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Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence

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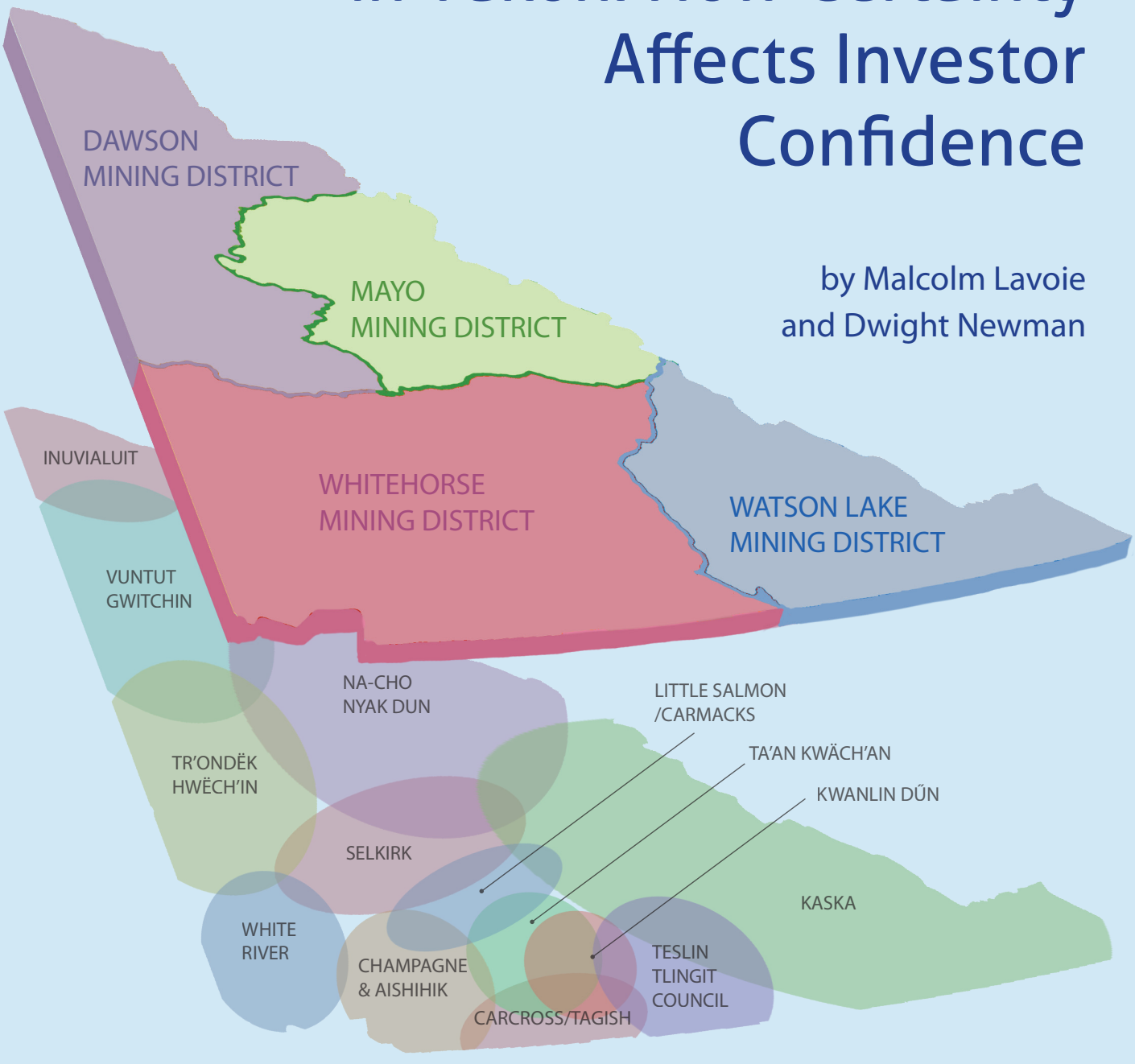

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Executive summary

Legal uncertainty is a topic often raised in discussing unresolved Aboriginal land claims, such as those in British Columbia. *Mining and Aboriginal Rights in Yukon* examines legal uncertainty on Aboriginal rights in a different way, and in an underexamined Northern context. We examine what we identify as growing legal uncertainty in Yukon. This topic is not one that would have been expected a few years ago. In Yukon, modern land claims agreements with 11 out of the territory's 14 First Nations once seemed to have established a high degree of certainty on Aboriginal claims. This certainty was even seen as a significant advantage for Yukon in the global competition for mining investment.

However, changing perceptions in the mining industry now suggest that this advantage has been undermined in recent years. The phenomenon of growing legal uncertainty in Yukon may also have implications for the whole country. It may be that modern land claims agreements—long seen as the best tool for establishing certainty on outstanding Aboriginal claims—are not living up to their promise in the current legal environment.

Analysis of data from the Fraser Institute's annual *Survey of Mining Companies* shows that there has been a measurable shift in the mining industry's perceptions of legal certainty on Aboriginal land claims in Yukon since 2012. In order to identify if changes have occurred that affect Yukon specifically, we also drew on comparative data from a jurisdiction without pertinent legal shifts during the same time period and a jurisdiction with the same shifts on general Aboriginal title issues. These data support the claim that something unique happened in the Yukon legal environment. Drawing on both the quantitative data and qualitative discussion of legal uncertainty in Hansard and the media, we find that the shift in perceptions was both very recent, dating from the years after 2012, and quite significant.

Several key legal changes related to the duty to consult and modern treaties can be correlated with this shift, and we suggest that these developments can explain a significant change in investors' perceptions. In particular, court decisions in two areas seem to have been especially important in changing perceptions of legal certainty. First, courts have shown a willingness to go beyond the terms of highly detailed modern treaties to impose additional, unforeseen obligations on governments. Second, courts have extended obligations to consult Aboriginal groups to new types of government decision-making, in one case effectively discarding the

legislative framework governing mining in Yukon. Investors appear to have taken notice of these recent legal trends. This, we argue, explains the dramatic shift in investors' perceptions of legal certainty in Yukon in recent years.

Why does legal certainty matter for resource sector investment? How do the details of decisions in Aboriginal rights cases affect legal certainty? In answering these questions, we arrive at a framework that distinguishes necessary forms of legal uncertainty—which may have to be tolerated in order to protect certain Aboriginal interests—and unnecessary uncertainty, which is not required in order to protect such Aboriginal interests. A number of trends in recent cases seem to have led to elevated levels of unnecessary legal uncertainty.

We conclude with the following recommendations, which are addressed primarily to courts deciding Aboriginal rights cases, especially the Supreme Court of Canada. Courts can enhance legal certainty by:

1. seeking to minimize recourse to terms outside modern land claims agreements, which are detailed documents intended to govern the relationship between Aboriginal groups and governments in a comprehensive manner;

2. continuing to develop the doctrine of the duty to consult in an incremental manner that both defers to existing precedent and provides greater clarity of purpose;

3. encouraging the resolution of underlying, substantive Aboriginal rights claims, both by adhering to the expressed intent of the parties to modern agreements and by providing streamlined processes for resolving Aboriginal claims;

4. seeking to develop Aboriginal case law in an incremental manner, and avoiding the dramatic shifts in the jurisprudence that have characterized the past three decades.

1 Introduction

The past year has seen a lot of Canadians paying attention to issues related to Aboriginal land rights. From opposition by Aboriginal groups to proposed pipeline developments in their traditional territories,[1] to a recent declaration of Aboriginal title in British Columbia,[2] to disputes over modern treaty implementation,[3] Aboriginal land rights have come to occupy an increasingly prominent place in public policy discussion in this country. A common theme in recent discussions of Aboriginal land rights has been their effect on legal certainty and the confidence of investors interested in developing natural resources.[4] Much of this discussion has focused on British Columbia, where, for the most part, treaties were not entered into, and where Aboriginal groups are therefore able to bring claims to unextinguished title to land. This paper focuses instead on Yukon as a case study. In Yukon, modern comprehensive land claims agreements were entered into in recent decades with the express aim of enhancing legal certainty. However, as this paper will show, this goal has proved somewhat illusory, and this has implications for policy makers and Aboriginal groups across the country.

For a variety of reasons, the Yukon Government and the Council of Yukon First Nations moved relatively early toward a modern treaty framework to resolve outstanding land claims issues.[5] After the Supreme Court of Canada's

1. See, e.g., *CTV News* (2015, May 17), No Pipeline Approval from First Nations without Safeguards: Grand Chief.
2. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.
3. See, e.g., *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*, 2014 NUCA 2.
4. See, e.g.: Ravina Bains (2014), A *Real Game Changer: An Analysis of the Supreme Court of Canada Tsilhqot'in Nation v. British Columbia Decision* (Fraser Research Bulletin, July); Tom Flanagan and Ravina Bains (2014, July 16), Aboriginal Title's True Meaning: Billable Hours, *Globe and Mail*: <http://www.theglobeandmail.com/globe-debate/aboriginal-titles-true-meaning-billable-hours/article19625777/>; Ken Coates and Dwight Newman (2014), *The End Is Not Nigh: Reason over Alarmism in Analysing the Tsilhqot'in Decision* (Macdonald-Laurier Institute Papers Series, September); Tom Flanagan (2015), *Clarity and Confusion? The New Jurisprudence of Aboriginal Title* (Fraser Institute Research Studies, April); Ravina Bains and Tyler Jackson (2015, February 5), Native Land Claims Will Kill Investment in B.C. if Liberals Fail to Act, *[Vancouver] Province*; Christopher Alcantara and Michael Morden (2015), Aboriginal Title One Year after Tsilhqot'in, *Policy Options* 36, 3: 64.
5. For some discussion on Yukon, see Dwight Newman (2014), *Evolution of Yukon's Aboriginal Law and the Goal of Reconciliation: A 360 Degree Perspective* (Action Canada, September). See also Christopher Alcantara (2013), *Negotiating the Deal: Comprehensive Land Claims Agreements in Canada* (University of Toronto Press): 29 (discussing moral and economic reasons why Yukon government entered into modern treaty framework).

1973 Calder decision showed in principle that Aboriginal title claims existed in parts of the country where historic land cessions had not occurred,[6] and Yukon First Nations effectively announced their negotiating position by presenting a document to the Prime Minister,[7] Yukon negotiations through the 1970s and 1980s moved toward an Umbrella Final Agreement in 1990 that would serve as the basis for negotiations with Yukon's 14 individual First Nations.[8] Although only 11 of Yukon's 14 First Nations would ultimately sign agreements under that Umbrella Final Agreement, the Umbrella Final Agreement was seen by many as a model that offered legal certainty and that had done so while negotiations dragged on in other jurisdictions. The advanced state of legal certainty in Yukon was advertised even in recent years as a key advantage for mining investment in Yukon.[9]

With this legal certainty as a backdrop, and a devolution of legal powers to the territorial government in 2003,[10] the policy environment in recent years had led to a welcoming of massive new investment in Yukon mining, with some calling this wave of development "the second Gold Rush" and with Yukon Premier Darrell Pasloski able to trumpet this wave of economic development in a major 2013 op-ed.[11]

However, Yukon unfortunately also serves as a measurable example of how legal certainty can diminish in ways that have negative impacts on resource development. Drawing on data from the Fraser Institute, we will examine in this research paper the possibility that ongoing developments in case law on the duty to consult and modern treaty interpretation have played a significant role in undermining legal certainty around land title issues in Yukon. Something has clearly changed. The Fraser Institute's regular studies of the attractiveness of various jurisdictions for mining investment started showing a drop for Yukon in the

6. *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313.

7. This was the famed Council of Yukon First Nations (1973), Together Today for Our Children Tomorrow. <http://cyfn.ca/wp-content/uploads/2013/10/together_today_for_our_children_tomorrow.pdf>.

8. See Newman (2014), *Evolution of Yukon's Aboriginal Law*: 10ff. The agreement was fully signed by 1993 and legislatively implemented by 1995.

9. Newman (2014), *Evolution of Yukon's Aboriginal Law*: 10; Government of Yukon, Department of Economic Development (2013), *Yukon Mining Advantages* (May).

10. For more detailed legal explanation of the devolution agreement, see Dwight Newman (2013), *Natural Resource Jurisdiction in Canada* (LexisNexis): 23–30.

11. See Darrell Pasloski (2013, March 25), You Say You Want a Devolution? In Yukon, It's Reality, *Globe and Mail*: <http://www.theglobeandmail.com/globe-debate/you-say-you-want-a-devolution-in-yukon-its-reality/article10194668/>.

rankings in recent years.[12] By early 2014, new concerns were registering, as a special advisor to the Yukon premier published a major op-ed about legal uncertainties resulting from court decisions on modern treaties.[13]

This research paper proceeds in several parts. In section 2, we use data from the Fraser Institute's annual *Survey of Mining Companies* to show a measurable shift in the mining industry's perceptions of legal certainty on Aboriginal land claims in Yukon. In order to suggest that something different has happened in Yukon, we draw on comparative data from a jurisdiction without legal shifts during the same time period and a jurisdiction with the same shifts on general Aboriginal title issues. These data support the claim that something different happened in respect of the Yukon legal environment. Drawing also on qualitative discussion of legal uncertainty in Hansard and the media, we try to highlight when this shift occurred. In section 3, we correlate the time of this shift with several key legal changes related to the duty to consult and modern treaties, and we suggest that these developments can explain a significant change in investor perceptions. In the latter parts of the paper, we consider more generally why legal certainty matters for resource sector investment and how the details of Aboriginal rights case law can affect on legal certainty. We conclude with a number of recommendations.

12. This was reported in the media over the last two years. See e.g., Jesse Winter (2014, March 5), Yukon Knocked from Top 10 for Mining, *Yukon News*: <http://yukon-news.com/news/yukon-knocked-from-top-10-for-mining/>; Eva Holland (2015, February 25), Yukon Drops in Fraser Institute's Mining Rankings, *Yukon News*: <http://www.yukon-news.com/news/yukon-drops-in-fraser-institutes-mining-rankings/>.

13. See Yule Schmidt (2014, February 25), When "Final Land Claims" Aren't Actually "Final", *National Post*: <http://news.nationalpost.com/full-comment/yule-schmidt-when-final-land-claims-arent-actually-final>.

2 Growing Legal Uncertainty on Land Claims in the Modern Treaty Context

The Fraser Institute has a rich body of data in its *Annual Survey of Mining Companies*.[14] The *Survey* has run since 1997, although we have drawn simply upon the last ten years of data concerning effects, from mining executives' perspectives, of uncertainty about land claims issues on their investment decisions. We gathered data on Yukon from the past reports, setting them out below (**table 2.1**) pursuant to the year during which survey gathering commenced (with the data always reported the subsequent year, and the 2014 data thus being the most recent).

Table 2.1: Yukon—effect on investment of level of uncertainty (%) concerning land claims

	1 encourages	2 no effect	3 deters	4 deters strongly	5 won't invest
2004	11	29	43	16	2
2005	5	32	40	19	3
2006	5	47	32	7	8
2007	9	30	44	16	0
2008	12	32	38	14	5
2009	18	36	40	3	2
2010	11	34	43	9	3
2011	22	41	29	7	2
2012	21	42	33	2	1
2013	11	31	37	18	3
2014	9	33	28	22	8

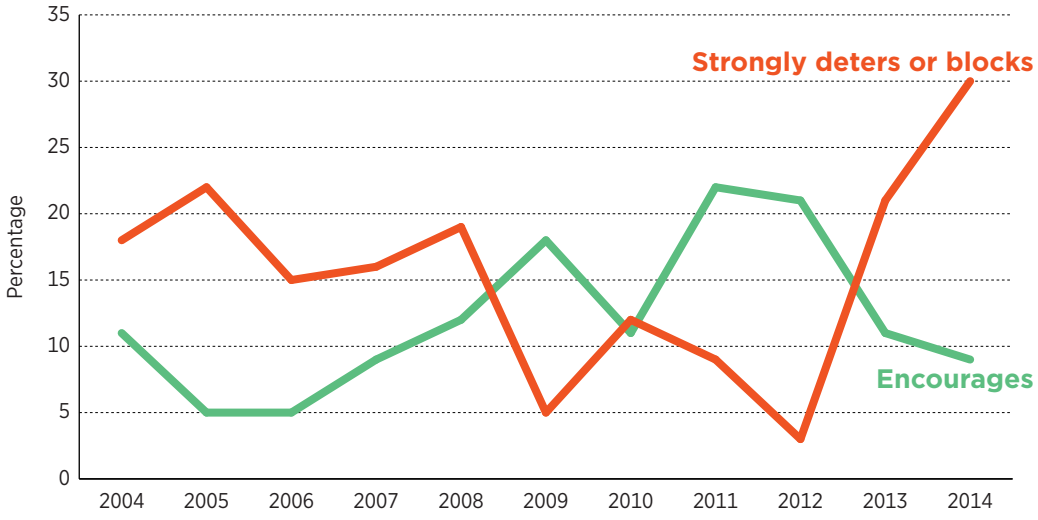
Sources: Various authors (2004/2005–2014), *Fraser Institute Annual Survey of Mining Companies*, <www.fraserinstitute.org>; authors' calculations.

14. Various authors (2004/2005–2014), *Fraser Institute Annual Survey of Mining Companies*. Most recent edition: Taylor Jackson and Kenneth P. Green (2015), *Fraser Institute Annual Survey of Mining Companies, 2014* (Fraser Institute), <http://www.fraserinstitute.org/research-news/display.aspx?id=22259>.

However, in order to consider the possibility of confounding factors, such as general shifts in the mood on Aboriginal issues, we also introduce two other comparator jurisdictions. To make them relatively similar to the Yukon, we have chosen two other Western Canadian jurisdictions with meaningful mining industries, but with different characteristics in terms of their legal framework on land claims issues. British Columbia has many outstanding land claims and very few historic or modern treaties, and it thus represents a jurisdiction potentially more sensitive to legal developments on Aboriginal title. Saskatchewan has its land claims issues essentially settled through historic treaties,[15] so it represents a more stable policy environment on this issue that should not be especially affected by changing law on land claims. The figures for these two jurisdictions are in charts in the Appendix (p. 36).

Looking at them on their own, Yukon's data show that uncertainty about land claims did not seem to be deterring investment from 2009 to 2012 and, indeed, the lack of uncertainty even appeared to be encouraging investment to some extent. However, there was a significant turn in the surveys during 2013 and 2014 (**figure 2.1**). Over that period, the investment climate with respect to land claims is seen as encouraging by far fewer mining executives. It becomes a

Figure 2.1: Effect of legal uncertainty about land claims in Yukon on mining executives' perceptions on investment, 2004–2014



Source: Various authors (2004/2005–2014), *Fraser Institute Annual Survey of Mining Companies,* <www.fraserinstitute.org>.

15. The statement as put would be the dominant view. There are First Nations activists who assert an interpretation of the historic treaties under which they agreed to share the land only to the "depth of a plough", and this claim may generate further political and/or legal determination in the years ahead.

significant deterrent to investment or outright barrier (categories 4 and 5) for 21% and then 30% of mining executives, as compared to between 3% and 12% from 2009 to 2012.

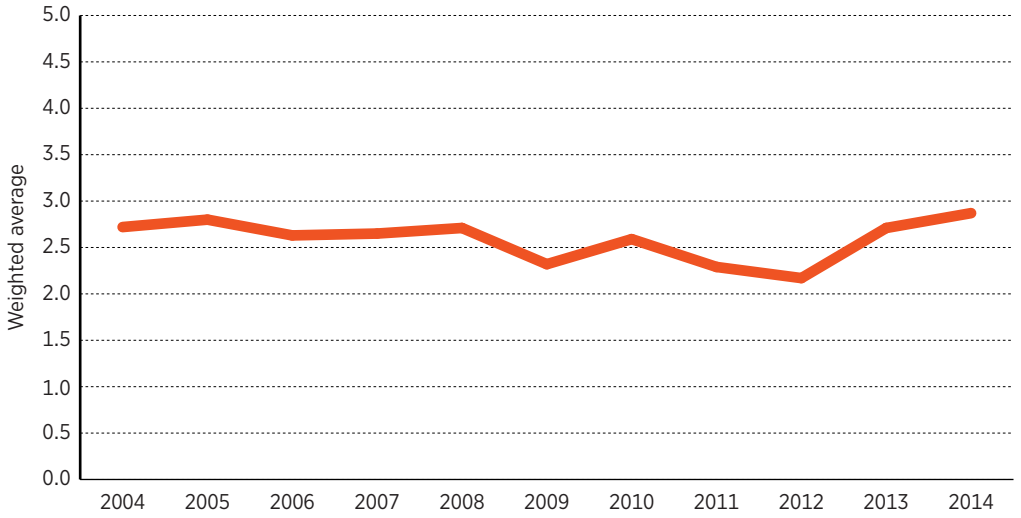
By contrast, in the settled legal environment of Saskatchewan, other than an outlier year in 2010, the same period saw a stable number of under 5% of executives considering land claims issues a significant deterrent or outright barrier. British Columbia's equivalent figures in the same time period were much higher than either Yukon's or Saskatchewan's (often 40% or 50% in these categories), and they were somewhat variable, but they did not show the same upward trend as in Yukon. So, we do not see the trends in Yukon as having been driven by any outside developments on Aboriginal land claims generally. The frightening part for Yukon is that, based on what would seem to be Yukon-specific factors, during the 2009-to-2012 period, highly negative reactions on land claims uncertainties were almost as low as those in the very stable environment of Saskatchewan, but in 2013 and 2014 those negative reactions have moved rapidly toward the numbers in the highly uncertain legal environment of British Columbia.

Obviously, in addition to the perceptions shown in figure 2.1, there is also a residual of those who consider land claims uncertainty to have no positive or negative effect on investment. Over the years, that line would have bounced around between approximately 30% and 45%. The same would have been the case for a line identifying "deterring" as opposed to "strongly deterring" or outright blocking investment. The graph presents the more extreme reactions to the question, which are significant in at least potentially speaking to specific actual effects on investment from this factor, at least as self-reported by those responding to the survey. However, the overall trends do not fundamentally change with different ways of assessing the data. For example, treating the categories as a Likert-style scale, one way of examining the trend would be to consider a weighted average concerning the weighted overall average position on the scale over time, which would reflect a type of average perception of the factor (**figure 2.2**).

The average weighted position was nearer 3 (factor deters investment) in 2004 and for the next several years until the significant improvement in the 2010-to-2012 period, when the weighted average moved well toward 2 (neutral effect on investment from the factor), before it worsened again and was closer than ever to 3 (deters investment) by 2014. In a typical year over the period, Saskatchewan's weighted average was around 2 and British Columbia's around 3. So, as described earlier, Yukon managed to become more like Saskatchewan on this factor until it reverted to becoming more like British Columbia.

We do not want to present these numbers as entirely definitive and independent of all other factors. For example, we think it very possible that general confidence in the mining industry filters through into greater confidence on Aboriginal

Figure 2.2: Perceptions of legal uncertainty about land claims in Yukon as weighted average on a 5-point scale, 2004–2014



Source: Various authors (2004/2005–2014), *Fraser Institute Annual Survey of Mining Companies,* <www.fraserinstitute.org>; authors' calculations.

land claims issues. In all three comparator jurisdictions, for instance, there is some shift toward a more confident note on this factor around about 2007 or 2008, strengthening in subsequent years. We might potentially explain that in terms of some general mining industry confidence in that period, even admittedly during challenging global economic times.[16] However, even if that were the case, that sort of confidence has tended to remain in Saskatchewan, and Yukon has shown a significant relative shift toward concerns about legal uncertainty on land claims as compared to both Saskatchewan and British Columbia. Again, the quantitative data seem to suggest that in the last couple of years the perceived legal certainty in Yukon with respect to land claims has withered based on some Yukon-specific factor.

This study, we note, is simply using the mining survey data to examine that legal certainty factor. We see a Yukon-specific shift in legal certainty. We have not attempted to show the quantitative effects of legal certainty on actual mining investment, which is affected by many factors. It would also be complicated to compare Yukon to other jurisdictions on actual investment because the resources involved

16. In a possibility to which we will return in the next section, it is also conceivable that rapid developments in the duty-to-consult doctrine during 2004/05 had been seen to settle down by a few years later as more case law and legal clarification developed on the duty to consult. On the duty to consult in that time period specifically, see Dwight G. Newman (2009), *The Duty to Consult: New Relationships with Aboriginal Peoples* (Purich).

would be different—Saskatchewan's data, for instance, would be differently affected by expected potash prices than Yukon's. Nonetheless, we would note the existence of a trend line on investment paralleling the trend we reference on legal certainty.[17]

Qualitative reference to Hansard debates and media reports seems to support this account of a shift in perceptions on land claims issues in Yukon over this time period. Considering first the two op-ed pieces referenced in the introduction, Premier Pasloski could very reasonably write in his early 2013 op-ed of the climate of perceived certainty, amongst other positive factors in the Yukon mining industry.[18] And when Yule Schmidt, special advisor to the Yukon premier, wrote in early 2014 of a climate of legal uncertainty,[19] she did not create this perception of uncertainty through her comment but accurately reflected a perception that had been growing in industry circles over the prior year.

A broader search for comments in Yukon Hansard and in media reports concerning Yukon also reveals a surge in comments on uncertainty for the mining sector in 2013 and 2014, with a fairly rapid transition from a mood of optimism to highly concerned comments. In late 2012, government ministers were out in the media explaining the legal certainty generated by the combination of devolution and the settlement of land claims.[20] However, for example, by some months into 2013, policy magazines were publishing reports of legal uncertainties resulting from court decisions on the duty to consult.[21] By mid-2013, the Yukon Prospectors Association was writing open letters to the government expressing concerns about the effects of particular developments in case law.[22] By early 2014,

17. Data from Natural Resources Canada show an approximate plateau in spending on exploration plus deposit appraisal during the period prior to 2010, greater investment from 2010 to 2012, with a peak in 2011 more than double any prior year, and a drastic decline in 2013/14 to levels a third those of 2011.

18. See Pasloski (2013, March 25), You Say You Want a Devolution?

19. See Schmidt (2014, February 25), When "Final Land Claims" Aren't Actually "Final".

20. See, e.g., Greg Komaromi (2012), Devolution in Yukon: Pioneering Territorial Resource Management, *Canadian Government Executive* (Dec. 4): <http://www.canadiangovernmentexecutive.ca/category/item/1069-devolution-in-yukon-pioneering-territorial-resource-management.html>. However, there were around the same time some questions being put to the government in the territorial assembly concerning whether its approach to First Nations issues was best promoting certainty, with the Yukon NDP arguing that a less conflictual approach on some issues would better promote land use certainty (Yukon Legislative Assembly [2012], *Hansard*, November 19: 1558–1559. Government ministers were able to respond with impressive figures concerning the amount of mining activity underway in Yukon.

21. Kirk Cameron (2013), Challenging Free Entry Staking: The Duty to Consult, *Northern Public Affairs* (Spring): 45–47.

22. Yukon Prospectors Association (2013), Letter to Minister of Energy, Mines & Resources (June 7), <http://www.yukonprospectors.ca/pdf/Letter_to_Minister_of_EMR_-_Class_I_notification_proposals.pdf>.

the Yukon NDP was posting press releases about a lack of legal certainty and the impacts for the mining industry, amid its criticisms of the government's approach to decision-making on issues related to the Peel watershed.[23] In March 2014, the Fraser Institute's annual *Survey of Mining Companies* for 2013[24] hit the Yukon media, prompting reports of Yukon's declining standing as a mining jurisdiction.[25] In April 2014, the Yukon Liberal Party was pursuing questions in the territorial assembly on increasing industry concern about legal uncertainty.[26]

Notably, to the extent that these various comments were not simply self-referential or based on a momentum of comments concerning uncertainty, they originated in policy debates that involved significant Aboriginal rights dimensions—such as the Peel watershed discussions—or, even more so, in Aboriginal rights decisions that affected Yukon. Indeed, the Yukon Court of Appeal decision of December 2012 in *Ross River Dena Council*[27] drew significant comment, as the decision seemed to require the government to commence work on redesigning its long-standing free-entry mining system so as to create space for early consultation with First Nations that had ended up deciding not to sign modern treaties structured within the Umbrella Framework Agreement.[28] When the Supreme Court of Canada denied leave on this decision in September 2013, those effects were confirmed. One practical effect has been what has now become a multi-year suspension of staking in the area while there is consultation with the First Nation.[29]

However, some of the media commentary also began to invoke older decisions, such as the 2010 Supreme Court of Canada decision in *Beckman v. Little Salmon/*

23. Yukon NDP Official Opposition (2014, January 30), Government Fails to Create Certainty Needed for a Sustainable Mining Industry, <http://www.yukonndpcaucus.ca/_blog/News/post/government-fails-to-create-certainty-needed-for-a-sustainable-mining-industry/>.

24. Alana Wilson, Miguel Cervantes, and Kenneth P. Green (2014), *Fraser Institute Annual Survey of Mining Companies 2013* (Fraser Institute), <http://www.fraserinstitute.org/research-news/display.aspx?id=20902>.

25. See, e.g., Winter (2014, March 5), Yukon Knocked from Top 10 for Mining.

26. Yukon Liberal (2014), *Question re: Mining regulatory certainty - April 29, 2014*, Yukon Liberal Party, <http://www.ylp.ca/question_re_mining_regulatory_certainty_april_29_2014>.

27. *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, leave to appeal to S.C.C. denied (19 September 2013).

28. This was the topic of Cameron (2013), Challenging Free Entry Staking. However, there came over time to be wider discussion as well in a variety of venues. For example, Whitehorse lawyer Graham Lang noted the impact of the Court requiring the development of new consultation frameworks and attempted to suggest more coordinated responses in Graham Lang (2014, May 14), Yukon Needs a First Nations Consultation Act, *Yukon News*: <http://www.yukon-news.com/letters-opinions/yukon-needs-a-first-nations-consultation-act/>.

29. Government of Yukon (2015), Yukon Government Extends Staking Prohibition in the Ross River Area to 2017, Press Release (January 28).

Carmacks First Nation,[30] in which the Court held that there were ongoing consultation requirements outside those agreed upon in modern treaties, even where the modern treaties appeared to be designed to specify the scope of consultation requirements as part of their pursuit of legal certainty.[31] Although Yukon won on the factual issues in the case, the changes in the approach to the duty to consult and the interpretation of modern treaties that were embedded in the reasoning would have longer-term impacts that became more apparent over time. By 2013/14, it was apparent that new legal challenges were emerging concerning the interpretation of modern treaties, as communities like the Nacho Nyak Dun First Nation began litigation on other modern treaty issues. The reality of such further modern treaty litigation reinvigorated the significance of the case beyond the narrower consultation issue that it had raised—and on which the Yukon government had actually won on the particular facts of the case. As a result, by 2013/14, the reasoning of the case had become something of broader interest, amid a larger set of legal developments.

So, a significant shift in sentiment on the certainty of Yukon land claims issues is apparent from both quantitative and qualitative measures, with that shift seeming to materialize in early 2013, and with the qualitative measures offering a tentative suggestion that the shift originated in court decisions on Aboriginal rights issues from around this time period. In the next section, we consider the logic of that possible cause in more detail and with more explanation of the cases at issue, and we argue that a series of legal developments on the duty to consult and the interpretation of modern treaties have indeed significantly undermined legal certainty on Yukon land claims issues.

30. *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103.
31. *Beckman v. Little Salmon/Carmacks First Nation,* at paras. 61–66.

3 Effects on Certainty of Developing Jurisprudence on the Duty to Consult and Modern Treaties

Every legal norm and every legal judgment is subject to interpretation. But some decisions promote certainty more than others do. Developing jurisprudence in Aboriginal law related to the two matters of the duty to consult and of modern treaties—as well as their interrelationship—has, we suggest, helped to create additional legal uncertainty in Yukon. We can see this simply by examining some key case law developments from 2010 onward.

The duty to consult, developed in its modern form in the Supreme Court of Canada since 2004,[32] is a proactive requirement on governments to consult with rights-bearing communities when contemplated government action might negatively affect their Aboriginal or treaty rights, even in the context of uncertainty as to the existence or scope of the right at issue.[33] Since 2004, this duty to consult has applied as a proactive requirement in the context of asserted rights, which vastly expands the scope of its potential applications and has led to a wave of policy-making and further litigation.[34] The extension of this doctrine to treaty rights in 2005 pertains to such matters as government action that could have the effect of infringing a treaty right.[35]

One question that was not explicitly addressed in the early case law was how to understand the duty to consult in the context of modern treaties, which typically have carefully negotiated consultation clauses within them that are designed to set out the contexts and scope of agreed consultation between the parties.[36] The case that ultimately considered this question, *Beckman v. Little Salmon/Carmacks*

32. The doctrine was enunciated in its modern form in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511. It was applied immediately in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2003 SCC 74, [2004] 3 S.C.R. 550. It was extended to the treaty rights context the next year in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388. For a general discussion of the doctrine, see Dwight G. Newman (2014), *Revisiting the Duty to Consult Aboriginal Peoples* (Purich).

33. *Haida Nation*, at paras. 35-36; *Mikisew Cree*, *ibid*. at paras. 33-34.

34. See generally Newman (2014), *Revisiting the Duty to Consult*.

35. *Mikisew Cree*, *ibid*.

36. There is discussion of such clauses in *Beckman v. Little Salmon/Carmacks First Nation*, *passim*. See also Julie Jai (2009), The Interpretation of Modern Treaties and the Honour of the Crown: Why Modern Treaties Deserve Judicial Deference, 26 *National Journal of Constitutional Law* 25.

First Nation, also effectively raised the question of how to interpret a modern treaty.[37] In the context of a government argument that the modern treaty in the case offered a complete code on when consultation was to occur, the majority rejected this argument and was prepared to read in additional requirements arising from the general duty-to-consult doctrine that would sometimes go beyond the treaty terms.[38] In other words, there would not always be duty to consult requirements beyond the requirements a treaty outlined, but there always could be. In the process, the majority developed a more flexible mode of interpreting modern treaties than the concurring opinion of Deschamps J. would have followed.[39] Both aspects expanded legal uncertainty in Yukon, the first by suggesting there could be unexpected consultation requirements and the second by suggesting modern treaty obligations could expand over time rather than providing the certain results the government had sought when negotiating them. The *Little Salmon* case concluded that consultation had been met on the facts. There was no specific gain from the decision for anyone, but the language around treaty interpretation opened significant uncertainties with the suggestion that modern treaty obligations could expand over time in uncontemplated ways.

This latter aspect has certainly played itself out in the recent Peel watershed litigation. This has seen a Yukon First Nation disputing the government's reading of the modern treaties, which is based on the plain meaning of the negotiated text. In the resulting trial decision, *Nacho Nyak Dun First Nation v. Yukon*,[40] the Yukon Supreme Court limited the Yukon government's ability to modify a land-use plan for public lands proposed by a commission on which affected Aboriginal groups were represented. The Court's analysis is based on additional requirements that effectively go beyond the text of the agreement, as it would typically be read, according to what the Court considers a more purposive reading. This kind of open-ended reading of modern treaties diminishes certainty as to what those agreements mean.

37. *Beckman v. Little Salmon/Carmacks First Nation*.

38. *Beckman v. Little Salmon/Carmacks First Nation*, at paras. 62, 66.

39. Cf. *Beckman v. Little Salmon/Carmacks First Nation*, at para. 10 (Binnie J. majority judgment falling into metaphor in describing how courts can think about even modern treaties creatively, stating that "the treaty will not accomplish its purpose if it is interpreted by territorial officials in an ungenerous manner or as if it were an everyday commercial contract. The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards".), paras. 138–39 (Deschamps J. following interpretive principles agreed within the treaty itself).

40. *Nacho Nyak Dun First Nation v. Yukon*, 2014 YKSC 69. The Yukon government is appealing the decision.

The duty to consult, it bears noting, entered into Canadian jurisprudence as a duty that arises when governments make administrative decisions, notably when they make a discretionary decision under a statute that gives some branch of government a responsibility to make a decision, such as on whether a particular licence or permit has met the requirements to be approved. Where the decision may have a negative impact on Aboriginal or treaty rights, a duty to consult arises. However, the *Ross River Dena Council* case, referenced briefly above,[41] does not fit with this traditional application of the duty-to-consult doctrine. What was at issue in the case was whether there was a duty to consult upon recording a mineral rights claim that a prospector had staked, where the free-entry mining legislation in place made it mandatory to record the staked claim, and where the prospector then acquired limited exploratory rights based on having a recorded claim. The statute gave no discretion, so the government official recording a staked claim was not making any administrative decision. The Yukon Court of Appeal held that the whole statutory regime had to be changed so as to create opportunities for consultation, with the Supreme Court of Canada denying leave for further appeal.[42]

This expands obligations to consult, particularly in the context of early-stage exploration. Although consultation obligations may impose a limited burden on junior exploration companies, these companies may also be the least suited to bear additional costs of consultation. The duty to consult may have a particular impact on this traditional entrepreneurial heartbeat of the mining industry, with potential long-term implications.[43]

Implicitly, we note that the *Ross River* decision actually changed the whole application of the duty-to-consult doctrine by subjecting legislation to scrutiny under the doctrine, though this has gone relatively unremarked.[44] A case that significantly changes application of a doctrine will tend to create uncertainty. If sustained elsewhere, the development in *Ross River* marks a major unexpected change to the duty to consult. It also likely drew much attention in Yukon because it led to a need for change to the territory's mining legislation. In any event, its timing was at the beginning of the period that has featured the most significant shift in industry perceptions on legal certainty in Yukon.

41. *Ross River Dena Council v. Government of Yukon*.

42. *Ross River Dena Council v. Government of Yukon*.

43. For more on this point, see Dwight Newman (2015), *Is the Sky the Limit? Following the Trajectory of Aboriginal Legal Rights in Resource Development* (Macdonald-Laurier Institute, June): 12–13.

44. Newman has noted previously that the Yukon Court of Appeal in the case "said that the existence of the duty to consult did not just apply to an administrative decision under an existing statute, but mandated a significant change to the statute itself. This decision changes the scope of the duty to consult" (Newman (2014), *Revisiting the Duty to Consult*: 23, 63.

The Ross River community was one of the three Yukon First Nations that did not enter into a modern treaty. These three First Nations are currently pursuing various forms of litigation against Yukon, with White River having pursued a case in recent years,[45] Ross River planning another on hunting rights,[46] and all three potentially having further Aboriginal title cases to pursue.

The *Little Salmon* case had of course opened several years ago the potential for flexible interpretation of modern treaty provisions. Later attention to this case makes sense once one notes the expanded litigation efforts by Yukon First Nations, with some of the contestation focusing on interpretation issues in the modern treaties, thus directly undermining the additional legal certainty these modern treaties were thought to provide. The recent *Nacho Nyak Dun* case stands as a first example of a phenomenon now thought likely to be repeated, of further litigation over the meaning of the modern treaties, with the possibility that courts will read the modern treaties much more expansively than had ever been expected. In changing fundamental expectations, the courts have expanded the scope of legal uncertainty during the very same time period that industry has felt legal certainty on Yukon land rights issues to be undermined. Industry, we would suggest, is reacting to actual legal developments in this time period. These kinds of legal developments have real impacts on investment decision-making, and ultimately on the prosperity of Yukon.

We might add that the courts' approach to the interpretation of the modern treaty framework will potentially have very significant implications for ongoing efforts by Yukon's government to enhance regulatory certainty. The enhancement of regulatory certainty is a major aim behind the government's moves to clarify the roles of different regulatory bodies, with such clarification having the potential to contribute to stronger investor confidence.[47] However, some of the ongoing reforms of the regulatory environment in Yukon have become enmeshed in a set of very significant controversies concerning whether federal legislation that modifies the Yukon Environmental and Socio-economic Assessment Act is consistent with the Umbrella Final Agreement.[48] Yukon First Nations had threatened to sue if the bill were passed, claiming that the legislation

45. *White River First Nation v. Yukon Government*, 2013 YKSC 66.

46. Chuck Tobin (2014, August 6), Fish, Game Association "Very Disappointed" by Suit, *Whitehorse Daily Star*: <http://www.whitehorsestar.com/News/fish-game-association-very-disappointed-by-suit>.

47. See discussion in Yukon Legislative Assembly (2014), *Hansard* (May 8): 4632.

48. On the background to the legislation, Bill S-6, see Sam N.K. Banks (2014), *Legislative Summary: Bill S-6: An Act to Amend the Yukon Environmental and Socio-economic Assessment Act and the Nunavut Waters and Nunavut Surface Rights Tribunal Act* (Library of Parliament

is inconsistent with their reading of their modern treaty relationship.[49] The potential viability of such a lawsuit simply manifests the ongoing development of legal uncertainty based on these trends in the case law, with even possibilities for regulatory reform to enhance certainty now caught up in the legal risks that are present. Again, there are potentially very real impacts on certainty for investment and prosperity for Yukon.

Publication 41-2-S6-E, June 18). After passage by the Senate and House of Commons, Bill S-6 received Royal Assent on June 18, 2015.

49. See Jacqueline Ronson (2015, March 30), Chiefs Stand by Promise to Sue Over S-6, *Yukon News*: <http://www.yukon-news.com/news/chiefs-stand-by-promise-to-sue-over-s-6/>.

4 Resource Development, Aboriginal Rights, and the Rule of Law

This section seeks to outline the basic economic arguments in favour of legal certainty, especially as they relate to resource development in Canada. We begin by outlining how the idea of certainty of legal obligations has been understood in legal and economic theory, and what this means in the context of natural resource development. Next, we set out the costs that uncertainty creates when it comes to investment decision-making in the natural resource sector. Finally, we address questions of when uncertainty may be necessary or inevitable in the development of the law, and strategies for minimizing it.

4.1 Legal certainty

The concept of legal certainty is linked to the broader idea of the rule of law. Indeed, for F.A. Hayek, the central purpose of the rule of law is to provide certainty to individuals with respect to the actions of government: "Stripped of all its technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge".[50] In other words, by securing legitimate expectations, a legal system under the rule of law enables individuals to make plans with a greater degree of reliance on the conduct of others, especially the government.

John Rawls also draws a strong link between the rule of law and securing individual expectations through legal certainty. According to Rawls, a central precept of the rule of law is that laws must be made public and must be clearly defined in advance.[51] When certain other basic criteria for the rule of law are also met—that the law be capable of being complied with, that it treat similarly situated persons equally, and that a mechanism be provided for ascertaining the truth of relevant facts—the law can be said to secure the legitimate expectations of citizens.[52] While for Rawls, "formal" justice of this kind is a necessary but not sufficient condition for a just society, he strongly emphasizes the importance of clearly delineated rights for establishing the liberty of the individual, free from the fear of arbitrary interference by the state.

50. F.A. Hayek (1944), *The Road to Serfdom* (University of Chicago Press): 72.
51. John Rawls (1971), *A Theory of Justice* (Harvard University Press): 236–239.
52. Rawls (1971), *A Theory of Justice*: 238.

The expectations secured by the rule of law in fact relate both to the actions of the government and the actions of other private parties, who themselves are also bound by the same fixed rules. Clear rules announced in advance thus enable parties to make predictions about when and how the government will exercise power as well as predictions about the scope of action of other private parties. This facilitates the making of reliable plans for the future, which is especially important when it comes to investment decisions.

Decentralized planning by private parties is crucial to economic development in a modern economy. It allows different entities with their own knowledge of the "particular circumstances of time and place" to bring their knowledge to bear and coordinate in a way that no central planner could hope to emulate.[53] For example, in the case of resource development in the traditional territory of an Aboriginal group, clearly defined, enforceable legal rights can enable a resource company and an Aboriginal group to enter into an agreement tailored to the needs, rights, and capacities of each party. Such rules also allow the parties to know precisely what they are entitled to do in the absence of agreement. By contrast, a distant administrative tribunal or court applying a balancing test based on all the relevant circumstances is in a situation akin to that of a central economic planner. Such a body is unlikely to be able to take account of the same fine-grained and specific information that is brought to bear by parties on the ground operating in the context of clearly defined rights and obligations.

It is worth observing at this stage that not all of the constraining effect of law can or should come from the literal meaning of enacted rules. Words, whether used in a statute or a previous judicial decision, contain inherent ambiguities. Consideration of the purposes behind a law,[54] and of the social practices it seeks to govern,[55] can also be used to limit the ambit of any discretion of judges and government decision-makers in deciding a case. This, in turn, can make law more predictable to those who must comply with it. On the other hand, if the underlying purposes behind an area of law are not understood with much precision, then this may serve to exacerbate legal uncertainty. Indeed, as one of us has pointed out, uncertainty as to the aims of the duty to consult may contribute to the ambiguity in the present state of the law.[56]

53. F.A. Hayek (1960), *The Constitution of Liberty* (University of Chicago Press): 156.
54. See Ronald Dworkin (1975), Hard Cases, 88 *Harv L Rev* 1057; Henry Hart, Jr. and Albert M. Sacks (1958), *The Legal Process: Basic Problems in the Making and Application of Law* (tentative edition): 166–167; Charles Fried (1980), The Laws of Change: The Cunning of Reason in Moral and Legal History, *JL Stud* 335.
55. F.A. Hayek (1973), *Rules and Order*, vol. 1 of *Law, Legislation, and Liberty* (University of Chicago Press): 105–106; Karl Llewellyn (1960), *The Common Law Tradition: Deciding Appeals* (Little, Brown).
56. Newman (2014), *Revisiting the Duty to Consult*: 34–35.

In the specific context of Aboriginal rights and resource development, our argument suggests that it is important for all parties to be able to develop a clear understanding of their rights and obligations in order to form a reliable plan for the future. For Aboriginal groups, clear knowledge of rights and obligations in different areas of their traditional territory allows a group to engage in long-term planning to reconcile traditional uses with economic development. For instance, certain knowledge that a set tract of a group's territory will be permanently reserved for traditional uses may make the group more willing to partner with investors in developing the resource potential of other parts of their traditional territory. Similarly, greater certainty about rights and obligations in a given territory enables resource companies and investors to make accurate predictions about the legal viability of a project before making plans and allocating capital. In industries like mining, which require the allocation of large amounts of capital years in advance of receiving a return on investment, certainty of this kind is paramount. The risk of an unexpected adverse legal ruling with respect to Aboriginal rights after capital has been allocated may often be enough deter investment in projects.

4.2 Risk, uncertainty and investment in natural resource development

The negative effects of an unpredictable legal regime on investment decisions can be broken down into at least three discrete elements: [1] reduced expected return; [2] greater quantifiable risk; and [3] greater non-quantifiable risk (economic uncertainty).

4.2.1 Reduced expected return

First, let us consider how legal uncertainty can reduce the average return expected from a given project. Imagine two legal regimes. In both regimes, there is a regulator that will approve some potential development projects and not others. In order to put forward a project under both regimes, a proponent will have to irrevocably allocate some capital in order to design the project, ensure its feasibility, run environmental tests, and so on. In the first regime, the rules are perfectly ascertainable, such that it is possible for a proponent to know in advance with 100% accuracy whether a proposed project will be approved. In the second regime, even the best designed projects are only approved with 50% frequency, because it is simply not possible to predict with better accuracy how the regulator will react to the facts in a given case.

Resource development proponents require a given level of return on investment in order to invest in a project. Under the unpredictable second regime, legal risk reduces the chance of receiving any return on investment at all by 50%.

By contrast, there is no such discount under the first regime. Accordingly, the "expected" or average return on investment is reduced by 50% in the case of the unpredictable legal regime. The result of this 50% reduction in expected returns may be to cause a project to fall below the threshold return on investment needed to make it profitable. As a result, there will be seemingly profitable development projects to which investors will be willing to allocate capital under the first regime, but to which they will be unwilling to allocate capital under the second regime because of the reduced expected returns due to legal unpredictability. Essentially, legal uncertainty can act as a discount in expected returns that makes otherwise profitable projects seem unprofitable to investors. This will mean that less investment is allocated and fewer projects go ahead.

Note that this reduction in the expected return on investment derives purely from the unpredictability of the regime, and is not necessary in order to ensure that some lands are protected from development, for example for traditional Aboriginal uses. It is possible to imagine the first regime creating its high level of legal certainty by barring development in territory A and creating a streamlined, predictable development process in territory B. All resource proponents would bring their applications in territory B and would enjoy the high level of predictability afforded, without any discount in expected returns. Territory A would remain undeveloped. By contrast, if the second regime sought to protect lands from development through the use of an unpredictable balancing test over both territories, it would end up discounting expected returns and deterring investors from investing in otherwise advantageous projects across both territories.

This example is a stylized demonstration of one way in which modern land claims agreements seek to enhance legal certainty. These agreements typically set aside some land for the exclusive use of the Aboriginal group, sometimes through the mechanism of fee simple ownership. However, in other portions of the group's traditional territory, the group cedes (or agrees not to assert) its Aboriginal rights. The government is able then, in theory, to approve resource development projects in these areas, often subject to specified involvement from the band in the approval process. Typically, the government hopes that this will enhance legal certainty along the lines of the territory A/territory B example. Indeed, even this understates the potential benefits since the Aboriginal group could choose to establish its own predictable development regime in the land it holds in fee simple.

4.2.2 Greater quantifiable risk

The second factor that is associated with costs due to legal unpredictability is quantifiable risk and the related phenomena of risk aversion and risk premiums. Risk aversion refers to the idea that, given a choice between two options with the same expected return, an investor will tend to prefer the option that involves less

risk.[57] For example, given a choice between being given a dollar, on the one hand, and flipping a coin and receiving two dollars for heads and nothing for tails, the risk-averse investor would prefer the first option. This is despite the fact that the expected or "average" outcome in both cases is one dollar. Since investors tend to be risk averse, they typically demand a "risk premium" that increases with the riskiness of an investment, even where the "expected" or average returns are the same.

The existence of a risk premium will tend to increase the economic costs associated with legal unpredictability. The risk of an adverse regulatory outcome not only reduces investors' expected returns, but it will generally lead them to demand a risk premium. As a result, some socially beneficial projects that would appear profitable in the absence of legal risk will not be pursued by investors because the returns are not sufficient to provide an adequate risk premium. The bottom line, again, will be less investment and fewer resource-development projects than there would be with a more predictable legal regime.

4.2.3 Greater non-quantifiable risk

The third concept that explains the economic costs of legal unpredictability is non-quantifiable risk or economic uncertainty. What distinguishes economic "risk" from economic "uncertainty" is calculability.[58] A risk is calculable. If Jane agrees to flip a coin and give Johan a dollar if the coin turns up heads, her risk of having to pay a dollar is a calculable 50%. By contrast, uncertainty is not calculable. An example might be trying to assess in advance whether Greece will default on its debt obligations. We know there is a chance that it will do so and a chance that it will not, but we are unable to calculate the chances with precision, due to the complexity of the problem and the role played by human agency.

The non-calculable nature of economic uncertainty introduces additional considerations when compared to the calculable risk considered above. Uncertainty is seen as a negative factor in most types of decision-making. Businesses and individuals constantly seek to minimize uncertainty by investing in information that allows them to calculate the risks involved in decisions. For example, hiring a lawyer and getting legal advice is one way of turning legal uncertainty into more ascertainable legal risk. However, some types of uncertainty, often including uncertainty stemming from government decision-making, cannot be eliminated

57. Gary S. Becker (1971), *Economic Theory* (Alfred A. Knopf): 61–64. Risk aversion derives from the phenomenon of diminishing marginal utility, which refers to the idea that, as one adds increments of a given good, agents may value earlier increments more than later ones.
58. Richard Posner (2014), *Economic Analysis of Law*, 9th ed (Wolters Kluwer): 4, citing Frank H. Knight (1971), *Risk, Uncertainty and Profit* (University of Chicago Press), and John Maynard Keynes (1948), *A Treatise on Probability* (MacMillan).

by making investments in information gathering. The rational response to uncertainty of this kind is to delay decision-making until more information is available.[59] This is particularly true with respect to making investments under conditions of uncertainty.[60] Investors may rationally decline to invest in otherwise profitable ventures because it makes sense to wait for uncertainty, including political or legal uncertainty, to resolve itself.[61]

Government and judicial decision-making relating to Aboriginal rights can create non-calculable uncertainty of this kind for investors. Not only is there a chance of an adverse outcome, but it is sometimes not possible even to quantify the chances of the adverse outcome. This creates an additional factor, on top of reduced expected returns and increased risk, which may lead investors to decline to participate in projects that would otherwise appear to be profitable and socially beneficial. Economic theory predicts that investors will react to uncertainty by exercising their option to delay investment into the future. In reality this will tend to mean that, in the present, they choose instead to invest in alternative jurisdictions that offer greater certainty.

Accordingly, there are at least three ways in which one would expect greater uncertainty in the law relating to Aboriginal rights to deter investment in the natural resource sector. First, the risk of an adverse legal outcome will reduce expected returns. Second, legal risk will lead investors to demand a risk premium, which may mean otherwise profitable projects will not go ahead. Third, non-quantifiable risk, or uncertainty, will tend to make investors reluctant to commit to projects, preferring to await resolution of the uncertainty. All three of these factors loom large in investor decision-making in Canada's natural resources sector, where perhaps the greatest source of legal uncertainty at present relates to the rights of Aboriginal peoples. There are good reasons to believe that this uncertainty is imposing a significant economic cost through lost investment. If there are ways to fulfill these important legal obligations to Aboriginal peoples in a manner that allows for greater legal certainty, they are surely worthy of serious consideration.

4.3 Legal certainty and the development of the law

Of course, some level of legal uncertainty is all but inevitable in any legal system. The law is not a rigid algorithm, nor should it be. There are sometimes good reasons why we must tolerate uncertainty, despite the negative effects considered above.

59. Posner (2014), *Economic Analysis of Law*: 4, 621.

60. Posner (2014), *Economic Analysis of Law*: 621; Brandon Julio & Youngsuk Yook (2012), Political Uncertainty and Corporate Investment Cycles, 67 *J Finance* 45.

61. Nick Bloom, Stephen Bond, and John van Reenen (2007), Uncertainty and Investment Dynamics, 74 *Rev Econ Stud* 391; Julio & Yook (2012), Political Uncertainty.

First, designing readily ascertainable rules in advance to govern all imaginable scenarios would be extremely costly, and it may be more efficient to give judges and government decision-makers leeway to adapt standards set by the law to circumstances as they arise.[62] Another reason that rules designed and promulgated in advance might not be ideal is that the decision-maker setting out the rule may simply lack the information needed to design rules that are well adapted to the circumstances they govern.[63] For this reason, one might prefer a body of law that developed gradually based on particular cases over one designed in advance, even if this gradual evolution means somewhat less certainty along the way.

One might ask whether considerations of this kind mean that high levels of legal uncertainty are inevitable if the legal system is to afford robust protection to Aboriginal rights and other Aboriginal interests. After all, much of what makes up Canadian Aboriginal law has been developed in just the past 25 years. The uncertainty observed in this paper could merely be the inevitable consequence of developing a new body of law. Yet there are reasons to doubt that this is entirely true.

While it would indeed be costly and difficult to design a whole new system of rules governing resource development that affects Aboriginal communities, it is not necessary to do this in order to ensure adequate protections for Aboriginal people's interests. This is most obviously the case where a modern treaty is in place. In cases like this, there is little need for courts to design additional standards and obligations, since the parties, negotiating from an informed position of equality, have set out in detail their respective rights and obligations. Where there is no treaty in place, or where the relevant treaty is an historic one setting out obligations only in general terms, less precise standards of conduct may be required. However, courts can still use the existing legal baselines to structure the analysis and create greater predictability than a general standard would allow for. The language used by an historic treaty is one example of a relevant legal baseline that gives structure to legal relations. Another legal baseline that creates greater precision would be specific Aboriginal rights to use resources or occupy land that have been definitively established in court.

Incidentally, this indicates that the goal of legal certainty will sometimes be served by Aboriginal groups bringing suits based upon underlying substantive rights to use resources or to occupy land. Where relatively well-defined rights such as these are established in court, all parties going forward are provided with greater guidance. By contrast, litigation based on the duty to consult does not serve the aim of creating future certainty in the same way. Unless such litigation relates to

62. Posner (2014), *Economic Analysis of Law*: 763–764; Louis Kaplow (1992), Rules versus Standards: An Economic Analysis, 42 *Duke LJ* 557.

63. Hayek (1973), *Rules and Order*: 100.

fundamental issues on the duty to consult that will arise again and again, it is likely to aid only in the resolution of the fact-specific dispute before the court and is unable to provide much guidance going forward, even to the very same parties in a future dispute. This point is noteworthy since most Aboriginal rights litigation over the last ten years has revolved around duty-to-consult issues, with a variety of factors creating incentives for Aboriginal communities to pursue their litigation in that way.[64] Courts have effectively set things up in this area so as to have ongoing litigation that does not generate further legal certainty.

64. See Newman (2014), *Revisiting the Duty to Consult*: 170 (stating that in recent times, "cases on substantive points of Aboriginal or treaty rights have in some ways become the exception. There are many incentives to put arguments based on the duty to consult, and to litigate on the duty to consult if necessary, rather than to seek a judgement that makes a final determination on an Aboriginal or treaty right. This dynamic arises because what is available via interim means under the duty to consult is significantly better than the result if an Aboriginal community litigates on a substantive point and loses.")

5 How to Enhance Legal Certainty while Protecting Aboriginal Interests

In this section, we give a brief summary of the sources of legal uncertainty in the general area of Aboriginal law and resource development, before setting out a number of ways judges and policy makers can work to enhance legal certainty. These include: minimizing recourse to terms outside modern agreements; the gradual elaboration of the duty to consult; resolving substantive rights claims; and the incremental future development of Aboriginal law.

5.1 The sources of uncertainty

The problem of legal uncertainty in Aboriginal law takes several forms, some more intractable than others. As indicated above, where there are claimed but unproven Aboriginal rights to use resources or occupy land, some degree of uncertainty is likely inevitable. In such circumstances, general standards of conduct, including the duty to consult, may be necessary to protect Aboriginal interests pending final resolution of the claim.[65] Because of the difficulty that would be associated with devising detailed rules to govern the wide range of circumstances in which potential rights violations might arise, it may be necessary to frame standards of conduct at a relatively high level of generality, as the duty to consult is framed. This will lead to some uncertainty, but this might be necessary in order to protect the potential rights at issue. Similarly, historic treaties are often framed in highly general terms, and of course were negotiated under conditions of inequality of bargaining power and information. Accordingly, courts have found that a generous approach should be used in interpreting historic Aboriginal treaty rights, and that a duty of consultation is owed where the government acts in ways that affect Aboriginal communities' treaty rights.[66] This, too, leads to uncertainty, but this may be necessary to protect Aboriginal interests.

However, there are other sources of uncertainty in Aboriginal law that do not bear the same functional relation to protecting Aboriginal interests. This section will seek to address ways to reduce this functionally unnecessary uncertainty, which comes in several forms.

65. This was clearly true, for example, in the leading duty to consult case of *Haida Nation*.
66. *R. v. Marshall*, [1999] 3 S.C.R. 456; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 6, [2005] 3 SCR 388.

First, with respect to modern comprehensive land-claims settlements, the parties, which are well informed and negotiating from a position of relative equality, have set out to structure their relationship in detail. Accordingly, there appears to be little need for layering on additional judicially administered standards that are not contained in the agreement, such as by reading the text in ways that no party would have contemplated. Second, while the absence of resolution of ongoing claims may justify the use of an open-ended standard like the duty to consult, this standard can be developed in such a way as to maximize certainty and predictability for parties. The third important source of uncertainty that could be minimized is the lack of resolution of ongoing claims. Measures that lead to resolution, either through agreement or litigation on the merits should be encouraged. And finally, now that the Supreme Court has established the broad outlines of Aboriginal jurisprudence through a series of dramatic judgments, the goal of certainty would be furthered by allowing for the gradual and incremental elaboration of these standards by the courts, as well as by Aboriginal groups, governments, and other parties on the ground.

5.2 Minimizing recourse to terms outside modern agreements

The main government objective in engaging in modern treaty-making is to enhance legal certainty with respect to the rights and obligations of all parties.[67] This is seen, for example, in a statement on the website of the Department of Aboriginal Affairs and Northern Development justifying the treaty process in economic terms:

> Uncertainty about the existence and location of Aboriginal rights create uncertainty with respect to ownership, use and management of land and resources. That uncertainty has led to disruptions and delays to economic activity in B.C. It has also discouraged investment. … The consequences of not concluding treaties will be lost economic activity as well as escalating court costs and continued uncertainty.[68]

Indeed, as the Supreme Court has noted, certainty is a goal not just for governments but also for Aboriginal groups.[69] It allows such groups to make definitive plans for the future, not only with respect to traditional uses, but also for their own economic development prospects.

67. Thomas Isaac (2012), *Aboriginal Law: Commentary and Analysis* (Purich): 172.
68. Aboriginal Affairs and Northern Development Canada (2010). *Fact Sheet – Treaty Negotiations*, <https://www.aadnc-aandc.gc.ca/eng/1100100032288/1100100032289>.
69. *Beckman v. Little Salmon*, at para 12, per Binnie J, and paras 109–111, per Deschamps J.

In order to achieve the promise of legal certainty, both Aboriginal groups and governments typically devote substantial resources to negotiating detailed agreements. Both sides have access to extensive legal resources (sometimes made possible through loan arrangements in the case of Aboriginal groups) and both sides have reasonable alternatives to concluding an agreement. There is no sense in which Aboriginal groups are "forced" into modern agreements. If an agreement is not reached, the alternatives are to continue on with uncertain rights, or to litigate the claims (with the possibility of a substantial advance cost award for the Aboriginal group to fund the litigation). There is, in short, no apparent need to go beyond the expressed intentions of the parties to modern land claims agreements in order to secure adequate protection for Aboriginal interests. To say this is not to say that a treaty could not include some ambiguity or have failed to contemplate some specific issue. However, overall, the agreements have been negotiated over lengthy periods, with large teams involved, and the way they deal with an issue is almost invariably going to be closer to the parties' needs than something a Court imposes based on its quicker examination of a problem, often from afar. There may be highly exceptional cases that amount to exceptions, but judicial adjustment of the implications needs a very strong rationale. Accordingly, any time courts introduce standards of conduct external to the agreed terms of a modern land claim agreement, a compelling justification should be given, since this recourse to external standards can undermine the very legal certainty that is the central purpose of the agreement.

In *Little Salmon*, the Supreme Court found that just such an external requirement of consultation should be imposed when the Crown exercises its right under the treaty to take up land.[70] This is despite the fact that the agreement in question set out consultation obligations in a number of provisions under the treaty, but not with respect to the taking up of lands. As pointed out by the concurring opinion, reduced legal certainty with respect to modern treaties will actually undermine, rather than promote, the ultimate objective of reconciliation between Aboriginal peoples and the Crown:

> To allow one party to renege unilaterally on its constitutional undertaking by superimposing further rights and obligations relating to matters already provided for in the treaty could result in a paternalistic legal contempt, compromise the national treaty negotiation process and frustrate the ultimate objective of reconciliation.[71]

70. *Beckman v. Little Salmon*.
71. *Beckman v. Little Salmon*, at para 107, per Deschamps J.

There is every reason to believe that eroding the certainty provided for by agreements will actually discourage parties from engaging in settlement negotiations in the first place. Modern land claims negotiations are quite costly. If the ultimate benefit to be derived from an agreement, legal certainty, proves to be elusive, then the costs of negotiation might not seem worthwhile to the parties.

Going forward, courts can enhance the legal certainty associated with modern land claims agreements by requiring a high bar for going beyond the terms of the agreement. Modern land claims agreements in fact have far more in common with complex commercial contracts than they do with the short and vaguely worded treaties of the 19th century, which were often negotiated under conditions of stark inequality of bargaining power. Modern treaties are the product of negotiations by teams of lawyers setting out to delineate rights with respect to valuable resources. When it comes to modern treaties, fidelity to the words that the parties have used to express their obligations seems like the best way to encourage meaningful and lasting reconciliation, not least because certainty is an abiding aim on both sides of the negotiating table. That said, as in the commercial realm, parties to a negotiation cannot anticipate every circumstance that may arise, and genuine gaps in agreements are inevitable. Such circumstances are likely to be the exception rather than the rule, however, given the priority accorded to legal certainty and the resources devoted to negotiations.

It may be helpful to highlight a recent decision that prioritizes the values of legal certainty and fidelity to the expressed intentions of the parties under modern land claims agreements. *Nunavut Tunngavik Incorporated v. Canada (Attorney General)*,[72] a decision of the Nunavut Court of Appeal, was based on litigation brought by the corporation representing the Inuit of Nunavut. The case stemmed from violations of the 1993 Nunavut Land Claims Agreement. The appeal dealt with a finding by the case-management judge that, in addition to the Government of Canada's obligations under the terms of the Agreement, Canada also owed general fiduciary, or trust-like, duties to the Inuit in the carrying out of its obligations under the Agreement. Such duties allowed the judge to grant remedies that would otherwise not have been available. Slatter J.A, writing for the majority, allowed the appeal, adopting a line of reasoning that prioritizes certainty in modern land claims agreements. Justice Slatter's reasoning is worth quoting at length, for it is hoped that this type of approach comes to be more widely adopted:

> Principles of interpretation cannot be taken so far that they compel the [government] to do more than what has been agreed to, nor to create new

72. 2014 NUCA 2.

> obligations that are not in the Land Claims Agreement. A treaty is not an empty vessel to be filled up using interpretive principles with whatever covenants one of the parties or the court thinks, with hindsight, would be a "good idea", "fair", or "consistent with the honour of the Crown"
>
> ...
>
> A proper interpretation of the Land Claims Agreement and the Act reveal that they were intended to be a comprehensive exposition of the specified rights and obligations of the appellant and the respondent. It is inconsistent with the entire legislative and contractual package to superimpose supplementary or parallel fiduciary duties to monitor over the express covenants in the Land Claims Agreement.
>
> ...
>
> It does not assist the treaty making process to send a signal that every new treaty carries with it ill-defined parallel fiduciary duties. Canada will be better positioned to enter into modern treaties if it knows that its obligations are to be found within the four corners of the treaty, based on recognized principles of interpretation of such covenants, and that surrendered Aboriginal claims will not still exist in some ephemeral state to impose additional, possibly inconsistent, fiduciary obligations.[73]

Decisions like this help to reinforce the legal certainty that is the central aim of modern land claims agreements, and provide incentives for parties to come to the table in order to gain the benefits of this certainty. It is to be hoped that future trends in the jurisprudence on the interpretation of modern treaties follow suit in minimizing recourse to terms outside of what are supposed to be comprehensive agreements.

5.3 Elaboration of the duty to consult

The next way in which courts can aid in establishing a greater degree of legal certainty in Aboriginal law relates to the doctrine on the duty to consult we discussed earlier in the paper. The uncertainty associated with litigation under the duty to consult is likely greater than with other types of litigation. The standards are framed in general terms, with many different factors that could turn out to be relevant in a given case, including the "strength" of the Aboriginal claim, the timelines for consultation, the types of consultation engaged in, the quality of the consultation efforts, and the degree, if any, of accommodation of Aboriginal interests. Moreover, the duty to consult aims to govern the process the government engages in, rather than the substantive rights and obligations of the parties,

73. 2014 NUCA 2, at paras 72, 73, 77, citations omitted.

which creates an additional layer of removal from what the parties are actually entitled to do with the resources in question. All of this makes predicting outcomes of duty to consult litigation very difficult.

The fact that industry is so eager to engage in deals with Aboriginal groups that are owed consultation indicates the seriousness of the legal risks associated with the duty to consult.[74] In light of the threat of litigation, it is often less costly to bring the Aboriginal group onside, even if this requires revenue sharing or other benefits, despite the fact that courts have emphasized that the duty to consult is not actually a veto power.[75] It should be noted as well that, where multiple Aboriginal groups are entitled to consultation, the challenges of coordination among the Aboriginal groups can mean that projects are stalled even when all of the groups stand to benefit, and indeed when all groups ultimately want the project to go ahead.[76] For example, one group might hold out for a greater share of benefits, creating delays that imperil the whole project.

As noted above, the duty to consult can play an important role in protecting Aboriginal interests where rights have not yet been proven, or where the Crown exercises rights under historic treaties that were not the subject of detailed negotiations. While some uncertainty may be inevitable in the implementation of a general, procedurally oriented, standard like this, as more cases are decided there are ways in which courts can develop the duty to consult that will provide greater clarity to the parties governed by it. There are two principal approaches that courts can take to create greater certainty, and these approaches are not only compatible with each other but mutually reinforcing.

The first way to get greater certainty for parties in understanding their obligations under the duty to consult is to establish greater clarity with respect to the principles that the duty is meant to serve. As one of us has observed, the theoretical foundations of the duty to consult are not as well established as they might be. Considerations relating to the "honour of the Crown", the structuring of negotiations between governments and Aboriginal groups, and the promotion of "reconciliation" can all be found in the jurisprudence.[77] A better understanding of the purpose of the duty to consult would allow parties and lower court judges to understand more readily what concrete obligations it requires in different circumstances.

The second way in which jurisprudence around the duty to consult can develop in a way that facilitates certainty is through a kind of rule-based elaboration of

74. See Dwight Newman (2015), *The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and Canada's Natural Resource Sector* (Macdonald-Laurier Institute Papers Series, May): 12–13.
75. *Haida Nation*, at para 48.
76. Newman (2014), *Revisiting the Duty to Consult*: 172.
77. Newman (2014), *Revisiting the Duty to Consult*: 23–35.

the standards involved. As case law builds up, there will be certain types of scenario that will present themselves again and again: for instance, the taking up of lands by the Crown under an historic treaty that also provides for treaty rights to hunt and fish in the ceded territory. If courts come to rely on the precedents from similar factual scenarios, then gradual elaboration of the specific content of the duty will emerge. It will come to be known, based on precedent, that a particular kind of project with a particular kind of effect on Aboriginal rights will result in a given set of discrete consultation obligations. Indeed, this process of elaboration is already happening, particularly through the substantial body of Aboriginal law jurisprudence at the British Columbia Court of Appeal.[78] For a process of gradual elaboration to work, judges must resist any temptation to simply decide cases on their perceived policy merits, and rather work to fit a given case within the existing and ever-growing body of consultation precedents. If this happens, and if there are no further dramatic shifts in the jurisprudence from the Supreme Court, then the gradual accumulation of precedent should result in an elaboration of the duty to consult that enhances certainty over time.

5.4 Encouraging resolution of substantive rights claims

In terms of legal certainty, there is no substitute for well-defined rights, including not only rights to land, but also rights to use particular resources. In the realm of Canadian Aboriginal law, there are essentially two avenues that an Aboriginal group can take to obtain well-defined rights of this kind. The group can initiate litigation to obtain a declaration of Aboriginal rights (that is, rights to use resources or engage in traditional practices) or a declaration of Aboriginal title (a right akin to ownership). Alternatively, the group can enter into a comprehensive land claim agreement with the Crown, which typically involves ceding or agreeing not to assert any Aboriginal rights or title. In exchange the Crown will recognize well-defined treaty rights, which usually include rights to defined areas of land and a right to use other resources. It should be readily apparent that both of these approaches lead to greater legal certainty than would be the case if the scope and content of the group's rights remained undetermined. Accordingly, both treaty-making and litigation of substantive rights claims can aid in establishing legal certainty.

Courts have expressed a strong preference for resolution of claims through negotiated settlements, and indeed these are likely to remain the primary mechanism

78. For some recent cases elaborating a set of rules in this area, see, e.g., *Nlaka'pamux Nation Tribal Council v. British Columbia (Project Assessment Director, Environmental Assessment Office)*, 2011 BCCA 78; *West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2011 BCCA 247; *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2012 BCCA 333; *Halalt First Nation v. British Columbia (Minister of Environment)*, 2012 BCCA 472.

of resolving ongoing Aboriginal rights claims. Yet courts should also recognize that litigation over substantive rights may also have a role to play. Where an Aboriginal group succeeds (or fails) in establishing Aboriginal rights or title in a given area, all parties going forward have much more information about the applicable legal framework. Further, the availability of litigation as a realistic option promotes settlement of disputes, since both sides of the negotiation know that intransigence may be met with an effective alternative means of achieving resolution.[79]

Aboriginal groups and governments should continue to attempt to resolve claims through negotiated settlement. While complaints are sometimes heard about the resources governments have devoted to achieving settlements with Aboriginal groups, the fact remains that this is usually the best way to avoid the significant economic costs associated with ongoing legal uncertainty, while also treating Aboriginal peoples' legitimate claims in a fair manner. Governments should also try to be as diligent as possible in fulfilling their obligations under treaties. Aboriginal groups will be more willing to come to the table if they know that they can rely on governments to fulfill their obligations voluntarily, rather than under threat of litigation. Despite the rejection of claims based on parallel fiduciary obligations, the litigation in *Nunavut Tunngavik Incorporated* did reveal violations by the federal government of the clear terms of the agreement.[80] When violations of this kind occur, they undermine relations between Aboriginal groups and the government in a way that can discourage future settlement negotiations.

At the same time, a streamlined process for litigating substantive rights claims in the courts also promotes legal certainty in the long run. It is true that trials over the content and scope of Aboriginal rights or title are usually quite complex by their very nature, often involving historical and anthropological evidence, along with oral histories. Yet any measures courts can take to achieve efficiencies and reduce delay in deciding claims will ultimately assist in achieving legal certainty. In the end, it will be a combination of litigation and negotiation—and the interactions between the two—that will resolve outstanding claims and yield a certainty dividend for Aboriginal and non-Aboriginal people alike.

5.5 Incremental Development of the Law

The final point relates more generally to the way in which the law is developed. Aboriginal jurisprudence over the past 25 years has been marked by a series of major decisions that dramatically altered the legal landscape and the expectations

79. The government, too, can theoretically use litigation as a means of achieving greater certainty, for instance by seeking a declaration that Aboriginal rights or title do not apply to a given area of Crown land.

80. 2014 NUCA 2, at para 17.

of parties involved in natural resource development. From the first recognition of constitutionally protected Aboriginal rights based on historic practices in *R. v. Sparrow*,[81] to the recognition of unextinguished Aboriginal title to land in *Delgamuukw*,[82] and a broad government duty to consult in *Haida Nation*, the courts have pushed Canadian law in a direction that allows for the robust protection of Aboriginal interests. Yet this rapid development of the law has come at the cost of significant legal uncertainty. And as the example of the *Ross River Dena Council* case from Yukon shows, further dramatic shifts in jurisprudence come at the cost of creating more uncertainty.[83]

Having now set out the basic framework for how Aboriginal interests can be protected, courts can enhance certainty going forward by working to develop this framework in an incremental manner. This avoids the uncertainty associated with sweeping new pronouncements from the courts. Perhaps more importantly, it allows a body of precedents to indicate concretely how abstract legal principles will be applied in particular categories of cases. Further, in deciding these cases, courts can be expected to be alert to practices that develop among Aboriginal groups, governments, and resource companies, and to gradually mold the law to accord with these practices and the expectations they foster.

By necessity, this task of gradually filling in the legal framework established by the Supreme Court will primarily fall to lower courts. The Supreme Court still has a role to play in resolving conflicting strands of jurisprudence and clarifying high-level principles, as it does in every area of law. However, it is to be hoped that the era of dramatic legal change implemented from the top of the judicial hierarchy is behind us. The Lamer and McLachlin courts have done a great service by putting Aboriginal rights, long neglected, at the forefront of legal discussion in this country. However, as Canadian Aboriginal law develops into a more "mature" body of jurisprudence, it is hoped that further developments come more from parties on the ground: Aboriginal groups, governments, and other parties seeking to order their affairs, on the one hand, and trial courts resolving concrete disputes in light of available principles, practices, and precedents, on the other.

81. [1990] 1 SCR 1075.

82. *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010.

83. *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, leave to appeal to S.C.C. denied (19 September 2013)..

6 Conclusions and Recommendations

This report has highlighted the ways in which Aboriginal law developments can generate legal uncertainty. And, indeed, the case study of Yukon illustrates the point clearly. Industry perceptions of legal certainty peaked in Yukon between 2009 and 2012 and, since then, have declined rapidly, such that on perceptions of legal certainty relating to land claims, Yukon is now more like British Columbia than Saskatchewan. The modern treaty framework has become less useful. But this need not remain the case.

Even where it seems that negotiations have established a great deal of legal certainty, perceptions of that certainty can be lost rapidly if it is not genuine. The courts can thus easily undermine extensive work between governments and Aboriginal communities if they act so as to create or perpetuate legal uncertainty. Changes in the application of the duty to consult and the interpretation of modern treaties have had a clear negative impact on perceptions of certainty in Yukon. This, in turn, has a direct effect on levels of investment in natural resource projects, and ultimately on the well-being of all territorial residents, Aboriginal and non-Aboriginal alike.

In addition to examining the specific case of changing perceptions of legal certainty in Yukon, this paper has also sought to outline the nature of legal certainty, why it is important, and how courts can enhance or detract from legal certainty in their decision-making, with specific reference to Aboriginal law. It is hoped that a restatement of the basic arguments in favour of legal certainty will motivate judges to prioritize this value. As the paper has sought to emphasize, protection of Aboriginal interests does not necessarily require the imposition of high levels of legal uncertainty. Drawing on the case study of Yukon, as well as legal and economic theory, the paper has set out a number of approaches that, if adopted by courts, would provide greater legal certainty, while at the same time giving due protection to Aboriginal interests. These include the following.

1 Minimizing recourse to terms outside modern agreements

Modern comprehensive claim settlements are highly detailed documents negotiated by informed parties working from a position of relative equality. Their principal objective is to enhance legal certainty. When courts rely on terms outside of so-called comprehensive agreements, they undermine this certainty, and thus imperil both the economic benefits associated with certainty and the broader goal of achieving reconciliation.

2 Elaboration of the duty to consult

The current state of the doctrine of the duty to consult is one of confusion as to purposes and indeterminacy as to concrete application. It is a significant source of ongoing uncertainty. Courts can help remedy the situation by establishing clearer purposes for the doctrine, as well as by the gradual elaboration of precedent. The latter requires a significant degree of deference to existing precedents, and a reluctance to impose dramatic shifts in the law. The *Ross River Dena Council* case from Yukon is an example of a dramatic shift in the doctrine that undermines, rather than bolsters, legal certainty in this area of law.[84]

3 Encouraging resolution of substantive rights claims

The resolution of ongoing Aboriginal rights claims, either through agreement or litigation, is the best way to achieve lasting legal certainty. Courts can encourage this process by declining invitations from parties to depart from the express terms of modern comprehensive agreements. This preserves the certainty dividend from agreements, and thus maintains the parties' incentives to enter into such agreements in the first place. Courts can also assist in encouraging resolution by streamlining processes for bringing substantive rights claims, thus helping make such claims more attractive relative to duty-to-consult claims, which do not yield the same certainty dividend.

4 Incremental development of the law

A great deal of uncertainty in Aboriginal law, including as it relates to Yukon, stems from dramatic and fundamental shifts in jurisprudence. Having now set out a basic framework within which Aboriginal rights can be understood, courts can enhance certainty by allowing this framework to be developed incrementally.

Some of these recommendations, such as the idea of developing the law incrementally, merely reflect the institutionally proper role of the courts. Some may seem to adopt specific policy aims. We suggest that in this particular area of constitutional law, the courts have had thrust upon them certain policy determinations. Government policy on Aboriginal issues has major impacts on both Aboriginal Canadians and non-Aboriginal Canadians, the latter particularly through mechanisms that affect resource industries, with consequences for prosperity for all. Government policy on Aboriginal issues, perhaps more than any other area of government policy, is affected by, and even determined by, the legal framework in which it operates. At the same time, because the law is constitutionalized,

84. *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, leave to appeal to S.C.C. denied (19 September 2013).

governments are not readily able to change judicial outcomes in this context. If courts applying the limited constitutional text in this area do not take into account the policy outcomes of their decisions, they may impose results that cause great harm. Even if policy considerations are not generally within the domain of courts, courts have special responsibilities to consider them in this context.

We should all be working also to hold courts accountable for their decisions. Careful critiques of decisions tell judges that rendered those decisions that there are problems with them. Such critiques have sometimes been a factor in courts later altering legal rules. In the meantime, rules that have been critiqued effectively may be seen as having less persuasive weight for other courts. The Supreme Court of Canada, a long way from Yukon in every respect, will nonetheless make major legal determinations that affect the fate of the territory. Everyone should be encouraging it to get things right and should be ready to speak out when it does not. This paper is part of that task—engaging with negative aspects of some constitutional law judgments made by the Supreme Court of Canada. That work may be less pleasant work than cheerleading for the Court, but it is essential work. Legal systems and certainty matter that much.

Appendix

Table App. 1: British Columbia—effect on investment of level of uncertainty (%) concerning land claims

	1 encourages	2 no effect	3 deters	4 deters strongly	5 won't invest
2004	4	9	31	42	14
2005	2	6	42	39	10
2006	3	17	41	33	7
2007	3	17	43	31	6
2008	3	15	40	35	6
2009	0	10	40	40	9
2010	4	17	27	41	12
2011	10	17	30	34	8
2012	11	22	30	33	4
2013	9	22	38	26	6
2014	6	21	22	38	12

Source: Various authors (2004/2005–2014), Fraser Institute Annual Survey of Mining Companies, <www.fraserinstitute.org>; authors' calculations.

Table App. 2: Saskatchewan—effect on investment of level of uncertainty (%) concerning land claims

	1 encourages	2 no effect	3 deters	4 deters strongly	5 won't invest
2004	13	46	39	2	0
2005	8	39	39	12	2
2006	8	40	40	8	5
2007	17	31	41	10	0
2008	13	41	38	9	0
2009	11	44	41	3	1
2010	18	45	25	12	0
2011	23	53	21	3	0
2012	16	53	30	2	0
2013	16	49	30	5	0
2014	22	46	28	4	0

Source: Various authors (2004/2005–2014), *Fraser Institute Annual Survey of Mining Companies*, <www.fraserinstitute.org>; authors' calculations.

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