time. In the context of decisions on Aboriginal title, litigation is immensely costly and is thus pursued fully through the courts in only very limited numbers of cases. The fact that there have been only three post-1982 Supreme Court of Canada cases ruling substantively on Aboriginal title illustrates the rarity of these cases. There are thus increasing voices calling for the Canadian courts to consider the economic effects of their

<sup>18</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (Can.). See generally, DWIGHT G. NEWMAN, *THE DUTY TO CONSULT: NEW RELATIONSHIPS WITH ABORIGINAL PEOPLES* (2009); NEWMAN, *supra* note 3.

<sup>19</sup> See generally, DWIGHT NEWMAN, *NATURAL RESOURCE JURISDICTION IN CANADA* (2013) and NEWMAN, *supra* note 3 (discussing some of the pressures that lead to IBAs and typical clauses in IBAs).

<sup>20</sup> *Tsilhqot’in Nation v. British Columbia*, [2014] 2 S.C.R. 257, para 97 (Can.).

<sup>21</sup> *Id.* at para. 92.

<sup>22</sup> See generally, BAS ROMBOUTS, *HAVING A SAY: INDIGENOUS PEOPLES, INTERNATIONAL LAW, AND FREE, PRIOR AND INFORMED CONSENT* (2014).

<sup>23</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 11 (Can.) (stating that “[a]s this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.”).

<sup>24</sup> See, e.g., Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEG. STUD. 51 (1977); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEG. STUD. 65 (1977); John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEG. STUD. 393 (1978); Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEG. STUD. 139 (1980); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551 (2003); Paul H. Rubin, *Micro and Macro Legal Efficiency: Supply and Demand*, 13 SUP. CT. ECON. REV. 19, 20-27 (2005); FRANCESCO PARISI & VINCY FON, *THE ECONOMICS OF LAWMAKING* (2009).

decisions in the Aboriginal policy context specifically.<sup>25</sup> The emerging call is for more explicit judicial consideration of economic factors, implicitly reviving an older tradition of law and economics analysis and perhaps showing its application in contextualized ways in areas of law that lack the incremental development of case law on which more recent economic theories of litigation have depended. Notably, the economic issues at stake are not only for Canada as a whole but for Indigenous communities themselves, as courts have failed to define some features of Aboriginal title in a manner that supports clarity on permissible uses of their own land by Indigenous communities.

Working out the practical effects of particular forms of property rights within a particular legal system may well be a particularistic exercise, somewhat removed from universalized statements concerning Indigenous property rights across the world. Indeed, circumstances may even differ internally across different parts of a state. Within Canada, outstanding land claims to much of the Pacific coastal province of British Columbia are against public land in a province with limited population density; however, in Canada's Atlantic-coast Maritime provinces, whose 1700s-era treaties did not include land surrender clauses, outstanding land claims overwhelmingly need to engage with private land ownership, because the geographical smallness of the provinces combined with their relatively earlier settlement now means that almost all land in those provinces is privately owned and used. How the courts even think about the interaction of Aboriginal title claims with private property interests might well differ on two coasts of the same state.

International, universalized propositions on the rights of Indigenous peoples may present important ideals. But the pragmatic futures of Indigenous communities and individuals may well depend on more detailed, particularistic determinations within domestic legal systems, wrestling with different interests, working through economic consequences of different positions for all the communities within the state, and trying to find ways of implementing Indigenous rights successfully rather than just theoretically.

<sup>25</sup> See, e.g., Swain & Baillie, *supra* note 12; Tom Flanagan, *Clarity and confusion? The new jurisprudence of aboriginal title*, FRASER INSTITUTE CENTRE FOR ABORIGINAL STUDIES (2015); Malcolm Lavoie & Dwight Newman, *Mining and Aboriginal rights in Yukon: How certainty affects investor confidence*, FRASER INSTITUTE CENTRE FOR ABORIGINAL POLICY STUDIES (2015).