

Inalienable Properties

*The Political Economy of
Indigenous Land Reform*

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1

Keeping the Land, Making the Market

THE NISGA'A NATION, whose people have lived in the Nass River Valley since a time "before memory,"¹ has made national headlines over the past decade by creating a new regime of "alienable" rights in Nisga'a lands.² These changes gave Nisga'a citizens the option to own small tracts of land in Nisga'a territory – including the right to transfer ownership of those lands to individuals who are not members of the Nisga'a Nation. Set against a long history of legal restrictions on buying and selling of Indigenous lands in Canada, the decision to create transferable land rights in the Nisga'a Nation marked what seemed, to some, a dramatic break from past law and practice.

The people of the Mi'kmaw Nation have lived on Unama'ki (Cape Breton Island) and throughout Mi'kma'ki (the Atlantic region and the southern Gaspé Peninsula) since "time immemorial."³ In 1916, the Exchequer Court of Canada authorized a forced surrender of a Mi'kmaw community's reserve lands at Kun'tewiktuk (Kings Road Reserve).⁴ The community had long resisted displacement from their lands at the entrance to the rapidly industrializing city of Sydney, but powerful commercial and local political interests ultimately won out, persuading the court to relocate the community to its current lands at Membertou, then on the city's outskirts. Despite its history of economic struggle on these lands over the past century, the Membertou First Nation has made remarkable strides in economic and business development, even as it continues to maintain community control of its lands instead of "liberalizing" its land base.

Nisga'a leaders have championed the nation's reforms as a way to catalyze community economic development.⁵ Supporters argue that alienable property rights will attract needed outside investment and reduce barriers to credit markets for financing new housing and public infrastructure.⁶ Others hold up the Membertou approach as a model of economic success that balances development against concerns that, by abandoning historical constraints on buying and selling land, the Nisga'a Nation and others may be opening themselves up to exploitation by powerful interests and to interconnected risks of cultural, environmental, and economic loss and social fragmentation.⁷

The consequences of these changes in land rights for the Nisga'a, Membertou, and other Indigenous communities in Canada are still unfolding.⁸ But whatever their ultimate successes or failures, these two contrasting approaches to community land rights raise unanswered questions about how property regimes persist and change. Why did the Nisga'a introduce property rights that can be traded in the market? And how have communities such as Membertou maintained control over their lands in the face of economic pressures and incentives that favour new regimes for saleable rights?

Answers to these questions in studies of institutional change throughout Indigenous-settler history have mainly relied on the political economy of colonial settlement.⁹ Colonial governments, land speculators, and other powerful interests allied with one another to impose formal limits on the sale of Indigenous peoples' lands, while using those same legal restrictions to channel land ownership into the hands of private settlers.

Today, however, as many Indigenous communities move increasingly toward self-governance and self-determination, and their own approaches to land rights and community development, new dynamics of political economy complicate our understanding of changing property regimes in these contexts.

This book explores the contrasting approaches to land rights illustrated by the Nisga'a and Membertou Nations in order to develop and test a theory of property transitions that helps us understand why Indigenous communities in Canada are making

different choices about whether, or how, their lands should remain inalienable. Much has been written in the media and in the academic literature about how First Nations *should* reform their property regimes to best pursue economic change and community well-being. In this study, I am interested in a different kind of inquiry. Taking it as given that goals for legal and economic reform will be set by and within Indigenous communities, I aim to understand – from an institutionalist and transactional perspective – how those goals might come to be established and sustained.

The Puzzle of Inalienability

A sizeable literature has developed over the past few decades around normative debates about “inalienability,” defined as limits on the range of permissible market transactions for a legal entitlement. These debates arise in the context of Indigenous peoples’ lands, as well as in relation to other important resources.¹⁰ In this book, I take up the question that has largely evaded research in property law and institutional analysis: *why* does inalienable property persist in some settings but not in others?¹¹ More specifically, how are both formal and informal limits on the free alienability of land rights sustained by self-determining political communities over the long term?

Framed in these terms, the central puzzle of this book is part of a broader set of questions about how property rights – and legal rules and norms more generally – change over time in different settings. As a way to engage this broader set of questions, my focus on inalienability may seem like an odd choice. Inalienability has always occupied a fitful position in research on property, where legal scholars have mostly dismissed the concept as having little to do with big questions of efficiency, fairness, and social change.¹² That position has been reinforced over the past few decades by the dominant tide of law-and-economics scholarship that centres its attention on owners’ rights to exclude, while consigning other dimensions of property to second-order concerns about “governance.”¹³ At the same time, some of the most contested social and

political issues related to property turn on the rules and norms that limit owners' participation in the marketplace. Limitations on the transfer and use of land, human tissues,¹⁴ legal claims,¹⁵ sacred objects and cultural property,¹⁶ parental and voting rights,¹⁷ ideas and information,¹⁸ and human capital¹⁹ are regularly debated in politics, in the press, and in voluminous popular and social science literatures.

Why this disconnect? Why does inalienability appear to pervade social and economic life and political discourse yet receive so little sustained attention when we turn to some of the most basic questions in property law and legal theory?

One answer is that popular ideas about the "evolution" of property rights reinforce the assumption that inalienable rights will inevitably give way to institutional arrangements thought to be more suitable to business development and economic growth. As Claire Priest has observed, "the emergence of the modern system of private property is ... often described as a steady march toward free alienability" – a position that takes "the freely alienable fee simple estate as the paradigmatic form of land tenure."²⁰ To the extent that free alienability has become inextricable from modernist private property, inalienability has rarely been studied as a distinctive set of rules or practices with their own dynamics of persistence and change. But because we lack a dynamic theory of how inalienability actually changes over time, our stories about this set of institutions tend to be swamped by encompassing narratives about evolutionary property – stories in which all legal systems inexorably move toward regimes of individuated, exclusionary, and transferable rights.²¹

As I explain in later chapters, there are substantial problems with the theory that alienable land rights are inevitable. Nevertheless, a community's ability to sustain inalienable property remains – in some cases – a difficult puzzle to explain. Under certain conditions, communities can face intense pressures to create new options for market exchanges in real property rights. Some of those pressures are likely the result of external economic and political forces – combined with pre-existing institutional conditions – that pull

individual community members' incentives in favour of alienability. In these cases, it is not obvious how communities can successfully sustain the legal architecture to support inalienability over the long term.

At least since Susan Rose-Ackerman's work on inalienability rules in the mid-1980s, it has been well understood that these rules can benefit groups when market failures occur due to externalities, incomplete information, and coordination problems.²² But even when inalienability is collectively beneficial in economic terms, the associated costs of restricting market exchange may be felt acutely by current and prospective owners who forgo their expected gains from trade as well as, in the case of land, the benefits of collateralization. Land market liberalization can also create the prospect of windfall gains for some group members, increasing political pressures for reform. Moreover, in the context of the land rights studied in this book, inalienability may approach a pure cost to current owners when the benefits of inalienability accrue mainly to future generations – as when inalienable land rights serve primarily to preserve community control over its land base for the future. In these situations, community members not only face the challenge of coordinating their actions to achieve collective ends but must also agree to sacrifice current private benefits as contributions to an intergenerational public good enjoyed by others at some indeterminate point in the future.²³

Under such conditions, how do communities successfully sustain regimes of inalienable entitlements as a matter of economic incentives? And what distinguishes those communities from others, facing similar conditions, who have taken up free alienability and pursued new markets for formerly inalienable rights?

These questions are raised squarely by changes in Indigenous land rights in Canada over the past half-century. As in other former colonies of the British Commonwealth, strict constraints on the transfer of property in Indigenous peoples' lands in Canada had long been imposed by colonial law, and inalienability remains the default position under that law for most First Nations to the present day. At least since the later part of the twentieth century,

however, as federal and provincial governments have gradually come to offer measured support for First Nations' self-determination and self-governance, some of these restrictions on alienability have been relaxed and communities have encountered a range of new options that make various forms of alienable land rights available. Given the dynamics of collective action sketched above, we might expect to see more First Nations moving away from long-standing inalienability rules. To date, however, few communities have done so – even among those who have taken other active steps toward land tenure reform.²⁴

Defining Inalienability

“Inalienability” is used throughout the book to describe a set of institutions – by which I mean formal legal rules or informal norms – that limit the range of permissible market transactions for an entitlement. These institutions might prohibit transfers directly, such as by excluding sales or gifts, or indirectly, such as by setting transaction fees or limitations on price. They might also constrain markets for an entitlement by limiting transfers to a defined class of owners or for a defined class of uses.²⁵ This definition of inalienability is considerably broader than the one used by some researchers who focus on rules dealing directly with transfers but who ignore any constraints that limit the general marketability of a resource.²⁶

I adopt the broader definition of inalienability here for three reasons. First, from a functional perspective, all restrictions that limit marketability – whether those placed on transfers or those that constrain the universe of willing buyers – raise the same basic problem of political economy because they require current owners to forgo potential gains from trade compared with a regime in which entitlements are freely alienable. Because I am interested in how long-term community support for such restrictions is sustained under these conditions, the broader definition of inalienability allows me to cast a wider net for case studies and empirical data to test the theoretical model described in [Chapter 3](#).

Second, a broader definition of inalienability that captures not only direct limitations on land transfers but also a range of other mechanisms through which property entitlements are adjusted, modified, and customized goes to the heart of a central question about Indigenous land tenure reforms: will the likely result of property transitions for First Nations in Canada be legal uniformity, or can variety and diversity among property regimes be sustained? What, in other words, does the political economy of land reform tell us about prospects for the future of legal pluralism in Canada?

According to one influential line of thinking in property theory, those prospects look dim. If a defining feature of property is that it mediates relationships between individuals who are often strangers to one another, then one of its key functions is to reduce the costs of generating and disseminating information about rights to resources.²⁷ One consequence of this argument is that “idiosyncratic” rules – as defined from the perspective of those operating in the predominant legal system – will raise transaction costs and ultimately diminish the value of reforms for owners and investors who face increased uncertainty.

Inalienability, defined broadly, includes those rules and norms that reduce the marketability of Indigenous peoples’ lands simply because the rules and norms themselves diverge from others that are more familiar to potential buyers or investors. The broader definition of inalienability above engages questions about whether – in the context of Indigenous land rights – this “standardization thesis” holds as a positive matter of institutional change, and if not, how communities can continue to sustain so-called non-standard property regimes in the face of substantial pressures for reform.²⁸

Third, as Lee-Ann Fennell has observed, “it is essential to recognize that alienability is not a binary switch to be turned on or off, but rather a dimension of property ownership that can be adjusted in many different ways.”²⁹ A broader definition of inalienability better captures this spectrum of options. For example, while the Nisga’a made the initial choice to introduce a limited form of

alienable property, this choice itself has opened the door to a new set of legal options concerning future constraints that might be placed on Nisga'a land ownership to balance competing interests and aims and to mitigate risks from alienability. Not only is the Nisga'a Nation empowered to establish new proprietary entitlements in its lands but Nisga'a lawmakers also wield governance and regulatory powers over land use, transfer, and expropriation.³⁰ How those powers will be exercised to determine who can own Nisga'a lands, how Nisga'a lands can be used, and when and how ownership can be transferred to others will ultimately shape the meaning and consequences of "alienability" in the Nisga'a Nation.

Explaining Inalienability

Both constitutionally protected Aboriginal title – based on Indigenous peoples' prior occupation of their lands – and federal statutory land rights in Canada are today subject to strict constraints on alienation.³¹ While an early period of colonial law sanctioned private exchanges between Indigenous communities and settlers in British North America, bureaucratic control over land markets was eventually centralized and private transactions with First Nations were prohibited. At the same time, even as colonial governments moved toward stronger restrictions on private markets for Indigenous lands, these legal changes made possible the transfer of Indigenous land rights to the very settlers who were prohibited from purchasing them directly.

Perhaps no other history illustrates so well the two conflicting stories that legal scholars often tell about what drives property rights and regimes to change over time. The most influential of these narratives is Harold Demsetz's theory that property regimes evolve from systems of inalienable, communal property to systems of private and freely alienable rights.³² For Demsetz, the pace and timing of property's evolution depend on the aggregate, *ex post* costs and benefits of reform – driven either by resource scarcity or by factors like geography and changing technology. But a growing suspicion that the Demsetzian narrative lacks any real

explanatory power has led some to embrace a different kind of story, one focused on the politics of elite power.³³ In this alternative “interest-group” account of change, property rights do not simply emerge or change on their own but are pushed and pulled in directions determined by the aims and coordinative abilities of powerful and well-resourced people or subgroups in society.

The history of inalienable Indigenous land rights in Canada seems at once to refute and support both of these stories about property. On the one hand, legal rules were developed to constrain the transfer of Indigenous lands and to position the colonial administration as the sole intermediary in all land transfers, even as the pace of colonial settlement and the demand for land among settlers increased. As restraints on alienation were carried forward from the era of large-scale treaty making, they worked to prohibit transactions around most of the land rights that remained to Indigenous peoples. This is exactly the inverse outcome predicted by Demsetz’s evolutionary theory, but it can be explained, to a degree, by historical shifts in the configuration of influential colonial interests driving support for inalienability over time.

On the other hand, formal restraints on alienation directly to private interests apparently facilitated transfers of Indigenous land rights to the colonial government, which then granted those rights to private settlers, thereby helping to meet the growing demand for land as settlement spread west across the continent. In this sense, formally inalienable lands became functionally tradable in the marketplace at precisely the same time that land available for colonial settlement was becoming scarce. Demsetz’s evolutionary theory arguably predicts, in general terms, the practices of alienability and inalienability on the ground.

In [Chapter 2](#), I describe why an evolutionary theory cannot provide an adequate account of institutional change, and I argue that the interest-group story does a better job of explaining the legal history of inalienability in Canada under the colonial balance of power. But this history also exposes the limitations of a theory of political economy that neither accounts for changes in the interests of actors themselves nor addresses the diversity of First Nations’

own approaches to inalienability in an era of increasing recognition and support for Indigenous self-governance. While interest-group theory helps to explain how inalienability rules emerged and were sustained under the power relationships between colonists and Indigenous peoples, it needs to go further to capture the complex settings of self-governing communities, where local political dynamics and their interactions with the Canadian state are significant determinants of legal and economic outcomes.

In order to understand property transitions in these settings from the perspective of political economy, we need new approaches that directly address actors and institutions within First Nations themselves. As recent scholarship on Indigenous law has shown so powerfully, First Nations have long sustained diverse legal orders and systems of governance that are integral to their communities.³⁴ As more and more communities build their capacities for self-governance, any viable political economy of legal change in these contexts must account for community dynamics and situate these within overlapping, polycentric systems of land rights and lands governance.³⁵

Leadership and Political Institutions

To develop an answer to the puzzle of inalienability described above, I turn to the roles and commitments of community leaders who help to shape the politics and political structures of their communities. I explore these aspects of property transitions to explain why some Indigenous communities in Canada have sustained inalienable land rights while others have opted to liberalize land markets as a means of attracting outside investment, new forms of collateralization, and non-member population growth.

Departing from predominant attempts to explain property transitions using theories about legal evolution or powerful interest groups, the framework I apply draws from an emerging body of research on leadership and political institutions as determinants of institutional stasis and change. Following recent efforts by organizational theorists to understand these processes in settings like

labour unions and business corporations,³⁶ I model Indigenous land reform as a special type of the public goods problem analogous to team production within a firm. In their collective efforts to plan, design, and implement property regime changes, this model assumes that community members look to a leader with privileged and valuable information that can help them coordinate their land reform activities. In this model, community members agree to incur the individual costs of inalienability as one form of compensation or “rents” to the leader insofar as that leader continues to deliver the collective benefits of “good” leadership.

Following earlier studies in this vein, my approach reveals that different forms of leadership rents – representing different political, cultural, or ideological commitments on the part of leaders – may be a crucial factor in explaining institutional dynamics. In particular, for those leaders committed to inalienable land rights and the preservation of the community’s land base for the future, their instrumental value as leaders could be the key to unlocking group members’ willingness to sacrifice some of their potential private gains from liberalization. Inherent information asymmetries in the land reform process therefore set the conditions under which leaders and community members can forge a distinctive type of social contract – a bargain that sustains a system of law and practice requiring members to forgo some of the returns they might expect from undertaking land reform in the first place.

There is, of course, considerable uncertainty and instability associated with making difficult-to-sustain property regimes contingent on individual leaders. But when such prominent individuals act at pivotal historical moments in a community’s land reform process, they may also have opportunities to shape political institutions – that is, rules for collective decision making – to address the dual challenges of uncertainty and instability and achieve a kind of long-term institutional equilibrium.³⁷ Those political institutions generate a new set of structural conditions going forward and determine how communities make future decisions around land reform after individual leaders are gone. As a result, in communities that sustain inalienability, we would expect

to see certain forms of collective decision making that differ from those in communities pursuing liberalization.

This type of model analogizes community land reform to a collective enterprise more closely resembling co-production in an organization than the contested terrain of national electoral politics. It offers a way to connect the economic logic of individual interests and incentives with a genuine role for shared goals and successful collective action. In doing so, it escapes some of the latent pessimism in property theory about a community's prospects for maintaining lasting control over their lands.

At the same time, this model turns on two assumptions: first, that individual community members face uniform private incentives to favour liberalized land regimes, and second, that community members' preferences for land reform are well defined from the outset. Clearly, both assumptions can serve only as initial generalizations that oversimplify the diversity of preferences and certainty of knowledge related to land reform within any given community. While these assumptions may yield good predictions in some cases, they are much less likely to hold in others. In later chapters, I relax both assumptions, making way for a closer study of how ideas, beliefs, and public discourses bear on community decisions about land rights and supporting political institutions. While the precise role of ideas in institutional change has long eluded social scientists, new approaches to studying the interaction of ideas and interests have opened promising ways to study these phenomena – especially where ideas are put forward by leaders or “political entrepreneurs” who use their positions of influence to shape public discourse and beliefs about the costs, benefits, and risks associated with change.

A Brief Map of the Argument

This study contributes to research on the political economy of legal change by using tools in game theory and institutional analysis to move beyond conventional stories about the driving forces of property regimes and economic change. It also contributes to a

growing body of empirical work on land reform in Indigenous communities in Canada and globally, using a series of community-level case studies as “analytical narratives” to develop and evaluate a theory of change centred on the role of leadership and political institutions.³⁸ This introductory chapter identified the central puzzle of inalienability explored in the book and sketched out my approach to answering that puzzle from an institutionalist perspective.

Chapter 2 establishes the theoretical and historical background for the book. Indigenous communities in Canada have, for most of colonial history, confronted strict constraints on the alienability of their land rights. In this chapter, I assess how well property scholarship’s conventional stories about land regime change explain this history. **Chapter 2** also introduces the modern era of Indigenous land tenure reform and the divergence in approaches to inalienability that appears to be emerging across different communities.

It is this divergence that the formal model developed in **Chapter 3** seeks to explain by bringing new attention to the role of community leaders in determining paths of institutional stasis and change. Before describing the model, I canvas a small but growing literature on the role of leaders within the field of law and development and point to existing gaps in our understandings of what it is that leaders actually “do” to influence or change institutions. To a degree, the model developed in **Chapter 3** addresses these gaps and offers a new perspective on property transitions that can be used to explain why First Nations in Canada have taken such divergent approaches to inalienability. **Chapter 4** then develops two comparative case studies to evaluate the predictions of the theoretical model.

In **Chapter 5**, I modify and extend the baseline model developed in **Chapter 3** to account for situations in which community members’ preferences for land reform are undefined or uncertain. To do so, I integrate new research on ideas and public discourses from institutionalist theory to show how key leaders not only offer instrumental value but also work to persuade their followers

about the benefits and costs of inalienability as a precondition for broader community agreement to pursue leaders' aims. I develop – more briefly than in [Chapter 4](#) – two additional case studies to evaluate some of the predictions from this revised model. [Chapter 6](#) concludes with a summary of my findings and discusses several directions for future work.

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