

***INALIENABLE PROPERTIES: THE POLITICAL ECONOMY OF INDIGENOUS LAND REFORM*, JAMIE BAXTER (VANCOUVER: UBC PRESS, 2020)**

Written by Jamie Baxter, an Associate Professor at the Schulich School of Law, Dalhousie University in Halifax,¹ this is a short (154 pages), ambitious book of selected case studies² and theoretical models addressed to Canadians.³ The book focuses on Indigenous property regime liberalization — intended to improve the circumstances of these long-marginalized communities.⁴

Baxter opens by contrasting the Nisga'a Nation in British Columbia who have experimented with private ownership in *Nisga'a Final Agreement* (1999)⁵ and Mik'maw Membertou First Nation's with relocated communally owned reserve lands governed by the *Indian Act*⁶ within the urban boundaries of Sydney, Nova Scotia.⁷ He inverts the discussion of private property regimes and focuses on "inalienability," defined as a range of permissible

¹ Jamie Baxter, *Inalienable Properties: The Political Economy of Indigenous Land Reform* (Vancouver: UBC Press, 2020).

² The selected cases are a minimal set of diverse case studies offering exploratory and tentative conclusions. See Jason Seawright & John Gerring, "Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options" (2008) 61:2 *Political Research Q* 294 at 297, 300–301.

³ Section 35(2) of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, defines "aboriginal peoples of Canada" as including "Indian, Inuit and Métis peoples of Canada," and "aboriginal law" refers to Canada's relationship to Indigenous People living in Canada. The use of "Canadians" is deliberate; current Canadian residents have, since 1867, inherited the territories, resources, and obligations of European colonial powers arising from historical encounters with Indigenous Peoples, as well as incurring new obligations. Current Canadian residents may not have participated in the history of Indigenous Peoples' dispossession and suppression, but they live in a Canadian society that has prospered on that history.

⁴ The complexities in *land reform*, with goals of poverty reduction and equitable distribution of the benefits, in the international context are elaborated in Michael Lipton, *Land Reform in Developing Countries: Property Rights and Property Wrongs* (London: Routledge, 2009), noting the disconnect between property theories and experience. In the Canadian context, marginalization is discussed in Omolara O Odulaja & Regine Halseth, *The United Nations Sustainable Development Goals and Indigenous Peoples in Canada* (Prince George, BC: National Collaborating Centre for Aboriginal Health, 2018), online: <www.nccah-ccnsa.ca/docs/determinants/RPT-UN-SDG-IndPeoplesCanada-Halseth-Odulaja-EN.pdf>; Pamela D Palmater, "Stretched Beyond Human Limits: Death by Poverty in First Nations" (2011) 65/66 *Can Rev Soc Policy* 112, online: <crsp.journals.yorku.ca/index.php/crsp/article/view/352220>.

⁵ The Nisga'a Nation has a population of 7,500 with approximately 2,000 residing in the remote Nass Valley with the balance residing in urban areas, mainly in British Columbia. They maintain a website <www.nisgaanation.ca> containing the *Nisga'a Final Agreement* (1999), online (pdf): <www.nisgaanation.ca/treaty-documents>.

⁶ *Indian Act*, RSC 1985, c 1-5, originally passed by the federal government in 1876, pursuant to the division of powers in the *Constitution Act, 1867* (UK), 30 & 31 *Vict*, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5 in section 91(24) over "Indians, and Lands reserved for the Indians."

⁷ The Membertou Nation [Membertou] with a population of approximately 1,015 people, on four Reserves totalling 986 hectares (ha) maintains a website <<https://membertou.ca>>. Ironically, the 1916 contested relocation of Kings Road Reserve to unproductive lands was intended to remove them from Sydney and is described from a Mik'maw perspective, online: <www.membertou.ca/wp-content/uploads/2019/05/kings-road-reserve.pdf>. Subsequent to the publication of this book, Membertou has approved Membertou Nation, Law-LC-001, *Membertou Land Code*, (8 June 2019), online: <www.membertou.ca/wp-content/uploads/2020/05/Membertou-Land-Code-03-12-19-Final-Law-LC-001.pdf> which preserves inalienability of title to non-members pursuant to the *Framework Agreement on First Nation Land Management* (1996) as ratified by the *First Nations Land Management Act*, SC 1999, c 24 [FNLMA]. See *Membertou Land Code*, s 2.1 definition of "Interest" and ss 25.4–31.3.

market transactions for *legal* entitlements.⁸ This book attempts to answer how inalienability of land is sustained by self-determining communities over the long-term.

In Chapter 2, Baxter successfully challenges “stories” about the inevitable historical evolution of property regimes from communal lands to systems of individualized alienable land rights popularized by Harold Demsetz in his 1967 article “Toward a Theory of Property Rights.”⁹ Demsetz gave the example of Montagnes of Quebec, where the beaver fur trade led to over-trapping, to provide the impetus for the development of private property rights in land; his central thesis is that those develop when the gains of internalization become larger than the costs of internalization.¹⁰ Baxter challenges this slim ethnohistory and characterizes this narrative as lacking explanatory power.¹¹ The conceptual benefits of private property include property trading from less efficient users to more efficient users, creating mutually beneficial gains. The empirical evidence surrounding the ability to mortgage property to improve access to credit markets, however, is mixed.¹² In the Indigenous context, where rights can only be transferred to another community member, inalienability may have a beneficial effect “in terms of cultural and community cohesion, support for Indigenous self-governance, and social equality.”¹³

Baxter attributes the development of current Canadian colonial property regimes to interest group theories,¹⁴ with history derived from the *Report of the Royal Commission on Aboriginal Peoples*.¹⁵ Noting that Indigenous lands were “tradable” prior to the *Royal*

⁸ Baxter, *supra* note 1 at 5–6. He adopts this definition from Susan Rose-Ackerman, “Inalienability and the Theory of Property Rights” (1985) 85:5 Colum L Rev 931 at 931 and says these debates not only affect Indigenous peoples’ lands, but extend to other important societal concerns, including limitations on the use of land, human tissues, legal claims, sacred objects and cultural property, parental and voting rights, ideas and information, and human capital, but he does not expressly consider the inalienability of land as a “societal good” from an Indigenous perspective.

⁹ Harold Demsetz, “Toward a Theory of Property Rights” (1967) 57:2 American Economic Rev, Papers & Proceedings Seventy-Ninth Annual Meeting American Economic Assoc (May 1967) 347. David B Schorr, “Savagery, Civilization, and Property: Theories of Societal Evolution and Commons Theory” (2018) 19:2 Theor Inq L 507 at 517–24, argues that Demsetz is influenced by “stadial theories” (“stages of civilization”) originating in the early 18th century that continues to affect Western academic discourse around private property and commons theories.

¹⁰ Demsetz, *ibid* at 350–52. Baxter uses the modern term Innu.

¹¹ Baxter, *supra* note 1 at 17, citing the literature referred to in Katrina Miriam Wyman, “From Fur to Fish: Reconsidering the Evolution of Private Property” (2005) 80:1 NYUL Rev 117. The agriculturist Indigenous peoples were disregarded; see Daniel Rueck, “Commons, Enclosure, and Resistance in Kahnawá:ke Mohawk Territory, 1850–1900” (2014) 95:3 Can Historical Rev 352. Michel Morin, “Indigenous Peoples, Political Economists and the Tragedy of the Commons” (2018) 19:2 Theor Inq L 559, contested Demsetz’s fur trade argument because Indigenous law provided sustainable familial trapping ranges that pre-dated the fur trade and colonization destroyed those regimes at 576–81, 583; Baxter, *ibid* at 21–22. See also Schorr, *supra* note 9 at 508.

¹² Baxter, *ibid* at 19. Internationally, see generally Lipton, *supra* note 4. A prominent advocate of land collateralization, is Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000), but recent meta-studies have found no empirical evidence for this, see Steven Lawry et al, “The Impact of Land Property Rights Interventions on Investment and Agricultural Productivity in Developing Countries: A Systematic Review” (2017) 9:1 J Development Effectiveness 61.

¹³ Baxter, *ibid* at 20. While the risks of alienability may include reduction of community land base, problems of absentee landlords, ownerships tied to political jurisdiction, and unequal distribution of wealth.

¹⁴ *Ibid* at 27. Because “colonial-Indigenous relations have historically been characterized by different positions of military and economic power, a theory that emphasizes the alliance of powerful elites appears to do relatively well in explaining why inalienability persisted throughout this period.”

¹⁵ *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) [RCAP].

Proclamation of 7 October 1763, that established inalienability except to the Crown.¹⁶ This continues to this day, under the *Indian Act*, treaties, and court decisions.¹⁷ In a broad overview, he divides communities into those pursuing freer alienability of their land rights [CL] and those sustaining inalienability [CI].¹⁸

In Chapter 3, Baxter generates a formal mathematical model¹⁹ to consider how prominent community leaders and political structures interact in property regime change.²⁰ Drawing on the 2013 work of John S. Ahlquist and Margaret Levi on American activist labour unions,²¹ his “approach interprets land reform in Indigenous communities as more closely resembling the dynamics and challenges of organizational teamwork than the contested terrain of electoral politics.”²² Describing the contemporary literature on leadership,²³ he says while context is important, institutional conditions that lead to *good development* should aspire “to a core set of reform objectives such as adherence to the rule of law and the creation of clearly defined and publicized legal entitlements.”²⁴ Organizational theory says that leaders are valuable to their followers because they have access to valuable information enabling members to coordinate their productive activities in return for “leadership rents.”²⁵ The baseline model for a community is based on assumptions that members prefer liberalization

¹⁶ George R, *Proclamation*, 7 October, 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [*Royal Proclamation*, 1763]. See also RCAP, *ibid*, vol 1, App D. See generally Terry Fenge & Jim Aldridge, eds, *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada* (Montreal: McGill-Queen’s University Press, 2015); Merete Falck Borch, *Conciliation-Compulsion-Conversion: British Attitudes Towards Indigenous Peoples 1763-1814* (Amsterdam: Rodopi, 2004).

¹⁷ Baxter, *supra* note 1 at 34–36. Baxter discusses inalienability under the *Indian Act*, *supra* note 6 ss 37–41: the grant and transfer of Certificates of Possession, the designation procedure for long-term leases to third parties, and the optional Land Codes under the *FNLMA* that remove most of the *Indian Act* restrictions.

¹⁸ Baxter, *ibid* at 40. These acronyms are for brevity.

¹⁹ Fortunately, the mathematic formulae are correct and can be understood in the interstitial commentary. The reviewer’s undergraduate degree in economics is dated and rusty — I am indebted to my colleagues in the Sustainable Energy Development program at the University of Calgary, Professor Blake Shaffer and in particular Professor Emeritus Curtis Eaton for their assistance. Any errors remain my responsibility.

²⁰ Baxter, *supra* note 1 at 41–42. He notes:

The reality of land reform in some First Nations today challenges this stark division between market and state actors. In the cases studied in this book, community members appeared to be heavily involved in collective decisions about land reform and development and closely connected to the processes of planning, designing, implementing, and utilizing new regimes as they emerged. This may be a reference to consensus decision-making — a hallmark of traditional Indigenous governance.

²¹ John S Ahlquist & Margaret Levi, *In the Interest of Others: Organizations and Social Activism* (Princeton: Princeton University Press, 2013); Baxter, *ibid* at 43, describes this formal model as an extension of the work of Benjamin E Hermalin, “Toward an Economic Theory of Leadership: Leading by Example” (1998) 88:5 *American Economic Rev* 1188; Benjamin E Hermalin, “Leading for the Long Term” (2007) 62:1 *J Economic Behavior & Organization* 1.

²² Baxter, *ibid* at 41. This assumption is questionable at best.

²³ *Ibid* at 44–50. Existing literature has not addressed the question of how pre-existing institutional structures, such as education, shape information flow and interpretation to community leaders.

²⁴ *Ibid* at 44. The justification of this assertion is unclear, although the requirement for legal entitlements does not allow Baxter to engage alternate theories of commons management, such as Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, UK: Cambridge University Press, 1990) written in response to Garrett Hardin, “The Tragedy of the Commons” (1968) 162:3859 *Science* 1243.

²⁵ Baxter, *ibid* at 13. The leaders’ valuable information may be about broader economic conditions, policies, political dynamics, or world affairs, but he does not elaborate upon how leader’s preferences are formed. This is a contractual model built on by Ronald H Coase, “The Nature of the Firm” (1937) 4:16 *Economica* 386 at 388. This is extended by Herbert A Simon, *Models of Bounded Rationality: Empirically Grounded Economic Reason* (Cambridge, Mass: MIT Press, 1982) whose insight provides that individuals will normally have incomplete information.

based on full knowledge of its private benefits and costs relative to those of inalienability.²⁶ Members will contribute to improve community economic conditions,²⁷ while community leaders are aware of local economic and political conditions (θ), and member benefits assumed are shared equally.²⁸ The value of θ is the primary concern, and the collective benefit is greatest by the contribution of all members.²⁹ The model is a repeated iteration of a non-competitive game in which members of the group will continue to the next round, unless the leader lies as to the value of θ ,³⁰ and predicts:

1. Prediction #1: the degree of alienability should reflect differences in the preferences and commitments of founding leaders;³¹
2. Prediction #2: the model is iterative and leaders may only gain traction to effect changes once they have established a reputation for truthfulness in the establishment period;³² and
3. Prediction #3: at some level of leadership rents, these payments may come into *tension* with the fundamental economic goals of land reform as members may be willing to endure *the self-sacrifices* entailed by inalienability rules only insofar as those rules do not undermine the community's ultimate potential for economic success.³³

²⁶ Baxter, *ibid* at 59. He justifies these assumptions as useful generalizations where the immediate benefits of alienability are especially high, such as urban communities facing rising land and housing prices as they represent the most challenging set of conditions to sustain inalienability.

²⁷ *Ibid* at 53. Efforts may include "taking on bureaucratic tasks, by participating in planning and consultation, or through taxes or other monetary payments."

²⁸ *Ibid* at 53–54. The formula is listed at 1.1. The value of θ is unspecified as to the component variables. This results in a classic "free rider" issue, where benefits are shared equally regardless of the individual contribution — however, the benefit formulation is highly dependent on the value of θ . In a two person game, the free rider problem only arises in a limited subset. For example, when θ is common knowledge, only $\theta > 0.5$ leads to individual benefits if one person contributes and the other is a "free rider." However, a two person game where $\theta < 0.5$ results in the "prisoners dilemma" where the strategy, in the individual interest, is for both persons to not contribute. However, θ can be a different value, for example, $\theta > 1$ does not technically create a "free-rider issue," as the non-contribution of one individual is overridden by the total benefits to the community.

²⁹ *Ibid* at 55–60.

³⁰ *Ibid* at 60. Presumably, the lie will be discovered by members once they do not receive the expected benefits. The possibility of a leader lying to their members does not accord with Indigenous traditional ethos of honesty, see ch 3 in Rupert Ross, *Dancing with a Ghost: Exploring Indian Reality* (Markham: Octopus Books, 1992).

³¹ Baxter, *ibid* at 60–61. Leadership rents will involve measurable material benefits, higher pay or perks of office, for CL leaders and non-material benefits for CI leaders, such as prestige and reputation.

³² *Ibid* at 61. Baxter does note that Ahlquist and Levi offer an extension of the Hermalin model that provides for electoral competition between potential leaders — although he does not address this in the text.

³³ *Ibid* at 62. This framing of self-sacrifice accords with the statement at 59 that [i]n the context of land reform, inalienability rules — especially those that preserve community ownership or control over their lands for future generations — serve as a kind of intergenerational redistribution from current to future community members. At least in the early stages of land reform, in order to persuade community members to forgo some present private gains from liberalization in order for others to achieve future benefits, leaders can demand these self-sacrifices in return for the leader's honest disclosure of θ to the community's membership.

The model is incomplete in two aspects: one is the equilibrium conditions,³⁴ and the other involves incomplete contracting,³⁵ with the answer contained in *organizational governance*.³⁶ Baxter extends that idea in the Indigenous context:

1. Proposition #1: CI communities could engage in litigation in the context of Indigenous rights or emphasize recognition of Indigenous laws to demonstrate commitment;³⁷
2. Proposition #2: CI communities may find a way to address the issue of incomplete contracting by making ongoing decisions more inclusive of group members, such that rules can be legitimately adapted as conditions change;³⁸
3. Proposition #3: CL communities must respond to the growing demands of non-members who become community residents by purchasing title or possessory rights;³⁹ and
4. Proposition #4: CI communities will distance themselves from the involvement of outside parties “as part of a strategy to improve their responsiveness and to be seen by their membership as independent and impartial.”⁴⁰

Chapter 4 tests the model against the Membertou First Nation [CI] and the Westbank First Nation [CL],⁴¹ both of which are in close proximity to urban centres and have experienced significant economic development, albeit two decades apart.⁴² Consistent with the model:

³⁴ *Ibid* at 63. Because “there are multiple truth-telling equilibria, each associated with different forms and levels of leadership rents, a group requires some means by which members and leaders can actually select between them.”

³⁵ *Ibid*. Because there are varying degrees of inalienability, the leader — follower agreements will be contingent and subject to re-negotiation as circumstances change.

³⁶ Ahlquist & Levi, *supra* note 21 at 23 defined organizational governance as “the formal rules and informal norms that delineate how decisions are taken, how the organization will respond to future events, and how and on what basis organizational members should evaluate the actions of leaders.”

³⁷ Baxter, *supra* note 1 at 64–66. Thus, in his model, while he acknowledges the expense and results, litigation and emphasis on Indigenous law is a *performative act* directed at members.

³⁸ *Ibid*. Decision-making delegation to a separate business or housing unit may or may not discourage member’s input depending on transparency. It may attenuate, but not eliminate, the conflict between inalienability rules and potential economic development.

³⁹ *Ibid* at 66–67. See for example Westbank case at 86–89: *Devil’s Gap Cottagers (1982) Ltd v Rat Portage Band No 38B (FC)*, 2008 FC 812; *Musqueam Indian Band v Musqueam Indian Band (Board of Review)*, 2016 SCC 36.

⁴⁰ Baxter, *ibid* at 67. CL communities would want to maintain good relations with governments and businesses.

⁴¹ *Ibid* at 69–71. Westbank First Nation [Westbank] is near the city of Kelowna in British Columbia, with a population of approximately 914 and five Reserves totalling 2,162 ha and maintains a website <www.wfn.ca>. Westbank, was an initial signatory to the *Framework Agreement on First Nation Land Management* (1996); *Westbank First Nation Self-Government Agreement Between Her Majesty the Queen in Right of Canada and Westbank First Nation*, 24 May 2003, online: <wfn.ca/docs/self-government-agreement-english.pdf> [Westbank SGA].

⁴² Baxter, *ibid*. Baxter discusses Westbank at 72–89 and Membertou at 89–107. Baxter states at 81, for Westbank:

By 1980 ... annual revenue from reserve land leases reached \$830,000, up dramatically from \$22,000 in 1971 [A]nnual revenues to Certificate of Possession (CP) holders rose from \$15,000 to \$466,000. The number of business enterprises on Westbank’s lands also increased from 1971 to 1982: community-owned businesses from one to nine, individual member-owned business from four to nine, and non-member businesses from four to twenty-two.

Baxter cites JW Evans, *Some Indicators of Change: Westbank Indian Band (1971/72 to 1980/81)* (Vancouver: Indian and Northern Affairs Canada, 1982) at 10–11, online: <publications.gc.ca/collections/collection_2017/aanc-inac/R5-190-1982-eng.pdf>. Baxter states at 90, 92 for Membertou,

formational leaders in Westbank⁴³ and Membertou⁴⁴ experienced a decade long *establishment period* with correspondingly low membership benefits,⁴⁵ but were both active in establishing organizational governance structures.⁴⁶ Once Westbank leaders were successful, they began to demand material leadership rents, resulting in what appeared to be considerable personal financial gains.⁴⁷ This controversy led to a Royal Commission in 1986,⁴⁸ and in the *Final Report of the Hall Commission*, Chief Ron Derrickson and his family were found to have received valuable lands, without the Band's approval or corresponding financial benefits to its membership.⁴⁹ It found that the central problem was conflict of interest both in Westbank and while Indian and Northern Affairs Canada (INAC) had policies that were inconsistently enforced.⁵⁰ Westbank negotiated the *Westbank SGA* in 2003,⁵¹ granting "self-government" in accordance with the *Federal Policy on Self-Government*,⁵² and while it confined initial

"[u]ntil the 1990s, Membertou relied primarily on federal transfers" and "faced a \$1 million annual deficit and had only \$4 million in annual revenues in the mid-1990s, but by 1999 the deficit had been nearly eliminated and band revenues had grown to over \$9 million annually. By 2016, annual revenues — principally from band-owned and operated businesses — had grown to nearly \$45 million."

⁴³ Baxter, *ibid* at 76. For Norman Lindley, the first Chief headed a small group, who in 1957 instituted a petition under the *Indian Act* to form their own band with 165 members in 1963. The surrender designation of Tsinstikeptum 10 Reserve in 1965 included a plan for the developer to develop all of the Reserve, but this was rejected by the Department of Indian Affairs (DIA) as not providing a fair return to the members of Westbank. Another plan was also rejected and Tsinstikeptum 10 Reserve reverted to Reserve status in 1972. Further, the political aspects were unstable, given the continued assimilationist policies. This instability affected the local business environment given their unfamiliarity with *Indian Act* procedures. It was only during the tenure of Chief Ron Derrickson (1974 to 1986), a descendant of one of the original Band Councillors, who repaired the strained relationship with INAC (successor to DIAND) that Westbank began to see significant economic gains.

⁴⁴ *Ibid* at 95. Membertou's Chief Terrence Paul was elected in 1984 "but it was not until the mid-1990s that his leadership began to yield tangible economic gains for the community."

⁴⁵ *Ibid*. Westbank leadership was led to promote the development of mobile home parks, which reduced the capital costs of investment and were more amenable to settings with less regulatory oversight but reduced the benefits to Westbank members. See *The Report of the Commission of Inquiry Concerning Certain Matters Associated with the Westbank Indian Band*, Catalogue No CP32-54/1988E-PDF (Ottawa: Privy Council Office, 1988) [*Commission of Inquiry*]. Membertou's leadership, consistent with the model, supported their member Donald J Marshall in his 1993 fishing litigation (*R v Marshall*, [1999] 3 SCR 456; *R v Marshall*, [1999] 3 SCR 533) in part to demonstrate commitment to CI principles and distanced itself from INAC.

⁴⁶ Baxter, *ibid* at 80–81, emphasizes that "[b]and lands should be used as the base to establish a viable economic and social environment for the community" and "land development by both Band and locatee interests would be encouraged," culminating in a Comprehensive Community Land Use Plan (1973) and establishing the Westbank Indian Band Development Company setting a focus "for community members to identify and find mutual agreement on leaders' vision for community development — a vision that placed the *liberalization* of reserve land markets at its centre" [emphasis added]. Baxter discusses Membertou at 95–98, Chief Paul recruited highly skilled community members who envisioned Membertou governance as a kind of transparent inclusive corporate structure with "a dual commitment to band-led development ... and strict community control over on-reserve land rights" through the Membertou Development Corporation (MDC) as the primary business owner and operator.

⁴⁷ *Ibid* at 82. These leadership rents generally came in the form of favourable land acquisitions and financing arrangements for commercial land developments that were owned by or personally beneficial to leaders and their families.

⁴⁸ *Commission of Inquiry*, *supra* note 45 at xv attributes his appointment in part due to "some of the highly charged allegations emanating from Mr. Crosby [leader of non-member mobile home owners] and those members of the Band who comprised an 'Action Committee' were viewed too credulously by certain parliamentarians. These individuals, believing their constituents, took an alarmist view of events at Westbank." This fit the false racist narrative that Indigenous leaders were exploiting their own people for their personal gain. See for example: Robert Harding, "Historical Representations of Aboriginal People in the Canadian News Media" (2006) 17:2 *Discourse & Society* 205 at 228–29.

⁴⁹ Baxter, *supra* note 1 at 82, citing the *Commission of Inquiry*, *ibid* at 114.

⁵⁰ *Commission of Inquiry*, *ibid* at xv–xvi.

⁵¹ *Westbank SGA*, *supra* note 41.

⁵² *The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Indian Affairs and Northern Development, 1995), online: <www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>. Westbank also approved at the same time its Constitution with the current version, *Westbank* (Westbank First Nation Constitution) (2016), Land Code and the CLUP.

leaseholds to members of Westbank, they could transfer their interest to other members *or other non-members* without condition or Band approval.⁵³ Thus, “through Westbank’s new constitution and a suite of subsidiary land laws ... formal rules pertaining to the granting and exchange of possessory interests — especially long-term leaseholds — were liberalized.”⁵⁴ Membertou pursued a different path to community development.⁵⁵ Under the influence of Chief Paul and a carefully assembled executive cohort, they experienced a dramatic shift in economic development in the mid-1990s by “building ... commercial enterprises owned and operated through the Membertou Development Corporation (MDC).”⁵⁶ Membertou and Westbank cases are compliant with the baseline model.⁵⁷

In Chapter 5, Baxter explores the “charismatic” influence of leaders on property transitions⁵⁸ by relaxing two key assumptions: first, that community members have a uniform set of private incentives favouring greater alienability irrespective of the leader’s own goals, and second, that community members’ preferences are well-defined.⁵⁹ He compares cases of land regime change between the James Bay Cree in northern Quebec⁶⁰ and the aforementioned Nisga’a Nation, albeit two decades apart. These cases are far from urban centres, where natural resource development and traditional modes of production form important components of their economies. A modern treaty requires extensive negotiations with governments and can contain complex alienability rules.⁶¹

In extending the baseline model, Baxter says that “[i]t is generally difficult, if not impossible, to determine from the outset both the content and consequences of the forms of property that will emerge when a new treaty is initially negotiated,” noting the central role of uncertainty.⁶² Neoclassical economic theory has defined uncertainty “as a lack of knowledge about expected costs and benefits, [while] economic sociologists have argued that

⁵³ Baxter, *supra* note 1 at 76 says the Westbank SGA said member “[l]easeholds of fifteen years or less can be granted directly by the council through resolution, leaseholds between sixteen and forty-nine years in term require a majority vote of community electors at a special meeting, and leaseholds longer than forty-nine years require a community-wide referendum.” Mortgages were limited to other members or the Band itself.

⁵⁴ *Ibid* at 75. Further “the land regulatory environment was standardized to reflect the type of land use plans and zoning laws familiar off reserve, with a clear priority to ‘create certainty of land use.’”

⁵⁵ *Ibid* at 89–90. With only two long-term leases to third parties (expired) and notably with an on-reserve population of 900, only 50 tracts had been allocated to members for residential use.

⁵⁶ *Ibid* at 92. MDC was incorporated in 1989 and those businesses now include: “an insurance brokerage, a data centre, a geomatics services company, a trade and convention centre, a commercial realty business, a seafood company, and extensive on-reserve gaming operations.”

⁵⁷ *Ibid* at 109:

[C]ommunity members who collectively contribute their effort toward local land reforms comply with leaders’ goals not because those goals are necessarily shared by the membership but because it is generally in their interests to go along. Moreover, when leaders craft political institutions that reinforce the contingent bargain they strike with community members, the equilibria supported by those political institutions can be relatively stable in practice.

⁵⁸ *Ibid*. Baxter cites Jay A Conger & Rabindra N Kanungo, “Toward a Behavioral Theory of Charismatic Leadership in Organizational Settings” (1987) 12:4 *Academy Management Rev* 637.

⁵⁹ Baxter, *ibid* at 110.

⁶⁰ *James Bay and Northern Québec Agreement* (11 November 1975), online: <www.cngov.ca/resources/agreements/> [*JBNQA*]. The Original and 12 Complementary Agreements to the *JBNQA* as of 1998 are archived online: <epe.lac-bac.gc.ca/100/200/301/inac-ainc/james_bay-e/jbnq_e.pdf>.

⁶¹ Baxter, *supra* note 1 at 110–11.

⁶² *Ibid* at 113, citing Carole Blackburn, “Searching for Guarantees in the Midst of Uncertainty: Negotiating Aboriginal Rights and Title in British Columbia” (2005) 107:4 *American Anthropologist* 586 at 595–96, which equates Government certainty over rights claims as motivations to a Treaty making process, in part due to capital mobility with increasing globalization. However, she locates the lived *uncertainty* in the ascendancy of the neo-liberal model of capitalism that decreases the certainty of work, the security of persons and peoples’ sense of future possibilities rather than discourses of capital certainty.

uncertainty is best understood as a ‘lack of knowledge about relationships between means and ends.’”⁶³ He selects the latter definition for his model and turns to Ahlquist and Levi’s research by introducing members’ differing preferences. He suggests that they can hold private valuations of the leader’s rents (as a proxy for the leader’s proposed course) such that those that disagree with the leader’s course experience rents as pure costs, while those that agree gain additional utility above the baseline model.⁶⁴ This revised model will require leaders to devote resources to persuade members to follow the leader’s preferred path in the *persuasion period*, in addition to the instrumental benefits of truthful leadership in the *establishment period*.⁶⁵ Leaders’ ideas play a dual role: firstly, leaders have reason to invest up front in persuading community members to their view, leaders’ ideas have an outsized influence on the outcomes of land reform and secondly, the question of how leaders’ ideas and the process by which those ideas are formed can explain variation in the political institutions that leaders establish during formative periods.⁶⁶ He draws on Vivien A Schmidt’s theories of *discursive institutionalism*,⁶⁷ that categorize ideas in three levels:

- at the most concrete level, ideas are *solutions* offered by leaders or others to respond to or resolve specific, predefined problems,⁶⁸
- at a higher level, ideas operate as the *framing* of problems that “articulate and circumscribe both the domain of lawmaking and the scope and nature of the problems to which legal solutions are addressed”,⁶⁹ and
- at the highest level, ideas operate at the level of *worldviews* that span particular problem-solution sets and speak to the whole range of underlying assumptions “that undergird the policies and programs with organizing ideas, values, and principles of knowledge and society.”⁷⁰

⁶³ Baxter, *ibid*. A distinction first popularized by the economist Frank Hyneman Knight, *Risk, Uncertainty and Profit* (Boston: Houghton Mifflin, 1921) who defined the former concept as “risk” to distinguish it from the concept of uncertainty, but unfortunately “risk” in neoclassical economics has expanded to subsume the Knightian concept of uncertainty.

⁶⁴ Baxter, *ibid* at 114. That can be represented by a parameter γ_i which, when incorporated into the member’s utility equation in Equation 1.3, results in a new member’s utility Equation 6.1. Thus, group members “with $\gamma_i < 0$ will be opposed to the leader’s goals and experience leadership rents as a pure cost, while those with $\gamma_i > 0$ will derive additional utility from pursuing the leader’s goals, independent of the benefits they derive from truthful leadership.” Because γ_i is specific to each individual within the group, the distribution of γ_i describes whether and to what extent the leader enjoys community support, in the aggregate, for the leader’s preferred direction of reform.

⁶⁵ *Ibid* at 115–17. These processes can and should overlap.

⁶⁶ *Ibid* at 118. “A deeper understanding of what those ideas are and how they came to be established, communicated, and interpreted can therefore help to explain how leaders successfully sustained their preferred pathways of reform over time by directly shaping their followers’ interests.”

⁶⁷ *Ibid*; Vivien A Schmidt, “Discursive Institutionalism: The Explanatory Power of Ideas and Discourse” (2008) 11 Annual Rev Political Science 303 [Schmidt, “Discursive Institutionalism”]. Baxter describes them as useful “constellation of theoretical approaches to studying the role of ideas ... [that] offers a set of conceptual classifications that at least begin to clarify the causal role of leaders’ ideas in the Indigenous land reform context.”

⁶⁸ Baxter, *ibid*. Here, “alienability” and “inalienability” capture specific legal forms but also ideational solutions to a set of assumed problems confronting First Nations and in pursuit of a set of assumed objectives held by each community. But while an “idea provides the means for solving the problem and accomplishing those objectives,” it is generally true that ‘problems and objectives are not pre-established.’”

⁶⁹ *Ibid* at 118–19. “Clearly, leaders not only put forward and advocate for their preferred solutions along the spectrum of possible alienability rules but also invest considerable effort in defining the broader problems to which land reforms seek to respond. Once set, these problem definitions in turn define the range and type of solutions available and influence which solutions are regarded as better or worse.”

⁷⁰ *Ibid* at 119, the quote is from Schmidt, “Discursive Institutionalism,” *supra* note 67 at 306.

“[A]t each level, ideas might address one or both concepts of uncertainty described above.”⁷¹ These categories can map the persuasive efforts leaders undertake, but the mechanism by which ideas are shared and contested are “discourses” between the different actors who interpret them,⁷² and can be divided into “coordinative discourses” (between leaders) and “communicative discourses,” where leaders engage the members in debate and disseminate their ideas.⁷³

The *Nisga’a Agreement* was the culmination of a long struggle for their land rights.⁷⁴ Frank Calder, a hereditary chief of the Nisga’a, was elected to the British Columbia legislature in 1949, and for thirty years, he exerted a powerful influence on provincial and federal politics.⁷⁵ He was the lead plaintiff in the 1973 Supreme Court of Canada’s decision in *Calder v Attorney-General of British Columbia*.⁷⁶ They lost on a technicality, but the effect of the decision was galvanizing, and the federal government moved to establish land claim processes to negotiate Modern Treaties in areas that lacked land surrender treaties.⁷⁷ The Nisga’a began negotiating with Canada in 1976, but it was not until 1990 when British Columbia joined that any serious progress was made. Frank Calder was replaced in 1974 by another prominent Nisga’a leader, James Gosnell, who was succeeded in 1990 by his younger brother Joseph Gosnell. It was Joseph who led the main treaty negotiations for the next decade.⁷⁸ These formative leaders, *framed the issue* to do away with the *Indian Act*’s oppressive impact on their community with the certainty of private property — although “Nisga’a leaders were careful to link them to ideas about economic prosperity and self-sufficiency.”⁷⁹ Because Frank Calder had cultivated strong connections with prominent decision-makers at both levels of government, the resulting *organizational governance* would focus on political institutions that featured coordinative discourses between elite

⁷¹ Baxter, *ibid*. Either by establishing the costs and benefits of a particular reform (neoclassical uncertainty) or by providing a “mental map” of how the world works according to a set of assumed causal relationships (Knightian uncertainty).

⁷² *Ibid*. These discourses encompass “both a set of ideas about public life and a process of interaction among public actors and with society at large focused on generating and legitimizing those ideas”; Vivien A Schmidt, “How, Where and When Does Discourse Matter in Small States? Welfare State Adjustment” (2003) 8:1 *New Political Economy* 127 at 134 [Schmidt, “Welfare State Adjustment”].

⁷³ Baxter, *ibid*. However “although politics always contain both coordinative and communicative discourses, in most circumstances one or the other predominates”; Schmidt, “Welfare State Adjustment,” *ibid* at 137.

⁷⁴ In the 1880s, Nisga’a leaders were formally asserting their land rights [Land Question] against Canadian encroachment; attempts by the British Columbia government to unilaterally assign Reserves led to a delegation of Nisga’a chiefs travelling to Victoria in 1887 to issue a formal protest and invite them to negotiate — those overtures were ignored and in 1913, they sent a petition to the Judicial Committee of the Privy Council in London without success, online: <www.nisgaanation.ca/sites/default/files/1913%20Petition.pdf>. See also Douglas Sanders, “‘We Intend to Live Here Forever’: A Primer on the *Nisga’a Treaty*” (1999) 33:1 *UBCL Rev* 103.

⁷⁵ Baxter, *supra* note 1 at 122. He was 34 years old at the time of his election and was the first Indigenous member of a representative government in Canadian history.

⁷⁶ [1973] SCR 313 [*Calder*]. The Nisga’a lost the trial, an appeal to the Supreme Court of Canada resulted in a split decision: the minority and majority disagreed on the application of *Royal Proclamation, 1763* to British Columbia and remedy. However, they did anchor aboriginal title in the prior occupation of First Nations. Justice Pigeon ruled on a legal technicality that there was no approval from the British Columbia government to waive Crown immunity and dismissed the appeal.

⁷⁷ Quebec; most of British Columbia; portions of Ontario; Atlantic provinces and Canada’s Arctic territories.

⁷⁸ Baxter, *supra* note 1 at 122-23.

⁷⁹ *Ibid* at 125–26, 128. Frank Calder was a prominent supporter of the *Trudeau White Paper* (1969):

While Calder was no doubt a strong advocate for Indigenous self-determination, he understood that goal through the particular lens of his first campaign platform: “Equal rights for all.” For Calder, the greatest threat to the cultural survival of the Nisga’a and other First Nations was the system of dependency entrenched by the federal reserve system and reinforced by the other markers of difference constructed under the *Indian Act*.

policy actors.⁸⁰ The resulting *Nisga'a Agreement* dealt with both land regime change and self-government by the Nisga'a Nation and converted their traditional territory in the Nass Valley into 2,000 km² of fee simple land.⁸¹ The *Nisga'a Constitution* (1998),⁸² set the national Nisga'a Lisims Government as the primary instrument with delegated Nisga'a Village Governments.⁸³ Joseph Gosnell was a talented orator and persuaded them to ratify the *solutions* contained in the *Nisga'a Agreement*.⁸⁴

The James Bay Cree had remained largely isolated, maintaining their traditional lifestyles and social organization until the 1970s.⁸⁵ In April 1971, Quebec's government announced it would immediately begin construction of a massive hydroelectric project in northern Quebec [Project] affecting the James Bay Cree's traditional territory.⁸⁶ The James Bay Cree, totalling 5,600 people, were never consulted, and their leaders began organizing a resistance in 1971.⁸⁷ Chief Billy Diamond emerged as a prominent leader when he, together with other leaders, arranged for a meeting in Mistassini in June 1971. There, it was resolved to approach Jean Chrétien, then federal minister of Indian Affairs and Northern Development, to represent them against Quebec as "the trustee of the Indian people."⁸⁸ The difficulties of Quebec separatism left the federal government very reluctant to intervene on behalf of the

⁸⁰ *Ibid* at 128:

Because typical features of such coordinative processes include closed interactions that are well insulated from community members and the broader public, they are more congruent with highly centralized and largely opaque collective choice mechanisms. By consolidating decision making in the hands of a few high-level political leaders and negotiators, Nisga'a leaders may have found that they could more effectively engage with outside governments and draft a land claims agreement that purported to definitively establish the legal contours of Nisga'a land rights with the high level of certainty they sought to achieve.

Baxter expresses concern over the stability of the *Nisga'a Agreement*'s inalienability regime given the impacts of the closely held negotiating strategy to the resulting Nisga'a National Government, citing Ross Hoffman & Andrew Robinson, "Nisga'a Self-Government: A New Journey Has Begun" (2010) 30:2 Can J Native Studies 387, online: <www3.brandonu.ca/cjns/30.2/08Hoffman.pdf>.

⁸¹ Baxter, *ibid* at 124. In the *Nisga'a Agreement*, c 3, ss 3–4. The Nisga'a Nation had claimed traditional territories of approximately 250,000 km².

⁸² *The Constitution of the Nisga'a Nation* (October 1998), online: <www.nisgaanation.ca/sites/default/files/legislation/Constitution%20of%20the%20Nisga'a%27a%20Nation%20-%201998-10-01.pdf>.

⁸³ *Ibid*. The National government may not transfer an interest in any one transaction in excess of 40 km² without a referendum and a Village government in excess of 10 km². A private land entitlement consisting of possessory rights could be granted to members directly by the Nisga'a Nation Executive or by one of the four Nisga'a Village governments which could be transferred only to another member or Nisga'a government. The *Nisga'a Landholding Transition Act* (2012), online: <www.nisgaanation.ca/nisgaan-landholding-transition-act> gave the option for possessory rights holders to request, and a Nisga'a Village government to authorize the vesting of the fee simple interest in those lands, subject to strict conditions — namely, the parcel is less than 0.2 ha in size, zoned for residential use, and not subject to mortgage. Nisga'a citizens who successfully apply for that fee simple interest were free to transfer that interest to any third person.

⁸⁴ Baxter, *supra* note 1 at 122–23.

⁸⁵ *Ibid* at 129. Prior resource conflicts had centered around mining and forestry. The lifestyles of hunting, trapping, harvesting, and fishing in which small groups of a few families primarily hunted in the bush during the long winter months, only coming together in larger bands during summers months along James Bay or on larger inland lakes.

⁸⁶ *Ibid* at 129–30. The first phase involved several large dams along the La Grande River flowing through the Ungava Peninsula into eastern James Bay with reservoirs flooding hunting grounds and disrupting traditional fisheries. Additional phases would affect northern Quebec Inuit's traditional territories in the same fashion.

⁸⁷ *Ibid* at 130–32. Prior to this government, the James Bay Cree themselves had not considered them as a political entity, rather they were "connected by bonds of friendship and family among hunters" Hans M Carlson, *Home Is the Hunter: The James Bay Cree and Their Land* (Vancouver: UBC Press, 2008) at 209. Although there were nine Cree Reserves communities under the *Indian Act*.

⁸⁸ Baxter, *ibid* at 132. Chief Billy Diamond was the son of the long-term Chief in the Cree community of Rupert House, who took over in 1970 at the age of 21.

James Bay Cree.⁸⁹ Chief Billy Diamond and Chief Robert Kanatewat of Fort George, filed an action in the Superior Court of Québec in May 1972 for an interlocutory injunction against the Project until their land rights were clarified.⁹⁰ On 15 November 1973, in *Chief Robert Kanatewat v James Bay Development Corporation*,⁹¹ Justice Albert Malouf recognized potential land rights and granted an injunction to halt work on the Project. The injunction was rapidly overturned by the Quebec Court of Appeal and appealed to the Supreme Court of Canada, but the delay provided the advantage the leaders needed to negotiate a formal treaty.⁹² The *JBNQA* recognized their land rights with new governance structures for the region and compensation for the effects of the Project.⁹³ The *JBNQA* deliberately left the ambiguity of common law aboriginal title for the time being.⁹⁴ In defining the nature of Cree land rights and governance, they navigated between governments, powerful economic forces pressing for greater access to their lands, and considerable internal opposition from competing viewpoints.⁹⁵ Given the uncompromising position of government, “Chief Billy Diamond and other Cree leaders *framed* the core problem they faced as one of state encroachment leading to the permanent loss of ecological and cultural integrity within

⁸⁹ *Ibid.* This was also communicated to the Quebec government but it was ill-timed from a political viewpoint, coming as it did some six months after the end of the October Crisis that arose from the Front de libération du Québec’s [FLQ] kidnapping of the British Trade Commissioner James Richard Cross on 5 October 1970 and the kidnapping and killing of Minister of Labour and Vice-Premier of Quebec Pierre Laporte on 10 October 1970. The wave of bombings, strikes, and unrest led Canada’s Prime Minister Pierre Elliot Trudeau to invoke the *War Measures Act*, SC 1914, c 2 on 15 October 1970 suspending civil rights in Quebec, a first in peacetime. Mr. Cross was released on 4 December 1970 under an agreement that his kidnappers would be flown to Cuba and the killers of Pierre Laporte were captured on 28 December 1970. Although the Federal government funded the lawsuits against the project. See Billy Diamond, “Aboriginal Rights: The James Bay Experience” in *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, Menno Boldt & J Anthony Long, eds, (Toronto: University of Toronto Press, 1985) 265 at 268–69.

⁹⁰ Baxter, *ibid* 131–32; Diamond, *ibid* at 269–77. The hearing involved 71 days, that spanned more than a year and a half.

⁹¹ *Chief Robert Kanatewat v James Bay Development Corporation*, [1974] RP 38 (QSC).

⁹² Baxter, *supra* note 1 at 132; Diamond, *supra* note 89 at 279, Chief Diamond phrased the decision to negotiate saying,

[i]mmediately after Mr Justice Malouf’s judgment of 15 November 1973, the Quebec government made an offer of settlement to the Crees and the Inuit. We did not feel that it was a good offer, although it contained some interesting points.... The decision of the Supreme Court of Canada in December 1973 not to give us permission to appeal the judgment of suspension was a turning-point. We undertook an intensive consultation process with our people and informed them of the offer the Quebec government had made. We also discussed with all the bands the likely outcome of the legal proceedings, the advantages and disadvantages of relying entirely on the courts, and the strengths and weaknesses of our case. Our people decided, reluctantly, to see what could be achieved through negotiation.

⁹³ Baxter, *ibid* at 133. He describes the *JBNQA*, *supra* note 60, as recognizing the rights of the Cree and their Inuit allies to over 900,000 square kilometres of the James Bay region. Just over 1 percent of those lands, however, were designated as Category I lands, on which the more permanent communities were established and in which the Cree and Inuit exercised rights to exclusive use and control. Another 14 percent of the lands surrounding local villages, designated as Category II, were allocated for exclusive hunting, trapping, and fishing activities — though development activities by non-Cree entities were permitted provided that compensation was paid by the province. The remaining 84 percent of the lands covered by the *JBNQA* were Category III lands, a designation that preserved Cree rights to hunt, trap, and fish, although these activities had to be shared with non-Indigenous Quebecers and development activities over these lands were largely unconstrained.

⁹⁴ Baxter, *ibid.* “Crucially, however, the *JBNQA* left ambiguity surrounding the ultimate status of title in lands covered by the agreement and on the ongoing existence of common law Aboriginal rights in the Cree territories.” See also Diamond, *supra* note 89 at 281, 283. Those details required additional agreements, principally the *Agreement Concerning a New Relationship Between Le Gouvernement Du Québec and the Crees Of Québec* — “*Paix Des Braves*” (2002) [*Paix Des Braves*] and *Agreement on Cree Nation Governance Between the Crees of Eeyou Istchee and the Government Of Canada* (2017) [*Cree SGA*], available at the Grand Council of the Crees (Eeyou Istchee)/Cree Nation, online: <www.cngov.ca/resources/agreements/>.

⁹⁵ Baxter, *ibid* at 133–34.

a context of rapidly changing legal, economic, and political parameters.”⁹⁶ The *solution* Cree leaders proposed was to embrace the legal uncertainty around this status of their lands.⁹⁷ The Cree leadership expended resources in *communicative discourses* to persuade their members as to the benefits of negotiation and their strategy both before and after the signing of the *JBNQA*.⁹⁸ Baxter suggests this was the origin of the decentralized governance structures chosen by the Cree leadership with its split into the *Grand Council of the Crees* (Eeyou Istchee) and *Cree Nation* which formed CI communities.⁹⁹ The extension of the model into Indigenous communities renders his conclusions as tentative.¹⁰⁰

Chapter 6 provides some conclusions and further thoughts. On a hopeful note, Indigenous communities — with strong leadership and appropriate governance — can maintain their land base in the face of strong outside demand *and* enjoy the material benefits of development without embracing alienability. The theoretical model and case evidence suggest property theorists have wrongly emphasized “interest group politics,” and group production in other organizational contexts can provide useful insights.¹⁰¹ The formative leadership will have an outsized impact on the chosen property regime, as would the form of leadership rents.¹⁰² These insights not only contribute to a better understanding of institutional dynamics in land reform contexts, but also speak to broader attempts by legal scholars to define a modern political economy of property.¹⁰³

I applaud Baxter for this interesting and insightful book, particularly the inversion of property rights to consider inalienability. I can see some understandable difficulties in his analysis given his intent. For example, the book does not give *reasons* for the limited economic opportunities for Indigenous peoples.¹⁰⁴ In focusing on Canadian recognition and

⁹⁶ *Ibid* at 135 [emphasis added].

⁹⁷ *Ibid*. Baxter says “the solution crafted by the James Bay Cree leaders was not simply one of outright resistance to natural resource development in the form of a claim that their land rights were strictly inalienable,” and this *solution*, while frustrating government and business interests in obtaining certainty, “may ultimately have enabled Cree leaders to sustain and to continue sustaining the inalienability of their lands and the traditional economies that are dependent on them — as imperfect and complex as that result has proven to be.”

⁹⁸ *Ibid* at 136. Although leaders negotiated the *JBNQA*, *supra* note 60, and additional agreements they did so conditionally upon consultation with their members, see Diamond, *supra* note 89 for Chief Diamond’s comments.

⁹⁹ Baxter, *ibid* at 137. “Rather than consolidate decision making within a single body, the Cree created a more decentralized structure consistent with the need to balance ongoing negotiations with provincial and federal governments against responsiveness to community members.”

¹⁰⁰ *Ibid* at 137–39. He acknowledges this. In particular, more work is needed to show how leaders interests changed over time; to link these changes to leaders’ investments in persuasive effort; and the connection between leaders’ discursive practices and the resulting political institutions.

¹⁰¹ *Ibid* at 140.

¹⁰² *Ibid* at 142. “This result, in turn, challenges assumptions about groups who sustain inalienable land rights as necessarily being insular and more vulnerable to control by authoritarian regimes.”

¹⁰³ *Ibid* at 142–43. Which that “remains elusive, its component parts severely disjointed and its useful insights into property transitions fragmented at best.” He does note that

there remains a great deal of both theoretical and empirical work to be done to explain *how leaders come to hold the beliefs they do and to understand how leaders mobilize their ideas to persuade others*. Finally, the dynamics of group production and the rents available to leaders will themselves be shaped and constrained by exogenous factors and stochastic shocks, underscoring the complex interplay between agency and structure as causal features of institutional change apparent in each of the cases. For the communities studied in this book, the influence of geography — especially proximity to an urban centre — was assumed to be an especially important factor.... That assumption remains to be tested across more cases, and there are no doubt other significant factors still to be uncovered in future research [emphasis added].

¹⁰⁴ The reasons for lack of opportunity include, among others, the deliberate displacement by Canadian settlement and Treaties with Reserve allocation to the most unproductive lands, chronic underfunding, and continuing trauma.

economic precepts, the traditional Indigenous worldview that land is not a commodity is disregarded.¹⁰⁵ Further, land regime liberalization is hard, as 96 percent of Indigenous people live in provinces with Reserves totalling, at most 0.005 percent of their territory, that require provincial and federal agreement to change.¹⁰⁶ It does not guarantee better outcomes, in part because 60 percent of lands reserved for Indigenous peoples are located in rural regions.¹⁰⁷ Resource demand could be a useful proxy for proximity to urban centres, as other regions such as oil sands in northern Alberta and forestry in Clayoquot Sound, British Columbia have resource conflicts affecting Indigenous people, but that is not addressed.¹⁰⁸ In terms of his models, they are, for the most part, useful¹⁰⁹ in explaining his case studies. However, some assumptions he bases them on are questionable, particularly in the top down formulation of the role of community leadership, which disregards the traditional consensus governance of Indigenous peoples.¹¹⁰

David K. Laidlaw
 Research Fellow
 Canadian Institute of Resources Law
 Faculty of Law, University of Calgary

¹⁰⁵ While there is no pan-Indigenous world view — the centrality of land for Indigenous peoples and their connection with it is certain, see for example *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 128–30. This is carried into CI leaders, for modelling purposes, as recovery and recognition are limited to performative acts.

¹⁰⁶ Statistics Canada, *Data Products, 2016 Census*, online: <www12.statcan.gc.ca/census-recensement/2016/dp-pd/index-eng.cfm>. The *FNLMA* is optional, but of the approximately 630 First Nations, only 90 have operational land codes with 63 being in development, see Lands Advisory Board, online: <labrc.com>.

¹⁰⁷ *Linking Indigenous Communities with Regional Development in Canada* (2020) (OECD) (Paris: OECD), online (pdf): <www.oecd-ilibrary.org/urban-rural-and-regional-development/linking-indigenous-communities-with-regional-development-in-canada_fa0f60c6-en> at 3, 73–75.

¹⁰⁸ The selected cases are those on unceded lands; there is no consideration of regions with land surrender treaties.

¹⁰⁹ There is a common aphorism that “All models are wrong, but some are useful” usually attributed to the statistician George Box, although the concept predates his statements.

¹¹⁰ Baxter does call for additional research in his conclusions as to the formation of leader’s preferences, the role of existing institutions in forming them, and their discursive practices.

[this page is intentionally blank]