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## Aboriginal title or Legal Personhood for Land?

Melany Banks

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**Abstract:** In 1983, British Columbia granted Carrier Lumber Ltd a license to engage in industrial logging within the territory of the Tsilhqot'in Nation. The Xenigwet'in First Nations government (part of Tsilhqot'in Nation) sought an injunction to halt Carrier. For the Xenigwet'in, the proposed logging would destroy the forest in which they lived and hunted. In order to gain the power to stop the proposed logging, the Xenigwet'in fought for a declaration of Aboriginal Title. After a lengthy trial, the Supreme Court granted their claim. This may sound like a story about victory for the Xenigwet'in people. After a long, and hard fought battle, they succeeded in gaining Aboriginal Title. What this characterization misses is that, in order to gain Title, the Xenigwet'in had to accept not only the process imposed on them by the Canadian government but also the implicit assumptions that the government relies on to justify its current (and, to a degree, past) relationship with Aboriginal peoples. Thus, Aboriginal Title requires that Aboriginal peoples choose between protecting the land by accepting these assumptions, or rejecting the assumptions but, in most cases, losing the land. In New Zealand as part of the process of deciding land claims, a new option has been added. Instead of granting Aboriginal Title to land, in some cases, the land itself is granted legal personhood. Such an approach de-couples the question of the political relationship between Aboriginal peoples and the government from the fight to protect the land. I argue that there is great value in separating these questions. By doing so, the government can better support the autonomy of Aboriginal peoples and be more inclusive of alternative perspectives. This approach (often endorsed in environmental philosophy) will be beneficial to non-Aboriginal peoples as well.

In 1997 Chief Justice Lamer of the Supreme Court of Canada wrote the following about Aboriginal title:

The justification for this special approach can be found in the nature of aboriginal rights themselves... *those [aboriginal] rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory.* They attempt to achieve reconciliation by 'bridging of aboriginal and non-aboriginal cultures.' Accordingly, 'a court must take into account the perspective of the aboriginal people claiming the right... while at the same time taking into account the perspective of the common law' (*Delgamuukw v British Columbia*, para 81) [emphasis added].

For Lamer, reconciliation in the above quote refers, not to the overarching goal of reconciliation between the Canadian government and Indigenous peoples, but rather finding a way to bring together Indigenous and non-Indigenous claims. It is not about addressing past injustices, but rather creating space and recognition for some Indigenous claims. Lamer is referring, in particular, to the test that will be used to determine Aboriginal title, a legal concept that confers a

type of legal ownership right over land to Indigenous peoples. Once Aboriginal title is granted, the Indigenous group has a legal right (although it is not absolute) to decide how the land will be used. (*Tsilhqot'in Nation*, para 73.)

While having Aboriginal title is better than having no legal claim or control over land, it does a poor job of “reconciliation” as it is understood in the final report from the Truth and Reconciliation Commission. The report describes reconciliation in this way:

To some people, ‘reconciliation’ is the re-establishment of a conciliatory state. However, this is a state that many Aboriginal people assert has never existed between Aboriginal and non-Aboriginal people. To others, ‘reconciliation’ in the context of Indian residential schools, is similar to dealing with a situation of family violence. It is about coming to terms with events of the past in a manner that overcomes conflict and establishes a respectful and healthy relationship among people, going forward (page 3).

Considering the above description of “reconciliation,” it is clear that in Lamer’s writing he is not considering “coming to terms” with the past, or seeking to establish a “respectful and healthy” relationship between Indigenous and non-Indigenous peoples. Instead, it appears that Aboriginal title is a way of addressing competing claims for land between Indigenous and non-Indigenous peoples, a method that presents the conflict as against a background where the Crown has (at least somewhat) legitimate control over the land in question.

As Aboriginal title fails to provide a route to “reconciliation”, it becomes yet another legal concept that works within the framework of the Canadian legal system and relies on the assertion that the Canadian government has ultimate authority and control over all land in Canada. Aboriginal title provides a way for Indigenous people to make a legal claim and argue for continued use of land that was, historically, their traditional territories. As such, this process assumes that all land in Canada belongs to the Canadian government, and justice simply requires that Indigenous people have a method for questioning (and refuting) that assumption to a certain degree in some cases. Aboriginal title leaves Indigenous people in the position where they are

forced to participate in a process that is based upon the claim that the Crown has legitimate authority to determine who gets what land and for what use. Alternatively, Indigenous people can eschew the process entirely, but in doing so, they may end up being driven from their land and traditional territories as legal ownership is granted to another group or company.

It is this issue of having to accept certain assumptions in order to participate in the legal process that I will examine in this paper. I begin with an examination of Aboriginal title, its history, and how it is being applied in the court. I then compare this process to a case in New Zealand where a land dispute between an Indigenous group and the government was addressed by granting legal personhood to the land. While at first, such an approach may appear radical, upon closer examination this option allows for the separation of the more problematic claims about Indigenous and non-Indigenous legal relations from the protection of the land. Further, by focusing on the land, it can also provide a better path to reconciliation by recognizing and affirming a different kind of relationship between humans and land.

### **1. The Canadian Approach: Aboriginal title**

*St Catharines Milling & Lumber Co. v The Queen* (1887) was a dispute between the federal government and the Province of Ontario over the ownership of former “Indian lands” and the rights to timber on that land (p. 578-9). The Judicial Committee of the Privy Council, affirming the ruling of the Supreme Court of Canada, held that Aboriginal title was allowed only at the Crown’s pleasure, and could be taken away at any time (*ibid.*, p. 647-8). Here the Indigenous population was treated as subordinate to the Crown, as noted in the decision, “nor can I see anything in that proclamation that gives the Indians forever a right in law to the

possession of any lands against the crown. Their occupancy under that document has been one of sufferance only. Their possession has been, in law, the possession of the crown” (*ibid.*).

Almost a century later the Supreme Court altered its position on Aboriginal title in *Calder v British Columbia (Attorney General)* (1973) where the court agreed that the Nisga’a had had title to the land at some point.<sup>1</sup> In 1984 in *R v Guerin*, the court determined that Aboriginal title was a *sui generis* right that included a fiduciary duty owed by the Crown to Indigenous peoples (p. 382) In *Delgamuukw* (1997) the Court sets out a test to determine if an Indigenous group has Aboriginal title (p. 117). The test is then further clarified in *Tsilhqot’in Nation*.

The legal concept of Aboriginal title has changed significantly from *St Catharines Milling* where Aboriginal title was at the discretion of the Crown to *Tsilhqot’in Nation* where Aboriginal title emerges from a history of occupation and use prior to the Crown’s declaration of sovereignty (*Delgamuukw*, para 143). The current concept of Aboriginal title recognizes that Indigenous peoples were present in North America before the arrival of British and French colonists. It recognizes that prior and continued occupation of land creates some kind of right to continued use of that land. It does not treat this right as absolute, and therefore even in *Tsilhqot’in Nation*, the Supreme Court of Canada relies on the background assumption that all land in Canada is, ultimately, the property of the Crown.

To see how Aboriginal title works (and does not work), I turn to the case in *Tsilhqot’in Nation* and the story of the Xenigwet’in. The Xenigwet’in are one of the six bands that make up the Tsilhqot’in Nation. The Xenigwet’in live in a remote valley in central British Columbia (para 3). In 1983 the province of British Columbia granted Carrier Lumber Ltd. a licence to engage in industrial logging within the Tsilhqot’in territory. The Xenigwet’in First Nations

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<sup>1</sup> The court agreed that the Nisga’a had Aboriginal title at some point, but was split as to whether the title had been extinguished.

government objected and sought an injunction to halt Carrier (para 5). The Premier at the time, Bill Bennett, promised the Xenigwet'in that there would be no further logging without their consent. However, talks between the Xenigwet'in and the provincial Ministry of Forests ended in an impasse as the Xenigwet'in claimed a right of first refusal to the proposed logging. As a result of this conflict, the original claim was amended to include a claim by the Tsilhqot'in people for Aboriginal title over the relevant area (*ibid.*).

Rosenberg and Woodward write that in this case the Tsilhqot'in people did not want to go to court, but rather had to as their very survival as a group was at stake. (p. 949-50) The Chilcotin forest district where they lived had been clear-cut all around them. Their traditional practices of hunting and trapping required the forest, and without it the way of life of the Tsilhqot'in people would be forced to change drastically. (p. 949) A claim for Aboriginal title was an act of last resort. In order to prevent the destruction of the forest that was integral to the traditional practices of the Xenigwet'in, and so to save their society that was located in a largely inhospitable area, the Xenigwet'in's best course of action was to appeal to the (yet undefined) legal concept of Aboriginal title (p. 946).

In *Tsilhqot'in Nation* the Supreme Court described Aboriginal title as a "collective title held not only for the present generation but for all succeeding generations" (para 74). Once Aboriginal title has been found, it confers ownership rights such as "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefit of the land, and the right to pro-actively use and manage the land" (para 73). These beneficial interests in the land are not absolute. They can be restricted in ways consistent with the "group nature of the interest and enjoyment of the land by future generations," and in cases where the government can justify the infringement on the "basis of a

compelling and substantial public interest” (para 88). While Aboriginal title confers a certain level of control over the land, it is important to note that it does so within a framework that accepts Crown sovereignty over the land, and the process itself was created by non-Indigenous people to apply to Indigenous people.

There are two key issues that arise with a claim for Aboriginal title. The first is that the process is long. For example, *Tsilhqot'in Nation* took twenty-five years from the first Writ of Summons to the decision issued by the Supreme Court of Canada (Rosenberg, p. 950). The first trial before the British Columbia Supreme Court in 2002 continued for 339 days over five years (*Tsilhqot'in Nation*, para 7).<sup>2</sup> This is a problem because the decision in *Tsilhqot'in Nation* draws a clear line between the rights that exist before Aboriginal title is declared and the rights that exist after. For example:

Prior to the establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed (para 89).

Compare this to after title has been declared by the court:

After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s.35... (para 90).

Rosenberg and Woodward identify a few key issues that arise from these passages in the decision. First, Indigenous groups need to work towards a declaration of Aboriginal title as soon as possible because the relationship between the Crown and the relevant Indigenous group changes significantly upon declaration of title. Rosenberg and Woodward point out that, without

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<sup>2</sup> It is possible that future cases will be faster as Justice Vickers was breaking new ground by finding a largely nomadic group had occupied the land to an extent sufficient to ground a land claim, a finding that differed from earlier court cases.

title, there is an ongoing “jeopardy” faced by the Indigenous group in delayed court proceedings as “mining, forestry, road building, hydroelectric projects, etc., can all proceed without the need to obtain Aboriginal consent, up to the point of the court declaration” (p. 960). In fact, this seems to create an incentive to act now for those who wish to engage in these activities on lands that may ultimately fall under Aboriginal title. The pressure imposed by the government upon Indigenous peoples to act quickly or risk losing control over the land further emphasizes that this relationship is moving, not towards reconciliation, but rather is another way in which the government forces Indigenous people to subordinate their power to that of the Crown.

Secondly, the recognition of Aboriginal title in the courts remains problematic. John Borrows argues that while the *Tsilhqot'in Nation* decision declares that “[t]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada,” the decision in *Tsilhqot'in Nation* in fact relies on such a conception of the relationship between Indigenous and non-Indigenous peoples (para 69). This is illustrated by the claim, “At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province” (*Tsilhqot'in Nation*, para 69). Borrows questions how we can acknowledge, as the court did in *Calder*, that the land was owned by Indigenous peoples prior to the assertion of European sovereignty while also believing that the Crown acquired title by merely asserting sovereignty. It appears that some version of *terra nullius* must be in the background (*Tsilhqot'in Nation* para 69, Borrows p. 703). This suggests that the Crown views the existence of Indigenous people in Canada prior to the declaration of sovereignty as inadequate for full property rights, as if Indigenous peoples and their occupation of the land were somehow not sufficiently real to deny the colonists their ability to discover a new land. As long as the Canadian government holds on to this idea that the Crown has underlying title, then the



relationship between Indigenous peoples and the Crown will always be one where the Crown has ultimate authority. This is not the language that would be used if we were to take seriously the idea that Indigenous peoples and European settlers came together as two equal sovereign nations. It is also not the language we would use if the Crown were concerned with achieving reconciliation between Indigenous and non-Indigenous peoples.

The implicit (and at times explicit) assumptions the legal relationship between the Crown and Indigenous peoples relies on colours the Aboriginal title process. By participating in a claim for Aboriginal title, an Indigenous group may be able to secure continued and future use of its traditional territories, but the process itself requires that the Indigenous group submit to the authority of the Crown. In this way, Aboriginal title does not “come to terms” with the past, and it does not create a “respectful and healthy relationship.”

Perhaps it is too much to ask the application of Aboriginal title to address the many issues and obstacles that we face on the road to reconciliation. What we can ask is that an offer of control over one’s traditional territories ought not come with an acceptance of the sovereignty of the Crown over all land in Canada. There must be a better way. In what follows I turn to the case of the Whanganui River and the possibility of giving land legal personhood. This approach has the ability to de-couple the two questions – protection of land and authority of the Crown – when it comes to addressing conflicts over land. When considered in light of the goals of many Indigenous peoples in Canada, this may be the more ethical option.

## **2. Whanganui River**

In August 2012 the Maori of the Whanganui River and the government of New Zealand signed an agreement that identified the Whanganui River as a “legal person.” The Whanganui

River is the longest navigable river in New Zealand. For the people of the River, the Whanganui Iwi, the River is central to both their health and wellbeing. (Hsiao, p. 371) For over 150 years the Whanganui Iwi have fought for their rights in regards to the River, often attempting, unsuccessfully, to fight for control over fishing, or to stop the government from removing resources such as gravel from the River (*ibid.*, p. 372). The Maori did have rights to the River, and these rights remain unextinguished even by law.

The situation of the Whanganui Iwi and the Maori peoples, in general, is similar to that of Indigenous peoples in Canada. In both cases, there is an indigenous population that occupied the land before European colonization. In both cases that population is now unjustly required to jump through the legal hoops of the colonizers in order to secure rights in regards to their traditional lands. As such, Indigenous peoples in New Zealand also make claims for use (or continued use) of particular areas of land and, as in Canada, they have fought in court for recognition of such rights for many generations.

The August 2012 Tūtohu Whakatupua agreement recognizes the Whanganui River as “Te Awa Tupua” meaning a living being, “an individual whole incorporating its tributaries and all its physical and metaphysical elements from the mountains to the sea”(*ibid.*, s.1.2). It also recognizes the “inseparability of the people and River” (*ibid.*, s.1.3). The Tūtohu Whakatupua further calls for “statutory recognition of Te Awa Tupua as a legal entity with standing in its own right” (s.2.1). This means that the river bed was returned to the River itself, not to the Whanganui Iwi. As a result, the land in question can no longer be “owned,” at least not under the common law conception of property ownership. This outcome is beneficial for the Whanganui Iwi (and Maori more generally) who do not think that land can be owned.

The practical implications of this decision are that the River will have two guardians: one from the Crown and one from the Whanganui Iwi. Their role will be the protection of the River (Shuttleworth). The values which will guide their decisions have yet to be determined, but it is logical that they will be guided by the idea that they must do what is in the best interests of the River. What this seems to exclude necessarily is any resource extraction or similar actions by the Government or third parties that will have a lasting or harmful impact on the ecosystem of the Whanganui River.<sup>3</sup> In this way, as the River is protected so too will the use of the River by the Whanganui Iwi.

The case of the Whanganui River is not the first of its kind in New Zealand. The Te Urewera Act 2014 granted legal personhood to a former national park. When the Act took effect, the government gave up formal ownership of the 821-square-mile park, and the land became a legal entity with “all the rights, powers, duties and liabilities of a legal person” (s11(1)). Chris Finlayson, New Zealand’s Attorney General, said this issue was resolved once his Government took the Maori perspective into consideration. He said, “In their worldview, ‘I am the river and the river is me... Their geographic region is part and parcel of who they are’” (*quoted in Rousseau*). As such, legal personhood of the park is in line with the world view of the Maori.

There are political aspects to this approach that are important to consider. While the declaration of legal personhood of land was rooted in Indigenous land claims in New Zealand, arguably this does not need to be the case. This depends in part on whether one interprets the Te Urewera Act as acknowledging the land as a legal entity *because* of the Maori belief system, or if one interprets the Act as *acknowledging* the Maori beliefs (e.g. that the river is part of who the Maori are) while also upholding values that are important to the non-Maori population (e.g.

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<sup>3</sup> *Ibid*. It is important to note that declaration of the River as a legal person was not the only remedy and that the settlement regarding monetary compensation for historical claims is still undergoing

property rights). If the Act is interpreted in the first way, then the granting of legal personhood to land is important because it works towards reconciliation with the indigenous population by placing a high value on its belief system. If the Act is interpreted in the second way, then the Act may avoid some of the political questions about Indigenous sovereignty and instead begin these negotiations at a place of equality where both parties seek to get something of value. At first blush this second interpretation may not seem as valuable as the first, but, I argue, there are benefits.

If, by granting legal personhood to land, we can do so without engaging in the discussion of Indigenous sovereignty then it means that (a) we may be able to more quickly put in place mechanisms to protect the land in question while questions of Indigenous rights occur in parallel, but separate, judgements, and (b) we avoid basing these decisions on problematic assumptions like *terra nullius* that are used to justify the Crown's sovereignty over land.

For (a), the benefit may simply be another practical outcome – it could speed up the process. Indigenous self-government is complicated as is the relationship between Indigenous and non-Indigenous peoples in Canada. By separating these questions, we allow the slow process of acknowledging various Indigenous rights to continue on its present path. While, arguably, it would be better if the process could move faster, the hope is that in each successive court case the relationship between the two groups is improved. If this process is tied to a time-sensitive issue, such as with the Xeni Gwet'in seeking to stop further logging of their territory, we may rush through the process and come to a conclusion that is worse than what we could do if those two goals were de-coupled from one another.<sup>4</sup>

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<sup>4</sup> One example of a worse outcome might be if we had stopped the evolution of Aboriginal title as it was defined in *St Catharines Milling*. It would be faster if we did not question the decision on *St Catharines Milling*, but the outcome would put Indigenous peoples in a much worse position regarding claims to traditional territories than they are post-*Tshilqot'in Nation*.

For (b), the analysis is similar. In order for the Xeni Gwet'in to stop the logging and protect their territory, they are forced to engage in a process that declares them as unequal with the Crown. They have to accept the parameters set up by the Supreme Court of Canada, parameters determined by non-Indigenous peoples, as to what is required to show that they have title in their traditional lands. They must accept these claims, and then they bear the burden of proving that, in fact, they do have a claim to their traditional territories. In a way, they have to accept the assumption, as identified by Borrows, that European colonization occurred in a situation of *terra nullius*. So what began as the Xeni Gwet'in acting, within the law, to protect their traditional territory and traditional practices from a commercial logging company, becomes an implicit acknowledgement of the many problematic principles--in particular that the Crown gained legitimate ownership over all of Canada through an assertion of sovereignty despite the land being already occupied--on which the non-Indigenous law is based.

By pursuing legal personhood for land, it may be possible to avoid these political problems. It may be possible to focus on protecting the land itself and leave the question of Indigenous sovereignty and the relationship between Indigenous and non-Indigenous peoples to other court decisions and other political and non-political policies and actions. This may allow the process to move faster and the land will be protected before it is too late. Whether legal personhood for land is a better option depends, at least in part, on whether it would be valuable to Indigenous peoples.

### **3. Goals of Indigenous peoples**

I cannot speak for the goals of Indigenous peoples in Canada. What I can do in this section is briefly identify some goals that have been made clear in various reports where

Indigenous people were interviewed.<sup>5</sup> The Royal Commission on Aboriginal Peoples (RCAP) was established in 1991 following the Oka Crisis. Its mandate was to study the evolution of the relationship between Indigenous peoples, the government of Canada, and non-Indigenous peoples of Canada (Doerr). One part of the report included a public hearings process where the RCAP visited Indigenous communities across Canada, heard briefs from over 2000 people, and included more than 350 research studies (*ibid.*). It is also important to note that there were seven Commissioners on the RCAP and four of the seven identified as Indigenous (*ibid.*).

In 1996 the RCAP published their report. In the introduction of Volume 2, the report identifies the problem posed by the doctrine of *terra nullius* as follows:

A country cannot be built on a living lie. We know now, if the original settlers did not, that this country was not *terra nullius* at the time of contact and that the newcomers did not ‘discover’ it in any meaningful sense (p. 1).

This statement is important when considered in light of the arguments discussed by Borrows above. While the Court and Canadian Government may claim that the doctrine of *terra nullius* never applied in Canada, the assumptions of *terra nullius* still appear to operate in the background. In the report, this leads to a central concern of Indigenous peoples – self-government. While Indigenous people have been ruled by the French, British, and then Canadians for over 400 years, they do not recognize these governments as having legitimate authority over them as they never provided their consent (p. 3-4).<sup>6</sup> It is important moving forward that this is recognized. As Herb George of the Gitksan and Wet’suwet’en stated:

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<sup>5</sup> While Indigenous peoples across Canada share many beliefs, values, and practices, they do not speak with a single voice. Here I do not want to assume that all Indigenous people believe or think one thing. In order to get a sense of some of the beliefs and values that are commonly held among many (but not all) Indigenous peoples, I have turned to the reports in this section.

<sup>6</sup> Consent is required under the right to self-determination. The argument is that in various international treaties that Canada has signed, there is a claim that all people have the right to self-determination, which includes not imposing a government on a people without their consent.

What is required here is not an inquiry of the current law or international law to determine the source of our rights. What is required here is the recognition that our rights exist in spite of what international law says, in spite of what common law says, and in spite of what have been the policies of this government to the present day.

If this issue is to be dealt with in a fair way, then what is required is a strong recommendation from this Commission to government that the source of our rights, the source of our lives and the source of our government is from us. [T]he source of our lives comes from the Gitksan-Wet'suwet'en law (p. 107).<sup>7</sup>

This focus on recognition is important. While the land claims process is not perfect (and imperfection on some level may be acceptable), it is a problem if engaging in the process requires an implicit acceptance by Indigenous peoples of assumptions like *terra nullius* that do not recognize Indigenous sovereignty.

Land is central to many Indigenous people, and “land” includes not only the earth in a particular area, but also lakes, rivers, streams, seas, air, sky, sun, moon, planets, stars and the full range of living and non-living entities in nature (*ibid.*, p.113). As Grand Chief Harold Turner of the Swampy Cree Tribal Council noted:

The Creator gave us life, inherent rights and laws which governed our relationship with nations and all peoples in the spirit of coexistence. This continues to this day.

We as original caretakers, not owners of this great country now called Canada, never gave up our rights to govern ourselves and thus as sovereign nations. We, as sovereign nations and caretakers of Mother Earth, have a special relationship with the land.

Our responsibilities to Mother Earth are the foundation of our spirituality, culture and traditions... Our ancestors did not sign a real estate deal, as you cannot give away something you do not own (*ibid.*, p. 428).

Much like the discussion of sovereignty above, this is a representative belief, although one that appears to be widely held. What this tells us is that some Indigenous peoples see their relationship with the land as tied up in their culture and traditions, such that loss of land is

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<sup>7</sup> Not all Aboriginal people view sovereignty the same way, but this quote is fairly representative of those in the report. The idea here is not to suggest this is the “Aboriginal” position, but rather to show that if this is the desire of some Aboriginal peoples, participating in the process to gain a declaration of Aboriginal title may result in an important loss in terms of acknowledgment of equality of relationship.

also the loss of culture and tradition. This is repeated in other quotes, like that from Elder Alex Skead who says that “This is my body when you see this mother earth, because I live by it” (*ibid.*, p. 427).<sup>8</sup> Indigenous peoples are also positioned as “caretakers” of the land, rather than owners of it. In this role, the Indigenous person is responsible to the land and must protect and lend aid. This is that person’s obligation. As such, a loss of land in such a case could be viewed as a failure of that duty.

#### **4. Analysis**

The above illustrates part of what may be at stake in a land claim for an Indigenous people. It is not just land, but their culture, traditions, and worldview that may be harmed. In order to truly reconcile and rebuild trust between Indigenous and non-Indigenous peoples in Canada, the assumptions of the past must not be repeated in current and future dealings. It is not simply a question of what land Indigenous peoples control, but also how that relationship is treated by the non-Indigenous population. Is it the case that the Indigenous group is granted the land by a charitable government? Or was the land always under the control and guardianship of the Indigenous group? The way the question is asked and the shape the process takes is as important as the result.

The political and practical reality is that discussions of the relationship between Indigenous and non-Indigenous peoples as part of the discussion of Aboriginal title will slow that process. This delay may impede the ability of Indigenous peoples to continue with their traditional practices (like the Xeni Gwet’in). The process of gaining a declaration of

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<sup>8</sup> Full quote: “We are so close to the land. This is my body when you see this mother earth, because I live by it. Without that water, we dry up, we die. Without food from the animals, we die, because we got to live on that. That’s why I call that spirit, and that’s why we communicate with spirits. We thank them every day that we are alive...”



Aboriginal title creates this tension between avoiding an implicit agreement with the politics of colonization and the speed at which Indigenous groups must act in order to protect the land (before, for example, a resource company is granted permission by the Crown to remove resources in a way that destroys the ability of the Indigenous group to continue to use the land and, for many Indigenous people, causes them to fail in their obligations to care for the land).

Are these problems avoided if, instead, the land is granted its own legal personhood? The short answer is that no, many of these problems persist. What it does allow is for the decoupling of the question of the sovereignty of Indigenous people from the process of protecting the land. The hope is that the former would continue even if not tied directly to the question of land use. Further, granting the land legal personhood acknowledges the perspective of many Indigenous peoples that land is a living entity and that it cannot be owned. In the case of the Whanganui River, the proposal is that there would be two guardians for the River, one from the Whanganui Iwi, and one from the New Zealand government. They would be in charge of making decisions for the Whanganui River that are in the best interests of the River. While this is not quite the relationship envisioned by Indigenous groups who see themselves as guardians, this does present an important step in a new and possibly better direction.

Making decisions for land from within the framework of “guardians”, where decisions are to be made in the “best interests” of the land, creates boundaries around the types of activities that are permissible. Activities that are likely to destroy the land, the ecosystems, and cause major destruction to the movement of animals would be difficult to justify under such a system. Perhaps some resource extraction would be permitted, but likely little and it would have to be sustainable in nature. If the Chilcotin forest district in which the Xenic

Gwet'in live is a legal person, then in order for Carrier to engage in logging it would have to be approved by the guardians of the forest. It is unlikely that clear-cutting would be permitted. In such a case the Xenigwet'in would then be able to protect the forest, continue their traditional practices, and engage with the non-Indigenous population regarding questions of Indigenous sovereignty when, and if, they so choose.

## **5. Conclusion**

In the above, I have compared two different approaches to addressing the relationship of Aboriginal people to the land: declaration of Aboriginal Title and granting legal personhood to the land itself. Each has practical and political benefits and drawbacks. To date, no land has been granted legal personhood in Canada so it remains unclear what that might look like. What the above does illustrate is that the process of Aboriginal title in Canada requires implicit acceptance of assumptions that are rejected by many Indigenous peoples, including the doctrine of *terra nullius* or the authority of the Canadian government in general. This is not the path towards reconciliation as identified by the Truth and Reconciliation Commission. The truth of the shared history of Indigenous and non-Indigenous peoples is being hidden in assumptions instead of being acknowledged. Indigenous peoples are forced to submit rather than treated with respect. The law has become a vehicle for oppression rather than liberty.

Granting legal personhood to land aligns with the beliefs of many Indigenous peoples who believe that the land is a living entity which cannot be owned and that humans are the caretakers of the land. Legal personhood will protect land from destruction through resource extraction, which will allow Indigenous peoples to continue to occupy and use the land. Legal personhood for land is not a perfect solution, and it cannot address the larger conflict over the

sovereignty of Indigenous peoples. However, the problems with Aboriginal title suggest that legal personhood for land may be a better, and more ethical, path to reconciliation.

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