

# *Tsilhqot'in Nation* as a Gateway Towards Sustainability: Applying the Inherent Limit to Crown Land

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*This paper argues that the inherent limit on Aboriginal title has been subtly reframed in Tsilhqot'in, a 2014 Supreme Court of Canada judgment. The language used in Delgamuukw to describe the inherent limit showed a primary concern for cultural preservation, but the language used to describe the inherent limit in Tsilhqot'in highlights the communal nature of Aboriginal title and the well-being of future generations. This new development provides a foundation for the inherent limit, which has thus far received near-universal denunciation, to become a positive development in the law.*

*Specifically, the paper argues that Tsilhqot'in Nation provides the foundation on which to advance two normative positions: (1) the inherent limit should be applied to Crown land, and (2) environmental legal norms, and more specifically intergenerational equity, should inform the analytical framework of the inherent limit. When combined, these two propositions can help alleviate the inferiority of Aboriginal title relative to fee simple, promote sustainability as an organizing principle throughout the entirety of the law, and begin a fundamental reorientation of what it means to own land.*

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*Dans cet article, l'auteur défend que la limite inhérente du titre ancestral autochtone a été subtilement modifiée dans Tsilhqot'in, un jugement rendu par la Cour suprême du Canada en 2014. Le langage utilisé dans Delgamuukw afin de décrire la limite inhérente a montré le souci de préserver la culture autochtone. Par contre, dans Tsilhqot'in, le langage utilisé met plutôt l'accent sur la nature communautaire du titre ancestral et le bien-être des générations futures. Ce nouveau développement établit un fondement juridique favorable de la limite inhérente, qui avait jusqu'alors été dénoncée par presque tous les acteurs. Plus particulièrement,*

*cet article affirme que Tsilhqot'in Nation constitue le fondement sur lequel peuvent se baser deux propositions normatives : (1) la limite inhérente devrait être appliquée aux territoires de la Couronne et (2) les normes juridiques environnementales, et plus spécifiquement l'équité intergénérationnelle, devraient informer le cadre analytique de la limite inhérente. Lorsque combinées, ces deux propositions peuvent aider à renforcer le titre ancestral relativement au fief simple, promouvoir le développement durable tel un principe organisateur à travers l'entièreté du droit et amorcer une réorientation fondamentale de ce que signifie la propriété d'un territoire.*

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## 1. INTRODUCTION

On June 26, 2014, the Supreme Court of Canada declared Aboriginal title for the first time in Canadian history.<sup>1</sup> The Tsilhqot'in Nation – composed of six semi-nomadic bands living in the Cariboo-Chilcotin region of British Columbia – claimed Aboriginal title over an area encompassing 141,769 hectares (about 5 percent of the Tsilhqot'in people's claimed traditional territory).<sup>2</sup> The original dispute was over logging rights being granted by the province to Carrier Lumber Ltd. in the area in 1983. The claim was amended to include Aboriginal title in 1998; the trial began in 2002 and lasted 339 days over five years. Justice Vickers presided, and found that the Tsilhqot'in Nation was entitled to title to most of the claimed area, and portions outside of it, but did not make the declaration because of a defect in the pleadings. The Court of Appeal found that title had not been established, but was of the opinion that title might be established in specific sites in the future. The Supreme Court of Canada was unanimous in declaring Aboriginal title in the area found by Justice Vickers.<sup>3</sup>

Undoubtedly *Tsilhqot'in* is a monumental decision for Aboriginal peoples, giving Aboriginal groups not only another option in litigating for title, but also providing more leverage against the Crown at the negotiating table.<sup>4</sup> The full extent of the decision's ramifications remains to

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<sup>1</sup> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [*Tsilhqot'in*]

<sup>2</sup> *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 43, 623.

<sup>3</sup> *Tsilhqot'in*, *supra* note 1 at paras 5–8. The Tsilhqot'in did not claim title over privately held or underwater lands.

<sup>4</sup> Ken Coates & Dwight Newman, "Tsilhqot'in ruling brings Canada to the table", *The Globe and Mail* (11 September 2014), online: <theglobeandmail.com>.

be seen, and much commentary is likely to emerge on the implications of the decision. Yet novel developments in legal doctrine appear sparse. The Court was largely able to arrive at its conclusion by applying the factual foundation developed at trial to the legal framework that was already settled in *Delgamuukw*.<sup>5</sup>

However, one subtle new development, I argue, has potential implications not only for Aboriginal law, but also for the common law more generally. For the first time, the inherent limit on Aboriginal title was explicitly tied to the fact that Aboriginal title is held collectively, for the benefit of future generations. Therefore, development of land that removes the potential for future generations to similarly benefit from the land is prohibited. While both the inherent limit and the nature of collective ownership were discussed in *Delgamuukw*, there was never an explicit link between the two. Rather, the inherent limit described in *Delgamuukw* was focused on the issue of cultural preservation.

This paper discusses the possibilities created by this link between a restriction in land use and the collective ownership of land for the benefit of future generations. While this link does little to ameliorate concerns Aboriginal law scholars have expressed regarding the disparity the inherent limit creates between Aboriginal title and common law title, I argue that it does provide an opportunity to apply the inherent limit to Crown land. This would remove the inequality between Aboriginal title and Crown land.<sup>6</sup> Further, the language in *Tsilhqot'in* invites the application of environmental legal norms to develop the content of the inherent limit. Indeed, despite universal denunciation of the inherent limit from Aboriginal law scholars, incorporating inherent limits into land ownership is a major achievement for environmental law scholars. Klaus Bosselmann goes as far as suggesting that “[d]eveloping a property regime with *inherent* responsibilities, is, in fact, the purpose of environmental law.”<sup>7</sup> I argue that imbuing the inherent limit with environmental legal norms can create a more flexible framework while still meeting the goal of cultural preservation. Thus, the inherent limit as described in *Tsilhqot'in* provides a foundation on which to advance two normative positions: (1) the inherent limit should be applied to Crown land, and (2) environmental legal norms should inform the analytical framework of the inherent limit.

The paper proceeds as follows: Section 2 describes the inherent limit in *Delgamuukw* and the scholarly criticisms accompanying it. The section also highlights the change in the framing

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<sup>5</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*]. *Tsilhqot'in*, *supra* note 1 at paras 42, 128–52 (clarifications in the law were provided as the court did reject the “postage stamp” approach to title and held that interjurisdictional immunity is inapplicable in the context of Aboriginal rights).

<sup>6</sup> This inequality is implicit from the fact that “Aboriginal title is a burden on the Crown’s underlying title” (*ibid* at para 145). See also the discussion in Section 2.1, below, on how the development of Aboriginal title in *Delgamuukw* resulted in an inferior interest in land. There is also a normative presumption throughout this paper that changing the conception of Crown sovereignty by incorporating an inherent limit is a beneficial endeavour. The normative claim here is not as wide as suggesting that the rights under Aboriginal title and Crown land should be completely identical. But both should be under identical limitations to the extent that the use of the land would harm future generations. See Section 5 for an extended normative discussion.

<sup>7</sup> Klaus Bosselmann, “Property Rights and Sustainability: Can They be Reconciled?” in David Grinlinton & Prue Taylor, eds, *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Leiden: Koninklijke Brill NV, 2011) 23 at 27.

of the inherent limit in *Tsilhqot'in*. Section 3 advances the proposition that the inherent limit should be applied to Crown land. Two views of Crown land are examined—first as private property and second as held in trust for the public. I argue that the first view is not a bar to applying an inherent limit to Crown land while the second view suggests that the inherent limit should necessarily be applied. Section 4 applies environmental legal norms, specifically principles of intergenerational equity, to create a flexible analytical framework for the inherent limit. Lastly, I conclude with a brief normative discussion: why is the inherent limit, if applied to Crown land and imbued with principles of intergenerational equity, a good thing? I assess the normative benefits from the perspective of Aboriginal law, environmental law, and property law.

## 2. THE INHERENT LIMIT

### 2.1 ORIGINS AND COMMENTARY

The inherent limit requires that Aboriginal title land not be used in a way that is irreconcilable with the attachment an Aboriginal group has with the land. The development of the inherent limit on Aboriginal title was largely unforeseen by most commentators. As Kent McNeil acknowledged at the time: “[t]o my knowledge, this inherent limit is a new development in the law. It was not present in the earlier jurisprudence on Aboriginal title, nor am I aware of any precedent for it in the common law generally.”<sup>8</sup> The inherent limit was explicitly stated as one aspect that made Aboriginal title *sui generis*.<sup>9</sup>

In *Delgamuukw*, Chief Justice Lamer fleshed out the inherent limit in eight paragraphs, emphasizing the “importance of the continuity of the relationship of an aboriginal community to its land over time.”<sup>10</sup> There is a temporal dimension to Aboriginal title that seeks to protect the special relationship between an Aboriginal group and its land into the future. Therefore, any use of the land that puts this special relationship at risk is incongruent with Aboriginal title, and prohibited.<sup>11</sup> Lamer CJ goes on to provide some examples of such incongruent uses:

For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).<sup>12</sup>

An aboriginal group wanting to put the land to such irreconcilable uses can do so if it surrenders title to the Crown, for valuable consideration.<sup>13</sup> Lastly, Lamer CJ draws parallels

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<sup>8</sup> Kent McNeil, “The Post-*Delgamuukw* Nature and Content of Aboriginal Title” in Kent McNeil, ed, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001) 102 at 116 [footnotes omitted].

<sup>9</sup> *Delgamuukw*, *supra* note 5 at para 125.

<sup>10</sup> *Ibid* at para 126.

<sup>11</sup> *Ibid* at para 128.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid* at para 131.

between this *sui generis* inherent limit and the common law doctrine of equitable waste, suggesting that uses similar to “wanton or extravagant acts of destruction” are required to breach the inherent limit.<sup>14</sup> The objective of the inherent limit was to ensure that the very relationship that is relied on to claim title could not be subsequently subverted by a culturally incongruent use of the land. While this desire for cultural preservation was undoubtedly well-intentioned, the inherent limit came under immediate scrutiny.

The most obvious attack is that the inherent limit, by attempting to preserve cultural practices, becomes a significant impediment to modern economic uses of the land. McNeil exemplifies this concern. Assuming that much of Aboriginal title would likely be proved through hunting, many other developments, not just strip-mining, would be prohibited because

even if the destruction of habitat and the presence of people and buildings did not cause the game to disappear, it would be unsafe to hunt in such populated areas. Alternative Aboriginal uses of these lands might, therefore, be limited to agriculture, forestry, and other less intrusive activities, and then only as long as sufficient habitat was preserved to maintain game populations. Moreover, because the limit is inherent to Aboriginal title, it would continue to restrict the use of the land even if the Aboriginal people in question were no longer interested in hunting, or the game disappeared.<sup>15</sup>

Though the court in *Delgamuukw* explicitly stated that this inherent limit should not be a “straitjacket”,<sup>16</sup> the practices used to prove Aboriginal title can be nothing but a straitjacket on how Aboriginal title land could be used.<sup>17</sup>

The precise uses that are prohibited remain uncertain. Part of this uncertainty stems from the fact that the source of the inherent limit was never explored.<sup>18</sup> Lamer CJ identified the “physical fact of occupation” and “pre-existing systems of aboriginal law” as sources of Aboriginal title.<sup>19</sup> It is difficult to see how physical occupation gives rise to the inherent limit, suggesting that the limit arises from pre-existing systems of Aboriginal law.<sup>20</sup> Unfortunately, the court never explores what these pre-existing systems of Aboriginal law are, and what attributes they have. The court in *Delgamuukw* has been criticized for emphasizing the importance of Aboriginal legal perspectives while not actually relying on these perspectives in determining the contents and limits to Aboriginal title.<sup>21</sup>

<sup>14</sup> *Ibid* at para 130.

<sup>15</sup> McNeil, *supra* note 8 at 118.

<sup>16</sup> *Delgamuukw*, *supra* note 5 at para 132.

<sup>17</sup> McNeil, *supra* note 8 at 119.

<sup>18</sup> Another part of this uncertainty arises from the analogy to equitable waste and the requirement of wanton destruction. Yet Lamer CJ’s examples of prohibited conduct would not amount to equitable waste in common law, but rather voluntary waste. See William F Flanagan, “Piercing the Veil of Real Property Law: *Delgamuukw v British Columbia*” (1998) 24 Queen’s LJ 279 at 313–14.

<sup>19</sup> *Delgamuukw*, *supra* note 5 at paras 114, 126.

<sup>20</sup> Flanagan, *supra* note 18 at 318ff.

<sup>21</sup> *Ibid* at 305–07, 321.

The crux of the scholarly criticism is that the inherent limit does nothing to eliminate, and in fact exacerbates, the paternalistic relationship between the Crown and Aboriginal peoples.<sup>22</sup> Instead of creating Aboriginal title in a way that empowers Aboriginal groups to determine and decide for themselves how their land should be used, the court places a limit of uncertain scope based on Western conceptions of Aboriginal groups' relationships with the land. Aboriginal groups seeking to develop their land economically and avoid the uncertainty surrounding the inherent limit must surrender their land to the Crown. As compared to fee simple, Aboriginal title is simply an "inferior interest".<sup>23</sup>

Hidden by the overwhelming criticism from Aboriginal law scholars, there has been at least one instance of scholarly commentary viewing the inherent limit from an environmental law perspective. Jane Matthews Glenn and Anne C Drost have noted that the inherent limit as justified by Lamer CJ is reminiscent of the language and concept of sustainable development in the Brundtland Commission and the Rio Convention.<sup>24</sup> In *Tsilhqot'in*, the language describing the inherent limit is even closer to that of the language found in international instruments regarding sustainable development. The language shifts the focus away from cultural preservation and towards the importance of communality and the well-being of future generations.

## 2.2 THE SHIFT IN *TSILHQOT'IN*

In *Tsilhqot'in*, the court has only a few words to say about the inherent limit on Aboriginal title. However, the language shows subtle, and important, developments. Reiterating the holding from *Delgamuukw*, the court's first mention of the inherent limit states that non-traditional uses of Aboriginal title land must be reconcilable with the "communal and ongoing nature of the group's attachment to the land."<sup>25</sup> The mention of "communal" is a new development in *Tsilhqot'in*. While *Delgamuukw* discusses the communal characteristic of Aboriginal title as an aspect of its *sui generis* nature, communality was never implicated as a reason or a source for the inherent limit.

This new emphasis on the collective nature of Aboriginal title can be seen in the court's main discussion of the inherent limit:

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

<sup>22</sup> McNeil, *supra* note 8 (calling the inherent limit "paternalistic and disrespectful" at 120); Paul Joffe, "Assessing the *Delgamuukw* Principles: National Implications and Potential Effects in Quebec" (2000) 45 McGill LJ 155 (calling the inherent limit "paternalistic and inflexible" at 162); Richard H Bartlett, "The Content of Aboriginal Title and Equality Before the Law" (1998) 61 Sask L Rev 377 (calling the inherent limit "paternalistic control" at 388); John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 Osgoode Hall LJ 537 (demonstrating a "feudalistic relationship" at 570).

<sup>23</sup> *Ibid* at 572.

<sup>24</sup> Jane Matthews Glenn & Anne C Drost, "Aboriginal Rights and Sustainable Development in Canada" (1999) 48:1 ICLQ 176 at 181; see also World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987) (defining sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" at 43).

<sup>25</sup> *Tsilhqot'in*, *supra* note 1 at para 67.

means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes—even permanent changes—to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.<sup>26</sup>

Several things are apparent in this paragraph. First, as emphasized, collective title not only involves the communal holding of land at one point in time, but also for the benefit of future generations. Theoretically then, even if the Aboriginal group holding the title land were down to one member, the title in question would still be encumbered by the inherent limit. Critically, the language shifts attention to the well-being of future generations, which even more closely parallels international definitions of sustainable development compared to the language used in *Delgamuukw*, which focused on preserving the special bond between an Aboriginal group and the land. In *Tsilhqot'in*, the court does not flesh out the scope of the inherent limit. There is no mention of the examples given by Chief Justice Lamer in *Delgamuukw*; the court simply states that it is a factual matter to be determined when the issue arises.

Another new development in *Tsilhqot'in* is that the Crown is similarly prohibited from using the land in ways that substantially deprive future generations of the benefit of the land. Such use would breach their fiduciary duty:

[T]he Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.<sup>27</sup>

This is significant in that it places restrictions on otherwise wide powers for the Crown to infringe on Aboriginal title. However, it also puts into question whether Aboriginal groups can consent to the Crown putting the land to irreconcilable uses,<sup>28</sup> further pushing Aboriginal groups towards surrendering their title if economic development is sought.<sup>29</sup> Even if title is surrendered, it is still plausible that the honour of the Crown may similarly limit how the Crown can use the land.

In *Tsilhqot'in*, the court reframes the inherent limit from one concerned primarily with cultural preservation to one emphasizing the well-being of future generations. This reframing,

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<sup>26</sup> *Ibid* at para 74 [emphasis added].

<sup>27</sup> *Ibid* at para 86.

<sup>28</sup> For example, if the Crown wanted to grant licences to clear-cut an area under Aboriginal title, the justification test in *Delgamuukw* would suggest the Crown would be able to do so provided that it sufficiently accommodated, compensated, and received consent from the Aboriginal group. This passage in *Tsilhqot'in* however, places in doubt whether the Aboriginal group could validly consent to such a Crown infringement, even if it believed it was in the best interests of the present and future community.

<sup>29</sup> Surrendering title would appear necessarily to deprive future generations of the benefit of the land. See Jeff Waatainen, "Standing in the Shadows of Delgamuukw: Uses of Aboriginal Title Land Under the *Tsilhqot'in* Decision" (2014) 21:5 BC Forest Professional 28.

unfortunately, does little to resolve the criticisms posed by Aboriginal law scholars after *Delgamuukw*. Considerable uncertainty remains, and this uncertainty may be compounded by the new notion that the Crown might not be able to breach the inherent limit even if Aboriginal groups wanted it to. Such uncertainty increases the inferiority of Aboriginal title relative to fee simple. However, the emphasis in linking the communality of title to the inherent limit does open the door to potentially applying the limit to Crown land. Such an application would help address the disparity between Aboriginal title and Crown land.

### 3. APPLYING THE INHERENT LIMIT TO CROWN LAND

If the inherent limit was equally applied to Crown land, the main criticism proffered by Aboriginal law scholars—that the inherent limit makes Aboriginal title an inferior interest, creating and perpetuating disparity between the Crown and Aboriginal peoples—would be ameliorated. Applying the inherent limit broadly is also a positive implementation of sustainability in domestic law. Thus the question is: why should the inherent limit not be applied to Crown land, or even more broadly to all property interests?

To explore this question, an examination of the nature Crown land is needed. Crown land can be viewed in two ways: “private property held by the Crown in the same way that other private owners own property, or as property held in trust on behalf of the nation, (i.e., we all own it but the Crown holds it on our behalf).”<sup>30</sup> While the latter view provides positive support for applying the inherent limit to Crown land, I contend that the former view does not impede the application of the inherent limit to Crown land.

#### 3.1 AS PRIVATE PROPERTY

Under the view of private property, Crown land is just like any other fee simple interest except the landowner is the Crown. The Crown therefore has the same rights and obligations as any other landowner. At first blush, this conception of Crown land is antithetical to applying an inherent limit to the use of the land. The fee simple interest prizes individual liberty above all else. As Sir William Blackstone famously wrote: “The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.”<sup>31</sup> But delving deeper into the history and purpose of private property, there is in fact no reason why an inherent limit cannot be incorporated into the fee simple interest.

When examining the history of private land ownership, one realizes that almost all cultures and religions emphasizes sustainability with some type of guardianship or trusteeship obligation to maintain land and resources for the benefit of future generations.<sup>32</sup> In Islam, the

<sup>30</sup> Nin Thomas, “Maori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights” in Grinlinton & Taylor, *supra* note 7, 219 at 241. In reality, these two perspectives are simultaneously present. That is, Crown land is not the identical to any other fee simple landowner, nor is it identical to any other trust relationship. It includes characteristics of both. However, for the purposes of this paper, it is useful to isolate these two polar perspectives to examine how the inherent limit would fit within each.

<sup>31</sup> Samuel Warren, *Blackstone’s Commentaries: Systematically abridged and adapted to the existing state of the law and constitution with great additions*, 2nd ed (London: W Maxwell, 1856) at 106.

<sup>32</sup> See CG Weeramantry, “Rights, Responsibilities, and Wisdom from Global Cultural Traditions” in Grinlinton & Taylor, *supra* note 7, xv at xvi–xix; Edith Brown Weiss, *In Fairness to Future Generations*:

attitude towards natural resources is one of “joint ownership in which each generation uses and makes the best use of nature, according to its need, without disrupting or upsetting the interests of future generations.”<sup>33</sup> In Judeo-Christian scripture, God gave the land of Canaan to humans and their offspring as an everlasting possession.<sup>34</sup> Similar notions of trusteeship are found in Hinduism and Buddhism.<sup>35</sup>

Indigenous cultures echo a similar story. The Iroquois Confederacy had a “seven generation rule” where the impacts of all environmental decisions should be assessed up to seven generations in the future.<sup>36</sup> The Maori have a concept of guardianship called *Kaitiakitanga*.<sup>37</sup> The Haida have a similar ethic termed ‘Laa guu ga kanhllns.<sup>38</sup> Australian Aboriginal wisdom conceives of human beings as linked to Mother Earth by an umbilical cord.<sup>39</sup> Customary law in Africa have similar principles—land belongs to the community and passes from one generation to the next.<sup>40</sup>

These customary and religious wisdoms suggest that an inherent limit has a place in land ownership. One of the fundamental aspects of property law is that it shapes and responds to the social context in which it is embedded.<sup>41</sup> Examples abound in history: the Roman concept of *dominium*,<sup>42</sup> feudalism,<sup>43</sup> the English commons and enclosures.<sup>44</sup> Each of these reflects not only a relationship with the land but also a social regime.<sup>45</sup> So too did our current conception

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*International Law, Common Patrimony, and Intergenerational Equity* (Tokyo: The United Nations University, 1989) at 18–20.

<sup>33</sup> Abou Bakr Ahmed Ba Kader et al, *Basic Paper on the Islamic Principles for the Conservation of the Natural Environment* (Gland, Switzerland: IUCN, 1983) at 13.

<sup>34</sup> Genesis 17:8 (King James Authorized Version).

<sup>35</sup> Weeramantry, *supra* note 32 at xviii.

<sup>36</sup> Andrea Tunks, “One Indigenous Vision for Sustainable Development Law? Tensions and Prospects” in Klaus Bosselmann & David Grinlinton, eds, *Environmental Law for a Sustainable Society* (Auckland: New Zealand Centre for Environmental Law, 2002) 97 at 114–15.

<sup>37</sup> See Thomas, *supra* note 30 at 226–30.

<sup>38</sup> British Columbia, Council of the Haida Nation, *Towards a Marine Use Plan for Haida Gwaii: A Discussion Paper* (2007) at 4.

<sup>39</sup> Weeramantry, *supra* note 32 at xvii.

<sup>40</sup> Weiss, *supra* note 32 at 20. For example, “[u]nder the principles of customary land law in Ghana, land is owned by a community that goes on from one generation to the next. A distinguished Ghanaian chief said, ‘I conceive that land belongs to a vast family of whom many are dead, a few are living, and countless host are still unborn.’ Land thus belongs to the community, not the individual.” See Nan Sir Ofori Atta NA Ollennu, *Principles of Customary Land Law in Ghana* (London, UK: Sweet & Maxwell, 1962) at 4.

<sup>41</sup> Joseph William Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000) at 14.

<sup>42</sup> Bosselmann, *supra* note 7 at 29 (“[d]ominium originated in social status, either gained or inherited, and for this reason included the element of protection and care”).

<sup>43</sup> See generally Francis S Philbrick, “Changing Conceptions of Property in Law” (1938) 86:7 U Pa L Rev 691 at 706–08 (for feudalism as an example of property law and social context).

<sup>44</sup> Peter Horsley, “Property Rights Viewed from Emerging Relational Perspectives” in Grinlinton & Taylor, *supra* note 7, 87 at 88. See generally JM Neeson, “Commoners: Common Right, Enclosure and Social Change in England, 1700–1820” (Cambridge, UK: Cambridge University Press, 1993).

<sup>45</sup> See generally Philbrick, *supra* note 43.

of private property, which emphasizes rights at the expense of obligations,<sup>46</sup> arise from the social changes brought on by liberalism, capitalism, and secularity.<sup>47</sup> The industrial revolution further gave rise to industrial property rights,<sup>48</sup> and greater rights for intensive land use at the expense of quiet enjoyment.<sup>49</sup>

These historical examples illustrate how conceptions of property shift dramatically to meet the social priorities and conditions of the time.<sup>50</sup> The very purpose of property is to promote the well-being of the collective society. “Property does not exist in isolation”<sup>51</sup> and it is only when the collective recognizes and enforces private property rights that these rights actually arise.<sup>52</sup> In our recent history, strong individual rights coincided with the social priorities of developing land and industrialization. In the present, our priorities have changed. We now recognize the harms of unrestrained development. But property rights can change to reflect changing social needs. It is often forgotten that property rights are malleable and arise as “a function of the social and economic conditions governing a society.”<sup>53</sup> Reconceptualizing what it means to own land would be appropriate given how our social systems need to adapt to our current environmental challenges. To not do so, to continue to allow private property rights to harm society, undermines the very purpose and legitimacy of property rights.

The history and purpose of private property suggests that there is little reason why an inherent limit cannot be applied to all forms of property interests. Crown land, when viewed as a form of private property, is therefore also amenable to the incorporation of an inherent limit. But it is the second conception of Crown land for which *Tsilhqot'in* provides leverage for incorporating the inherent limit, as the emphasis on the communal nature of Aboriginal title parallels the conception of Crown land being held in trust for the benefit of society.

### 3.2 AS HELD IN TRUST

When Crown land is viewed as a form of private property there is no theoretical impediment to an inherent limit being applied to fee simple interests. When Crown land is viewed as being held in trust for the benefit of society, the reasoning of *Tsilhqot'in* necessarily implies that

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<sup>46</sup> Singer, *supra* note 41 (“owners have obligations as well as rights. We know this to be true, but our language for talking about property denies it. It is a knowledge that we suppress by the way we frame discussions about property” at 16).

<sup>47</sup> Horsley, *supra* note 44 at 88; Bosselmann, *supra* note 7 at 31 (“[t]his logic of individual rights deprived of inherent duties is the hallmark of all classical liberal thinkers ... By justifying property rights in a secular manner ... it also detached them from any collective morality”).

<sup>48</sup> Philbrick, *supra* note 43 at 726.

<sup>49</sup> Eric T Freyfogle, “Taking Property Seriously” in Grinlinton & Taylor, *supra* note 7, 43 at 50.

<sup>50</sup> This view is especially apparent with a group of New Zealand scholars: see Prue Taylor & David Grinlinton, “Property Rights and Sustainability: Toward a New Vision of Property” in Taylor & Grinlinton *supra* note 7, 1 at 3, 6.

<sup>51</sup> Joseph L Sax, “Takings, Private Property and Public Rights” (1971) 81:2 Yale LJ 149 at 152.

<sup>52</sup> Freyfogle, *supra* note 49 at 48.

<sup>53</sup> Johannes M Renger, “Institutional, Communal, and Individual Ownership or Possession of Arable Land in the Ancient Mesopotamia from the End of the Fourth to the End of the First Millennium B.C.” (1995) 71:1 Chi-Kent L Rev 269 at 269.

Crown land should also be subject to such an inherent limit. All that needs to be established is that Crown land, like Aboriginal title, is held collectively for the benefit of future generations.

The Supreme Court of Canada has so far declined to view Crown land as held in trust for society. Indeed, in *Alberta v Elder Advocates of Alberta Society*, the court refuted the existence of any broad trust relationship between the Crown and the public, conclusively stating that “[no] fiduciary duty is owed to the public as a whole.”<sup>54</sup> The court is noticeably more comfortable viewing the Crown as a holder of private rights and obligations than as having any public obligations. For example, in *Elder Advocates*, the court stated that to establish a fiduciary duty incumbent on the government, it is a precondition to find a strong correspondence with a traditional private trust relationship (e.g., agent-principal).<sup>55</sup> Similarly, in examining the potential for incorporating a public trust doctrine in *British Columbia v Canadian Forest Products Ltd*, the court ultimately declined to base the action on the Crown as a public trustee and instead relied on the Crown’s private property rights.<sup>56</sup>

Despite the court indicating worries about indeterminate liability if the Crown was viewed as a public trustee,<sup>57</sup> the real tension seems to stem from the prospect of limiting Crown sovereignty. However, many have argued that being a trustee is inherent in being sovereign. For example, US scholars have advanced this view as a basis for the public trust doctrine, where it has been noted as “inalienable as an attribute of sovereignty no more capable of conveyance than the police power itself”,<sup>58</sup> representing “a fundamental, inherent attribute of state sovereignty.”<sup>59</sup> United States courts have recognized the same,<sup>60</sup> and other jurisdictions, like Australia, have readily recognized that Crown land is the “patrimony of the nation”.<sup>61</sup>

Indeed, it is difficult to think of what other purpose Crown land could be used for, except for the benefit of society. Such a public purpose was fundamental from the very emergence of Crown land in English medieval law. As Bruce Lyon writes:

There was also a generally held conception that the king was a public person or prince who held the realm as real property which, however, was of a public character and could not be disposed of as private property. The royal proprietorship was public and must be shared with the community of the realm.<sup>62</sup>

Hesitancy from the court to impose legally enforceable public trust obligations on the Crown does not mean that Crown land is not, at the very least, held in the collective for

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<sup>54</sup> *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 50, [2011] 2 SCR 261 [*Elder Advocates*].

<sup>55</sup> *Ibid* at para 47.

<sup>56</sup> *British Columbia v Canadian Forest Products Ltd.*, 2004 SCC 38 at para 82, [2004] SCR 74.

<sup>57</sup> *Ibid* at para 81.

<sup>58</sup> Jan S Stevens, “The Public Trust: A Sovereign’s Ancient Prerogative Becomes the People’s Environmental Right” (1980) 14 UC Davis L Rev 195 at 196.

<sup>59</sup> Richard M Frank, “The Public Trust Doctrine: Assessing its Recent Past & Charting its Future” (2012) 45:3 UC Davis L Rev 665 at 686.

<sup>60</sup> *In re Water Use Permit Applications* (Waiahole Ditch), 9 P (3d) 409, 432 (Haw 2000); *Lawrence v Clark Cnty*, 127 Nev Ad. Rep 32, 613 (Nev 2011). See also *Illinois Central R Co v Illinois*, 146 US 387 (1892).

<sup>61</sup> *Mabo v Queensland (No 2)*, [1992] HCA 23, 175 CLR 1.

<sup>62</sup> Bryce Lyon, *A Constitutional and Legal History of Medieval England* (New York: Harper and Row, 1960) at 587 [emphasis added].

the benefit of future generations. Indeed, in *Elder Advocates*, the Court held that imposing a fiduciary duty towards a specific sector of society would be at odds with the Crown's general "duty to act in the best interests of society as a whole."<sup>63</sup> "Society as a whole" presumably encompasses future generations.<sup>64</sup>

Also supportive of applying the inherent limit to Crown land is the fact that Aboriginal law scholars have already paralleled Aboriginal groups with federal and provincial governments in arguing that Aboriginal title encompasses rights to self-governance. For example, McNeil writes that Aboriginal title

more closely resembles the position of the federal and provincial governments in regard to their public property... [T]he federal and provincial governments each hold title in their own right, for the benefit of the people of Canada and each province. Those governments are nonetheless collective entities in the sense that they exist as units distinct from the people they represent, in much the same way as Aboriginal nations exist as units distinct from their members. To carry this analogy one step further, the federal and provincial governments obviously have decision-making authority with respect to their public property, the exercise of which, to borrow a phrase from Peter Russell, is 'a fundamental activity of government.'<sup>65</sup>

In the same way that title held communally for the benefit of the group's members carried with it decision-making authority in *Delgamuukw*, in *Tsilhqot'in* it now carries with it the inherent limit. Thus, the inherent limit should be applied equally to the Crown as it applies to Aboriginal title-holders.

#### 4. APPLYING THE PRINCIPLES OF INTERGENERATIONAL EQUITY TO THE INHERENT LIMIT

By describing the inherent limit as "inherent limits of group title held for future generations"<sup>66</sup>, the language in *Tsilhqot'in* not only raises the possibility of applying the inherent limit to Crown land as argued in the previous section, but it also invites viewing the inherent limit from an environmental law perspective. Such a perspective informs the development of a framework for analysing inherent limit—an analysis that the court has declined to develop. Guidance can be provided by the doctrine of intergenerational equity developed by Edith Brown Weiss in the late 1980s. Using trust law as the legal basis, her starting proposition was that "each generation is both a custodian and a user of our common natural and cultural patrimony. As custodians of this planet, we have certain moral obligations to future generations which can transform into legally enforceable norms."<sup>67</sup> While her theory focuses on international legal obligations, the three principles underlying her theory are transferrable to the context to an inherent limit in domestic property law. These three principles are: (1) conservation of

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<sup>63</sup> *Elder Advocates*, *supra* note 54 at para 44.

<sup>64</sup> Similarly, "all members of the human family" in the Preamble to the Universal Declaration of Human Rights has been interpreted to include future generations. See Weiss, *supra* note 32 at 25.

<sup>65</sup> McNeil, *supra* note 8 at 124–25 [footnotes omitted].

<sup>66</sup> *Tsilhqot'in*, *supra* note 1 at para 94.

<sup>67</sup> Weiss, *supra* note 32 at 21.

options,<sup>68</sup> (2) conservation of quality,<sup>69</sup> and (3) conservation of access.<sup>70</sup> How would these three principles apply to the inherent limit?

Conservation of options means that the diversity of natural and cultural resources should be preserved. However, it is not always the case that this principle will preserve the status quo. The development of resources can create substitutes and help conserve more scarce resources. What needs to be taken into account is the relative scarcity of the resources of the land in question. For example, if land subjected to the inherent limit contains both a commercially valuable forest and coal deposits, but the forest contained endangered species, the inherent limit may only limit logging the forest to preserve the scarce species but not bar the development of coal if it can help create other, diverse resources.

The conservation of quality is the principle that perhaps best captures what the Supreme Court of Canada has in mind when explaining the inherent limit in *Tsilhqot'in*. Conservation of quality means that the quality of the natural and cultural environment is left in no worse condition than it was received. This means actions on land that may have substantial harmful impacts would be prohibited under the inherent limit, provided that the quality of the environment cannot be easily remediated following the action. For example, the logging of old-growth forest may be prohibited under the inherent limit because the quality of a replanted forest would be materially different.

The conservation of access implies both intergenerational and intragenerational thinking. Intergenerationally, “the level of access of the first generation is an absolute minimum which each generation must pass on.”<sup>71</sup> Intragenerationally, “all peoples should have a minimum level of access to the common patrimony.”<sup>72</sup> Thus, in some cases, development of land is required to ensure beneficiaries gain more access to the land’s benefits. The conservation of access must therefore be balanced with the conservation of quality and the conservation of options. It also implies that the development of land that creates further inequalities between the beneficiaries of the land would be prohibited.

These principles, while not providing any black and white rule for what uses should be and should not be subject to the inherent limit, do provide a framework for landowners, their beneficiaries, and the courts, to assess what factors should be considered in making decisions about land use. Factors like the relative scarcity of the resources on the land, the amount of harm to the land, the possibility of remediation of any harm, and the relative inequality of the beneficiaries should be taken into account. Critically, economic growth is not a factor to be weighed. It is only incidentally relevant if it reduces inequality or expands the diversity of the resource base.

Applying these principles of intergenerational equity to the inherent limit provides more flexibility as to what land can be used for, while still preserving Lamer CJ’s original goal in developing the inherent limit in the first place: cultural preservation. Instead of trying to

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<sup>68</sup> *Ibid* at 40–42.

<sup>69</sup> *Ibid* at 42–43.

<sup>70</sup> *Ibid* at 43–45.

<sup>71</sup> *Ibid* at 44.

<sup>72</sup> *Ibid*.

reconcile conflicting sentiments between not restricting development (not a “straitjacket”) and what necessarily would be a restriction of the use of land based on the practices used to prove title, intergenerational equity prioritizes the protection of cultural resources since “[cultural] resources are the common patrimony of our species”.<sup>73</sup> Weiss argues that what is most important is the preservation of *cultural knowledge*. Cultural practices need not be continually practiced to preserve cultural knowledge. Therefore, using the principles of intergenerational equity to create a framework for the inherent limit analysis would preserve the cultural heritage of Aboriginal groups without needing to marry permissible uses of the land to the practices used to prove title.

## 5. A NORMATIVE DISCUSSION

Thus far, we have seen that there is no bar—and in fact, good reason—to apply the inherent limit to Crown land. Doing so would provide parity between Aboriginal land and Crown land. Applying the principles of intergenerational equity as a framework for the inherent limit provides flexibility to land use while maintaining the goal of cultural preservation. But there are other important implications for Aboriginal, environmental, and property law if an inherent limit imbued with the principles of sustainability is applied to Crown land.

### 5.1 ABORIGINAL LAW

Not only would applying the inherent limit to Crown land reduce the inequality between Aboriginal land and Crown land, it would also militate against the paternalistic notions that Aboriginal law scholars have criticized.<sup>74</sup> Both the Crown and the Aboriginal groups would be under the same limit—and ultimately subject to the principles of intergenerational equity—because of similar structures of land governance: decision-making authority over communally held land.<sup>75</sup>

Further, applying the inherent limit to the common law would be an instance of Aboriginal law and indigenous principles, which hold their obligations to future generations closely, informing (or re-informing) the common law. Again, this diffuses the paternalistic relationship between the Crown and Aboriginal groups. Instead of one-way talk from the Crown to Aboriginal groups, there would be cross talk to share legal principles and find solutions to our common environmental challenges. It would exemplify true dialogue —“a conversation between equals.”<sup>76</sup>

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<sup>73</sup> *Ibid* at 257.

<sup>74</sup> See Joffe, *supra* note 22; Gordon Christie, “*Delgamuukw* and the Protection of Aboriginal Land Interests” (2000) 32:1 Ottawa L Rev 85 (for other characteristics of Aboriginal title that have been seen as paternalistic); Kent McNeil, “Self-Government and the Inalienability of Aboriginal Title” (2001) 47 McGill LJ 473.

<sup>75</sup> *Ibid*. This would also give greater credence to the sovereignty of Aboriginal nations.

<sup>76</sup> Horsley, *supra* note 44 at 108.

## 5.2 ENVIRONMENTAL LAW

Not only would applying the inherent limit to Crown title significantly further the core goal of environmental law,<sup>77</sup> it would also be an instance of incorporating “strong” sustainability into the law.<sup>78</sup> Despite over eighty-five domestic statutes recognizing sustainable development principles,<sup>79</sup> there has been a lack of progress in halting environmental degradation.<sup>80</sup> Part of the reason is that domestic courts and tribunals have been slow and reluctant to enforce any strong environmental ethic. Where courts do look towards principles of sustainability, it is mostly to act as a counterweight to ensure economic development proceeds as efficiently as possible.<sup>81</sup> Such use of “weak” sustainability does not prioritize an ecological-based outcome because it is perceived that natural capital can be readily substituted with human-made capital.<sup>82</sup> But an inherent limit would, effectively, provide ecological considerations that trump economic ones. That is not to say that there is no balancing involved, but the balancing is between current generations and future generations; weighing how the diversity, quality, and access to resources would be impacted over time. Nowhere in this formula is economic development on its own viewed as unqualifiedly beneficial. Rather, it is only beneficial in relation to its capacity for alleviating existing inequalities in accessing the benefits of the land.

In addition, using the principles of intergenerational equity to inform the analysis of the inherent limit would exemplify a more effective (or at least an additional) method of incorporating sustainability into the law. Environmental law principles like intergenerational equity are often thought as international norms, or ‘soft law.’<sup>83</sup> Domestic courts rarely utilize such norms to any meaningful effect, often relegating the use of such norms as an aid to statutory interpretation.<sup>84</sup> But such norms can be useful to reform analytical frameworks in traditional areas of law, like property law, with which courts are more comfortable engaging.

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<sup>77</sup> See Bosselmann, *supra* note 7.

<sup>78</sup> “Strong” sustainability does not regard natural capital as not replaceable with human-made capital. See Eric Neumayer, *Weak Versus Strong Sustainability: Exploring the Limits of Two Opposing Paradigms* (Northampton, Mass: Edward Elgar Publishing, 2003) at 1. See also Paul Ekins et al, “A Framework for the Practical Application of the Concepts of Critical Natural Capital and Strong Sustainability” (2003) 44:2–3 *Ecological Econ* 165.

<sup>79</sup> Natasha Affolder, *The Legal Concept of Sustainability: A Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage* (Calgary: Canadian Institute of Resources Law, 2012) at 1, 13–20.

<sup>80</sup> See David R Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003).

<sup>81</sup> See e.g. *Mountain View Regional Water Services Commission et al v Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (2004), Appeal Nos 03-116 and 03-118-121-R (AEAB).

<sup>82</sup> Neumayer, *supra* note 78.

<sup>83</sup> David B Hunter, “International Environmental Law: Sources, Principles, and Innovations” in Paul G Harris, ed, *Routledge Handbook of Global Environmental Politics* (Abingdon: Routledge, 2014) 124 at 129-33; Armin Rosencranz, “The Origin and Emergence of International Environmental Norms” (2003) 26 *Hastings Int’l & Comp L Rev* 309.

<sup>84</sup> See e.g. 114957 *Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241.

These reformed frameworks could apply sustainability as an “organizing principle”<sup>85</sup> throughout the entirety of the law, instead of confining it as just another factor to be considered in environmental decision making.

### 5.3 PROPERTY LAW

If the inherent limit were to be applied more broadly, Canadian legal thinking on what it means to own land would dramatically change. Recognizing the malleability of property rights would weaken the assumption of exclusive use as the core right in ownership.<sup>86</sup> The purpose of property rights would reorient from that of wealth generation to a wider reconciliation of how property impacts the complex relationships in both social and environmental worlds.<sup>87</sup> Moreover, it may encourage novel property regimes, such as local and collective forms of ownership that are more effective at managing natural resources.<sup>88</sup> For public property, the emphasis would be placed on the public obligations that come with sovereignty. Such sovereignty would necessarily be tempered with the inherent obligations the Crown owes to future generations.<sup>89</sup> This recognition may lay the groundwork for incorporating more legal tools that ensure the accountability of the Crown, such as the public trust doctrine.

Such a shift in framework—which emphasizes responsibilities and duties at the expense of liberty<sup>90</sup>—should not be taken lightly given the degree to which Western society is enveloped in the ownership/exclusivity paradigm.<sup>91</sup> Yet even Blackstone recognized that the “absolute right” of property was only “without any control or diminution, *save only by the laws of the land*.”<sup>92</sup> Given our current economic, social, and environmental failings, public necessity dictates that the laws of our society need to reconceptualise what it means to own land. When our system of law allows land to be used for the benefit of the owner without regard for the cumulative

<sup>85</sup> *Bhasin v Hrynew*, 2014 SCC 71 (“an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines ... It is a standard that helps to understand and develop the law in a coherent and principled way” at para 64).

<sup>86</sup> The Australian High Court has recognized the malleability of property, see *Yanner v Eaton*, [1999] HCA 53 at paras 17–31, 73 ALJR 1518. The Supreme Court of Canada has also begun to recognize this fact, see *Saulnier v Royal Bank of Canada*, 2008 SCC 58, [2008] 3 SCR 166 (“[t]he notion of ‘property’ is ... a term of some elasticity that takes its meaning from the context” at para 16). Rights to exclude have been around since ancient civilizations, see Robert C Ellickson & Charles DiA Thorland, “Ancient Land Law: Mesopotamia, Egypt, Israel” (1995) 71 Chi-Kent L Rev 321 at 341–42. However, their centrality in our understanding of property arose in the mid-19th century, see Freyfogle, *supra* note 49 at 50–51.

<sup>87</sup> See Horsley, *supra* note 44; Craig Anthony (Tony) Arnold, “Sustainable Webs of Interests: Property in an Interconnected Environment” in Grinlinton & Taylor, *supra* note 7, 167.

<sup>88</sup> See Lee Godden, “Communal Governance of Land and Resources as a Sustainable Property Institution” in Grinlinton & Taylor, *supra* note 7, 249 at 250. Local governance is often the best situated to deal with local commons, see generally Thomas Dietz, Elinor Ostrom & Paul C Stern, “The Struggle to Govern the Commons” (2003) 302 Science 1907.

<sup>89</sup> Weiss, *supra* note 32 at 290.

<sup>90</sup> David Grinlinton, “Evolution, Adaptation, and Invention: Property Rights in Natural Resources in a Changing World”, in Grinlinton & Taylor, *supra* note 7, 275 at 301–02.

<sup>91</sup> Singer, *supra* note 41.

<sup>92</sup> Warren, *supra* note 31. See also Grinlinton, *supra* note 90 at 277.

harm towards the environment or future generations, the system of law needs to be changed. As Singer writes: “[a] legal system that allow[s] right holders to exercise their rights without regard for the legal entitlements of others would be a legal system in name only.”<sup>93</sup>

## 6. CONCLUSION

In a public address, Chief Roger William described the *Tsilhqot’in* decision as “an opportunity”.<sup>94</sup> This paper has argued that *Tsilhqot’in* indeed offers a unique opportunity. The creation of the inherent limit in *Delgamuukw* was criticized as being detrimental to Aboriginal groups and reflecting the Crown’s paternalistic attitude. *Tsilhqot’in* shifted the focus of the inherent limit from cultural preservation to the well-being of future generations. This new focus invites the application of the inherent limit to Crown land and the inclusion of intergenerational equity in developing an analytical framework for the limit. These two propositions, when combined, would help diffuse the paternalistic relationship between Aboriginal peoples and the Crown, and provide a framework that ensures environmental and cultural preservation while still allowing for economic development of the land. Perhaps most critically, it could be the first step towards a fundamental reorientation of what it means to own land. Joseph Singer writes: “[p]roperty implies a vision of the social world.”<sup>95</sup> Our vision of what society ought to look like has changed; *Tsilhqot’in* provides an opportunity for the law to match it.

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<sup>93</sup> Singer, *supra* note 41 at 16.

<sup>94</sup> Address of Chief Roger William of the Xeni Gwet’in First Nation, vice-chair of the Tsilhqot’in National Government (18 September 2014) at UBC First Nations Longhouse, online: <aboriginal.ubc.ca>.

<sup>95</sup> Singer, *supra* note 41 at 142.