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Book Review



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Abstract

In June of 2021, the federal government passed legislation that affirmed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and began the process of formalizing its provisions in Canadian law. Among other things, UNDRIP states that Indigenous peoples have rights of self-government and rights of ownership, use, and development of traditionally-held lands and resources.

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Book Review

Inalienable Properties: The Political Economy of Indigenous Land Reform by Jamie Baxter¹

LIAM CARSON²

IN JUNE OF 2021, the federal government passed legislation that affirmed the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and began the process of formalizing its provisions in Canadian law.³ Among other things, UNDRIP states that Indigenous peoples have rights of self-government and rights of ownership, use, and development of traditionally-held lands and resources.⁴

Across Canada, Indigenous communities must navigate issues related to uncertain legal interests in traditional territories, environmental changes affecting those territories, and various pressures related to questions of resource

1. (UBC Press, 2020) [Baxter, *Inalienable Properties*].

2. JD Candidate (2022), Osgoode Hall Law School.

3. *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

4. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/Res/61/295 (entered into force 13 September 2007, endorsed by Canada 10 May 2016), arts 4, 26 [*UNDRIP*].

development.⁵ In that context, questions of how Indigenous governments can establish or reform property regimes are of the utmost importance.

Inalienable Properties: The Political Economy of Indigenous Land Reform (“*Inalienable Properties*”) offers an alternative approach to questions of property law reform that draws from a wide range of disciplines, both emerging and established. Jamie Baxter, a law professor at Dalhousie’s Schulich School of Law, writes and publishes widely on topics such as Indigenous land and property law, political economy approaches to various governance issues, and rural–urban connections.⁶ Through this new work, he argues that lessons learned from studies of team production and from leadership in political institutions like labour unions can provide a helpful lens for studying the complex factors involved in Indigenous communities’ efforts to reform their property laws.⁷

Baxter sets out to address what he calls “the puzzle of alienability.”⁸ To do so, he draws on a wide range of disciplines, from long-established academic works on alienability and property law to newer research on the mechanics of leadership in private organizations. Despite canvassing such a broad field, Baxter nevertheless identifies a gap in the scholarship that he intends to fill:

Much has been written...about how First Nations *should* reform their property regimes...I am interested in a different kind of inquiry. Taking it as a given that goals for legal and economic reform will be set by and within Indigenous communities, I aim to understand...how those goals might come to be established and sustained.⁹

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5. See generally, Titi Kunkel, “Aboriginal values and resource development in Native Space: Lessons from British Columbia” (2017) 4 *Extractive Industries & Society* 6 (on Tsilhqot’in resistance to mining development within their traditional territory); Ryan Bowie, “Indigenous Self-Governance and the Deployment of Knowledge in Collaborative Environmental Management in Canada” (2013) 47 *J Can Studies* 91 (on the integration of Indigenous governance and knowledge into resource management in Ontario and British Columbia); Stephen Wyatt et al, “Strategic approaches to Indigenous engagement in natural resource management: use of collaboration and conflict to expand negotiating space by three Indigenous nations in Quebec, Canada” (2019) 49 *Can J Forest Research* 375 (on the participation of Atikamekw Nehirowisiwok Nation, Huron Wendat Nation, and Mi’kmaq nations in forestry management in Quebec).
 6. See *e.g.* Jamie Baxter, “Leadership, Law, and Development” (2019) 12 *L & Development Rev* 119; Jamie Baxter, “No Lawyer for a Hundred Miles? Mapping the New Geography of Access to Justice in Canada” (2015) 52 *Osgoode Hall LJ* 9; Jamie Baxter, “Legal Institutions of Farmland Succession: Implications for Sustainable Food Systems” (2013) 65 *Maine L Rev* 382; Jamie Baxter, “From Integrity Agency to Accountability Network: The Political Economy of Public Sector Oversight in Canada” (2015) 46 *Ottawa L Rev* 231.
 7. Baxter, *Inalienable Properties*, *supra* note 1 at 12.
 8. *Ibid* at 12-13.
 9. *Ibid* at 5 [emphasis in original].

Put differently, Baxter sees a lack of scholarly attention to the ways that Indigenous communities can determine their own goals for property regime reform and how they might sustain progress towards those goals. To fill this gap, Baxter creates a game theoretical model in which decisions taken by Indigenous communities to maintain, modify, or eliminate inalienability rules are regarded as a “special type of the public goods problem,” drawing from models of analogous situations used to describe “team production within a firm.”¹⁰ Pulling back a bit, Baxter places his work in the broader academic context of work on alienability rules in general, setting the results of this study against Demsetzian analysis—a school of thought that predicts that exclusionary property rights will inevitably develop, and related alienability regimes will always emerge, as soon as the benefits of alienability outweigh the social costs associated with change.¹¹

Baxter’s valuable contribution diverges from previous studies of institutional change vis-à-vis alienability rules by drawing on emerging scholarship that explores the role of leaders as individuals with specific “aims and attributes” that have measurable effects on institutional outcomes.¹² In the first chapter, Baxter sets the scene by introducing the central question: “What...does the political economy of land reform tell us about prospects for the future of legal pluralism in Canada?”¹³ In chapter two, Baxter gives readers an effective introduction to the subject matter needed to understand his approach to the problem. Histories of alienability scholarship and of the inalienability of Indigenous lands in Canada are distilled down to twenty-four readable pages that give enough background information for readers unfamiliar with one (or perhaps both) of those areas.

In chapter three, Baxter introduces readers to his model, his answer to the question posed in chapter one. The model describes the relationship between the following factors: leaders’ aims regarding alienability, the material or non-material rents¹⁴ those leaders extract from communities, political institutions that emerge in times of changing alienability rules, and the decisions that community

10. *Ibid* at 13.

11. *Ibid* at 19-22. See also Harold Demsetz, “Toward a Theory of Property Rights” (1967) 57 *American Economic Rev* 347; Harold Demsetz, “Toward a Theory of Property Rights II: The Competition between Private and Collective Ownership” (2002) 31 *J Leg Stud* S653.

12. Baxter, *Inalienable Properties*, *supra* note 1 at 45.

13. *Ibid*.

14. *Ibid*. Baxter provides a definition of “rents” for the non-economist readers. In this context, rent is the compensation that leaders demand in exchange for conveying information to their communities—information that only leaders can access. Rents can, and often do, take the form of monetary compensation but can also be non-monetary; for example, greater political autonomy for the leader(s) in future decision-making scenarios. See *ibid* at 42-43.

members make about whether to support leaders' aims. For someone without an economics background, skimming chapter three can be intimidating. However, Baxter's explanation of the model shows his acute awareness of his audience. Of course, there is a somewhat complex equation that relates those listed factors to one another, based on assumptions that are defined beforehand.¹⁵ However, the accompanying text is direct and clear, offering less of an explanation of what each granular piece of the equation is and more of what the model is intended to show and how it does that. Baxter says that the model "provides a central rationale for leadership in addressing the most significant collective action problems associated with land reform, and offers a means for community members to enlarge the set of equilibria in which leaders tell the truth by agreeing to endure the costs of inalienability up to some threshold."¹⁶

Chapters four and five put this model and its assumptions to the test. In chapter four, Baxter tells the stories of Westbank First Nation and Membertou First Nation as each one achieved economic success despite following different alienability paths. Westbank First Nation liberalized their land markets, allowing for allocation of reserve lands to non-members, while Membertou First Nation maintained inalienability of its reserve lands, retaining community control while still achieving considerable economic success.¹⁷ Baxter's previous work on the importance of narratives in property transitions¹⁸ shines through in this chapter. The narratives map out complex times of political and institutional change for both First Nations. Chapter four captures that complexity and introduces the key factors that fill out the model (thereby testing it) for each community. It would be easy for this chapter to feel like a somewhat rote, fill-in-the-blank exercise, taking the facts of each community's transition and plugging them into the model. Instead, readers are treated to compelling and thoughtful depictions of the communities studied that still list the necessary factors for testing the model. The change of pace—from the more abstract discussions necessary to ground the model in scholarship to the narratives that bring it to life—is refreshing and allows Baxter to showcase his talent as a writer.

Whereas both First Nations studied in chapter four are located near midsize urban centres (Kelowna, British Columbia and Sydney, Nova Scotia, respectively), chapter five applies the model to two more remote communities, albeit in a

15. See *ibid* at 59-60.

16. *Ibid* at 63.

17. *Ibid* at 69.

18. Jamie Baxter, "Storytelling, Social Movements, and the 'Evolution' of Indigenous Land Tenure" (2014) 18 AILR 65 at 69 (building on the work of Carol Rose in this area).

more relaxed form.¹⁹ Introducing these communities, Nisga'a First Nation and James Bay Cree Nation, Baxter recognizes up front that some contextual features challenge assumptions made in the model about the communities profiled in chapter four. First, he notes that there will be different incentives exerting different pressures on community members in more remote First Nations.²⁰ Second, both of these First Nations have entered into modern treaties with federal and provincial governments.²¹ For these contextual reasons (and potentially others), Baxter acknowledges that further work may be needed to extend the model to better describe the experiences of these communities and those like them.

The book ends with a forward-looking chapter that suggests how others may take up this project of using non-traditional tools to examine and inform Indigenous land reform projects.²² The chapter begins by restating some of the lessons gleaned from the application of the model to the case studies: that leaders' individual aims and methods play an important role in the development of new alienability regimes; that oft-mentioned issues, like the free rider problem, are less prominent than other obstacles such as information problems; and that rents demanded by leaders play a role in shaping institutions of community governance.²³ With that in mind, Baxter posits future work in this area, suggesting, for example, drawing on studies of corporate governance to examine institutional changes among Indigenous communities in the land reform context.²⁴

For the most part, Baxter's blend of theoretical approaches with a clear narrative voice is effective. Over the course of the book, the value of looking at the puzzle pieces via Baxter's model becomes apparent in large part because of his comfort with storytelling, and these narratives benefit from the structure imparted by the model. For example, in chapter five, uncertainty is introduced as a factor in the model.²⁵ The first half of that chapter gives readers some background on theories of uncertainty, keeping the discussion quite abstract. Then, in describing the development of the two modern treaties in the second half, the role of uncertainty in those political processes is made very clear.²⁶ It does not, however, feel as though any part of those stories—neither of the Nisga'a Final Agreement nor the James Bay and Northern Quebec Agreement—has been obscured by the

19. Baxter, *Inalienable Properties*, *supra* note 1 at 110.

20. *Ibid.*

21. *Ibid.* at 110-11.

22. *Ibid.* at 140.

23. *Ibid.* at 141-42.

24. *Ibid.* at 144-48.

25. *Ibid.* at 113-14.

26. *Ibid.* at 121-37.

focus on uncertainty, or any other factors of the model for that matter. Models necessarily present idealized versions of the real world, and the stories used to measure the strength of those models are almost always messier than the model can represent. As such, it would be no surprise for a model and a case study to be somewhat at odds with one another. In *Inalienable Properties*, that is not the case. This may speak to Baxter's astute choice of case studies, the strength of his model, or some combination thereof. Together, the model and the narratives build compelling arguments for looking at the emergence of alienable property rights (or maintenance of inalienability rules) in the terms offered.

The model predicts that there is a connection between the rents that leaders extract from communities and the political institutions that emerge in times of reform by those leaders.²⁷ Of all the connections drawn between various factors in the model, this connection was the most difficult to grasp. In chapter three, the explanation of the model suggests that "at some level of leadership rents, these payments may come into tension with the fundamental economic goals of land reform."²⁸ The payments here can be monetary, material (in the form of property allotments or other perks), or non-material. Non-material payments refer to sacrifices that leaders ask of community members, for example, foregoing the potential immediate monetary benefits of creating a system wherein community members are allowed to sell land to non-members.²⁹ I found it difficult, in the narratives that followed, to see clear relationships between the types of rents demanded by leaders and the institutions that supposedly developed from them.³⁰ This is not to say that I do not believe there is a relationship; it is only to say that, compared with the clarity found elsewhere, this analysis was more difficult to follow.

Near the end of the book, there is an acknowledgement that this analysis stands not only in opposition to other theories of alienability, but to other, harmful discourses surrounding Indigenous governance. Having discussed the subject of compensation for political leaders in Indigenous communities, Baxter notes that conversations about Indigenous leadership and good governance can reinforce "negative stereotypes around Indigenous self-government."³¹ Baxter hopes that his model, as an alternative to a discourse often fraught with racist

27. *Ibid* at 63.

28. *Ibid* at 62.

29. *Ibid* at 58.

30. *Ibid* at 59.

31. *Ibid* at 151-52.

accusations of corruption that are not borne out by data,³² may “help disentangle legitimate worries about how to achieve and reinforce good governance.”³³ There is certainly value in setting this model in opposition to unsubstantiated claims about corruption. However, it may have been more effective to flag this concern earlier in the book—*i.e.*, during the contextual explanation of Indigenous land governance in chapter two. Its inclusion is nonetheless useful.

Inalienable Properties does not pretend to be a how-to guide for Indigenous communities in selecting features of alienable property regimes. It looks at the experiences of four communities, notes their successes, and offers an explanation for those successes using frameworks not often applied to Indigenous governance. In doing so, Baxter highlights the agency of Indigenous leaders and community members, recognizing and proving that the choices they make are central to understanding institutional, political, and economic outcomes. The author deserves credit for pulling effectively from so many different disciplines to offer a framework that stands in opposition to Indigenous governance discourses that can sideline the actual people involved. While certainly aimed at a particular academic audience, this book is a valuable resource for those involved in the politics of Indigenous land reform.

32. See Sean Jones, “The myth of the *First Nations Financial Transparency Act*,” *The Globe & Mail* (6 November 2015), online: <www.theglobeandmail.com/report-on-business/rob-commentary/the-myth-of-the-first-nations-financial-transparency-act/article27125271>.

33. Baxter, *Inalienable Properties*, *supra* note 1 at 152.

