

# New, old notions of land title

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The Supreme Court's 8-0 [decision](#) recognizing Aboriginal title to land First Nations communities have inhabited since before European contact is huge. It legitimizes understandings of land tenure as habitation and sustainable use. And it legitimizes these inhabitants' right to define or co-define that sustainable use into the future, instead of merely being consulted on mitigating damage when outside corporate interests move into their territory to develop mines, or oil and gas.

This historic ruling could be even more significant depending on how non-Aboriginal Canadians respond: If they choose to see it not as obstructing development, but as an opportunity to redefine "development" as mutually beneficial for habitat as well as human inhabitants, drawing on their own pre-contact heritage for inspiration.

For many immigrants from Britain, including my ancestors, that pre-contact heritage includes living on the land, inhabiting it as commons. The word common originally meant community and land, inhabitants and habitat, "together as one" or "bound by mutual obligation." These forebears of Canadian "settlers" didn't consider themselves as owning the land they occupied. Nor did they consider land as private property. That came later, with the Improvement and the Enclosure movements, the emergence of a modern market economy, changes in law and its jurisdiction and the writings of foundational philosophers like John Locke and Adam Smith. Considered the father of modern economics, Locke penned a treatise (in the 1690s) proposing that people can claim land as their own property by virtue of their labour "improving" it, while Smith, in his 1776 *Wealth of Nations*, argued that the state and the courts should back such claims.

Land in Britain had been considered *allodial*, that is, without a supreme authority, until the Norman Conquest and the introduction of *feu* charters granting formal control to Norman and Anglo-Norman lords. Even when commoners paid rent (in kind at first) to these lords, their commoning rights persisted. These entitled them to use the land by virtue of having inhabited it since before recorded time, and to do so according to traditional self-governing practices, as habitat that sustained them while they sustained it.

While the Tsilhqot'in people moved around a fairly extensive territory west of Williams Lake in B.C., the commoners managed their relations with the habitat through *stints*, or quotas. For example, each family could only send so many sheep, cows and goats to the common pasture, to prevent over-grazing. Markets and trade had a place in this economy, but didn't govern it, and this was key. In his 1945 classic *The Great Transformation*, Karl Polanyi chronicled the shift from an economy regulated by the social relations of community and ecological relations with the land to one regulated by the logic of the market. The result of this transformation, he warned, "must disjoint man's relationships and threaten his natural habitat with annihilation."

The transformation is not complete here in Canada, as the Supreme Court's ruling makes clear. It holds open the door to honour the past and draw on its precedents to heal those relationships, to preserve natural habitats and even, perhaps, restore them. There are many inspiring First Nations initiatives and treaties upholding co-determination or self-determination in traditional lands, the Eeuyou Istchee or James Bay Cree administration and Nunavut Land Claims Agreement being two examples. But there are as many roadblocks, including the Yukon Government's recent sidestepping of a 1993 constitutional agreement to negotiate directly with the Yukon First Nations over development in wilderness areas like the Peel River Watershed, forcing a court challenge.

One way to support the claims of First Nations is to hold political leaders accountable to negotiate in good faith around existing agreements and court judgements. Another is to work through environmental and social-justice groups to think about land differently: not as property but as habitat with which, as co-inhabitants, we all have ongoing relationships and responsibilities.

**Heather Menzies' 10<sup>th</sup> book, *Reclaiming the Commons for the Common Good* (New Society Publishers) was published in May.**