SUPPORTING PROPERTY INTERESTS ON LANDS RESERVED FOR FIRST NATIONS

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Abstract

My concern within this thesis is the ongoing debate regarding the relationship of First Nations communities and private property rights. I do not advocate or share the view that private property rights on reserve are necessarily a colonial-based approach nor that they are a product of a continued Canadian project of genocide. Not all attempts to reconfigure land tenure rights for First Nations are attempts to eliminate Indigenous relationships with land or attempts to eliminate Indigenous peoples.

The thesis shows that there are more options for private property on reserve than often realized. I examine the history of First Nation land management and provide a brief background of three land management regimes types: the Indian Act land management (IALM), First Nations land management (FNLM) and, more briefly, self-government land management (SGLM). While a direct comparison is not offered, I discuss the FNLM regime in greater detail and focus on the fact that it is a strong self-governing model for First Nations lands and resources.

Despite the formality of land tenure offered through Certificates of Possession (CPs) under the *Indian Act*, many First Nations have not used CPs in the past. Instead, some have turned to an informal system of property rights often referred to as customary allotments. Some First Nations may have recognized these customary allotments and even recorded them in some fashion, but such property rights are not sanctioned under the *Indian Act*. This thesis will present some insight as to how those customary allotments have transitioned into a more formalized property system under the laws made by a First Nation pursuant to their land codes.

Scholars have argued that an informal system lacks security of title due to poor documentation and often un-surveyed land holdings. I partly agree, though I also argue that land rights do not have to be absolute to be effective and the Framework Agreement provides for a better land registry scheme which is consistent and updated. It allows for First Nations operating under land codes to register their allotment or member-interest in lands as specific instruments. More importantly, I argue possibilities under the Framework Agreement including the broad law-making authority and an assessment of individual allotment laws. These are actual government laws, not bylaws, and they are only increasing as the number of First Nations with land codes grows.

I conclude that the implementation of private property on reserves is not restoring pre-colonial property rights regimes. These are real choices made by First Nations based on what works best for their community, culture, traditions, and future. More property regimes and private property options exist on reserve than what is currently discussed, with an increasing number of First Nation communities that are choosing to have private property rights for their members.

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CHAPTER I: INTRODUCTION

Private property rights on reserve are sometimes considered a delicate topic. It is important to know that they are not mutually exclusive with the *Indian Act*[1] and have evolved even more so under the Framework Agreement on First Nations Land Management[2] (Framework Agreement). More private property regimes and private property options exist on reserve than what is currently discussed. There are an increasing number of First Nation communities that are choosing to have private property on reserve for their members and utilizing these various options. Which is most effective is the subject of debate. This thesis aims to show that the Framework Agreement especially allows for expanded opportunities for private land holdings. These come in various forms of allotment or individual holdings. There is much evidence surrounding how many First Nations under their own land codes have drafted and are currently making room for some sort of private property rights for their members. The flexibility, law-making, and enforcement authority under the Framework Agreement are incomparable.

Private property rights are an important and controversial subject for First Nations[3] people in Canada. Now more than ever, First Nations are taking steps to protect, preserve and enhance their rightful interests in property and lands. With steady increases in populations, self-governing and sectoral legislation,[4] on-reserve businesses often operated by First Nations members, and a variety of economic development projects, to name a few considerations, it is an opportune time for understanding the importance and uses of private property rights in relation to

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* As a First Nation lawyer who has dedicated my career in the broad field of Indigenous law, the views in this thesis are intended to convey a broader approach to private property rights on reserve lands. The research is sincerely coming from an Indigenous perspective and utilizes ideas held by many First Nations communities across Canada

[1] *Indian Act*, RSC 1985, c I-5 [*Indian Act*]

[2] *Framework Agreement on First Nations Land Management*, February 12, 1996, as amended in 2018 [Framework Agreement].

[3] In Canada the term "First Nations" most often used in plural, has come into general use to replace the term "Indians." The term refers to the various Aboriginal people in Canada who are neither Inuit nor Metis. See e.g. https://www.queensu.ca/indigenous/ways-knowing/t https://www.rcaanc-cirnac.gc.ca/eng/1323350306544/1544711580904 terminology-guide

[4] Canada, "Attempts to Reform or Repeal the *Indian Act*" (July 5, 2013), < https://www.rcaanc-cirnac.gc.ca/eng/1323350306544/1544711580904>. Since the late 1990s, a number of sectoral arrangements under the *Indian Act* regime have been successfully concluded with some First Nations. The process for sectoral arrangements begins with specific proposals by First Nations wishing to take on new or expanded law-making and/or other authorities within the purview of federal powers under section 91 of the *Constitution Act, 1867*.

First Nations groups across Canada. For the purposes of this thesis we are discussing individual rights to land on Indian reserves[5] in Canada. This thesis will discuss the various legislative regimes that govern land tenure on First Nation lands and how these regimes impact property rights for members on reserve.

First Nations are engaged in various ways in having forms of individual land tenure and are finding creative ways of achieving this through legal regimes. There is evidence of the growing sense of the importance of having a form of individual land tenure on reserve. Depending on which First Nation you visit in Canada, you will find varying views on private or individual property rights. For example, in some First Nations communities, private property may not be seen as a traditional perspective, rather as more of a western or colonial approach to thinking that has no place in First Nations land tenure. On the other hand, many First Nations have seen the benefits of having a formalized private property structure on their reserves, especially in relation to home ownership or having the ability to generate revenue from leasing farmland for example. Due to the controversial nature of private property rights amongst First Nations, it is essential to discuss how various forms of these rights are structured and respected across Canada so both First Nations and others can have an understanding that there is no one-size-fits-all approach.

The landscape for property rights in Canada in general is significantly different for First Nations people living on-reserve than it is for Canadians or First Nations living off-reserve. The land tenure system for First Nations in Canada is governed by a separate piece of legislation dealing with "Indians and lands reserved for the Indians",[6] the *Indian Act*. Specific sections of the *Indian Act* will be examined, particularly those dealing with lands and land management. While a partial focus will be on the *Indian Act*, a large portion of the thesis will be dedicated to the Framework Agreement and highlight some brief references to modern treaty

[5] An Indian "reserve" is defined in section 2(1) of the federal *Indian Act, supra* note 1, as a "tract of land, the title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band."

[6] *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 91(24) states that the federal government has exclusive authority over "Indians, and Lands reserved for the Indians". This means that the federal government, not the provinces, has the authority to pass laws that are "in pith and substance" about First Nations people and their lands.

agreements. Both ultimately have offered a viable alternative to the *Indian Act* and are included in the foreseeable future of land tenure for some First Nations.

Many First Nations have or are currently adopting land codes under the Framework Agreement and a handful have been able to obtain modern land claim or treaty agreements. Those that wish to utilize private property rights have been limited in the past by archaic, paternalistic legislation. Despite this, private property has been achievable for some First Nations under the *Indian Act* and has largely been incorporated into a more modernized approach when First Nations move away from the *Indian Act* land tenure system. The following will first examine the *Indian Act* land tenure system to understand how First Nations property rights on reserve within the *Indian Act* operate and then ask how it is possible to preserve or expand upon such rights in the event the *Indian Act* is no longer the primary land management regime[7] for the First Nation.

The latter parts of this introduction provide a very short overview of the land tenure regimes available for First Nation reserve lands, setting the stage for the more detailed discussions that follow, and briefly introduce some conceptions of private property for Indigenous people in general. Following the introduction there are essentially two main chapters and then a conclusion. Chapter two examines what is currently the main land tenure regime for most First Nations, the *Indian Act*. We will see how such private ownership rights operate for different First Nations communities under the *Indian Act*. Here is where we see the beginning and formalization of private property rights for First Nations with allotments and Certificates of Possession ("CPs"). The various land tenure provisions, regulations, funding and management regimes will be briefly explored and some of the major limitations with the legislation will be examined as well. There will be a heavy emphasis on the use of CPs as evidence of private property rights already working for some First Nations on reserves.

Chapter three is dedicated to First Nations operating under their own land codes under the Framework Agreement. In the context of a limited legal scholarly literature on the Framework Agreement, this chapter provides a description of how the Framework Agreement allows for

[7] First Nations lands in Canada are under one of three land-management regimes: The *Indian Act*, including the Reserve Land and Environment Management Program (RLEMP, 2015), the First Nations Land Management regime, and various frameworks of self-governing land management.

extensive land and resource management free from the constraints of the *Indian Act* land tenure system. The law-making powers under the Framework Agreement are unsurpassed, and several First Nations have chosen to adopt some type of individual property rights through laws enacted in a Framework Agreement context. Under the Framework Agreement, a First Nation develops a land code and land laws to manage their lands and natural resources outside the restrictions of the *Indian Act*. The chapter highlights examples of how specific First Nations have chosen to continue or enact private ownership for their members.

Extensive literature on how the Framework Agreement has enhanced economic activity and development on reserve does exist. An examination of those economic issues is beyond the scope of the present thesis. Special reference should be made to notable authors Malcolm Lavoie and Moira Lavoie who have provided a comparison of how First Nation communities have chosen to exercise their powers under the Framework Agreement to define and regulate land interests on reserve while giving a preliminary examination of economic impacts. Several other authors have also completed studies in the realm of the Framework Agreement and hopefully this thesis within the same field of law can contribute to the literature in a broader Canadian context.[8]

The final chapter will briefly discuss a few alternative approaches including what some First Nations have recently negotiated in treaties and a brief introduction and update on the failed First Nations Property Ownership Initiative. While land tenure security on reserve is related to and important for economic development, the question of whether First Nations would still be interested in having a private property regime for their on-reserve members without economic development in the mix is discussed as well.

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[8] Authors such as Malcolm Lavoie, Jamie Baxter, Michael Trebilcock, Marena Brinkhurst and others have greatly contributed to the research on the First Nations Land Management regime: Malcolm Lavoie & Moira Lavoie, , "Land Regime Choice in Close-Knit Communities: The Case of the First Nations Land Management Act" (2017) 54 Osgoode Hall LJ 599; Jamie Baxter & Michael Trebilcock, "Formalizing Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform" (2009) 7:2 Indigenous LJ 45; Jamie Baxter, *Inalienable Properties: The Political Economy of Indigenous Land Reform* (Vancouver: UBC Press, 2020); Marena Brinkhurst, Community Land Use Planning on First Nations Reserves and the Influence of Land Tenure: a Case Study With the Penticton Indian Band (MRM Planning, SFU School of Resource and Environmental Management, 2013), online: <//summit.sfu.ca/item/12957>; Marena Brinkhurst, & Anke Kessler, "Land Management on First Nations Reserves: Lawful Possession and its Determinants," Discussion Papers dp13-04, Department of Economics, Simon Fraser University (April 2013).

A. Land tenure 101

To understand the argument in this thesis, it is necessary to have a grasp on the background surrounding the situation of First Nations and their land tenure. Land tenure for First Nations has been extensively written about. As Aragon and Kessler note **"**nearly forty percent (40%) of First Nations, or more than 300,000 people, live on reserves. Reserves are tracts of land set apart "for the collective use and benefit" of a First Nations band."[9] A band is typically governed by a band council as structured in the *Indian Act* or according to a customary governance arrangement as negotiated with the federal government. According to the Ministry of Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC),[10] there are currently more than 3,000 reserves with a combined area of over 3.8 million hectares.[11] The overwhelming majority of reserve lands are managed under the *Indian Act* land tenure regime. Those parcels are registered in the Indian Lands Registry System (ILRS) which is a database of instruments relating to Reserve Lands and Crown Lands.[12] The rest fall into regimes established through the First Nation Land Management Regime, through modern treaties or self-government agreements, or through custom arrangements.[13]

According to CIRNAC, there are over 630 First Nations communities across Canada.[14] Despite the large land base held as reserve lands in Canada, there is no single land tenure system that applies to every reserve although, the majority, roughly 550 bands, operate under the *Indian Act's* land-related provisions. The *Indian Act* itself has been a controversial piece of legislation that was forced upon the First Nations of Canada governing almost every aspect of their lives.

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[9] Fernando M Aragon & Anke Kessler, "Property rights on First Nations' reserve land", Discussion Papers dp17-14, Department of Economics, Simon Fraser University at 4 (2017) [Aragon & Kessler].
[10] Canada, "Transformation: Indigenous and Northern Affairs Canada" (Ottawa. Indigenous and Northern Affairs Canada 2017), <https://www.canada.ca/en/indigenous-northern-affairs.html#shr-pg0>. The Department of Indigenous and Northern Affairs Canada (INAC) was dissolved and two new departments were created, Indigenous Services Canada (ISC) and Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), the latter being responsible for all previous INAC data collection and processing services
[11] Aragon & Kessler, *supra* note 9 at 4
[12] An Instrument is a formal legal document dealing with transactions relating to interests in Indian land: the document specifies the type of transaction, the parcel of land, the parties to the transaction, and any legal details and specifications required.
[13] Aragon & Kessler, *supra* note 9
[14] Canada, "Indigenous Peoples and Communities" (Ottawa. Crown Indigenous Relations and Northern Affairs Canada (CIRNAC June 11, 2021), <https://www.rcaanc-cirnac.gc.ca/eng/1100100013785/1529102490303>.

The *Indian Act* came into existence in 1876 with approximately one third of the *Indian Act* dealing with land management, resources and the environment; the remainder of its provisions, which are not specific to land, are not the focus of this thesis.

The Framework Agreement, discussed in more detail in chapter three, is an historic, government-to-government agreement signed on February 12, 1996 between the original 13 First Nations who created and advocated for it and the Minister of Indian Affairs and Northern Development. The initiative was developed by these First Nations to opt out of the lands-related sections of the *Indian Act*. While the Framework Agreement recognizes First Nations' inherent right to govern their reserve lands, the land remains in reserve status whereby the federal Crown holds title to the land in trust. Today, the Framework Agreement has expanded to include an ever-growing number of communities across Canada who want to replace the lands restrictions of the *Indian Act* with the legal framework developed in a community land code.

It is important to note the significance of the use of the terminology of the Framework Agreement as compared to the *First Nations Land Management Act*[15] (FNLMA). Although the FNLMA is likely the most familiar and widely used term, this thesis focuses on the Framework Agreement. When the Framework Agreement was concluded, Canada had committed to ratify the agreement in Parliament. This was done through the passage of the FNLMA. Signatory First Nations also ratify the Framework Agreement through the passage of their land codes. The Framework Agreement is the guiding document that both Canada and the First Nations are actively working to implement.

While the *Indian Act* has evolved over time and various amendments are currently underway, it remains quite a paternalistic piece of legislation. The amendments themselves have for the most part, been developed without the participation or consent of any First Nations in Canada, the last amendment being in 2015. Contrast this approach with the Framework Agreement[16] which can only be amended if most of the operational First Nations vote in favour of such amendments.

[15] *First Nations Land Management Act,* S.C. 1999, c. 24 [FNLMA].
[16] *Framework Agreement*, *supra* note 2

For most First Nations people, the *Indian Act* has both damaged and destroyed their sense of being, including their cultures and languages. It imposed attendance at residential schools where thousands of children were subjected to physical, sexual and mental abuse. It also dictates identity as to who can be considered a "status Indian," denied status to First Nations women who married non-First Nations men[17] and, at one point, officially banned cultural religious ceremonies. Despite its horrific legacy, many First Nations are not completely sold on the idea of abolishing the *Indian Act* to replace it with yet another piece of federal legislation. Briefly consider a few of the key points from the 1969 proposed *White Paper*[18] that would have included: dismantling the *Indian Act*, taking away Indian status, converting reserve lands into private property to be sold, and gradually terminating existing treaties. This paper was obviously met with strong opposition from First Nation leaders and governments across Canada and the experience of it may have been a contributing factor to the abandonment of the First Nations Property Ownership Initiative discussed later in this thesis.

A significant portion of the *Indian Act* deals with land-related provisions which will be the focus of Chapter two. These land-related provisions determine the formal arrangement of reserve land governance and forms of land tenure. They also set out how governments, bands, organizations and individuals can control, use and transfer reserve lands.[19] Within these land-related provisions lies section 20[20] of the *Indian Act* which has a large impact on some First Nations communities. This section allows an individual First Nation person living on reserve to hold possession of a parcel of land within the reserve. Depending on how the section is used, it can be seen as a beneficial piece of the *Indian Act*, having the ability to protect or enhance individual rights to land on a reserve.

Many First Nations have adopted their own land codes and have signed on to the Framework Agreement. According to the Lands Advisory Board and Resource Centre, "roughly fifteen percent of First Nations communities across Canada have signed on to the Framework

[17] *Indian Act, supra* note 1, s 12(1)(b).
[18] Rose Charlie, "The White Paper 1969", <https://indigenousfoundations.arts.ubc.ca/the_white_paper_1969>.
[19] *Indian Act, supra* note 1, s 20-29, s. 37-50, s.53-142
[20] *Ibid*, s 20 deals with lawful possession of reserve lands. Certificates of Possession, Cardex System, and Location Tickets are all considered lawful possession under the *Indian Act.* The legal land descriptions of Cardex Holdings were vague and often inaccurate.

Agreement and are seeing the benefits of local governance of their lands, environment and resources. Another fifteen percent are either in the development stage or have formally expressed interest."[21] When a First Nation becomes a signatory to the Framework Agreement and implements their land code, they resume self-governance over their lands and resources and manage their own affairs.[22] There are many qualifications a First Nation must meet in order to come under the Framework Agreement. They must draft a land code, hold community meetings to ratify that code and have a funding agreement in place with Canada. The First Nation Lands Register has been established under the Framework Agreement as the official lands registry for those First Nations governing their reserve lands under the Framework Agreement.

Two studies have been done by the consulting firm KPMG in 2009 and 2014.[23] Both studies found that First Nations participating under the Framework Agreement are making decisions more quickly and are displaying stronger economic outcomes when compared to First Nations that continue to have their land managed by the federal government under the *Indian Act*. The studies concluded that the Framework Agreement provides First Nations with additional tools for community-based decision making and achieving greater legitimacy and accountability, concluded that First Nations reported a forty percent (40%) increase in new business overall by band members, attracting approximately $53 million in internal investment and close to $100 million in external investment.[24]

The Framework Agreement has been very successful, and it continues to improve with amendments to favor the prosperity and self-governing of its First Nation signatories.[25] There are numerous benefits for First Nations who enact their own land codes. A land code is the basic

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[21] First Nations Land Management Resource Centre, "13 Questions: Answers to common questions about the Framework Agreement on First Nation Land Management" (Feb 2020), <https://labrc.com/wp-content/uploads/2020/02/13-FAQs-Feb-2020v2-002.pdf>.
[22] *Ibid*
[23] See KPMG, "Cost/Benefit Analysis of Future Investment in the Framework Agreement on First Nations Land Management" (27 January 2010), online: First Nations Land Management Resource Centre [KPMG Report I] and KMPG, "Framework Agreement on First Nation Land Management: Update Assessment of Socio/Economic Development Benefits" (27 February 2014), online: First Nations Land Management Resource Centre [KPMG Report II].
[24] National Aboriginal Economic Development Board, *Addressing the Barriers to Economic Development On Reserve* (April 2013) at 21, <http://www.naedb-cndea.com/reports/addressing-barriers-to-economic-development-on-reserve.pdf>
[25] Framework Agreement, *supra* note 2, s 57.2 indicates the Framework Agreement may be amended with the approval of 2/3 of the First Nations who have ratified the Agreement and Canada.

land law of the First Nation and replaces the lands-related provisions of the *Indian Act*. While the Framework Agreement greatly facilitates economic development, it is not a primary goal. When First Nation communities resume governance over their lands and resources, they are able to make timely and more appropriate decisions that reflect local needs and priorities, which may or may not include economic development.[26]

It is important to note that for now, the Framework Agreement only deals with lands and resources. For example, while it allows First Nations to opt out of 44 provisions dealing with land and resources under the *Indian Act,* the rest of the provisions of the *Indian Act* still apply. While it can also take years to draft and ratify a land code, many First Nations require the time to ensure they have the financial resources, staff capacity or technical knowledge to administer their lands on their own.[27] The Framework Agreement was designed to recognize the inherent right of self government by First Nations and to enable First Nations to re-establish control over their lands, natural resources and environment by replacing the antiquated *Indian Act* lands sections with their own laws.

It is important to know that being under the Framework Agreement does not imply or grant any legal rights of title to the First Nation. The title to their reserve lands remains with the federal Crown as First Nation lands continue to retain the same protection as "Lands Reserved for the Indians" under section 91(24) of the *Constitution Act*, 1867. the Framework Agreement only allows for an increased delegation of decision-making in relation to lands and surface rights management. The land codes vary considerably amongst First Nations who are signatories to the Framework Agreement. The Band Council of a First Nation still has ultimate authority to make decisions regarding the allotment and transfer of individual interests in land, granting of use licenses, approving leases and management planning.[28]

In terms of a formal registration system, subsection 51(1) of the Framework Agreement provides for Canada to establish a First Nations Land Registry System (FNLRS) to record

[26] "13 Questions", *supra* note 21
[27] Some treaty advisory committees have written briefing notes in which they discuss implications of going under the FNLMA.
[28]See e.g. Liam Kelly, L & B James Deaton, "Endogenous Institutional Change on First Nations Reserves: Selecting into the First Nations Land Management Act", Agricultural and Applied Economics Association 2020 Annual Meeting, July 26-28, 2020, Kansas City, Missouri, at 9.

documents respecting First Nation land or interests on the reserve. It is administered by Canada as a subsystem of the Indian Lands Registry System (ILRS) established under the *Indian Act*. The FNLR Regulations set out the rules for the registration or recording of documents and these regulations only apply to First Nations that have an effective land code in place. The FNLRS until recently, was administered by the Department of Crown-Indigenous Relations and Northern Affairs Canada located in Ottawa.[29] The system is entirely electronic and does not contain actual physical documents. Applications are submitted to the registry through a secure website where First Nations have access.

There also exist "customary" land tenure systems on reserves, which generally have no security and are not enforceable in Canadian courts.[30] Authors Alcantara and Flanagan note that many reserves in Canada have no formalized individual property rights. In actual practice, some First Nations communities allow or permit families to hold some sort of land as a form of customary private property. Essentially, "individuals or families acquire tracts of reserve land directly by allotment by the band council based on the notion that they have lived on the land a long period of time, or indirectly through inheritance from their ancestors."[31] The authors also provide a brief example of customary holdings, on Morley reserve of the Stoney Nation in Alberta, some members have fenced off reserve land for pasture, based on their customary property rights. This method of acquiring lands on reserve is very informal, resulting in a situation where such lands cannot be sold in any formal documented way. Similar to other private property interests in reserve land, they are usually left to family members or subdivided. Lands acquired this way lack formal legal protection as the federal government does not acknowledge customary allotments through the *Indian Act* or any other piece of legislation.[32]

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[29] An amendment to the FNLMA has enabled the Governor in Council to create regulations relating to the transfer of the administration and maintenance of the First Nations Land Registry to any person or body.
[30] See discussion in Tom Flanagan, Christopher Alcantara & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal & Kingston: McGill-Queen's University Press, 2010). Flanagan, Alcantara and Le Dressay discuss advantages and limitations of customary rights on Indian reserves and give examples of the Pikani, Blood and Siksika tribes in Alberta.
[31] Tom Flanagan and Christopher Alcantara, "Individual Property Rights on Canadian Indian Reserves", Fraser Institute, Public Policy Sources, No. 60 (July 2002) at 5 [Flanagan & Alcantara]
[32] *Ibid*; see e.g. *Johnstone v. Mistawasis First Nation* 2003 SKQB 240, 235 Sask.R. 206 (QB) where the First Nation decided to take back twenty hectares of customary-held land from Johnstone

As customary land tenure systems carry no legal protection in the general sense, they are not ideal structures. Several problems associated with these customary holdings include the fact that they are made at the discretion of the First Nation Chief and Council and they provide no tenure security or legal status for their holders. While some First Nation individuals and communities have continued to assert their customary land rights and in some cases, they enforce those rights within their own internal governing systems, Canadian courts have still not recognized these rights.[33] Sometimes, the nature of the customary rights themselves are discriminatory towards women, spouses, and those who are not actual band members who may have an interest or relationship with the community. They are a weak form of land tenure and, while significant enough to mention, they will not be a focus of this thesis.

B. Private Property and First Nation Lands

Throughout this thesis, and particularly in some final comments about possible future legislation, I will discuss the notion of privatizing reserve lands. In these discussions the most common phrase we may hear is transferring those lands into "fee simple."[34] In jurisdictions which preserve traditional common law as the legal basis of land ownership, fee simple is the highest interest in land an individual can hold. Fee simple ownership means that the individual has the land forever and has full freedom to sell it to someone else. An individual can grant the land to anyone in a Will and has absolute and exclusive use of the land forever. The ability to transfer the land held in fee simple to heirs whether by way of Will or automatically by way of legislation upon death of the holder, is one of the fundamental characteristics of fee simple. It creates continuity and enables wealth to be transferred between generations, creating opportunity, belonging and place for the heirs which is unavailable for First Nations living on reserve.

[33] In *Joe v. Findlay* (1981) 122 DLR (3d) 377 reserve land was found to be held in common not by an individual member of the band

[34] Fee Simple is the "The maximum possible interest (estate) one can possess in real property" The fee simple estate has unlimited duration and can be passed on to heirs. Denise L Evans & O William Evans, *The Complete Real Estate Encyclopedia*(Toronto: McGraw-Hill Companies, 2007)

Another obstacle related to fee simple being unattainable on reserve, is access to credit. Section 89[35] of the *Indian Act* has the effect of severely limiting the ability of First Nations to access credit on reserve. It creates a legal risk for lenders' security interests and overall problems in the context of secured lending. As Douglas Sanderson notes, "secured transactions like loans, are impossible when the assets of a person or business are located on reserve."[36]

The second type of ownership is a life estate in the land: "under a life estate, the individual owns the land only as long as he lives. Due to the temporary nature of ownership, the individual cannot sell or transfer the land. Also, the individual cannot designate the land to someone else in the event of his or her death and cannot exploit the natural resources of the land."[37] The individual however, does enjoy all of the other benefits of individual ownership, including the right to construct a house or other buildings on that land. This type of ownership, when compared to the system in place for many First Nations living on reserve in Canada, may seem analogous, although this thesis will expose some significant differences. For example, an individual band member on reserve is subject to the discretion of band leadership on home improvements, reimbursement for costs and archaic bylaws related to possessory interests of members.

Enforcement of private property rights on reserve is essentially non-existent. Even when an individual obtains lawful title, there is no guarantee it will be secure.[38] This is an important discussion because enforcement of bylaws and laws made on reserve is an ongoing challenge. Economist de Soto has examined property rights extensively, and looks at the issue through the lens of some third world countries that "lack any formal and reliable system of enforcing property rights."[39] When police and other enforcement authorities do not recognize or assist in

[35] *Indian Act, supra* note 1, s 89(1) states: "Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band."
[36] Douglas Sanderson, "Overlapping Consensus, Legislative Reform and the Indian Act" (2014) 39 Queen's LJ 511 at 546
[37] Christopher Alcantara, "Individual Property Rights on Canadian Indian Reserves: The Historical Emergence and Jurisprudence of Certificates of Possession" (2003) 23 Cdn J Native Studies 391 at 404
[38] Flanagan & Alcantara, *supra* note 31 at 3.
[39] *Ibid*

protecting land and homes, it can literally become a free-for-all, inciting gang or violent activity.[40] Sadly, this is a reality for many First Nations on reserves in Canada.

There is virtually no enforcement of *Indian Act* bylaws made on reserve lands with respect to trespassing, disorderly conduct or observance of law and order for examples. Lawyer Nick Sowsun discusses enforcement of *Indian Act* bylaws in greater detail and rightly notes:

> It is difficult to imagine a situation where municipal bylaws are not enforced because there is no prosecutor or court willing to prosecute the tickets." For municipal offences, provincial/territorial offences, federal and criminal offences there will always be a prosecutor and a court willing to pursue the charges. As with so many other aspects of the reality of life on First Nation reserves, the standard is completely different, and that is wrong.[41]

The *Framework Agreement* has much stronger enforcement provisions for enforcement of individual interest holdings on reserve lands.

Christopher Alcantara and Tom Flanagan have provided a significant amount of work surrounding the notion of individual property rights on reserves. They note how private property rights have been taken for granted by Canadians while the *Indian Ac*t has deprived First Nations living on reserve of the same right.[42] They further rely on others, including Casey Timmermans, who wrote that "Canada's aboriginals are denied access to our formal Canadian property system within their settlement lands",[43] and John Koopman, who stated that Canada's "Aboriginal reserves…lack a formal real property system that is rooted in individual ownership of land, resulting in third world conditions on reserves where poor aboriginals live in houses constructed on lands they do not own and cannot sell or encumber outside their community".[44]

There is merit to the above statements. Flanagan and Alcantara also note that "Indian land ownership is indeed highly constrained by the effects of more than two hundred years of British and Canadian colonial policy. The *Royal Proclamation of 1763* forbade private

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[40] *Ibid*; Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000) at 59, 61-62.
[41] Nick Sowsun, "Solving the Indian Act by-law enforcement issue: Prosecution of Indian Act by-laws" online: < https://www.oktlaw.com/solving-the-indian-act-by-law-enforcement-issue-prosecution-of-indian-act-by-laws/>
[42] Flanagan & Alcantara, *supra* note 31.
[43] *Ibid*; Casey Timmermans, "Open Up the Treaty Talks" *Vancouver Sun* (13 March 2001).
[44] *Ibid*; John Koopman, "This land isn't your land" *Ottawa Citizen* (21 June 2001).

individuals to purchase Indian lands and required such sales to be made only to authorized representatives of the Crown."[45] Lavoie explains how the rule against alienating Indigenous lands exists in common law and statutory forms throughout not only Canada, but within the United States, Australia and New Zealand.[46]

The history is very clouded with Crown-dominated oversight, as "the Crown retained ownership of reserves set aside for the use and benefit of Indians under treaty. Long established policy has tended to channel First Nation property rights in a collective government-dominated direction."[47] The truth of the matter is that for the most part, the Crown still retains underlying ownership of lands. First Nations have gained greater control over governing their lands and resources under the Framework Agreement which has in many cases included strengthened private property rights for their members.

In terms of private ownership of land from an Indigenous or First Nations perspective, prior to European arrival it is difficult to determine with accuracy the extent of exactly how Indigenous people viewed the concept. As a First Nation individual, the historical context, culture of the particular group and the environmental would play a large factor: "Europeans had a concept that land could be divided up into packages which could be individually owned and controlled, by an individual, a company, or the government. Essentially, individuals or companies could create wealth from the land they owned by farming it, mining it, exploiting it for other commercial purposes, or renting it to others."[48] In terms of forms of individual and family property in the pre-contact period, there has been some work on the subject, although such research is not widely known.[49] Many First Nations recognized group rights to land, not necessarily individual rights. The land was not an asset to be exploited but to be taken care of

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[45] *Supra* note 31.
[46] Malcolm Lavoie, "Why Restrain Alienation of Indigenous Lands?" (2016). 49 UBC L Rev 997 provides a comprehensive account of the rule against alienating Indigenous lands to private parties, or parties other than the government. Lavoie explains how the rule exists, in common law and statutory forms, across common law settler societies, including the United States, Canada, Australia, and New Zealand
[47] *Supra* note 31 at 3.
[48] "Two Views of Treaty" (June 13, 2012), online: <//education.usask.ca/documents/fieldexperiences/tools-resources/diversity/saskatoon-public/grade-5/7-Two-Views-of-Treaty.pdf>.
[49] Flanagan & Alcantara, *supra* note 31 at 4.

and shared. There was a respect granted towards territorial rights of other tribes but not so much in relation to individual rights to control a piece of land.[50]

Prior to contact with Europeans, First Nations of this continent operated in multiple political and cultural groups, each with their own institutions and systems for managing and allocating land and other natural resource rights within their respective territories.[51] The resulting Indigenous land tenure systems varied significantly but generally reflected differences in cultures and the demands of diverse physical landscapes as adapted over long periods. Various First Nation groups may have had stronger connections to certain regions and recognized certain territorial rights however, the division of land into parcels that could be owned or controlled by individuals was not a reality. The preservation of the land, along with the plants and animals upon such lands was considered a very sacred and important task.[52] Although the concept of private ownership of land by an individual may have been foreign to First Nations, it could have existed in other forms.

The oral traditions of First Nations people played a very large role in their culture and daily lives. They passed down important information by speaking and teaching during ceremonies and at celebrations, so nothing was recorded for land registries or titles. These oral traditions played an integral role in treaties as well. Most of the settled lands of Canada including those in Ontario, Manitoba, Saskatchewan, and Alberta, were transferred from First Nations to the Crown through treaties. It is crucial to understand they both had and still have, two widely different concepts of what the treaties were about and the promises that were being made from each side. The differences in understanding are the result of having different purposes

[50] *Supra* note 48.
[51] Hadley Louise Friedland, *Reclaiming the Language of Law: The Contemporary Articulation and Application of Cree Legal Principles in Canada* (PhD dissertation, University of Alberta), at 17 n16 ("Prior to European contact … Indigenous peoples lived here, in this place, in groups, for thousands of years. We know that when groups of human beings live together, they must have ways to manage themselves and all their affairs. Therefore ... at some point, and for a very long time, all Indigenous peoples had self-complete systems of social order."); see generally Kenneth H Bobroff, "Retelling Allotment: Indian Property Rights and the Myth of Common Ownership" (2001) 54 Vanderbilt Law Review 1559 (describing multiple various Indigenous property systems in detail).
[52] *Supra* note 48

and objectives especially in relation to lands, along with each side coming from distinctly different cultures and parts of the world.[53]

While this thesis does not delve into private property rights on reservations in the United States, it is important to mention that "the history of federal Indian policy and the current rules of reservation land tenure have both limited the ability of Indigenous nations to nurture and develop these relationships on their own terms."[54] Jessica Shoemaker, an Associate Professor at the University of Nebraska has made significant contributions on this end and notes how "the federal government tightly regulates Indigenous land tenure. Many blame the restrictiveness of this federalized property system for the intense poverty across many, but not all, Indigenous communities."[55] Similar to Canada, "American Indians suffer some of the worst housing shortages, food desert conditions, and lack of credit access in United States despite fairly widespread land bases."[56]

There are a variety of options for those First Nations wishing to implement private property for their members. Even with opposition to proposed federal legislation to enable fee simple for First Nations, for the Nisga'a, Tsawwassen First Nation, and other communities that have signed 'modern' treaties through the BC Treaty Process, fee simple property on their reserves is already becoming a reality. Although these are very significant representations, they are not discussed in greater detail within this thesis.

With regards to Indigenous traditional land management systems, these "can only be traced back to a point far after European colonization by treaty or by conquest."[57] Recently,

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[53] See e.g. DJ Hall, *From Treaties to Reserves: The Federal Government and Native Peoples in Territorial Alberta, 1870–1905* (Montreal: McGill-Queen's University Press, 2015). Hall asserts that as a result of profound cultural differences each side interpreted the negotiations differently, leading to conflict and an acute sense of betrayal when neither group accomplished what the other had asked

[54] Jessica A Shoemaker, "An Introduction to American Indian Land Tenure: Mapping the Legal Landscape" (2019) 5 JL Prop & Soc'y 1.

[55] *Ibid.* at 8. Shoemaker explores land-related legal issues facing tribal governments and Indigenous peoples in the United States, discussing forced property law reforms used throughout history as a primary tool for implementing colonial objectives.

[56] *Ibid.*

[57] Robert Fligg & Derek Robinson, "Reviewing First Nation land management regimes in Canada and exploring their relationship to community well-being" (2020) 90 Land Use Policy 2 at 2 [Fligg & Robinson]; Lisa Strelein & Tran Tran, "Building Indigenous Governance from Native Title: Moving away from 'Fitting in' to Creating a Decolonized space" (2013) 18 Rev Const Sts 19.

University of Waterloo authors Fligg and Robinson noted with regards to land management regimes in Canada "in more recent years, inherent rights of Indigenous people or pre-existing rights that First Nations had before European settlement in a global context have been addressed under" the United Nations Declaration on the Rights of Indigenous Peoples[58] (UNDRIP). They recognize also that "UNDRIP has brought attention to the importance of recognizing Indigenous inherent-rights in governance, land tenure and socio-economic development on Indigenous lands."[59] Interestingly enough, the most recent amendments to the Framework Agreement have the first recognition within legislation of Canada's commitment to UNDRIP.

See e.g. *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996), vol 1 at 282-85 & vol 2 at 485-519.

[58] United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly, 2 October 2007, UN Doc A/RES/61/295.

[59] Fligg & Robinson, *supra* note 57.

CHAPTER TWO: *Indian Act* Land Tenure

This chapter reviews the legislation that sanctions the main land management regime widely used by First Nations in Canada and the property rights available under the same. Examining the use of CPs, bylaws and enforcement challenges is essential to see the differences when First Nations choose to enact other legislation for management of their lands and resources. While the *Indian Act* is a federal law, its lack of clarity on the issue of enforcement and prosecution of bylaws is a real problem and direction from policing authorities on enforcement is inconsistent.

A. *Indian Act*

The *Indian Act* is a Canadian federal piece of legislation that governs matters pertaining to Indian status, bands and Indian reserves. It is a colonial law that has been and continues to be beyond invasive and paternalistic. It essentially authorizes the Canadian government to regulate and administer the affairs and lives of registered Indians and First Nation communities: "This authority has ranged from overarching political control, such as imposing governing structures on Aboriginal communities in the form of band councils, to control over the rights of Indians to practice their culture and traditions and even to define who qualifies as an Indian in the form of Indian Status."[60]

Through the *Indian Act*, the government has determined and controlled the land base of First Nations reserves. While First Nations have a recognized interest in reserve lands including the right to exclusive use and occupation, legal title to these lands is held by the Crown rather than by individuals or organizations, making reserve lands different from other lands.[61] This status of reserve land does not change when a First Nation becomes a signatory to the Framework Agreement and subsequently enacts their own land codes. Framework Agreement First Nations take over responsibility for old *Indian Act* land instruments such as renewals, renegotiation of leases, permits and so forth. These items are now the responsibility of the First Nation rather than Canada.

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[60] Erin Hanson, "Introduction to the *Indian Act*" (2009), online:<http://indigenousfoundations.arts.ubc.ca/the_indian_act//>.
[61] Kristen Kayseas, AANDC, "Land Management: Presentation for the First Nation Housing Conference" (February 2013) at 6.

The majority of First Nation bands in Canada still operate under the federal *Indian Act*, although there is a gradual shift towards more authority in land management provided by the Framework Agreement, modern treaties and self-government agreements. The vast majority of all First Nations were initially governed under the *Indian Act* which has limited and continues to limit First Nation governance over their lands.[62] As noted by Fligg and Robinson, "As of July 15, 2019 roughly eighty four percent (84%) of First Nations managed their lands under the *Indian Act*."[63] The *Indian Act* has not been amended since 2015 and is administered by the Minister of Indigenous Services Canada, the Minister of Crown-Indigenous Relations, and Northern Affairs. Approximately one third of the *Indian Act* or 44 sections, relate to land management, resources and the environment.[64] The remaining pieces of the *Indian Act* will not be discussed in this thesis.

Prior to the *Indian Act*, the 1763 *Royal Proclamation*[65] is the "first known official document to recognize First Nation rights and title to land in Canada ensuring First Nations' lands could not be taken without surrender and government consent."[66] The events following the *Royal Proclamation*, saw quite a drastic shift from First Nations being military allies of the British throughout the war of 1812, to becoming wards of the state. Land was taken up for settlement by Europeans, and these settlers brought sickness to First Nations who were unprepared for the conditions to come. The *Crown Lands Protection Act* in 1839 followed, unilaterally authorizing the government as guardian of Crown lands including lands set aside for First Nations.[67] None of this was done with the consent of First Nations people at the time.

Assimilation efforts began in full force as reserves were set aside for First Nations with the disguise of protecting the land interests of First Nations. The government promised housing and agricultural assistance on reserve which turned out as an outright failure. The goal to assimilate First Nations saw the creation of the *Gradual Civilization Act*[68] in 1857. This "encouraged literate Indians to give up their traditional ways, surrender their Indian status, and

[62] Fligg & Robinson, *supra* note 57.
[63] *Ibid* at 2.
[64] *Ibid* at 3.
[65] Royal Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App 11, No. 1.
[66] Fligg & Robinson, *supra* note 57 at 2.
[67] *Ibid.*
[68] *An Act for the Gradual Civilization of the Indian Tribes in the Canadas,* SC 1857, c 6 (20 Vict).

live a civilized lifestyle as British citizens."[69] Reserves themselves are artificial creations by the federal government. The *Indian Act* of 1876 arranged the methods through which the federal government controlled Indian status and reserves. Despite various issues including poverty, insufficient care health services, poor housing conditions, land claim disputes and a long list of others, reserves do represent a tangible piece of evidence and history for First Nations people.[70] The connection to the land remains, despite how it came into existence.

The *Indian Act* land tenure system has had negative impacts on social economic development although the extent of the impact remains an ongoing dispute. As mentioned, a large focus surrounds the notion that title to non-reserve lands can be held in fee simple whereas title on reserve land is held in trust by the Crown. Under the *Indian Act*, the Crown can grant First Nations a possessory title to land with evidence of title called a Certificate of possession (CP).[71] These CPs are part of a larger formal property rights system where evidence of title is registered in a legally recognized land registry, sanctioned under the *Indian Act*. CPs will be discussed in more detail below as they are also an important component for many First Nations with land codes operating under the Framework Agreement.

The *Indian Act* vests authority over reserve land ownership and use with the Federal government in law-making, capacity and operational capacity.[72] Most land transactions such as creation and transfer of land title, leases, permits, mortgage or loan agreements and land-use planning must be approved by the Minister. For example, the official lessor of a parcel of reserve land is the Federal government rather than the First Nation or band. The Federal government holds rights to access, withdraw, exclude, and alienate reserve lands.[73]

Provincial law and municipal governments have almost no authority with respect to reserve lands under the *Indian Act.* In relation to land issues, reserve lands function as pockets of federal government territory. With a few exceptions such as wildlife and environmental regulations, provincial laws for land tenure and planning do not apply to reserve lands.

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[69] Fligg & Robinson, *supra* note 57
[70] Harvey A. McCue, "Reserves", in *The Canadian Encyclopedia*, online: <https://www.thecanadianencyclopedia.ca/en/article/aboriginal-reserves>.
[71] *Indian Act, supra* note 1, s 20
[72] Kelly & Deaton, *supra* note 28 at 7.
[73] *Ibid.*

Municipal bylaws, land-use planning, and zoning have no application on reserves. Some First Nations have entered into agreements with the provinces or municipalities for certain services, but these entities have no real say in reserve land management.[74] The same continues under the *Framework Agreement* as First Nations have the option of entering into agreements for a variety of services for land management activities and environmental enforcement for example.

The *Indian Act* is incredibly wide-ranging in scope, covering governance, land use, healthcare, education, wills and estates and of course, Indian reserves. Legislation concerning First Nations was consolidated into the first federal *Indian Act* in 1876.[75] Since its inception, the *Indian Act* has been revised, amended and more importantly, strictly imposed on the Indigenous people of Canada. There was no negotiation, it was and still is a unilateral Act that governs most aspects of First Nations lives. There are 44 sections of the *Indian Act* that deal with reserve land management. The 1876 *Indian Act* defined the system of "reserves" to be set aside for the members of "bands" who adhered to a treaty. The term "reserve" means any tract or tracts of land set apart by treaty or otherwise for the use and benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees, wood, timber, soil stone, minerals, metals or other valuables therein.

The *Indian Act* also contained many other significant sections dealing with First Nation property rights many of which still exist in some form or another today.[76] It is no secret that the idea of individual property rights was driven by colonization. In further efforts to assimilate First Nations, First Nations individuals under the *Gradual Enfranchisement of Indians Act* 1869[77] could give up their Indian Status and become citizens of Canada and patent parcels of land outside of the reserve.[78] The land management approach to property rights on reserve has a darker history yet largely remains in force today. At least operating under the Framework

[74] For example, Muskeg Lake Cree Nation has a Municipal Services Agreement with the City of Saskatoon to provide municipal services such as garbage collection, snow removal, fire and police protection and utility services to its urban reserve within the city of Saskatoon.
[75] *An Act to amend and consolidate the laws respecting Indians*, SC 1876, c 18 (known as the *Indian Act,* continued on into the *Indian Act, supra* note 1).
[76] Gordon E Olsson, "First Nation Lands Property Rights and Boundary Systems in Canada, Chapter 7", online: <//www.acls-aatc.ca/files/english/publications/Chapter%207.pdf> at 14-15.
[77] *,An Act for the gradual enfranchisement of Indians, the better management of Indian Affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42* SC 1869, c 6.
[78] Fligg & Robinson, *supra* note 57; ; Brinkhurst, *supra* note 8.

Agreement, First Nations can address individual holdings or allotments on their own accord free from federal oversight.

Several reports, including by the United Nations Permanent Forum on Indigenous Issues, have indicated a widely held view that a core element of a people's identity deals with control over their lands and resources.[79] Regardless of which legislation or modern treaty agreement is used in the context of reserve lands, this statement holds truth. The *Indian Act* addresses only reserve lands, which to First Nations people, represents only a fraction of their lands, but even in this area the *Indian Act* fails to recognize First Nation control over their lands and resources. Instead, through sections 18 to 41, the *Indian Act* provides for a weak governance regime under the Minister's control. Some of the key provisions are expressed below.

The *Indian Act* provision that provides a great degree of power and discretion over reserve lands to the Crown is subsection 18(1). The first part of this subsection states that reserves are held "for the use and benefit" of the Indians; the second part empowers the Minister to "determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band." For example, the Minister in his or her discretion, can authorize the use of reserve lands for purposes of Indian schools, the administration of Indian Affairs, Indian burial grounds and Indian health projects. There is basically no limit on the Minister's discretion. Consent of the band council is only required when other purposes are involved.

Section 18(2) of the *Indian Act* authorizes the use of reserve lands for the general welfare of the First Nation. There is a threshold and process which must be met by a specific project. There are essentially two categories, projects under the list[80] and projects for the benefit of the community as a whole, available to all members of the First Nation. If a First Nation wants to develop lands under s. 18(2), but the lands have already been allotted to a First Nations member

[79] At the sixth session of the UN Permanent Forum in 2007, Stella Temang, an Indigenous leader from Nepal, summarized this relationship: "Indigenous peoples have an intimate connection to the land, the rationale for talking about who they are is tied to the land, they have clear symbols in their language that connect them to their land…".

[80] Any project within section 18(2) must be on a list. For example, First Nations schools, building for administration, health projects, burial grounds. If the project is not on the list, it must be approved by the First Nations Council and be for the general welfare of the band.

or lawful possession holder, the Minister can negotiate a settlement with the member or use an established process for working with the member if they do not consent.[81]

A reserve can be surveyed and subdivided into lots or subdivisions through Section 19. Section 19 also allows the Minister to authorize the location and construction of roads on reserves. For the most part, this is done under policy and not under law, as is the case for the rest of Canada. The survey records for the external and interior boundaries of reserve lands are recorded in the federally regulated Canada Lands Survey Records (CLSR), as opposed to being filed in the provincially regulated Land Title or Registry offices. This is because reserve lands are defined as "Canada Lands"[82] to which the federal *Canada Lands Surveys Act* applies. In comparison, provincially regulated Land Title or Registry offices generally have up to date land survey records.

Section 20 is fundamental to government control over reserve lands. It provides that no Indian is in lawful possession of lands on reserve unless the consent of the Minister is obtained. There can be no dealing with the Indian's interest in land, whether by way of transfer or otherwise, without the consent of the Minister. This means that neither individual First Nation members nor First Nation governments have the rights and privileges of an owner with respect to reserve lands. The standard rights and privileges of land or property owners will be discussed further in the following section. Aside from a very small percentage of First Nations bands, the majority of First Nations, whether referring to a band as a whole or an individual, need the permission of Canada to grant or transfer an interest in reserve lands. In practice, this means that if a First Nations person wants to transfer or sell his or her house to another, the Minister must approve the transfer. Under the Framework Agreement, there is no need for Ministerial approval.

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[81] Indigenous and Northern Affairs, *Land Management Manual* (2002), chapter 4 at 5-6.

[82] Section 24 of the *Canada Lands Surveys Act*, RSC 1985, c L-6 defines those lands that are Canada Lands. While there are numerous different categories of Canada Lands, the category that applies to First Nation reserve lands that are governed by a Land Code is: "…any lands belonging to Her Majesty in right of Canada or of which the Government of Canada has power to dispose that are situated in Yukon, the Northwest Territories or Nunavut and any lands that are…surrendered lands or a reserve, as those expressions are defined in the *Indian Act*".

While approving transfers of parcels of lands and providing authority over such transactions may not seem so grievous, there are many issues at play which are not ordinarily considered. For example, the time constraints to approve certain transactions involving reserve land is outstanding and counter-economic. To elaborate, the time it takes to go through the appropriate avenues under the Indian Act is considerably longer than a traditional land transaction involving non-reserve lands. It is very common for several months if not years to pass by without an approval being granted. In the meantime, the First Nation may miss out on revenues or economic and business development opportunities. Of course, these hurdles can be remedied by moving under the Framework Agreement and the fact of the matter is that an increased number of First Nations are taking that route.

Another issue that inhibits land transactions involving First Nations lands under the *Indian Act* is the Indian Land Registry System (ILRS). It can become quite complex to navigate through the ILRS and it has been subject to a host of complaints for many First Nations. There are three main but separate land registry systems, they include: the Indian Land Registry System (ILRS) which consists of documents related to and interests in reserve and any surrendered lands that are administered under the Indian Act; the First Nations Land Registry System (FNLRS)[83]; and the Self-Governing First Nations Land Register (SGFNLR). The latter two are both systems used by First Nations operating under agreements of self-governance.

ISC lands registries record property interests in First Nations lands. The first three land registry systems described above are maintained by Head Quarters in Ottawa, web-based, and are accessible to First Nations and the public. ISC personnel carry out provisions of the *Indian Act* and work with First Nations to manage interests on reserve land. Departmental responsibilities in this capacity are extensive, perhaps a reason as to why the land transactions for First Nations are incredibly slow. To complicate the matter further, these land registries and regimes undergo frequent changes as do their manuals which are issued by ISC. Most reserves do not benefit from accurate surveys or adequate descriptions of the boundaries of land parcels. In many cases, the challenges posed by inaccurate or out of date surveys have persisted for decades.

[83] The First Nation Lands Register establishes prioritization of registered instruments and is therefore a leap forward beyond the *Indian Act* Land Registry which is only a document repository.

Along with the above, there are separate land tenure regimes[84] under the *Indian Act* as well. These include the Reserve Land and Environment Management Program (RLEMP) and 53/60 Delegated Authority.[85] The RLEMP was meant to be a restructuring of the Regional Lands Administration Program (RLAP) and the delegated authority program under sections 53/60 delegated authority. The government provides financial support to First Nations for services associated with *Indian Act* land and environment management services. There are three levels of funding available to First Nations under RLEMP which in some cases has facilitated a transition to the First Nation Land Management regime. It is by no means a prerequisite to become a signatory to the Framework Agreement and develop a land code.

As briefly mentioned, under the *Indian Act*, there are also separate systems of land-holdings for First Nations which consist of:

> "Collectively held Band land that is managed by the Band government; Land allotted as individual land holdings or "lawful possessions", evidenced by Certificates of Possession (CPs) typically held by individuals but that can also be held by the Band; Conditional or temporary forms of CPs known as Certificates of Occupation; Locatee leases, leaseholds of CP lands; Leases of designated Band land; Various leases or permits for special activities such as agriculture, timber harvesting, mining, oil and gas extraction, etc."[86]

B. Bylaws and enforcement under the *Indian Act*

Section 81(1) of the *Indian Act* grants First Nation councils the right to create bylaws in a number of areas, including traffic, public health, law and order, disorderly conduct, nuisances, animal control, zoning, residency, land use and building construction. While these bylaws only apply within the boundaries of the reserve, they apply to everyone including non-residents. Section 81 bylaws are more common now that Ministerial approval is no longer required.[87] They can play a limited but important role in governing reserve land development but they cannot go as far to allocate individual parcels of land to band members or others. Laws made under the Framework Agreement have the ability to allocate parcels of land to individual members.

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[84] For present purposes, a "regime" is a form of government or a system of management.
[85] Since 2011, this 53/60 Delegated Authority was closed to new entrants.
[86] Brinkhurst, *supra* note 8 at 4.
[87] Amendments to the *Indian Act* in 2014 repealed the power of disallowance by the Minister and gave First Nations greater freedom to pass bylaws.

On the matter of private property rights, *Indian Act* bylaws are not helpful. They do not carry the weight of law as opposed to allotment laws made pursuant to the Framework Agreement and "can only be enacted if it covers a subject that is within the powers provided to the council under the *Indian Act*, and there are some restrictions to what band councils can control through their bylaws."[88] First Nation Band councils may make bylaws as long as "they are not contrary to the *Indian Act* or the regulations enacted pursuant to section 73 of the *Indian Act.* In addition, a bylaw may not be contrary to or conflict with other federal laws, such as the *Criminal Code of Canada* or the *Controlled Drugs and Substances Act*."[89]

The police force in charge of law enforcement on reserves for the most part is the Royal Canadian Mounted Police (RCMP). The RCMP are supposed to be responsible for enforcing *Indian Act* bylaws.[90] Currently, the reality is that most RCMP detachments do not have the resources to effectively enforce bylaws and the number of officers patrolling a reserve is often not enough to cover bylaw enforcement. "A bylaw will not be enforceable and may be struck down in a court of law if it has not been properly enacted in accordance with the procedural requirements set out in the *Indian Act.* Sections 81, 83, and 85.1 of the *Indian Act* provide the statutory authority for First Nation councils to pass bylaws."[91]

A First Nation bylaw is considered "a local law that is passed by a First Nation council, similar to a municipality, to regulate affairs within its community."[92] This is an important consideration because First Nations should be considered governments and not akin to municipalities. A bylaw governs the activity in question on all reserve lands under the control of the band council that passed the bylaw. The bylaw applies to everyone present on the reserve, regardless of whether they are a band member or whether they reside on the reserve. One of the

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[88] Canada, "Changes to Bylaws" (January 27, 2015), online:< https://www.sac-isc.gc.ca/eng/1421864597523/1565371978843>.
[89] *Ibid*; *Indian Act*, *supra* note 1, s 73 provides for the Governor in Council to make regulations in regards to a variety of areas such as fur bearing animals, destruction of noxious weeds, medical treatment for the health and wellness of Indians, and to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable.
[90] Police force can include RCMP, provincial or municipal police or First Nation assigned constables.
[91] *Supra* note 87; *Indian Act*, *supra* note 1, ss 81, 83, 85(1). Section 83 pertains to money matters, property taxation, expenditure of band moneys and business licensing while section 85.1 deals with intoxicants: the prohibition of sale, supply, manufacture and possession of intoxicants, as well as the prohibition of public intoxication on reserve.
[92] *Ibid.*

largest issues with bylaws is that they can be poorly drafted, unclear and ambiguous with regards to enforcement. In addition, they are a creature of the *Indian Act* so are limited in scope. Other drawbacks include the unenforceable nature of bylaws.

Prior to 2014, whenever a First Nation wanted to enact a bylaw under the *Indian Act*, the First Nation had to seek Ministerial approval.[93] Having the possibility of a bylaw being disallowed is quite a large drawback and while the disallowance powers of the Minister have been removed, money and taxation bylaws still require approval by the Minister, and those related to intoxicants require majority consent of the electors of the First Nation voted at a special meeting called to consider the bylaw. While these changes created space for self-sufficiency and were part of a larger approach to improve conditions for First Nations communities, in practice, the enforcement of such bylaws remains a large issue with policing bodies.

First Nations have the power to enact bylaws pursuant to section 81 of the *Indian Act*. These section 81 bylaws are fairly common and can sometimes play an important role in governing reserve land development. The purposes for these bylaws must not be inconsistent with the *Indian Act.* Some examples include preventing disorderly conduct and nuisances, control of domestic animals, preservation, protection and management of fur-bearing animals, fish and other game on reserve, and trespass on reserve. These powers are analogous to the powers granted to councils of municipal corporations.[94] Those First Nations who have enacted land codes under the Framework Agreement can continue to make bylaws under sections 81 of the *Indian Act* although these bylaws relate to matters other than land.[95] Environmental management matters are not enumerated powers under section 81.

A First Nation council is limited to the subject areas and powers provided under the *Indian Act* with respect to enacting bylaws. The restrictions on what they can control through enactment of a bylaw are set out within section 81 of the *Indian Act.* According to section 81,

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[93] See s. 7 of *The Indian Act Amendment and Replacement Act* (December 16, 2014) [Amendment Act], which repeals section 82. Pursuant to section 82, copies of every band bylaw enacted pursuant to section 81(1) had to be forwarded to the federal Minister of Aboriginal Affairs, who had the power to disallow the bylaw.

[94] *R v Rice*, [1981] 1 CNLR 71 (CA

[95] Framework Agreement, *supra* note 2, s 22.

bylaws must not be contrary to the *Indian Act* or the regulations enacted pursuant to section 73 of the *Indian Act*. In addition, as mentioned above, a bylaw may not be contrary to or conflict with other federal laws, such as the *Criminal Code of Canada* or the *Controlled Drugs and Substances Act*.[96] The relationship between *Indian Act* bylaws and federal and provincial laws is an interesting subject of debate.[97]

A court will strike down a bylaw that has not followed the procedural requirements for enactment under the *Indian Act*. Currently, there are three types of bylaw making powers found in the *Indian Act* and each has its own procedural requirements for enactment. This part is concerned with the general bylaw powers, set out in s 81(1). Section 81(1) sets out 22 subject areas that cover a range of topics including health, traffic, law and order, trespassing on reserve, public games, animal control, public works, land allotment, zoning and building standards, agriculture, wildlife management, commercial activities on reserve, and residency and trespass on reserve. Finally, there is a clause empowering the passing of bylaws with respect to any matter arising out of or ancillary to the exercise of power under s 81(1).

As noted by Naiomi Metallic, although these powers provide First Nation leadership the authority to pass bylaws on "a variety of subjects relating to reserve land and band members, they have existed within the Indian Act since the late 1800s. Such instruments have largely been seen by First Nation governments as being ineffective at giving them control over local matters affecting the day-to-day lives of their community members."[98] Metallic further writes:

> This is primarily because the *Indian Act* gave the federal Minister of the Department of Indian and Northern Affairs final say over whether such bylaws could take effect (known as the disallowance power). In addition, the Department adopted a narrow interpretation of the expanse of the *Indian Act* bylaw provisions, taking the position that any bylaws touching on issues that overlapped with provincial powers would not receive Ministerial approval, thereby preventing First Nation governments from passing laws setting community norms relating child welfare, social assistance, education and a number of

[96] An actual example of this is the bylaw power over the regulation of traffic on reserve. Although a band can regulate traffic on reserve pursuant to s 81(1)(b), it cannot pass bylaws that are inconsistent with the provisions of the *Indian Reserve Traffic Regulations* CRC, c 959, which incorporate by reference provincial motor vehicle laws and regulations

[97] Naiomi Metallic, "Indian Act bylaws: A viable means for First Nations to (re)assert control over local matters now and not later" (2016) 67 UNBLJ 211.

[98] *Ibid.*

other areas. For these reasons, First Nations have not seen the *Indian Act* bylaws as giving them any real form of self-government.[99]

In relation to bylaws created under section 81 of the *Indian Act*, case law and the relevant legislation suggest that the provincial court has jurisdiction to deal with charges arising pursuant to the *Indian Act*. The Ontario Court of Appeal in *R. v. Crosby*[100] held that the prosecution of a charge of trespass on reserve was within the jurisdiction of the provincial court and the responsibility of provincial, rather than federal Crown counsel. The *Indian Act* land system has failed in part because there is no enforcement of bylaws and regulations. For example, from a legal perspective, a First Nation can enact a bylaw that governs who is entitled to be resident on reserve, often called a "residency bylaw", but they have no means of enforcement for eviction when issues arise. The First Nation as a community can regulate the entitlement of their members and other persons to reside on reserve but this authority is meaningless if it cannot be enforced.

The case law in this area is limited but generally bylaws made under sections 81 and 85.1 of the *Indian Act* must not exceed the authorities provided to band councils for law-making under these sections. Previous advice by the Department of Justice indicates that each bylaw needs to be looked at on a case-by-case basis for compliance with administrative law principles, the *Charter*, and the *Canadian Human Rights Act*,[101] while keeping in mind the Government's initiative towards reconciliation. Laws made under the Framework Agreement are robust laws that of course will comply with the Charter and human rights legislation, however, the areas for law-making are expansive.

There is also very little case law about the meaning and scope of paragraph 81(1) (p.1) of the *Indian Act* in relation to residency. However, it appears to be sufficiently broad as to allow band councils to prescribe rules for determining who is entitled, and who is not entitled, to reside on a reserve.[102] First Nations under the Framework Agreement are passing similar laws related to community safety and residential tenancy, with some going as far as looking towards banishment laws. The scope of these banishment laws has not yet been determined.

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[99] *Ibid.*
[100] *R. v. Crosby* (1980), 54 CCC (2d) 497 (Ont CA)
[101] *Ibid*.
[102] *Ibid*.

In terms of enforcement of First Nation bylaws by the RCMP, this is more of an operational policy question than a strictly legal question. Upon reviewing some of the RCMP policy on this issue, there is no one central policy. For instance, F Division's Operational Manual says the RCMP will enforce bylaws, but not Band Council Resolutions (BCRs).[103] E Division's Operational Manual states that the "RCMP has the authority to enforce valid bylaws or BCRs pursuant to the federal *Indian Act*, only if the bylaw specifically provides the RCMP as the designated law enforcement authority."[104] The policy also notes that "generally, the RCMP should only be involved in matters which address issues of public order."[105]

It is important to note that First Nation Councils or any government cannot direct how the RCMP deliver operational policing. The RCMP, as peace officers, have a broad discretion to decide whether to investigate a matter, conduct searches, lay charges, or proceed with charges. The Supreme Court in *R. v. Beaudry* explained that such discretion is essential in the "practical, real-life situations faced by police officers in performing their everyday duties."[106] This discretion includes situations where an officer decides not to act. This discretion has some limits and the decision must be made rationally. The RCMP in various jurisdictions have been inquiring about laws enacted pursuant to First Nation lands codes and will hopefully become more involved in the near future.

In the case of *Georgev. Attorney General of Canada and the RCMP*, a Band asked the Federal Court to judicially review the RCMP's decision not to lay a charge of trespass on reserve under the *Indian Act*.[107] The RCMP had met on numerous occasions with the Band and sought advice from the Department of Justice. The RCMP decided there was insufficient evidence to lay a charge on these facts. The Court declined to review the RCMP decision.

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[103] F Division Operational Manual - Chapter 9. General Indian Acts, chs 2.2.1, 2.4.1,< http://infoweb.rcmp-grc.gc.ca/manuals-manuels/div-reg/f/om/om9/9.htm#t2>.
[104] E Division Operational Manual, Part 38.1 Aboriginal Policing Services, ch 4.1.4,<http://infoweb.rcmp-grc.gc.ca/rcmpmanuals/ediv/eng/om/38/1/om38-1.htm#t4>.
[105] *Ibid*, if the band is evicting a trespasser under a BCR, the RCMP can be requested to attend to keep the peace should certain criteria be met (chs 4.1.5, 4.1.5.1). However, the police cannot enforce a Banishment Letter under a BCR (ch 4.1.11); only a court order can be enforced by the RCMP (ch 4.1.11.1).
[106] *R. v. Beaudry*, 2007 SCC 5, [37].
[107] *Chief Denton George et al v. Canada (AG) et al*, 2007 FC 920.

In another case *Conley v. Chippewas of the Thames First Nation Chief*,[108] the Ontario Provincial Police (OPP) refused to attend a 911 call when First Nation constables attempted to evict a band member. The OPP had an agreement with the First Nation that it would not enter the reserve unless requested by the First Nation Police Service. The Court commented that police have considerable discretion in how to carry out their duties and declined to second guess the decision of the OPP. This is typical and continues to pose challenges for enforcement on reserve.

There needs to be a commitment to comprehensively address how to prosecute and enforce *Indian Act* bylaws. Managing reserves lands under the federal government's imposed *Indian Act* has been less than ideal. Despite its obvious faults, there are ways in which some First Nations have done quite well. The bylaw creation powers can be a great tool for First Nations although many do not have the financial or human resources to effectively create or enforce such bylaws within their community, and there is no clarity on prosecution.

C. The History of Certificates of Possession

The Certificate of Possession, or "CP," is documented evidence of the closest thing to "ownership" of land on a reserve that a First Nation individual may have. The original intent of the CP has a dark history. However, despite the history and original intentions of the CP which are discussed below, the CP remains a powerful tool under the *Indian Act* and for some First Nations under the Framework Agreement. As mentioned in the preceding text, the CP system is yet another form of on-reserve property right for First Nations people living on reserve. These CPs are the closest form of individual property rights an individual First Nations member can have on a reserve. Perhaps the only significant power of a band council under the *Indian Act* with respect to reserve land, is the power to allot possession of that land to individual band members upon approval by the minister.[109]

The history of the CP is not a story of a positive breakthrough in the relations between the federal government and First Nations in Canada. Recall that section 91 (24) granted the Parliament of Canada legislative authority over "Indians, and Lands reserved for the Indians." In

[108] *Conley v. Chippewas of the Thames First Nation Chief*, 2015 ONSC 404.
[109] Claudia Notzke, *Aboriginal Peoples and Natural Resources in Canada* (North York, Ontario: Captus University Publications, 1994) at 180, quoting Richard H. Bartlett.

1869, Parliament passed the *Gradual Enfranchisement Act*. The goal of enfranchisement was to rid the Indians of their Indian status tobecome citizens who were eligible to vote and hold land on reserve. Under the *Gradual Enfranchisement Act*, the amount of land that an enfranchised Indian received was less than the maximum fifty acres under the British government.[110] At the time, lawful possession of individual tracts of land wasonly recognized if the Governor-in-Council granted a Location Ticket. Land held under a Location Ticket gave an individual Indian lawful possession of the land, an exemption from taxes and legal seizure, limited the transferability to non-Indians, and allowed for the ticket to pass to an heir upon death, all characteristics of the CP we know today.

The Location Tickets were another means to solve the "Indian problem" and assimilate First Nations people into mainstream society as industrial workers. In 1873, Minister of Interior Laird stated that "the great aim of the Government should be to give each Indian his individual property as soon as possible."[111] Laird also saw private property as a means of ending Indian dependence on handouts, which he believed was rooted in their communal lifestyle. Despite a communal lifestyle at the time, First Nations had their own, very effective systems which were quite different from European conceptions. Of course, they were also forced to live on tiny parcels of reserve land which were, in some cases, far removed from their traditional homeland. From this, Laird introduced the Location Ticket system for Indians living on reserves.

The 1876 *Indian Act* was "revolutionized" to contain five sections dealing with the Location systems. The Location Ticket was a halfway point towards private ownership, a loose system of property rights for First Nations people on reserves. These sections set out the following principles: the Superintendent General could subdivide reserve land into individual lots; an individual Indian could only gain lawful possession of land if the band and the Superintendent General consented; if an allotment was approved, the applicant was issued a location ticket granting title of the land to the individual; lands held under a location ticket were protected from legal seizure; and the ability to transfer title to land was restricted to transfers to another Indian of the same band. The land could be transferred to a widow and children although, if there were no heirs, then a cousin was eligible, or otherwise the land became Crown

[110] Flanagan & Alcantara, *supra* note 31 at 401
[111] Cited in *ibid* at 402.

land to be managed for the benefit of the band. Section 10 provided for any non-treaty Indian in the west and north who made improvements on their lands before the lands became reserve lands to enjoy Location Ticket rights and privileges.[112]

It is clear that enfranchisement and private property rights for First Nations have a connection. To be eligible for enfranchisement, an Indian could demonstrate to the Superintendent General that he had "attained a character for integrity, morality, and sobriety."[113] After a three-year probationary period in which the applicant demonstrated that he would use the land as a European would, the applicant would be enfranchised and gain fee simple interest in the allotted land. In essence, the 1876 *Indian Act* created two systems of land holding. Under the first, non-enfranchised Indians could hold lawful possession, life estate, of reserve land allotted to him by the band council with a location ticket issued by the Superintendent General. Under the second system, enfranchised Indians could gain a fee simple interest to reserve land.[114]

There are also the Certificates of Occupation, or COs which the government introduced in 1890 for the western Indian tribes. COs were introduced as a system of private property for the western Indian tribes in Manitoba, Keewatin, and western territories. Under a CO, lawful possession of up to 160 acres could be granted to each family head. The CO however, could be cancelled at any time by the Superintendent General of Indian Affairs.[115] In 1919, some returning Indian war veterans were granted Location Tickets by the Deputy Superintendent General without band consent.[116] Before enactment of the present *Indian Act*, evidence of possession was by way of Location Ticket. In 1927, Parliament passed legislation indicating that if an individual Indian made permanent improvements on reserve land, then he must receive compensation if he is lawfully remove from the reserve.[117]

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[112] *Ibid*
[113] *Ibid*
[114] *Ibid*.
[115] *Ibid* at 403.
[116] Thousands of First Nations people served in the First and Second World Wars along with the Korean War. At the time of the First World War, First Nations were not eligible for conscription because they were not considered citizens of Canada and did not have voting rights. Despite this, many still found ways to enlist and serve. After the First World War, they did not receive the same assistance as other returned soldiers under the *War Veterans Allowance Act*; this policy endured from 1932 until 1936.
[117] *Ibid.*

On September 4th 1951,[118] amendments to the *Indian Act* saw the CP replace other existing individual interests in land. These interests included what were known as Cardex Holdings, Notices of Entitlement and Location Tickets. A Cardex Holding is a historical individual interest in reserve land. The land descriptions associated with Cardex holdings were vague and often inaccurate. While most of the interests known as Cardex Holdings are registered under the ILRS, a proper survey must be done before any further transactions can take place on the particular land. Generally, the individual with a Cardex Holding is considered to be in lawful possession under the *Indian Act.*

An interest held under a Notice of Entitlement is similar to a Cardex Holding, in that the holdings were created by an allotment by the First Nation council and approved by the Minister under c.20(1) of the *Indian Act*. Also characterized by a vague description of its boundaries, a new transaction involving an interest under a Notice of Entitlement will not be registered in the ILRS until the lands are surveyed and a proper legal description obtained. The interest of the holder of a Notice of Entitlement is recognized as lawful possession under the *Indian Act.*

D. Traits and Characteristics of Certificates of Possession

Many individuals including government officials may also refer to a CP as a "lawful possession" which is accurate to some extent. A CP is proof of lawful possession issued under the authority of the Indian Act by the Minister of Indian Affairs after approval by the band council. However, great care should be taken to ensure that the idea of lawful possession of a particular piece of land is understood. There are some CP holders who consider their ownership interests in their plots of land to be absolute. Several legal battles would show otherwise, ensuring CP holders and others know that the land described under a CP remains federal Crown land and remains within the boundaries of the reserve.

CPs are unique, legal instruments that can be viewed as a hybrid form of ownership considering the nature of both fee simple and federal Crown ownership of reserve lands in Canada. A CP is similar to fee simple ownership in many ways. For instance, they are permanent and they cannot be cancelled by the band or the Minister. There are however, exceptions to every rule and even fee simple property ownership has its limitations. In cases

[118] See Brinkhurst & Kessler, *supra* note 8 at 4.

related to fraud, or, where the individual First Nation holder of the CP, ceases to be a member of the band, the CP will ultimately be transferred back to the band.[119]

In some cases, a First Nation can surrender their reserve land entirely or they can surrender pieces or sections.[120] When this happens, a CP can be cancelled in the process. Consent of the CP holder is required and it is yet to be determined whether compensation is awarded to the CP holder.[121] Another example of cancellations or revisions to CPs occur where there have been cases of error.[122] Such cases of error might include a wrongful calculation or misrepresentation in acres involving a CP. In some instances, court challenges have been brought by particular CP holders against the band in relation to original acreages or improper division of a CP amongst family members.

While a CP may be considered evidence of lawful ownership, it falls short of ownership in the fee simple sense. One of the biggest differences with a CP as opposed to a fee simple form of ownership is the "limited transfer" aspect. More specifically, a CP can only be held by a First Nation band member and can only be transferred to another member of the same band, either in whole or subdivided upon approval by the Minister.[123] If the CP holder or Locatee, as sometimes referred to dies, his or her lawful possession must be transferred to his or her heirs through an administrative process. Under Section 49, the Minister must approve the transfer of a lawful possession under a Will or intestacy.[124] In general, the First Nation council does not need to approve transfers amongst band members.

Depending on individual perspectives these particulars may be seen as downsides to the CP system for a few reasons. First, thanks to the *Indian Act*, band membership for the majority of First Nations is decided upon by the band council itself. Many times, band membership issues arise and there are unfair and contentious decisions that deny membership for certain individuals.

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[119] Alcantara, *supra* note 37 at 407

[120] Notzke, *supra* note 109, at 180 states, "No reserve land can be disposed of or leased without a surrender of the land to the Crown having taken place. A surrender generally requires the consent of the majority of the electors of the band."

[121] Brinkhurst, *supra* note 8 at 4.

[122] *Ibid.*

[123] *Derrickson v. Derrickson*, [1986] 1 SCR 285, [9].

[124] These principles appear in the INAC Estates Manual and Lands Management Manual Intestacy refers to an individual deceased who at the time of death, did not have a Will.

Second, transferring a CP to a spouse is incredibly challenging, as many spouses, whether married or common law, are not considered band members of their spouse's particular First Nation. Third, eventually the potential heirs of the CP dwindle away as family members die off or heirs cease to be official band members due to intermarriage, moving away from the reserve, or other reasons.

The fact that a CP may only be transferred to another band member can be considered a positive aspect in some respects. The land itself remains in the general domain of the First Nation who still retains some, albeit limited authority over the CP. The fact that the land described under the CP is still considered part of the reserve land base is important, along with the idea that there is no possibility of outsider occupation or control of the CP land on reserve, but this has its exceptions if a CP land is leased out to non-band members. Considering the CP holder is a band member, it is assumed they have some type of connection with the band and are hopefully acting within the best interests of the land.

In contrast to the above, an individual property holder in Saskatchewan, for example, can sell and transfer the title to their property to whomever they wish. There are virtually no restrictions on the sale as long as the buyer obtains financing and fulfills their contractual obligations as a buyer. A foreign citizen could buy the property and hold the title. In this scenario, the property will always remain within the particular city and province of Saskatchewan. Both the city and province will be the governing bodies, with these governments controlling services, taxes, and even access for the property. The new property owners will be subject to the same laws regardless of their culture or status, and they will enjoy the enforcement of municipal bylaws with respect to their property rights.

The interest in a CP can be leased, assigned, or subletted to another member, the First Nation or a non-member. These interests are referred to as Locatee Leases which require consent from the Minister but do not require consent of the First Nation.[125] All revenue from those leases goes directly to the individual CP holder, with minor exceptions.[126] For example, it is common in cases where the holder wishes to lease their land for agricultural purposes to

[125] INAC *Lands Management Manual* (2002), ss 2-2.3.16; *Indian Act*, *supra* note 1, s 58(3).
[126] Cowichan First Nation in BC is an exception where the band takes a portion of the proceeds from the leases.

neighbouring farmers. This possibility also offers an incentive for CP holders to start a business or become an entrepreneur as the revenue from the business goes directly back into their pockets. This aspect can be seen as negative or unfair by those members that do not have any CP holdings.[127] Some members feel that the CPs were improperly issued and that the reserve land base was supposed to be held for the benefit of the band and its members.

Aspects of access and exclusion are essential points of a CP. A CP holder is entitled to access the property, occupy it and withdraw products of resources located on the property. This of course may vary amongst First Nations communities with CP holdings. Permits are generally required as restrictions are placed on the cutting or timber and the extraction of minerals or soil resources. [128] Certain resources like minerals, oil and gas are subject to varying rules as well.[129] A CP holder can exclude others from access, trespass and withdrawal rights to the property, except where the land is designated by the First Nation or expropriated for public use.

One of the most prevalent entitlements of a CP holder is the ability to mortgage the interest in reserve land. CP holders have the ability to mortgage their interest in reserve land through programs such as the Canadian Mortgage Housing Corporation's (CMHC) housing support program. Lawful possession of reserve land may be used as security for a financial loan. They are of course, unable to mortgage the interest in reserve land to a non-member.[130] As you will see in the following discussion, the usage of CPs for both housing and economic development has been widely successful.

There are often discrepancies on data related to CPs. For example, research shows that over the last 125 years, more than 145,000 CPs have been issued to property owners on 301 reserves in Canada.[131] Although this data is not necessarily incorrect, the Indian Lands Registry

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[127] As a member of Muskeg Lake Cree Nation, a First Nation that has a significant land base held in the form of CPs, I can speak to the tensions that arise within families and the community amongst those CP holders. Many CPs on Muskeg Lake are quite large tracts of land that are leased to nearby farmers.
[128] The locatee may cut timber without a license if the CP land is not already subject to a license, if the timber and any product made from the timber is intended for use on the First Nation lands of the Band. Otherwise, permits and licenses to harvest timber are required. Canada, Reg. 2002-109, *Indian Timber Harvesting Regulations,* s 4(2).
[129] *Indian Oil and Gas Act*, RSC 1985, c I-7, s 20(6).. The *Indian Oil and Gas Act* concerns the exploration and exploitation of oil and gas on-reserve and continues to apply under the Framework Agreement.
[130] See *Indian Act supra* note 1, s 89; INAC, *Lands Management Manual* (2002), ss 2-1, 2.3.
[131] Flanagan, Alcantara & Le Dressay, *supra* note 30 at 91.

System (ILRS) described above follows their modification and transfer over time. A certificate is re-issued or a parcel is sub-divided and two new certificates may be in place of the previous one. To be more accurate, when past CPs and duplicate CPs for the same parcel of land were removed, AANDC calculated that there were 40,841 lawful possession parcels in existence since 2012,[132] with each representing a distinct parcel of land. The current acreage of land currently held under these lawful possessions is 113,032.76 hectares which is roughly 2.93 percent of the total reserve lands in Canada.[133]

The inconsistency of CP holdings across Canada is dramatic. Some reserves have a few, some reserves have many, but ultimately the majority of reserves in Canada have none. The reserve lands under lawful possession holdings are fairly concentrated in certain provinces including British Columbia, Ontario and Quebec. The Six Nations reserve in Ontario has the majority of their land allocated to CP holders, with approximately 10,000 CPs.[134] It is difficult to determine why there is such a concentration of CPs within these particular provinces. At the end of the day, there is a reluctance of some First Nations to grant CPs and a very strong inclination for others to issue them on a consistent basis.

More First Nations and businesses are becoming aware of CPs in general and realizing that a CP is the strongest form of property ownership, or the right to property, an individual First Nation can have on reserve. Unlike a customary property right, a CP creates a form of ownership similar to fee simple and is legally enforceable in Canadian courts.[135] The continued use of the CP signals a recognition, at least, that First Nations may have a sense of security from the legal protection offered for CPs.

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[132] Geomatic Services, AANDC 2012.
[133] *Ibid.*
[134] Flanagan & Alcantara, *supra* note 31 at 7.
[135] In *Seguin v. Pelletier* (2001) 41 RPR (3d) 411, [22], the application judge uses a quote from Jack Woodward's *Native Law* text, which is still in the present version of his looseleaf: *Native Law*, looseleaf (Toronto: Carswell, 2014), at p. 278: "Individual possession of reserve land is a unique form of land tenure not equivalent to any other type of land ownership under Canadian law. It is not precisely the same as fee simple ownership off reserve and it is entirely different from the Band's interest in the unallocated land of a reserve. An individual Indian has no right of possession over the unallocated lands of the reserve, but when an individual Indian is in possession of reserve lands under Section 20 of the Indian Act, the rest of the band members lose their collective right to occupy that portion of the reserve. The individual may then occupy and develop lands in their possession without interference by the Band Council or the other Band members."

E. Certificates of Possession and the courts

There has been no shortage of case law involving CPs although the outcomes have been somewhat inconsistent. In general, Canadian courts will settle disputes and in other ways enforce the rights generated by CPs[136] Problems have arisen when the *Indian Act* does not contain specific provisions for certain situations. For example, the *Indian Act* does not provide for the division of matrimonial homes in divorce proceedings, and it contains ambiguous provisions such as the phrase "lawful possession" and the application of leases to those circumstances. Another problem confronted by the courts is the role of the Minister and the band council. It is much more likely that the courts will rule in favour of Ministerial discretion at the expense of band council jurisdiction.

Beginning with the term "lawful possession," in 1986 the case of *Pronovost* v. *Minister of Indian and Northern Affairs* described it as follows:

> The Act speaks of a right of "possession" which be proven by a Certificate of Possession, taking the place of a real estate title: it speaks of a right which does not derive from that of an owner but which may nonetheless be transferred as such, both by *inter vivos* and *mortis causa,* although such a transfer can only be fully effective after it has been approved by the Minister; and this hybrid right, which is both patrimonial and personal, is applied formally to the land by the Act without specifying what becomes of buildings or improvements on the land. It has been called a *sui generis* right: that is undoubtedly true, but what I wish to emphasize here is that this *sui generis* right defies any rational classification under our traditional property law.[137]

Both Flanagan and Alcantara have canvassed case law surrounding CPs. In *Westbank Indian Band v. Normand*[138] the Federal Court of Appeal ruled that the band could not sue the defendant CP holder for negligence. Rather, it was up to the CP holder to pursue a suit against the defendant. According to the Court, a CP transfers all "incidents of ownership" from the band to the individual holder.[139] In *Simpson v. Ryan,* the CP holder did not fully comply with the

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[136] Alcantara, *supra* note 37 at 407. In *Westbank Indian Band v. Norman* [1994] 3 CNLR 197, the Court found that a certificate of possession transfers all incidents of ownership from the band to the individual holder.
[137] *Pronovost v. Minister of Indian Affairs* [1985] 1 F.C. 517 at 523-24 (F.C.A.); Flanagan and Alcantara, *supra* note 31 at 407.
[138] *Louie v. Normand,* [1994] 3 CNLR 197 (BC SC).
[139] *Ibid;* Flanagan and Alcantara, *supra* note 31 at 407.

relevant sections of the *Indian Act* to transfer the CP to himself and his daughters leaving the application of joint tenancy invalid. [140] Various cases describe the differences of CPs as compared to other forms of land ownership.

> The Federal Court of Appeal in *Boyer v. Canada* outlined some of the very important differences between CPs and ownership in fee simple:" The member [of the band] is not entitled to dispose of his right to possession or lease his land to a non member (s. 28), nor can he mortgage it, the land being immune from seizure under legal process (s. 29), and he may be forced to dispose of his right, if he ceases to be entitled to reside on the reserve.[141]

As mentioned there is no shortage of case law on CPs especially when it comes to separation and division of property. In *Greyeyes v. Greyeyes*[142] the parties were married and eventually separated. The respondent was a CP holder to over 400 acres of farmland on reserve. The wife sought compensation in the form of a portion of the matrimonial property and a portion of the equity in the new home purchased by the respondent. Although the home and farm land constituted matrimonial property, the court could not divide up the land among the parties since lands reserved for Indians are exclusively within the jurisdiction of the Parliament of Canada, and it was beyond the court's jurisdiction to order a division or sale of such land.[143] It was found that the wife did have an interest in the land and therefore was entitled to some form of compensation even though the husband had sole possession of the CP over the farm land.

There is a large gap which has been identified by numerous cases dealing with the division of property on reserves as compared to off-reserve. Generally provincial statutes related to matrimonial property rights do not apply to First Nation reserve lands since such lands fall squarely within federal jurisdiction.

One of the most prominent cases dealing with CPs is the *Derrickson*[144] decision. The parties were both members of a First Nation, the wife applied under the provincial *Family Relations Act* for a one-half of the interest in the properties held by her husband under s. 20 of the *Indian Act*, or for compensation in lieu of division. The Supreme Court of BC dismissed the

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[140] *Ibid* at 408.
[141] Alcantara *supra* note 37 at 410; *Boyer v. Canada* [1986] 4 CNLR 53.
[142] *Greyeyes v. Greyeyes* [1983] 1 CNLR 5.
[143] *Ibid*
[144] *Supra* note 124.

application. The BC Court of Appeal concluded that the wife was not entitled to an interest in the property but made an order for compensation, which the wife appealed. Again, the issue was whether the provisions of the provincial *Family Relations Act* could apply to land on an Indian reserve. The Court held the *Act* could not apply to lands on reserve. When provincial legislation extends to federal jurisdiction as Indian lands are under 91(24), it should be read down to preserve its constitutionality within the limits of the provincial jurisdiction. While the Court recognized there could be inequitable results, it held that it is possible to award compensation for the purpose of adjusting the division of family assets between the spouses.

The case of *Syrette v. Syrette*[145] involved a matrimonial home as well. The parties were both status Indians who worked and resided on the First Nation. After being married for almost twenty-five years, they separated in 2005. The husband had been granted a CP by the First Nation council, and the couple had built a home on the reserve. Following the separation, the wife continued to live in the house. The wife applied to the court for equalization payments and spousal support. The application was granted in part and the amount of support payable was made contingent on possession of the land.

The court did not have jurisdiction to make an order for sale of the land and the band was considered ultimately in control of who was in possession of the property. The husband's appeal was allowed in part by the higher court varying one paragraph. The court and application judge did not have authority to make an order concerning possession, ownership, or disposition of property on reserve. The court made reference to the *Derrickson* decision as well. To the extent that the impugned paragraph of application the judge's order was intended to address ownership or possession of the matrimonial home, this part of the order could not stand. The impugned paragraph was varied to read, consistently with the application judge's findings, that each party had an equal interest in the matrimonial home for equalization purposes. All of the other aspects of relief sought by the husband were denied.[146]

It is a misconception that provincial courts do not have any jurisdiction when it comes to CPs. Most cases dealing with CPs involve possession of Indian reserve lands in the family law context, with *Derrickson* and *Syrette* as examples where the applicable provincial statutes were

[145] *Syrette v. Syrette* (2012) 222 ACWS (3d) 171 (Ont CA).
[146] *Ibid*

inoperative. These cases are not authority for the proposition that the jurisdiction of a provincial superior court is ousted in regards to the transfer of a CP under the *Indian Act* or equitable principles such as a mandatory injunction. Further, the Federal Court case of *Batchewana First Nation of Ojibways v. Corbiere* specifically held that disputes between a Band and a CP holder were properly within the jurisdiction of the Ontario courts.[147] The court has plenary and inherent jurisdiction to hear and decide all cases that come before it. The motions judge was correct in finding that the provisions of the *Indian Act*, when read together, permit the order that was made.

In the Federal Court case of *Mohawks of Akwesasne v. St. Lawrence Seaway Authority*[148] the Defendants brought forward a motion for summary judgment on a portion of a much more comprehensive amended Statement of Claim (the Claim). The Defendants were seeking an Order for partial summary judgment dismissing portions of the Claim regarding dumping of fill upon land located in Area M on Cornwall Island and a declaration that the interests were intended to and were fully finally settled by agreement with each Locatee whose land had been affected. In the alternative they wanted a declaration to the effect of the later in the above, subject to any legal impact that might later be determined to arise should a treaty be found to apply to the transaction. Although the motion was dismissed for a variety of reasons,[149] it was an important step towards a larger settlement agreement for the First Nation.

The central issue in this part of the Claim was the rights of a Band as contrasted with those of an individual Band member holding a CP. Specifically, the issue of whether the Band held a collective interest separate from the interest of individual Band members.[150] The St. Lawrence Seaway Authority (SLSA), created under federal statute, was part of the joint Canada-USA construction of the new canal and other works in the St. Lawrence River. It planned and supervised the construction of navigation works and bridges from 1956 to 1963. As part of its

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[147] *Batchewana First Nation of Ojibways v. Corbiere* (2000) 102 ACWS (3d) 3 (FC).
[148] *Mohawks of Akwesasne v. St. Lawrence Seaway Authority* 2015 FC 918
[149] Reasons provided by Justice Phelan included: material facts were in issue in respect to area M and also in respect to the whole of the Claim; the law on aboriginal land title and possession both generally and in particular, related to the facts is not settled; that the issues in respect to Area M overlap with issues in the balance of the Claim; the determination of which should not be done at this stage; that alternatives to Summary Judgement such as Summary Trial would not be sufficiently practical or beneficial now; and that the litigation requires active case management including a review of the Phasing Order in the light of legal developments since its issuance and the developing position of the Plaintiffs.
[150] *Mohawks of Akwesasne v. St. Lawrence Seaway Authority*, *supra* note 148, [4].

operation, it excavated large parts of the north and south of the Island. To do so, it expropriated land and dumped fill in different locations in and around the Island.[151]

The band had consented to SLSA's infill project in 1957 which would add fill to the land held by individual Band members under a CP. The Certificate was referred to as a COP and the Band members as Locatees. The specific area at issue was referred to as area M. Area M was comprised of several lots, each one held by a Locatee. Another BCR in 1957 confirmed that the Band Council agreed to SLSA's wishes "to pay for any compensation claimed by individual owners for the loss of the use of the land and crops in the fill area".[152] From 1957 various Locatees complained about the suitability of the filled in land. It was contended that SLSA recognized this problem and agreed to pay for crop loss in 1959.[153] In 1960, without Band Council's consent, SLSA released the contractors doing the work in Area M who left the land unfit for occupation. The Band Council continued to complain until 1967 to the SLSA and various studies and efforts at remediation were undertaken. These efforts appeared to dissipate over time. SLSA paid for crop losses until and including 1964 when SLSA refused until Band Council agreed to a settlement.[154]

The Ontario Court of Appeal released an important judgement in *Tyendinaga Mohawk Council v. Brant.*[155] The unanimous decision, penned by LaForme J.A., not only confirms the legal ability of band councils to settle debts owed to bands by band members, but it also provides an honest assessment of the *Indian Act* and its underlying policies, including the doctrine of discovery. The judgment exposes the paternalistic and racist foundations of the *Indian Act* regime. This is significant coming from a unanimous holding of the highest court in Ontario. The judgment will no doubt be useful in future legal challenges to the *Indian Act* regime or even as a political tool to change the status of First Nations in Canada's constitutional order.

For First Nation governments, the *Tyendinaga* decision is important because it makes clear that obtaining a court order for seizure of a CP is a legitimate method of enforcing a debt owed by a band member. The proceeding arose from a long-standing dispute between the

[151] *Ibid* at para. 9
[152] *Ibid* at para 14
[153] *Ibid* at para 15
[154] *Ibid* at para 17
[155] *Tyendinaga Mohawks of the Bay of Quinte v. Brant*, 2014 ONCA 565..

Mohawks of the Bay of Quinte First Nation (MBQ) and individual members of the MBQ named Shawn Brant, Ron Brant and Andrew Miracle. In 2008, a mandatory injunction restraining Miracle from occupying certain land on the reserve, and ordered the Brants and Miracle to pay $250,000 in general damages and $50,000 in punitive damages. This order was later affirmed by the Ontario Court of Appeal.[156] Costs were awarded to MBQ in the amount of approximately $265,000.[157]

To satisfy the judgment, MBQ took out a writ of seizure and sale of three properties on reserve allotted to Miracle, for which he held CPs (the "CP Allotted Lands"). The CP Allotted Lands were not involved in the original dispute with the MBQ. The anticipated sale proceeds from selling possession of the CP Allotted Lands were estimated to be $890,000. In May 2011, the Ontario court validated the MBQ's writs and directed the Sheriff to sell the CPs for the CP Allotted Lands. The Order included the condition that the sale was to be in accordance with the *Indian Act*, and approval of the Minister of Indian Affairs was required.

In September 2011, the provincial Ministry of the Attorney General advised the Sheriff to decline to sell the CPs for the CP Allotted Lands in accordance with the court order. The basis for this position was that section 29 of the *Indian Act* prohibited such a sale because the CP Allotted Lands were "reserve lands" and therefore not subject to seizure. Subsequent court hearings in 2012 amended the original order, and further costs were ordered against Miracle.[158]

MBQ brought a further motion to enforce the transfer of the CP to satisfy the judgment debts and cost awards made against Miracle. The Attorney General of Canada participated in the proceeding on behalf of the Indian Lands Registrar. The motions judge rejected the submission that section 29 of the *Indian Act* prohibited the seizure of Miracle's possessory interest in the CP Allotted Lands. The motions judge also held that section 89(1) of the *Indian Act* allowed an Indian Band such as the MBQ to seize and execute upon "real and personal property on a reserve". It was also within the Court's power to order Miracle to complete any documents required to transfer the CP, but there was no authority to bind the federal Minister to approve the transfers.

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[156] *Ibid*
[157] *Ibid* at para 12
[158] *Ibid*

Miracle appealed the August 2013 order. The first ground of appeal related to jurisdiction. He relied upon authorities such as *Derrickson* and *Syrette* for the proposition that provincial legislation cannot apply to the right of possession on Indian reserve lands. The Ontario Court of Appeal dismissed the jurisdiction argument and held that reliance on cases like *Derrickson* was misplaced. The *Derrickson* and *Syrette* cases involved possession of Indian reserve land in the family law context, and the applicable provincial statutes were inoperative.

The second ground of appeal concerned whether the motions judge erred in finding that CPs are "real or personal property of an Indian situated on a reserve" within the meaning of section 89(1) of the *Indian Act*, and therefore subject to seizure by the band.[159] Miracle argued that the *Indian Act* prohibited the enforcement of the court judgment against the CP allotted Lands. Also, that possession of reserve land pursuant to a CP is the closest equivalent to fee simple ownership for Indians, that the individual may occupy and develop the lands without interference from other band members. In consequence, lands held pursuant to a CP become equivalent to "reserve lands", and therefore exempt from seizure pursuant to section 29 of the *Indian Act*. The Court of Appeal rejected this ground of appeal, based upon the wording of the *Indian Act* and an application of the principles of statutory interpretation.[160]

The Ontario Court of Appeal affirmed a lower court ruling that allowed an Indian Band to execute a court order against a band member, through the sale of the band member's possession of reserve lands evidenced by a CP. The Court of Appeal held that the provincial courts have inherent jurisdiction over cases that come before them, and nothing in the *Indian Act* ousted such jurisdiction in this case. The Court also affirmed the order of the motions judge requiring the appellant band member to complete any documents necessary to transfer his CP to the respondent band. Section 29 of the *Indian Act* does not prohibit such an order. Further, section 89(1) of the *Indian Act* explicitly provides for the ability of Indian bands to seize or execute upon the real or personal property of an Indian situated on reserve.

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[159] *Indian Act, supra* note 1, s 89(1) provides that the real and personal property of an Indian on a reserve is not subject to seizure or execution at the instance of any person "other than an Indian or a band".
[160] With regards to this ground of appeal, LaForme J.A. performed a comprehensive review of the history and purpose of the *Indian Act* and in particular, the provisions relating to the inalienability of reserve land.

While the issues dealing with CP holders in the family law context seem to be well established it will be interesting to see any future cases dealing with CPs and those First Nations who have enacted self-governing agreements and continue to utilize CPs. The case of the *Mohawks of Akwesasne v. Saint Lawrence Seaway Authority* can be distinguished as it deals with collective rights of the band and the relationship with the Crown as opposed to interference with possession by individuals.[161] In *Joe v. Findlay* the issue was the right of an individual to sue for trespass. Similar to common law property cases, where a tenant in possession may sue for trespass, so too can a band member. However, the court accepted that a band had sufficient legal interests to claim for trespass in allotted land. In *Tyendinaga*, the Ontario Court of Appeal made no finding as to individual rights and band rights.[162] Lastly, the decision in *Behn v. Moulton Contracting Ltd*[163] shows that the matter of Aboriginal collective and individual rights is a live issue.

An increased use and reliance upon CPs for many First Nations in Canada has led to growth and opportunity for their members. The diverse uses of CPs across Canada should not go unrecognized, especially when examining the recent trend to moving towards a private ownership approach. Despite some of the inconsistencies in case law, it is clear that CPs themselves are evidence of lawful possession. A CP seems to invest the owner with all incidents of ownership, thus mimicking the fee simple rights that are enjoyed by those living off reserve.

F. Use of Certificates of Possession across Canada

It is possible also to explore briefly how CPs have been used by First Nations across Canada and how they have been an effective tool in economic development, home ownership, community growth and well-being. Whether it be for obtaining housing, starting a business, collecting lease or rental revenues or economic development endeavors, the use of CPs can undoubtedly be a positive approach to dealing with the hurdles imposed by the *Indian Act*. Interestingly enough, the First Nations listed below have enacted land codes under the Framework Agreement or moved into self-government and continue to prioritize individual land holdings for their members.

[161] *Supra* note 148 at 53
[162] *Ibid* at 49
[163] *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at paras 33-35.

This section will show that the use of a CP can serve as a strong tool for some First Nations in Canada. Research performed in 2013 by Marena Brinkhurst and Anke Kessler of Simon Fraser University, has provided substantial links to key geographic and socio-economic measures that are strong indicators of whether a First Nation has some or no land under lawful possession. Such factors include a relatively educated community with low levels of poverty and located within a favorable geographic location.[164] Undoubtedly these are all key elements although there are other historical, political, cultural and knowledge-based aspects that should be considered. For example, some members within a First Nation are unaware of the CP system and its potential benefits, and some political leaders with ulterior motives are reluctant to discuss let alone to issue CPs to members.

First Nations in some parts of Canada have a higher concentration of CP holdings. The following information will illustrate the use of a CP as an effective tool mainly for private home ownership and some economic development ventures. The high concentration and continued issuance and use of the CP in these areas can be an indicator of how a right to private property is beneficial on reserves. Some First Nations who are enjoying strong local economic development have credited individual land holdings and the CP or lawful possession system as encouraging entrepreneurship, improving housing quality, and supporting an overall better quality of life for their members. The majority of the First Nations mentioned below are supporting efforts to reform the system to allow for further privatization.[165] The following will provide examples on how some First Nations communities across Canada are utilizing their CP holdings including communities in British Columbia, Nova Scotia, Ontario and Alberta.

Cowichan Tribes

An appropriate example of an extensive use of the CP system is with Cowichan Tribes near Duncan, British Columbia where twenty percent of their land is held by individual members in the form of CPs. While Cowichan now governs their lands under their own land code, CPs were issued under the *Indian Act* prior to its ratification in 2015. Cowichan's practice of allotting parcels of land to individual families pre-dates colonization, and it has one of the largest per-

[164] Brinkhurst & Kessler, *supra* note 8.
[165] Flanagan, Alcantara & Le Dressay, *supra* note 30.

capita CP allocations among First Nation bands.[166] Most of the revenue from land rental or resource use goes to the CP holder. Cowichan is only paid a nominal amount to negotiate and administer leases or agreements. During the ratification process, Chief and Council along with their and code development committee met with their members in efforts to ratify their land code. One of the concerns noted was the issue with non-payment of rents by members. As a result, the system of allocating houses and CPs had temporarily halted.

While many First Nations communities in British Columbia are relatively small in numbers, some comprised of maybe two hundred members, Cowichan has over 4600 members and is the single largest First Nation in British Columbia. Their land base is composed of 2,389 hectares (5,903 acres), comprised of nine reserves. Most of Cowichan's reserve land is allocated or claimed by individual band members. The only communal land holdings are the site of the Administration complex and a parcel by St. Ann's Church, thus leaving virtually no land for overall community development purposes unless the First Nation purchases it from the CP holder.[167]

Westbank First Nation

Westbank First Nation (WFN) is a thriving, modern First Nation community which many consider ideal and academics have also studied intensively. For years it has been common practice to issue CPs to their members, yet they are not under the *Indian Act* and are no longer under the Framework Agreement land management regimes.[168] WFN is comprised of five reserves, two of which border Okanagan Lake and are in close proximity to the City of Kelowna, BC. When visiting WFN, it is difficult to differentiate which areas are reserve lands and which are part of West Kelowna. The planning, development, infrastructure and overall surroundings are natural and well-kept, and they flow together seamlessly.

WFN is in quite a unique situation when it comes to their lands and government. Unlike most First Nations in Canada, WFN lands are governed under a modern comprehensive set of

[166] See the Cowichan Tribes website at <https://cowichantribes.com/about-cowichan-tribes/land-base/certificate-possession>.
[167] *Ibid*
[168] The Westbank First Nation Self Government Agreement came into effect less than three years after the adoption of the Westbank First Nation Land Code, removing Westbank from the jurisdiction of the Framework Agreement.

community laws. WFN has full jurisdictional control over their lands and resources. WFN is governed under the *Westbank First Nation Self Government Act*[169] which is a self-government agreement between WFN and the Government of Canada. The use and development of WFN Lands is subject to Part XI of the Westbank First Nation Constitution (the "Land Rules"). Westbank has their own Land Registry, which is a sub registry under the Self-Governing First Nations Land Registry held in Ottawa. It is a public registry that is password protected but can be accessed at no charge.

The WFN Land Registry has its own set of regulations which came into force in November 2007. These are Federal regulations enacted under the authority of the *Westbank First Nation Self Government Act*. When drafting the regulations, input was received from a variety of sources, including the financial community and legal counsel who provided expertise in on-reserve property transactions. WFN Land Registry Regulations work in conjunction with the Land Rules. In the event of a conflict, the Regulations will prevail with respect to the registration of interests in WFN Lands.[170] The WFN First Nation Land Registry Regulations provides many benefits including the establishment of priorities; expedited registration process; reduction of lending risk; reduced cost of business; security and certainty to investors and developers.[171]

As with common law property systems, the WFN also honors a priority of registered interests system similar to a personal property registry system. For example, the priorities of previous registered interests that were in place before the regulations came into effect come first. Time and date of registration as well as mortgage interests are the greatest priorities.

Before the Self-Governing Agreement came into place, land administration and transactions were slow and suffered from many of the downfalls associated with the administration of the *Indian Act* system. As is the situation with most First Nations across Canada, community lands have to be designated before they can be leased. This is no longer necessary as WFN can grant a leasehold interest. There are two types of WFN Lands: Community Lands which includes previously designated lands; and Allotted Lands. The latter

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[169] *Westbank First Nation Self Government Act*, SC 2004, c 17.
[170] Westbank First Nation "Lands Registry", <https://www.wfn.ca/business-development/lands-registry.htm>.
[171] *Ibid.*

are lands which have been allotted to individual WFN members. For the purposes of this section, we are concerned with the Allotted Lands, as these lands have CP holdings.

Two of the five reserves of the WFN First Nation are approximately eighty percent (80%) held by CP holders. The issuance of CPs began back in the late 1960's when WFN broke away from the Okanagan Indian Band to become their own community. At that time, CPs may have been around thirty percent (30%) of the two reserves, but with subdividing, transferring and so forth, the percentage has increased. Many of the CPs have been used as leasing tools to third parties to generate revenue and many of course are used for residential housing.[172] A large portion of those CPs are held mostly by one member of the WFN.

On WFN, allotments and leasehold interests can be mortgaged under section 107 of the Westbank First Nation Constitution. These mortgaging clauses were designed to address the seizure provisions under section 89 of the *Indian Act* as previously discussed. The lender is provided security to lend against interests on Westbank lands without the guarantee of the WFN government. The issue or realization of a security interest on reserves has been a hurdle for many bands wishing for economic development opportunities. Many are unable to do business as the costs and time involved to undergo such ventures are major deterrents. Sometimes these elements are not only unreasonable, but they are also unworkable in most cases. Below is an outline of the WFN's mortgaging provisions:

> A mortgage may be granted by a written instrument registered in the WFN Lands Register provided that: (a) the land is in the sole, lawful possession of the Member granting the Mortgage or, the Leaseholder, or License holder, granting the Mortgage holds the entire legal and beneficial interest in the Leasehold or Licence; (b) the granting of the Mortgage and the terms of the Mortgage are permitted by the provisions of the Allotment, Lease or Licence;(c) there is a proper legal description of the lands that are to be subject to the Mortgage and, if required, the lands have been surveyed and the survey registered or recorded in the WFN Lands Register; and (d) in the case of a Mortgage of a Leasehold or Licence, the Mortgage term does not exceed the duration of the Leasehold or Licence.[173]

[172] These points were also emphasized by Lynn Vanderburg, Director of Lands at Westbank First Nation (personal communication, October 2015) [Vanderburg].
[173] Section 107.4 Westbank First Nation Constitution, online: <https://www.wfn.ca/docs/land_mortgages_brochure_2018_web.pdf>.

Over 3,272 mortgages have been registered on WFN lands. These have been issued by various residential, commercial and private lenders.[174] WFN has continued to utilize CPs and in general, accomplished so much economically for their membership. There are a variety of factors which enable WFN to do so well economically although they are not within the scope of this thesis.[175] It is also essential to understand that WFN lands remain section 91(24) lands, that is, lands reserved for Indians under the Canadian Constitution. All existing interests in WFN Lands prior to self-government, including CPs, were recognized and continued in accordance with their terms and conditions after self-government. They have been diligent in honoring their commitments and following through with their own Constitutional rules and regulations.

The WFN First Nation Constitution sets out the rules and administrative structures for land management and administration of Westbank Lands and establishes types of interests in Westbank Lands. As demonstrated, many of these interests are private in nature but utilized very effectively. WFN also continues to administer pre-Self-Government instruments in place of the Minister, and Member approval is required for long term leases and/or licenses on Community Lands. Subject to their own laws, Council approval is no longer required for private land transactions, for example, leases, mortgages and transfers. In terms of more recent CP activity, under self-government today, a CP is issued for housing purposes on community-held land, or if and when a current CP holder transfers property to another WFN member.[176]

[174] See the Westbank First Nations Lands website.
[175] Factors include strong leadership, appropriate and capable self-governing arrangements, proximity to major urban centers and tourism, educated and supportive membership.
[176] [Vanderburg] *supra* note 172. Vanderburg explains more recent CP usage amongst Westbank.

K'ómoks First Nation

K'omoks First Nation is located in the Comox Valley of Vancouver Island. It is a smaller community with a few hundred members. The First Nation has been actively issuing CPs for decades as the Chief and Council of K'omoks First Nation felt that by issuing CPs, members would have a sense of pride and responsibility, and it would be an incentive for members to be responsible for maintenance or upkeep of their homes and the land.[177] The idea that if an individual owns land or a home for example, they may generally put more care and effort into that ownership interest is not a new concept and can be related to interests both on and off-reserve lands.

When a member of K'omoks First Nation wishes to build a home on reserve lands, they request and receive a housing information package which outlines several steps that must be followed in order to build a home on the reserve lands. As with most First Nations, there are specific areas of the reserve dedicated for residential use and all homes must be constructed within these areas.[178] For the most part, the applicants are able to choose a lot of their choice from a map of unencumbered lots. Once they have chosen a lot, it is held for three months while the rest of the application steps are completed. These include obtaining a letter of intent from their financial institution; providing proof of a down payment; verification of employment and, if applicable, a reference letter from their previous landlord.[179]

Throughout the process, the member is to receive assistance from the Band Manager and the house plan is reviewed to ensure it fits the grade of the lot. The member selects a qualified general contractor upon receiving estimates and the First Nation grants approval to commence construction. The First Nation holds the subsidy and the member's down payment in trust. Monies are released to the contractor after an independent inspector's report confirms the construction is in accordance with British Columbia's building code.[180] The financial institution to release the mortgage funds to the First Nation for disbursement to the contractor. Upon final payment of their mortgage, members gain clear unconditional title to their house and land and a

[177] Available information online "lands" at <http://www.komoks.ca/about-us>.
[178] Canadian Real Estate Agency, *The Path to Home Ownership*, K'omoks First Nation: The Band Supports, Individuals Choose" 2012 at 12.
[179] *Ibid*
[180] *Ibid*

CP is issued. If a member defaults on mortgage payments and the bank begins the process of foreclosure, the home reverts to the First Nation. Defaults are rare on K'omoks First Nation compared to other First Nations such as Cowichan, which is perhaps evidenced by the fact that sixty percent of band members hold clear title to their homes.[181]

K'omoks is currently in the treaty negotiation stages with the British Columbia Treaty Commission and they have negotiated an Agreement in Principle (AIP) with some fairly telling provisions. Within the would-be future treaty, there are provisions protecting and securing existing property rights of CP holders and maintaining the same for those that do not enroll in a treaty.[182] In terms of enrollment, individuals of K'omoks are not automatically eligible to come under the treaty, and they must enroll through a specific process set out through an Enrollment Committee. Interestingly enough, there is a provision regarding the use of the regular B.C. Land Registry or Torrens System. The overall suggestion of those involved in negotiations on behalf of the First Nation, appears to be that this system provides lenders with confidence so they are willing to loan money based on using the land as security through mortgages.

Within the treaty negotiations there is also the option to embark upon creating a K'omoks Land Registry System to designate and provide security to lending institutions, owners and lessees in a similar fashion.[183] This is not uncommon in modern day treaties especially in British Columbia, emphasizing the rights and protections of individual property rights of their members seems to be widely respected and recognized.

> With fee simple ownership of K'ómoks Lands, K'ómoks may "register" lands in the provincial land registry system, or create its own land title system. Considering the costs and risks associated with creating a new land title system, K'ómoks will use the provincial land title system. When K'ómoks individuals have a "registered" title to lands, they have a form of ownership that can be taken to a lender. Registered lands can be bought and sold, and therefore have a significant value to the holder.[184]

The treaty negotiations with K'omoks First Nation have been very lengthy and rightly so as there are a lot of controversial points outside of the scope of this thesis. In the meantime,

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[181] *Ibid.*
[182] K'omox First Nation website Treaty Chapter Summaries available online at <https://komoks.ca/stages-of-treaty/>.
[183] *Ibid*
[184] K'omoks "Chapter Summary of Treaty", online: <http://komoks.ca/stages-of-treaty/>.

K'omoks has since enacted a land code[185] under the Framework Agreement and still issues individual land holdings to members in the form of allotments and CPs.[186] The issuance of these individual holdings is subject to the laws and policies developed by the First Nation under their land code.[187]

Tyendinaga Mohawk Territory (Tyendinaga)

As with most First Nations, the lands department of Tyendinaga in Ontario is responsible for processing all land transactions including land transfers and leases. The First Nation is currently managed within the RLEMP land management regime under the *Indian Act*. As mentioned, the RLEMP program allows First Nations to be involved in a variety of land management activities including community land use planning, environmental management, and compliance, which enables them to exercise greater control and decision making with respect to land and environment management. RLEMP does not remove or change First Nations' existing authorities under the *Indian Act.*[188]

According to the Canadian Real Estate Agency in 2018, Tyendinaga operates one of the most successful homeownership programs in Canada and the use of CPs has been an integral part of that success. The First Nation has achieved an ownership rate of nearly ninety percent, which is well above the national rate of sixty-seven percent for all Canadians.[189] Defaults on mortgages are uncommon but comparable estimates to overall Canadian mortgage defaults were unavailable for this discussion. The issuance of mortgages began when Tyendinaga began pooling federal housing subsidy funds instead of awarding them to individual band members roughly thirty-six years ago. This formed the basis for a revolving loan fund that underpins its homeownership program.

Similar to off-reserve, the builder or buyer must be apprised of and comply with national and provincial building standards including Mohawks of the Bay of Quinte building codes,

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[185] K'omoks First Nation "Land Code" (June 28, 2016)
[186] *Ibid* (see section 32 in relation to allotments in KFN land and section 33 Certificates of Possession (or CPs)).
[187] *Ibid* (for example see ss. 33.2 no Certificate of Possession will be issued until a KFN land law has been enacted establishing a policy and procedure for their issuance)
[188] <https://mbq-tmt.org/community-services/lands/>.
[189] Chris Maracle, "Innovators Find Paths to Homeownership" Canadian Real Estate Agency (October 2018) [Maracle].

regulations, and requirements, regardless of the source of funding. To build or buy a home on the Territory, the new home-owner must belong to the membership list registered to the Mohawks of the Bay of Quinte. Builders and sellers must hold the registered CP for the lot on which they plan to build or sell. There are three options to fund building or buying a new home on the Territory including: Mohawks of the Bay of Quinte Revolving Mortgage program; Mohawks of the Bay of Quinte Market Based Housing program; and Private or Self-Sufficient funding.[190]

The First Nation effectively became a financial institution. Members felt they could increase prosperity in their community and do a better job of providing housing if they kept funding for housing delivery and administration circulating within their community. Through the system, members can apply for a mortgage and make payments to the First Nation's housing fund. Preserving the bulk of the First Nation's housing as capital allows for more mortgages to be granted. Further, by maintaining control of housing funds, the costs for homeowners are lowered.

As the equivalent of a mortgage lender, Tyendinaga retains possession of the CP while the loan is outstanding. When the loan is fully repaid, the owner receives the CP.[191] By combining financing with rigorous construction and energy efficiency standards, Tyendinaga has increased the quality and durability of its housing as well. Individual pride of ownership ensures homes are well maintained. The First Nation has a strong resale market and sellers are realizing good returns on their initial investments.

Kahnawake

Another Eastern First Nation, Kahnawake has enabled individual choice as a key feature of homeownership. The First Nation member chooses the location, contractor and house specifications while the First Nation facilitates the financing and makes land available. The Mohawk Council of Kahnawake (MCK) established a revolving loan fund in 1977 to finance mortgages for members of the community who wanted to build and own their own homes.[192] The

[190] See <http://www.mbq-tmt.org/administration-and-services/housing-sustainable-development/housing-programs>.
[191] Maracle, *supra* note 189.
[192] *Ibid.*

fund operated as the main source of financing for years until MCK established its own Caisse Populaire, through the Desjardins System. While some community members also chose to finance their homes through mortgages from off-reserve lenders, backed by a ministerial guarantee, the Caisse system was very helpful.

> The Caisse soon became a popular mortgage lender, offering two programs. The main program, based on a ministerial guarantee, required a ten per cent down payment. Loans were offered for construction and purchase of homes, as well as for renovations, usually topping up Residential Rehabilitation Assistance Program grants from CMHC. The second program required a 25 per cent down payment. It offered loans on the basis of a guarantee provided directly by the Caisse Board of Directors, eliminating the need to go through the MCK and the ministerial guarantee. This translated into less paper-work and faster loan processing.[193]

As Ministerial guarantees ended in 2000 it became difficult for residents to obtain mortgages and of course demand exceeded supply. MCK negotiated an agreement with the Bank of Montreal.[194]The Agreement stipulates that MCK guarantees the mortgage and holds the participant's CP as collateral until their loan is fully paid out. In many of these financing endeavors we see the First Nations being keen on utilizing the CP as collateral and an incentive to homeownership for their members.

Inevitably, suitable land for on-reserve housing will run low. In this case, the council subdivided adjacent communal land on the First Nation and installed infrastructure so residents could apply for a Communal Land Allotment and build a home. The Communal Land Allotment remains in the name of the Mohawks of Kahnawake until the mortgage is paid off. Once the mortgage is paid out, MCK, on behalf of the Mohawks of Kahnawake, issues an Executive Directive and INAC then registers a CP.[195] It is quite a unique situation and financial arrangement geared towards individual ownership in land.

Enoch Cree Nation

Enoch Cree Nation is one of the most progressive First Nations and is located on the outskirts of the city of Edmonton Alberta. The prime location of the reserve allows for increased

[193] *Supra* note 178 at 11.
[194] *Ibid.*
[195] *Ibid.*

development opportunities which the band has taken advantage of including small businesses and multi million-dollar endeavours. They have a large casino, Marriott hotel, recreational facilities, housing, and business complexes to name a few. They have also maintained and utilized CPs mainly for agricultural purposes, but the First Nation has not been in the practice of issuing CPs in the same way as those First Nations in Eastern Canada. Prior to discovering oil and becoming more interested in economic development opportunities, they had issued some CPs.

G. Situating CPs Alongside Other Property Systems

First Nations in British Columbia have a higher concentration of CPs, especially amongst those in the southern region. They are much less common elsewhere, especially in remote communities. Where they have been granted, they are used not only for owner-occupied housing on reserve but can also be leased to outsiders for commercial development. It seems that First Nations that make use of CPs are quite distinct from those that do not. On average, the former are smaller both in population size and reserve area, their location is less remote, and their members tend to have a higher level of education along with slightly higher median incomes and a lower unemployment rate. They are also more likely to use the *Indian Act* electoral system, as opposed to a customary electoral system, or they have attained self-governance through a modern treaty agreement or are currently engaged in negotiations.

While few reserves in Canada have CPs and the actual land mass of CPs is tiny compared to the overall amount of reserve land in Canada, they are an effective tool. They are a benefit to the CP holder and in some cases the First Nation community itself in relation to economic development ventures—consider the examples shown with Cowichan First Nation and Westbank First Nation. Effective governing structures, education and location are important for these CP holders, however, they are not crucial. Again, the band cannot rescind a CP as it is a legal instrument, although some bands may feel inclined to "buy back" CPs on their land from the band members.

CPs are essentially a creature of the *Indian Act*, so they are not without their problems. They cannot be transferred or bequeathed to non-band members and if an individual ceases to be

a band member or has children that are not eligible for band membership,[196] the CP cannot be transferred. Again, most bands control their membership requirements and it is not uncommon today for bands to disallow membership, leaving the CP holder without an heir to whom to transfer his or her property. Further, CPs are subject to Ministerial approval. Many First Nations are not in any rush to issue any CPs to their members and of course there are those that feel CPs were improperly issued by the Government of Canada.

CPs play an interesting role in the administration of wills and estates as well as designations[197] on First Nation lands. With designations, a First Nation must be still operating under the *Indian Act* land tenure system. The provisions regarding designations do not apply to those under the Framework Agreement or modern-day treaties. Those First Nations operating under those regimes have their own land codes and procedures for designation of lands for leasing purposes for example. In general, those First Nations who hold CPs have their estates administered under the *Indian Act* as opposed to provincial wills and estates regulations.

From a House of Commons Study in March 2014 on land management and sustainable economic development on First Nations reserve lands, the fourth recommendation emphasized "that the federal government continue to explore options to allow First Nations living on reserve to obtain, on a voluntary basis, the benefits of private property ownership."[198] Although there was no mention of the use and issuance of CPs, it is not left out as a viable option if the majority of First Nations are going to continue to be governed under the *Indian Act* land tenure regime.

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[196] There are two systems that "control" band membership under sections 10 and 11 of the *Indian Act*. Section 10 gives First Nations control over who they allow into their membership by creating membership rules or codes.

[197] First Nation designated lands are reserve lands that a First Nation has agreed to lease for commercial, agricultural, recreational or other purposes which is voted on by the members of a First Nation according to the rules of the *Indian Referendum Regulations*. Similarly to how a municipality would zone land for a specific purpose off a reserve, First Nations who operate under the Indian Act identify lands on their reserve for specific purposes following a land designation process. Designated lands remain reserve lands. When a First Nation designates land, it allows a business partner to temporarily run a business on a specified portion of the reserve while the First Nation retains its interest in the land. This arrangement allows First Nations to economically benefit from their lands and to manage them according to their bylaws.

[198] Canada, 2014, *Study of Land Management and Sustainable Economic Development on First Nations Reserve Lands.* Report of the Standing Committee on Aboriginal Affairs and Northern Development. Parliament, House of Commons.

The important point is that entering into any private property endeavour on reserve should be optional or voluntary.

The Committee's findings suggest that while tenure security is vital to economic security, the nature of that security is not necessarily tied to formal individual title. In many instances, a long-term lease, rather than freehold title, may be a less risky and a more appropriate form of tenure for First Nations communities. While it is true that existing property rights instruments like CPs have not been widely adopted, they are still being heavily used and are transforming into similar forms of private property rights for those under the Framework Agreement. The number of First Nation communities interested in, and that might benefit from, extending individual fee simple title might be limited given their location far from urban or semi-urban areas.[199]

CPs can exist in the formal sense, under both *Indian Act* and Framework Agreement land tenure regimes. Some First Nations will enact a land code with the intention of continuing the issuance of CPs, others may stop the CPs altogether: "The overlap is even more evident with another form of property right, leases. Leases can be granted on a First Nation's collective land as well as well as on any type of individually controlled land. The *Indian Act* provides for three types of leases, short term leases or permits, long-term leases referred to as designated lands and leases granted on behalf of a CP holder."[200]

Permits under the *Indian Act* are essentially the right to use reserve lands in a limited, specific way for a defined period of time. For example, permits are issued for rights of way to run power lines, for agriculture, or to remove clay, sand, gravel or wild timber. A lease grants exclusive possession of a parcel of land, a permit does not. More than one permit may be issued over the same parcel of land provided the uses are compatible. Permits are approved by the First Nation and issued by the Minister of Aboriginal Affairs and Northern Development. First Nations under the Framework Agreement continue to issue permits but deal with such matters internally.

[199] *Ibid* at 63.
[200] Flanagan & Alcantara, *supra* note 31 at 11.

Long-term leases incur a designation process under the *Indian Act*. The land designation process has for its entirety, been an enormous obstacle to economic development on reserve. Projects on reserve are severely delayed compared to projects off reserve. Many First Nations have felt the frustrations and financial burdens of stalled projects: "The due diligence associated with ministerial approval of land designations results in significant delays. When economic development projects are time sensitive, these delays can lead to missed opportunities, and/or significantly raise costs to investors. Delays are further exacerbated by the voting system associated with community approval of a designation."[201]

Buckshee leases are essentially a non-formal "hand-shake" lease agreement. These types of informal leases exist on a number of First Nations across Canada. "A buckshee lease refers to a lease that has not been granted by Her Majesty pursuant to the *Indian Act*. While buckshee leases have provided First Nation members or bands the ability to collect lease revenue directly, this arrangement does not afford First Nations or leaseholders any court enforceable property rights."[202] These types of leases are unlawful and void under the *Indian Act*. For this reason, the holder of a buckshee lease is not eligible for a mortgage.[203]

There are First Nation communities doing well without freedom from federal oversight although within the last few years several of these First Nations have made the leap into the Framework Agreement. Some examples are the Osoyoos Indian Band in British Columbia and the Membertou First Nation in Nova Scotia. Both have carefully cultivated contact with various businesses and have not only concentrated on job and wealth creation, but have made moves towards individual land rights for their members.[204] The next chapter turns to examine Framework Agreement contexts.

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[201] National Aboriginal Economic Development Board, "Addressing the Barriers to Economic Development On Reserve" at 13, online: < http://www.naedb-cndea.com/reports/addressing-barriers-to-economic-development-on-reserve.pdf>.
[202] Lands Advisory Board Resource Centre, "Buckshee Leasing v. Registered Leases".,
[203] Andrea East, "Buckshee Leases of First Nations Land: Tenants Beware" (November 27, 2009).
[204] Joseph Quesnel, "A Decade of Nisga'a Self-Government: A Positive Impact, But No Silver Bullet" (2012) 31 InRoads, https://inroadsjournal.ca/a-decade-of-nisgaa%E2%80%A8self-government-a-positive-impact-but-no-silver-bullet/>.

CHAPTER THREE: Framework Agreement First Nations and Property Rights

The previous chapter discussed *Indian Act* land tenure in relation to private property on reserves with a focus on the use of CPs. The present chapter will examine the Framework Agreement and the growing number of First Nations who have developed their own land codes to manage their reserve lands and resources. It will also show that many of these land codes as well as the laws enacted under the same, are customized for individual land holdings. A highlight will be the enforcement of such land code laws and the recent decision out of British Columbia recognizing and supporting provincial court jurisdiction to prosecute a law enacted under a land code.

This chapter will also illustrate that the Framework Agreement allows for the best options for building more effective enforcement on an ongoing basis as an exercise of self-government authority. Self-government derives from First Nation history and traditions and is not granted or created by federal or provincial governments. Although Canadian law has taken a gradual approach to broadening law-making powers and jurisdiction of First Nations governments, the Framework Agreement has been an essential component of such approach. Accordingly, the power to make laws is one of the essential components of self-government.

Several authorities have raised issues regarding First Nations laws enacted under the Framework Agreement. There are some misunderstandings about the nature and enforcement of laws enacted under the Framework Agreement. This chapter also aims to clarify some of those and other related concerns. This chapter focuses on laws under the Framework Agreement and what is available under the *Indian Act*. Once under the Framework Agreement, the *Indian Act* land system is terminated but most federal laws, like the *Criminal Code*, continue to apply on reserve. It is also important to note that provincial laws of general application such as laws requiring driver's licenses to operate a motor vehicle apply, but provincial laws governing the use of land do not apply.

A. The Framework Agreement on First Nation Land Management

As noted earlier, a significant number of First Nation communities across Canada are actively working or are interested in implementing a land code in their communities. Over 237 First Nations, or one third (1/3rd) of all First Nations in Canada are involved in some way with

the Framework Agreement. Another sixty-two First Nations signatories are expected to be active in the developmental process by 2024.[205] As of October 2021, there are 102 First Nations operating with their own land codes and most have drafted and adopted certain laws.[206] A large percentage have laws related to private ownership for their members.

While First Nations under the Framework Agreement are not able to provide for the transfer of fee simple interests in their land to either members or non-members, they do have a relatively free hand in designing provisions relating to leasehold interests. These leasehold interests can be held by both members and non-members, as well as provisions relating to the possessory interests of band members, most commonly known as certificates of possession or allotments.

Despite a misunderstanding for some, lands held under the Framework Agreement are not and will never be turned into fee simple lands. The Crown still holds the underlying title to the lands and the First Nations take on the main responsibility in managing their lands and resources. There is a common misconception that under the Framework Agreement that reserve lands can become "privatized", but this is not the case. Neither the Framework Agreement nor the FNLMA grants any authority for a First Nation to privatize their lands. Even with the possibility of amendments to the Framework Agreement, the future for transferring lands into fee simple looks highly unlikely.

What is most significant with the Framework Agreement is that First Nations with their own land code can pass laws respecting development, conservation, protection, management, use and possession of First Nation Lands and respecting environmental protection.[207] By enacting a land code, a First Nation has all the legal status and powers needed to manage and govern their lands and resources. Essentially, the First Nation that has passed a land code has the same legal

[205] See <https://labrc.com/wp-content/uploads/2021/01/Annual-Report-2018-2019-LAB-Annual-Report-Final-w-financials.pdf>.
[206] Framework Agreement, *supra* note 2, s 18.2, 18.3 set out only some examples of laws contemplated by the parties, First Nations can pass a variety of laws for example environmental assessment, environmental protection, Matrimonial Real Property, Emergency, Trespass, Zoning etc.
[207] Framework Agreement, *ibid,* s 18.1 "The council of a First Nation with a land code in force will have the power to make laws, in accordance with its land code, respecting the development, conservation, protection, management, use and possession of First Nation land and interests or land rights and licences in relation to that land. This includes laws on any matter necessary or ancillary to the making of laws in relation to First Nation land."

status as a natural person for purposes related to land. However, despite taking on larger responsibilities, they are not just stepping into the shoes of federal administration.

The law-making authority is very broadly stated in the Framework Agreement. Canada does not have unilateral authority to dictate or modify the scope of this law-making authority. Land code First Nations do not need any approval from Canada to enact their laws. The penalties for violation of First Nation laws under land codes are also considerably stronger than for violation of *Indian Act* bylaws. These penalties match and are consistent with, summary conviction offences under the *Criminal Code* and with even stronger penalties for violation of some environmental protection laws.[208] This is an important step for environmental protection which was almost non-existent in the past under the *Indian Act.*

Pursuant to section 22 of the Framework Agreement, First Nations under their land codes, retain the authority to make bylaws under the *Indian Act*. While they have full law-making authority, they also continue to have the option of enacting bylaws pursuant to section 81 under the *Indian Act*.[209] Any bylaws which existed prior to enacting a land code can remain in place, however in practice, these bylaws have generally become a basis for prioritizing law-making. Again as mentioned, land code laws will trump First Nation bylaws created under the *Indian Act* and federal laws on environmental protection will prevail in cases of conflict with a First Nation's land code law.[210]

A very common form of property rights for individual members is the use of the CP within the context of the Framework Agreement. This may be due to the large numbers of CPs previously issued under the *Indian Act*. Many of these First Nations that now have their own land management authority had been accustomed to the prevalence and usefulness of the CP system, while others appreciate the notion of formalizing a stronger property and land tenure system for their members. Whatever the reasons may be, there are a substantial number of land

[208]Framework Agreement, *ibid*, s 24.3 provides that 'The First Nation environmental protection standards and punishments will have at least the same effect as those in the laws of the province in which the First Nation is situated."

[209] The general bylaw powers are set out in s. 81(1) of the *Indian Act.* Section 81(1) provides for 22 subject areas that cover a range of topics including health, traffic, law and order, trespassing on reserve, public games, animal control, public works, land allotment, zoning and building standards, agriculture, wildlife management, commercial activities on reserve, and residency and trespass on reserve.

[210] FNLMA *supra* note 15, ss 39-44.

code First Nations that have enacted and are developing CP or allotment laws for their members that have been quite successful.

One of the brilliant aspects of the Framework Agreement is that it is flexible and can be amended. Amendments are not easily done and require the approval of two thirds (2/3rd) of the operational First Nations along with several other hurdles. Over the course of time, the Framework Agreement has been amended six times to allow for the advancement of interests of First Nations. On November 26, 2018 the sixth amendments to the Framework Agreement were finalized by the Lands Advisory Board, Operational First Nations and Minister Carolyn Bennett. Canada then brought the provisions of the FNLMA into alignment with the amended Framework Agreement through the passage of Bill C-86, Division 11. Royal Assent for Bill C-86 took place on December 13, 2018.[211]

The new amendments include an introductory provision that is the first recognition of Canada's commitment to UNDRIP. Self-governance over lands is a step towards meeting Canada's commitments to self-government under UNDRIP. Notable changes for the purpose of this thesis include new provisions for additions to reserve, the inclusion of Yukon First Nations who have "lands set aside" rather than reserves, an expanded list of self-government law making powers, limitation of liability for First Nation governments, authority for a new First Nations-led land registry, and enhanced enforcement provisions. Future amendments are currently being targeted which may include expansive powers of wills and estate matters currently managed by INAC.

As mentioned, the Framework Agreement is a government-to-government agreement signed on February 12, 1996 by 13 First Nations and Canada. One other First Nation was added as a Party as of December 10, 1996.[212] The Framework Agreement is an initiative by these original signatory First Nations to opt out of the land management sections of the *Indian Act* and

[211] This is in the 2018-2019 Annual Report of the Lands Advisory Board.
[212] The First Nations who signed the Agreement included Westbank, Musqueam, Lheit-Lit'en, N'Quatqua, and Squamish (British Columbia); Siksika (Alberta); Muskoday and Cowessess (Saskatchewan); Opaskwayak Cree (Manitoba); and Nipissing, Mississaugas of Scugog Island, Chippewas of Georgina Island, and Chippewas of Mnjakaning (Ontario). Saint Mary's First Nation (New Brunswick) was added as a party to the Agreement effective 10 December 1996.

take over responsibility for the management and control of their reserve lands and resources. The Framework Agreement sets out the principal components of this new land management process.

Under the Framework Agreement signatory First Nations have the advantage of creating a land code which enables them to effectively manage their reserve lands and resources. The First Nation community goes through a development and approval process for their land code. In the meantime, their lands are still managed under the federal *Indian Act*.[213] These land codes are essential components for First Nations as they establish the legal framework that sets out land and environmental governance, tenure, interests, and rights. First Nations became frustrated with the poor management of their reserve lands, resources and environment and can now, under the Framework Agreement, manage these areas according to their own values and priorities while also enabling improved economic development.

The Framework Agreement sets out the mandatory content requirements for a land code. For instance, land codes must include general rules and procedures applicable to use and occupancy of the lands, such as use and occupancy under licences, leases, certificates of possession, and other member interests, and the granting or expropriation of interests or rights in these lands. They must speak to the procedures that apply to the management of interests at issue in the event of a breakdown of a marriage or in the implementation of a will. Land codes must also identify a forum for dealing with disputes related to these interests or rights, define the rules for enacting land laws, and set out procedures for amending the code. Lands remain reserve lands once the land code is enacted and cannot be alienated except through expropriation by or land exchanges with the federal government. Title to reserve land technically remains vested with the Crown, and this is not affected by a land code.

There may be some confusion as to the guiding documents and the Framework Agreement. When drafting pursuant to a land code, most practitioners tend to reference the First Nations Land Management Act (FNLMA)[214] rather than the Framework Agreement especially when developing laws. Canada enacted FNLMA as part of its obligation to ratify the Framework Agreement, it was given royal assent on June 17, 1999. The FNLMA brought into effect the

[213] The First Nations Lands Advisory Board, "Framework Agreement" online:< https://labrc.com/wp-content/uploads/2021/07/FAQs-July-2021.pdf>
[214] FNLMA, *supra* note 15.

terms and conditions agreed to in the Framework Agreement. It is important to note that it is the Framework Agreement that is actively being implemented by First Nations and Canada. First Nations sign the Framework Agreement, ratify the Framework Agreement with a vote, and implement the Framework Agreement through their land codes.

As mentioned, the land code developed by the First Nation is the central piece for self-government. When developing laws every reference always starts with the land code. Whether or not the law is compatible and consistent with the land code is the initial query. Moreover, it has been noted that "[t]he purpose of the land code is to establish rules for mandatory community participation in the proposal, development and approval of laws over reserve lands and resources. The land code must be agreed to by eligible voters on and off reserve in a ratification vote before it can be implemented."[215] It is not mandatory that First Nations create laws before the land code is implemented, and these can be developed at the speed of the First Nation. Priority can be given to certain areas such as environmental protection and spousal real property.[216]

There are common misconceptions that the Framework Agreement may affect treaty rights or that it is similar to signing a treaty with Canada, but this is not true. The Framework Agreement is not a treaty and does not affect treaty rights or other constitutional rights of the First Nations. Under the Framework Agreement, First Nation lands continue to retain the same protections as "Lands Reserved for Indians" under section 91(24) of the Constitution. The Framework Agreement ensures that sale and expropriation of reserve land by the province is prohibited. Expropriation by the Federal Crown is significantly restricted to a national public purpose, for a short period of time, with a reversion to reserve status after the use is over. In addition, other land of equal size and value is given reserve status, resulting in a larger reserve base.

The Framework Agreement is one sectoral component of self-government by First Nations, it is completely optional, and it deals only with their reserve lands and resources. Any

[215] This is in the Lands Advisory Board 2014-15 Annual Report at 5.
[216] Matrimonial real property or "MRP" refers mainly to the family home where both spouses or common-law partners live during a marriage or common-law relationship. MRP is a complex area of law not dealt with under this paper although consider the significance of Framework Agreement First Nations being able to enact their own MRP laws under their respective land codes.

lands held by a First Nation that are not yet reserve status or any areas that are considered traditional territory, are not covered under their land code. A First Nation can elect to omit certain areas of their reserve that may not fall under the land code.[217] This is usually done because of legal disputes over or within specific areas. Matters related to other topics such as elections, governance and education, are dealt with in the context of other agreements or remain under the *Indian Act*.

The Framework Agreement is not intended to define or prejudice inherent rights, or any other rights, of First Nations to control their lands or resources, for example section 35 of the Constitution.[218] The Framework Agreement also does not preclude other negotiations in respect of those rights. We see this with First Nations such as Westbank, Whitecap Dakota First Nation, K'omoks First Nation and others. Enacting a land code, for many, is a step towards greater self-governing authority. At least under the Framework Agreement, First Nations have the ability to create laws regarding their lands that align with their traditions and cultures.

The Framework Agreement does not directly impact other self-government arrangements. The provisions of the Framework Agreement are sufficiently flexible and progressive enough that other self-government initiatives are able to fit harmoniously with the First Nation land regimes established under the Framework Agreement. Westbank First Nation (WFN) is a superior example of this as one of the original signatories to the Framework Agreement. Since moving out from under the most restrictive and debilitating aspects of the *Indian Act*, WFN has prospered both socially and economically. The pace of change has been astonishing. As a result of self-government WFN has a more stable and predictable government based on community-developed laws, of which the most important is the Westbank First Nation Constitution. WFN is considered one of the most successful Indigenous communities in Canada.[219]

As of May 2021, Pekuakamiulnuatsh First Nation became the 100th First Nation to vote on and approve their land code. This demonstrates that the Framework Agreement is a preferred pathway for meaningful and achievable First Nations self-government. Some First Nations have

[217] This is in the Lands Advisory Board Annual Report, *supra* note 209.
[218] Section 35 of *The Constitution Act, 1982* recognizes and affirms existing Aboriginal rights, but does not define them.
[219] Westbank First Nation Brief, House of Commons Standing Committee on Indigenous and Northern Affairs (September 25, 2017).

been operational for more than fifteen years.[220] To date, over 100 First Nation communities have voted to ratify the Framework Agreement through their respective communities' land codes and the majority of operational First Nations are found in British Columbia and Ontario. These operational First Nations have enacted some very strong community-based laws in relation to trespass, illegal dumping of hazardous waste materials, zoning and so on. One of many examples is Tsawout First Nation in British Columbia who have enacted a Subdivision, Development and Servicing Law amongst others.[221] While these and other laws are relevant for ultimate land management authority, it is the laws related to allotment or individual interest holdings that are of greater assistance in this thesis.

While the issue of enforcement remains, First Nations are utilizing creative ways to tackle the enforcement realm. There is clear authority to establish within First Nation laws "comprehensive enforcement procedures consistent with federal law, including inspections, searches, seizures and compulsory sampling, testing and the production of information."[222] A First Nation council, managing its lands under a land code, will have the power to make laws in respect of the development, conservation, protection, management, use and possession of First Nation land. This includes laws on zoning, environment, services and dispute resolution.

B. Laws and Enforcement under the Framework Agreement

There are often questions related to the nature and status of laws created under the Framework Agreement, such as whether laws created under the Framework Agreement are federal laws, regulations or First Nation laws. In this respect, it is important to keep in mind the nature and authority of the Framework Agreement itself. Laws enacted under the Framework Agreement are First Nations laws applicable to lands and resources on reserve. First Nations are authorized to pass various laws relating to lands, environment and natural resources under their land codes. While the FNLMA is a federal piece of legislation, its purpose is to ratify and bring into effect the Framework Agreement. It is this agreement that is actively being implemented.

[220] Statistics are freely available at <www.labrc.com> and those websites of most operational First Nations
[221] Tsawout First Nation Subdivision, Development and Servicing Law, No. 02-2012.
[222] Framework Agreement, *supra* note 2, s.19.1 c.

When a First Nation signs onto and ratifies the Framework Agreement with a vote and subsequently implements the Framework Agreement through their land code, that First Nation has all the legal status and powers needed to manage and govern their lands and resources.[223] Essentially the First Nation will have the same legal status as a natural person for purposes related to land. This endeavour is not taken lightly, as the process of enacting a land code itself is tedious and requires absolute community commitment. The land code provides a mechanism to enact various laws in relation to land and resource management including laws related to private property.

Another common question involves a comparison with laws enacted under the Framework Agreement as bylaws or municipal laws. Compared to First Nations under the Indian Act, First Nations through their land codes, have a broader authority to govern land use in a way that is similar to the authority granted to municipalities, however, municipalities are creations of provincial law and are subject to provincial legislation. First Nations do not gain provincial status as municipalities under the Framework Agreement. Laws created under the Framework Agreement are not bylaws, but First Nations have and continue to have the authority to create certain bylaws under Section 81 of the *Indian Act*, with the interaction discussed in more detail below

The ability to enact laws that create stronger protections for the environment, for example, is an attractive feature of the Framework Agreement to many First Nations. In many cases, the federal government has failed to protect and preserve lands and resources for First Nations under the *Indian Act.* Environmental laws created under the Framework Agreement can wreak havoc over those who substantially violate its provisions, contemplating higher penalty thresholds for environmental laws and tracking the potentially high penalties possible under provincial law. First Nations have flexibility in establishing fines within the limits recognized in the Framework Agreement. For example, a First Nation can specify a maximum $100 fine for certain minor environmental violations and maximum $1,000,000 fines for more serious environmental violations if that penalty also applies under provincial law.

[223] *Supra* note 21.

Laws made under the Framework Agreement establish, for the most part, summary conviction offences. Summary conviction offences carry a maximum penalty of five thousand dollars or up to six months imprisonment or both. Again, looking at environmental laws outside of the Framework Agreement, many provincial environmental statues create a variety of offences, some of which can be prosecuted in criminal or civil courts.[224] Of course, the lines between certain provincial offences and criminal matters can be blurry, especially in those cases where violations have the possibility of leading to jail time. Some regulatory offences prescribe serious penalty provisions like hefty fines and periods of incarceration. With any environmental law, it largely depends on the province in which the offence occurs and the statute being invoked. Of course, the seriousness, nature or type of offence along with the type of offender will be a strong indicator of the sanctions or remedies that are available.

Aside from the obvious costs and resources that go into developing a law for a community, one of the largest issues is enforcement and prosecution of such laws. A First Nation will have full power to enforce its land and environmental laws.[225] How they choose to do so is another story. As mentioned, a First Nation may incorporate the summary conviction procedures of the *Criminal Code* for offences of their laws. Those procedures are the ones used for minor criminal offences.[226] Who or which agency is going to enforce these laws has been challenging as there is very little case law developed on the subject of enforcing laws made pursuant to a First Nation land code. This can be compared to the failure of enforcement of Indian Act bylaws and associated regulations on reserve.

It is important to discuss enforcement of laws made under the *Framework Agreement* as compared to the *Indian Act* bylaw enforcement (or lack thereof). The approaches First Nations take to enacting and enforcing laws pursuant to their land codes, including laws in relation to

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[224] Framework Agreement, *supra* note 2, s 23 sets out the environmental law-making powers of a First Nation.

[225] Framework Agreement, *ibid*, s 19.1 To enforce its land code and its First Nation laws, a First Nation will have the power to establish offences that are punishable on summary conviction; provide for fines, imprisonment, restitution, community service, and alternate alternative means for achieving compliance; and establish comprehensive enforcement procedures consistent with federal, provincial or territorial law, including inspections, searches, seizures and compulsory sampling, testing and the production of information; and provide for the collection of non-tax debts, fees or charges owed to the First Nation using taxation collection remedies made under First Nation taxation laws.

[226] The Framework Agreement provides for enforcement of First Nation laws on "summary conviction" which includes fines up to five thousand ($5,000) and up to six months imprisonment or both.

private property on reserve, will differ from one First Nation to the next. These are diverse communities with different needs for enforcement so there is no one-size-fits-all approach. The most suitable approach may depend on a variety of factors, including local context, relationship with local RCMP or municipal police forces, community priorities, and financial and human resources. The purpose of this part is to discuss emerging approaches to enforcement of laws and to highlight it as an ongoing endeavour.

Most allotment laws continue to use summary conviction for penalties for violations. As mentioned above, these summary conviction offences are also used in some provinces for offences under provincial laws, for example, offences under provincial environmental legislation. Summary conviction offences can be prosecuted in provincial courts. First Nation laws made under land codes should follow suit, although this will take time to develop. First Nation laws are designed to work alongside applicable federal and provincial laws, so an offender might be charged with a violation of a First Nation law as well as federal or provincial laws for actions on First Nation land. This should, by extension, enhance enforcement procedures, making it possible for enforcement officials to carry out their duties.

Many First Nations have had no success with the enforcement of their laws, as many police agencies and prosecutors are unfamiliar with the Framework Agreement and the scope of such laws. It is difficult for officers to lay charges when they may not know of the law and which court has jurisdiction to hear such offences. For the purpose of prosecuting offences, the First Nation will follow one or more of these options: retain its own prosecutor; enter into an agreement with Canada and the government of the province to arrange for a provincial prosecutor; or enter into an agreement with Canada to arrange for a federal agent to prosecute these offenses.[227]

A First Nation can appoint its own justice of the peace to try offences created under First Nation laws and can appoint its own prosecutor.[228] The appointment of a justice of the peace is an attractive solution to Framework Agreement First Nations throughout Canada although none have taken the formal steps towards appointment. Perhaps one of the most viable options is that

[227] Framework Agreement, *supra* note 2, s 19.9

[228] *Ibid*, s 19.3. Persons may be appointed by the First Nation or the Governor in Council to act as justices of the peace for the purposes of enforcement. If no justice of the peace is appointed, then First Nation laws will be enforced through the provincial or territorial courts.

First Nation laws may make provision for search and seizure, fines, imprisonment, restitution, community service or alternate means for achieving compliance. As an example, WFN enacted both the WFN Dispute Adjudication Law and the WFN Notice Enforcement Law to formalize its authority to issue tickets and to provide a dispute mechanism to all residents living on WFN Lands.[229]

There are many examples that highlight the flexibility and possibilities available for First Nations on the enforcement front. Qwi:qwelstóm First Nation has developed an interesting process to address land code disputes through their Land Code Enforcement Pilot Project. The enforcement mechanisms within expand upon the existing Qwi:qwelstóm processes, reflect culture, traditions, and practices and is a community driven process. It is also compatible with the Canadian legal system, and adopts some of its formalities where required, having built-in mechanisms for appeals, and appeals to the Provincial and Superior Court of British Columbia.[230] This is not even a remote possibility under the *Indian Act.*

In another instance, in 2019, Whitecap Dakota First Nation ("Whitecap Dakota") and the Government of Saskatchewan signed a bilateral agreement to allow the Saskatchewan Ministry of Environment to support the *Whitecap Dakota First Nation Environmental Protection Law*,[231] a law sourced in Whitecap Dakota's land code, ratified in 2004.[232] Under this agreement, Whitecap Dakota incorporates and modifies Saskatchewan's *Environmental Management and Protection Act, 2010*[233] and select provincial regulations so as to apply on its reserve lands. It also contracts out monitoring and enforcement duties to Saskatchewan conservation officers.

In relation to enforcement of the First Nation laws, Whitecap Dakota First Nation along with Muskoday First Nation and the Province of Saskatchewan have been working together to

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[229] See <https://www.wfn.ca/your-government/law-enforcement/disputing-ticket.htm>.

[230] Darcy Paul and Grant Morley, "Qwi:qwelstóm and Land Code Enforcement" (January 2019).

[231] *Whitecap Dakota First Nation Environmental Protection Law*, duly enacted on September 10, 2018 (the "Environmental Protection Law"). Pursuant to section 20, the *Environmental Protection Law* comes into force upon the execution of the Bilateral Administrative Management and Servicing Agreement between Whitecap Dakota and Saskatchewan.

[232] Saskatchewan, "Government of Saskatchewan and Whitecap Dakota First Nation sign historic environmental regulation agreement" (online: https://www.saskatchewan.ca/government/news-and-media/2019/may/28/environmental-regulation-agreement). See also the *First Nations Land Management Act*, SC 1999, c 24, schedule 2.

[233] *The Environmental Management and Protection Act*, 2010, SS 2010, c E-10.22.

establish a process for the enforcement of the First Nations' Laws. The parties signed a Memorandum of Understanding which creates a joint working group (the "Trilateral Task Group") to find solutions to issues associated with the enforcement of the First Nations Laws. Some of the issues include investigations, laying of charges, prosecutions, and adjudication. This pilot project is ongoing and is starting to receive support of other land code First Nations. As an immediate and practical solution, both First Nations wish to work with the province to find approaches that tap into existing and potentially new policing, prosecution and judicial mechanisms to ensure their laws are enforceable.

The provincial court system is available to enforce First Nation laws, however, this has been a slow process. The recent *K'omoks*[234] case out of British Columbia has been precedent-setting in the sense that a First Nations law, one concerning residential tenancy matters, was successfully taken to the Provincial Court. The Provincial Court judge earlier decided that the Provincial Court of British Columbia has jurisdiction to hear prosecutions under First Nation laws enacted under the authority of the Framework Agreement. The trial was heard in September 2018. Further details of this decision are included below.

The flexibility that First Nations have with respect to establishing fines and enforcement procedures within the limits recognized in the Framework Agreement, is a large incentive for First Nations coming under the Framework Agreement. Their laws can and will be enforced as opposed to having little to no options available under the *Indian Act*. While First Nations can set the maximum financial fines and terms of imprisonment, within the limits in the Framework Agreement, the courts can decide the actual fine amounts within those limits and decide whether or not to impose any imprisonment.

Land code First Nations across Canada are actively enacting their own laws to govern their lands. Allotment or private property laws are only a small fraction of the wide variety of laws already established. First Nations continue to engage their community members and work with lawyers and other experts to ensure that their laws will be effective not only for their own community members but also in dealing with non-members and businesses. Laws that have been enacted by land code First Nations range from subjects such as planning, zoning and subdivision

[234] *K'omoks First Nation v. Thordarson and Sorbie*, 2018 BCPC 114.

controls, to community safety related subjects such as trespass, allotment, nuisance and business permitting laws, to environmental laws dealing with illegal dumping, transportation and removal of soil, and unsightly premises.

Many of these carefully drafted laws include sophisticated enforcement provisions, including such matters as authority to conduct inspections and require documentation for permitted activities, the authority of inspectors to impose stop work orders and the offences for minor or major violations of the First Nation laws.

Recall that land code First Nations continue to have the ability to enact bylaws under section 81 of the *Indian Act*, but this ability does not cover allotment laws in the same umbrella as what is possible under the Framework Agreement. The issue of having police agencies act to enforce band council bylaws under the Indian Act remains and the Minister or federal government, still has a very large, quite intrusive role with allotting CPs under the *Indian Act.* There is also considerable variability amongst jurisdictions as to whether police agencies, perhaps other than band bylaw officers or on-reserve police, will take steps to enforce bylaws that contemplate quasi-criminal sanctions such as removal from reserve, banishment, or arrests.

In terms of enforcement, land code First Nations are in a much stronger position on the enforcement end. Some have enacted overarching enforcement and ticketing laws to set up general rules to be used throughout a range of their laws. Along with the ability to design and draft their laws, as well as their own internal systems for enforcement such as ticketing processes, First Nations also have the power to work with authorities at all levels of government to build effective connections to the courts and other established systems for enforcement of laws.[235]

Unlike the *Indian Act*, the Framework Agreement respects the independence and self-government authority of land code First Nations regarding enforcement. For example, it provides that First Nations can appoint justices of the peace without any requirement for approvals by other governments.[236] However, the Framework Agreement is also flexible,

[235] Framework Agreement, *supra* note 2, s 18.11 "For greater certainty, a First Nation may enter into agreements with other governments or government agencies in Canada regarding the performance of duties under First Nation laws by officials or bodies of those governments or agencies."
[236] Ibid ss, 19.3, 19.4, 19.5, 19.6, 19.7. 19.8 on appointing justices of the peace

making it possible for First Nations to forge connections for the administration of justice. Development, enactment, enforcement and prosecution of these laws enacted under the Framework Agreement will take time.

C. *K'omoks First Nation v. Thordarson and Sorbie*

The determination on K'omoks Nation's standing to prosecute an offence under the K'omoks Land Code in Provincial Court was precedent-setting. The reasons for the decision are particularly helpful because these reasons firmly establish that the K'omoks Land Code and all other First Nation Land Codes are law, capable of being enforced in the provincial courts. It also firmly establishes that the *Criminal Code* can be used to prosecute First Nation laws and punish offenders, something which had not been accomplished before.

By way of background, the Landlord was a member of the K'omoks First Nation (KFN), a holder of a Certificate of Possession[237] and as such was entitled to lease certain property on KFN land to non-members. This is a typical situation that could happen on any First Nation with similar land interests. Here, the Landlord leased property to the tenants who had stopped paying rent. Such a lease was entered into by way of a Residential Tenancy Agreement (RTA) form. Although the RTA did not come into play here, it was utilized as a matter of convenience to produce a contract-type relationship with tenants.

Under KFN's Land Code, it is an offence where a person resided or remained on KFN lands other than in accordance with their land code or other law. KFN provided the tenants notice to vacate and considered them to be trespassers and guilty of an offence under the KFN Land Code. The RCMP had been requested to assist in an enforcement capacity in this situation but were reluctant to do so and KFN had no ability to enforce the law without the cooperation of outside enforcement authorities.

KFN's Land Code had adopted the summary conviction procedures of Part XXVII of the *Criminal Code*, which are enforceable through provincial courts, and the FNLMA contemplated prosecution of offences contrary to land code. KFN brought an application pursuant to s. 508 of

[237] Certificate of Possession is documentary evidence of a First Nation member's lawful possession of Reserve lands pursuant to the Indian Act. This is similar to buying a share in a company, but in this case the stock equals use of land. The Government of Canada retains legal title to the land.

the *Criminal Code* to prosecute the tenants by way of *Criminal Code* information. The application was granted, and the Information, accompanied by summons with a return date, was served by a peace officer considering the tenants' hostility and serious criminal record. KFN established a case to go forward in provincial court and was entitled to a remedy. It was noted that while KFN might be entitled to pursue injunctive or other relief in another arena, the court's role was not to second guess KFN's approach to the problem. Rather, the Court's role was to determine whether, in all circumstances, KFN could prosecute the information.

Another important aspect of the decision is that it underlines the inequity of the situation created by what was considered a lack of RCMP enforcement and lack of Provincial or Federal prosecution. Many First Nations coming under their own land codes have been cautious with the law-making authority simply because of the issues surrounding enforcement and prosecutions. Law-making without enforcement is just a paper-writing exercise. Overall, the reasons from the decision were very helpful. There are a few paragraphs which will be particularly useful for K'omoks and other land code Nations in Canada going forward as they speak directly to the above points, providing language to rely on in both future prosecutions as well as the political discussions which will hopefully motivate and move other jurisdictions to follow in this process. Particularly helpful language includes that found at paragraph 16, which notes as follows:

> No outside agency agreeing to enforce K'omoks law] leaves the K'omoks First Nation in a situation where their case must be pursued under [a private prosecution]. The Band has a law on the books that may give relief from trespass, by way of court order, but no ability to enforce the law without the cooperation of authorities outside the Band, unless it assumes the burden of prosecution.

This paragraph is of value because it recognizes the land code as a law, recognizes the availability of a provincial court ordered remedy, and underlines the inequity of the non-cooperation of "authorities outside the Band" and the unfairness of passing the "burden of prosecution" onto the First Nation. Paragraph 15 is also helpful as it states:

> K'omoks says [prosecuting trespassers by way of a *Criminal Code* Information] is necessary because the local RCMP, having no experience with this sort of thing, is wary of pursuing the matter by way of an investigation and perhaps a Report to Crown Counsel that might result in a prosecution. I am not sure that would do any good, even if it transpired, because the Provincial Prosecution service and Crown Federal have declined to assist K'omoks. I expect that this is because unlike, for example the recently signed

> Tla-amin Final Agreement Act that would [establish an agreement with the Crown to prosecute], K'omoks has yet to sign such an Agreement.

While respecting that RCMP enforcement is a matter for a different branch of government, and thus well outside the scope of Justice Doherty's allowable mandate, this language is a good effort by Justice Doherty at underlining the absurdity of an RCMP which is not comfortable enforcing certain laws. This language "the local RCMP, having no experience with this sort of thing" is highlighting a reality and perhaps a solution that the local RCMP should have "experience with this sort of thing" because as we established above "this sort of thing" is enforcement of validly enacted and enforceable law in British Columbia which the RCMP must enforce via their enabling legislation, the RCMP Act.

The decision goes on to give the Province and the Federal Crown a reminder of the inequity they have created by choosing not to prosecute the law. The final statement of this paragraph regarding the Tla-amin Final Agreement may be helpful as well, insofar as it should underline the inequity of treating self-governing and non-self-governing Nations differently for the purposes of the enforcement of Nation law is fundamentally at odds with meaningful reconciliation. Although the decision is not determinative in other provinces, this is a significant win and provides excellent precedential value for K'omoks as well as all other land code First Nations in Canada.

This was the first case of its kind where a First Nation successfully pursued a private prosecution for trespass through the Provincial Court of British Columbia. KFN leaders approached the RCMP for help, but initially did not receive the support needed due to confusion over the legal authority of the KFN Land Code. The First Nation pursued legal action in provincial court over a costly 10-month period. The resulting decision ruled in favour of the community, up holding the legal authority of their land code. This case sets an important precedent as the Provincial Court of British Columbia agreed that the court has jurisdiction to try offences under land codes and laws enacted in accordance with the Framework Agreement.

D. First Nation Allotment Laws

As First Nations gain more control and authority over their land as they move under the Framework Agreement, existing land-holdings under the *Indian Act* such as CPs that were registered in the ILRS are brought forward to the FNLRS. While these formal holdings still

exist, First Nations are working to develop Traditional Land Holdings Laws including Family Holdings, Custom Holdings to name a few that merge the non-registered historical knowledge of the reserve to grant interests under the new system of Land Management. These types of interests are continuously being sought after and are a new type of land tenure. For example, Individual Land Holding (ILH), Right of Occupancy, Certificate of Allocation and so forth are being shaped for those First Nations that do not issue CPs on reserve. The Framework Agreement does not preclude First Nations from creating their preferred instrument names for their unique interests.

Given the potential to negatively associate the term allotment with First Nations land, it is important to differentiate that these allotment laws created under First Nations land codes are substantially different from those found in the United States. The allotment process in the United States was an assimilation tactic used by the Congress to essentially take land from American Indians.[238] By design, allotment in this respect caused massive damage to Indigenous land tenure systems and traditional social structures. Allotment also caused significant Indian land loss.[239]

The Aitchelitz First Nation is a First Nations government of the Sto:lo people, located at Sardis, near Chilliwack, British Columbia. They are a member of the Sto:lo Nation Tribal Council[240] and enacted their land code in 2013. They have a significant amount of CPs and have developed a CP law. Under their CP law, Allotment means an interest in Aitchelitz Lands granting a Member possession of a part of Aitchelitz Lands under Part 9 of their Land Code or, prior to the date the Land Code came into force, pursuant to section 20 of the *Indian Act*. The latter part pursuant to the *Indian Act* is very typical of allotment laws as moving under the Framework Agreement requires a recognition of existing interests in land, including CPs.

ʔaq̓am First Nation has long-standing policies on allotment for individual band members. They are situated in the Rocky Mountain Trench, in the East Kootenay region in southeastern British Columbia. Their community rests alongside the St. Mary's River as it approaches the

[238] In 1887 Congress passed the *General Allotment Act* also known as the *Dawes Act*. "Friends" of American Indians believed the act was an alternative to the extinction of Indian people. Tribal land that was not allocated was sold off and open to homesteading. Those that resisted the act were larger tribes including the Choctaw, Chickasaw, Cherokee and Seminole.
[239] Jessica Shoemaker, "Mapping American Indian Land Tenure", *supra* note 54 at 22.
[240] The Sto:lo Nation is the political amalgamation of eleven Sto:lo communities.

Kootenay River, within the Rocky Mountains. The First Nation is close to the center of the Traditional Territory of the Ktunaxa Nation, which stretches over approximately 70,000 square kilometers within the Kootenay region and parts of Alberta, Montana, Washington, and Idaho. They are located five kilometers from Cranbrook, the largest city in the East Kootenay, a short distance from the Canada-United States border.

For applicants wanting an allotment, the First Nation requires evidence in the form approved by Council showing the applicant has sufficient funds to construct proposed structures including a residential home. This would include a bank statement, private lending agreement, First Nations Market Housing Fund Lending Agreement; or evidence of a privately obtained construction mortgage pre-approval that covers cost estimates in the applicant's name. There are many other restrictions and preliminary requirements an applicant must meet. For example, the allotment must be consistent with best interests of ʔaqam and must be ʔaqʾam Community Lands, all information required for the application must be provided by the applicant, there must be legal access to the requested allotment, with discretion given to Council to make exceptions, any third party interest holders must consent to the allotment, and it must not adversely impact on approved development plans

Cheam First Nation enacted their land code[241] and regained governance over the day-to-day management of their reserve lands and resources. Cheam enacted their Cheam CP and Allotment Law on September 20, 2017. Cheam's law is interesting in that it allows for new interests granted to be for Residential use and in that the lot sizes are restricted to a maximum of one-half an acre. The allotment includes all natural resources to the extent they fall under Cheam's jurisdiction aside from water. The approvals are subject to any requirements for access agreements, road permits or other related authorizations and specify strata-title holdings as well. It is very detailed and includes very strict conflict of interest provisions for allocations of allotments.

Westbank First Nation (WFN) was one of the initial First Nations to enact an Allotment Law. Interestingly enough, they are one of the initial signatories to the Framework Agreement. The ability to obtain CP ownership takes place through a formal allotment process which ensures

[241] Cheam First Nation Land Code, September 1, 2016.

all WFN members are granted the opportunity for housing in a manner that meets both current needs and long-term housing goals.[242] The application process for housing utilizes a fair and transparent selection method, administered by an Allotment Commission. Allotment commissions or entities should be a standard or go-to approach taken by First Nations to ensure transparency.

The Allotment Commission is an integral part of the process at WFN. The Commission consists of five WFN members who are appointed by Council. Their duties include evaluating and making decisions surrounding allotment applications; administering the allotment of Community Lands; establishing policies and procedures for the Commission; and establishing programs of public information and education.[243] In terms of any risk of potential political interference surrounding allotments, the "Commission works at an arm's length from the Council, and there is no formal process by which an allotment can be appealed. This autonomy assures that a level of integrity and transparency is maintained by removing the risk of political interference."[244] Another important aspect is that the evaluation process for applications is constantly improving, ensuring a transparent and fair process while still incorporating traditional values and principles. "Allotting of Lands is another way that WFN is moving its members toward self-sufficiency."[245]

As mentioned above, WFN is unique among First Nations in that it allots portions of its community lands to Members. The allotting of lands is a concept for WFN that goes back to the times when they were under *Indian Act* land management. WFN realized upon the benefits of allotment and housing for their members and while recognizing the limitations of underlying title remaining with the Crown, were able to utilize the highest form of land ownership that was available. WFN has worked around the limitations of First Nation land ownership and is very proactive when it comes to housing needs within their community.[246]

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[242] WFN Strategic Plan 2016-2019, online: < https://www.wfn.ca/docs/wfn-strategic-plan-2016-2019.pdf>.
[243] WFN Allotment Commission, online: < https://www.wfn.ca/allotmentcommission.htm>
[244] *Ibid*
[245] *Ibid*
[246] *Ibid*

Decades ago, WFN Council often allotted large tracts of land to Members who fenced off an area of land and put forward an application. This resulted in what is now the foundation for most of the economic development on WFN Lands, although this practice was unsustainable. More recently, WFN began allotting lands to homeowners upon full payment of their mortgage under Canada Mortgage and Housing Corporation (CMHC).[247] Now that WFN is under self-government, they have continued the practice of allotting lands for housing through the Westbank First Nation Allotment Law[248] which came into force in 2006 and was updated in 2020. To be eligible for an allotment an individual must be a member of WFN, be at least 19 years of age, be in good financial standing with WFN, possess good character, credibility and reputation. They have quite strict provisions regarding allotment.

In general, most allotment laws enacted by First Nations under their land codes include similar provisions. Common themes include a continuation of CPs, registration of instruments in the First Nation Lands Registry, conflict of interest provisions, restrictions on allotments, mortgage requirements, discharges and penalties. The lands of course remain lands under section 91(24) of the *Constitution Act* as the underlying title always remains with the Crown and the reserve land base is not diminished.

Membertou First Nation is a Mi'kmaq First Nation government on Cape Breton Island in Nova Scotia. Membertou enacted the Membertou Certificate of Possession Law, 2020. This law is heavily reliant on the term and use of CPs both old and new. A person or persons who are allotted a CP under this Law is or are responsible for: (a) insurance and maintenance of the parcel of land that is described in the certificate of possession; (b) insurance, maintenance and repairs for structures and buildings on the parcel of land that is described in the certificate of possession; (c) managing and monitoring any interests, licences or permits granted over the parcel of land that is subject to the certificate of possession; (d) registering any changes to ownership of the certificate of possession with the First Nations Land Register; and (e) ensuring all uses of the parcel of land that is subject to the certificate of possession comply with Membertou laws and bylaws and any applicable laws of Canada.[249]

[247] *Ibid*
[248] Westbank First Nation Allotment Law No. 2006-03.
[249] Membertou CP and Allotment Law, s 15 (April 20, 2020).

Mississaugas of Scugog Island (Scugog) is a First Nation and reserve for the Mississaugas of Scugog Island band government in south-central Ontario. Scugog is a progressive and growing First Nation located on the shores of Lake Scugog in Durham. Scugog enacted their Law on Interests in Scugog Island Land on April 5th 2000. The Council may issue a certificate of allocation to a member to whom it has allocated a parcel of Scugog Island land. Subject to their Land Code and to section 3, a certificate of allocation in respect of a parcel of Scugog Island land is an interest that entitles the member holding it to:

> (a) permanent possession of the land; (b) benefit from the resources on the land and any revenue arising from the sale of those resources; (c) grant subsidiary interests or licences in the land, including: (i) leases not exceeding 25 years, (ii) with consent of council, permits, easements and rights-of-ways; (d) transfer, devise or otherwise dispose of the land to another member; (e) with consent of council, grant permits to take resources from the land, including cutting timber or removing minerals, stone, sand, gravel, clay, soil or other substances; and (f) any other rights, consistent with the Land Code, that are attached to certificates of possession issued under the *Indian Act*.

Like many other allotment laws, Scugog's law allows for the continuation of existing interests. For greater certainty a member holding a CP of First Nation lands issued by the Minister, pursuant to the relevant provisions of the Indian Act before the Land Code came into effect, has the same rights subject to the same conditions by virtue of that Certificate after the Land Code came into effect as attach to a Certificate of Allocation under Scugog's law.

The Tzeachten First Nation is located in the Upper Fraser Valley region near Chilliwack, British Columbia. They are a member government of the Sto:lo Nation tribal council. Tzeachten First Nation adopted their land code in 2011 and enacted the Tzeachten Certificate Possession Law in 2014. The First Nation has roughly ninety percent CP holdings and their leadership and membership are supportive of individual property rights on-reserve. Individual Land Holdings under the Tzeachten Land Code allow for land transfers, survey requests, research on individual land titles, updating titles, allotments of land, resolving internal boundary disputes, encumbrance checks and general inquiries.

Tzeachten First Nation is an hour-and-a-half east of Vancouver. They have approximately five hundred members, about half of those reside on the reserve. They began collecting property taxes in 1995 under a bylaw as that was the only option that was available at

the time. In 2010 the First Nation enacted a property taxation law. They have currently roughly 1,050 folios which are mainly residential.

Tzeachten, similar to other Framework Agreement First Nations also generates essentially what is their own-source-revenue by collecting property taxes. In doing so they are able to advance their own projects without relying on government funding. Municipalities have always benefited from the use of property taxation and the collection of revenues, Tzeachten has also realized upon the benefits of property taxation and became involved in collecting property taxes, Tzeachten has been administering property tax since 1995. Originally this process was done through a bylaw under the *Indian Act* because there were no other options available. There is now new federal legislation that allows First Nations to pass their own taxation laws under the guidance of the First Nation Tax Commission. Tzeachten has also enacted their own Property Assessment Law and Property Taxation Law.[250]

The question of why a First Nation would not just allot land pursuant to the *Indian Act* CP system is answered with providing examples of the First Nations who have entered into allotment agreements and passed laws pursuant to their land codes. Each of these laws is unique and provides the First Nation control over what their land is used for and who is entitled to hold particular parcels. Many of these laws share common grounds and are community-driven. Essentially, these laws allow communities to develop what is best for the community in terms of allotment of individual interests and how they fit in the plan for the community. Allotment laws are a secondary step as many land codes under the Framework Agreement have provisions for Allotments or CPs.[251]

While Seabird Island's Land Code does not mention CPs, it does allow for members to apply for allotments. In making an application for an allotment, a member must submit a written statement containing the history of any prior use or occupation of the Seabird Island Lands for which the allotment is sought by that member or family member and, any other information deemed relevant by the member seeking the allotment or as requested by Council.[252]

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[250] See <https://www.tzeachten.ca/departments-tzeachten/property-taxation/>.
[251] Copies of the land codes discussed in this thesis are on file with the author. In general, land codes are not made publicly available on a First Nation's website, though under the FNLMA they must be available for inspection in person at a place designated by the First Nation's band council.
[252] Seabird Island Land Code, January 12, 2009 section 18 "Allotments" at 12.

These laws are only a handful of those allotment or individual-interest holding laws enacted by First Nations under the Framework Agreement. They span across Canada and are each unique while holding very strong similarities. The economic-development aspect is important to many although these laws show a strong residential background and are tailored for residential interests. Allotment laws are a secondary step as many land codes under the Framework Agreement have provisions for allotments or CPs.

E. Leasing under the Framework Agreement

While the Framework Agreement does not establish fee simple ownership of individual parcels of lands, it protects the collective ownership of lands and the governance authority of the entire membership over their lands. Most Framework Agreement First Nations have developed at least part of their lands through leasing. Leases, particularly for relatively long terms of 49 to 99 years or even longer, have proven a very effective tool for development of portions of reserve lands for those Framework Agreement First Nations interested in residential and commercial development. In many cases, leases are to non-members and corporations but may also be to members themselves.

Most leases of Framework Agreement First Nation lands are conventional in the sense that they are well understood leasing arrangements with terminology that is familiar to lawyers, financial institutions and developers. Most of these leases are conventional "A to B leases" meaning that the party named as granting the lease (party A) is different from the party to whom leasehold rights are granted (party B). A to A leasing is an innovation that has been used on some First Nation lands where the first lease is granted by one person (party A) who is both the grantor and grantee of a lease. That is, the lease is from person A to the same person A as opposed to most leases which are from person A to some other person B.

The first lease or head lease is put in place where party A granting the lease is the individual who holds the allotment interest on reserve recognized by the First Nation government.[253] While some older CP holdings are used for these allotments, what is most

[253] "Backgrounder A to A Leasing on First Nation Lands", Lands Advisory Board and Resource Centre, September 2019, available online at <https://labrc.com/wp-content/uploads/2019/10/20a.-A-to-A-leasing-backgrounder.pdf>.

significant is that A to A leasing recognizes a modernized approach and has expanded to include individual interests under the Framework Agreement.[254]

In fall 2019, CMHC in partnership with the Lands Advisory Board (LAB), announced two policy enhancements: CMHC will provide mortgage loan insurance for home financing secured through A to A leasing, an innovation led by the Lands Advisory Board; and CMHC would lower the down payment requirements for First Nations borrowers, as they access insured home financing on-reserve.[255] A to A leasing is remarkable and a bit complex in terms of which lease is referred to in the event of default:

> A to A leasing echoes this separation of an individual First Nation member's allotment of land from the marketplace by making it clear that the first lease or head lease of allotted land is not intended to be in the commercial mainstream. Lending institutions and developers look to the terms of the leases subsequent to the A to A lease rather than the head lease if they are to exercise remedies for any defaults under a lease.[256]

Although the A to A leasing front is relatively new, several First Nations have notably taken advantage of the new policy changes. Williams Lake, Homalco, Kitsumkalum, and Nak'azdli Whut'en utilize some form of self-leasing, while Shuswap, and the Cowichan Tribes are considering amendments to their land codes in response to the recent options. Within the Fraser Valley area in British Columbia, there are two First Nations actively using A to A Leasing, Tzeachten and Skowkale. There are at least ten other First Nations that have included A to A Leasing as an option in their land codes, which include Aitchelitz, Yakweakwioose, Soowahlie, Chawathil, Cheam, Sqewlets (Scowlitz), Sumas, Shxwowhamel, Skawahlook, and Soowahlie. An interesting point to draw upon is that these First Nations have provided for allotment or CP interests within their land codes or have developed private interest laws for their members.

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[254] *Ibid*

[255] Leonard Catling, "Better Access to Home Financing for First Nations", November 27, 2019, available online at <https://www.cmhc-schl.gc.ca/en/media-newsroom/news-releases/2019/better-access-home-financing-first-nations>.

[256] *Supra*.

F. Property Rights Beyond the Framework Agreement

A brief look at private property law and proposals to implement private property regimes on First Nation reserves is provided below. This includes examining the notion of private property and arguments used by proponents to support legislation including the proposed *First Nations Property Ownership Act*[257] (FNPOA) and demonstrate how it can be seen as a reconstruction of the pre-colonial property rights system. It is significant to note that despite the legislation's failure, some First Nations are actively pursuing private ownership on reserve with modern treaty agreements.

The First Nations Property Ownership Initiative (FNPOI), with its proposed accompanying Act, was a proposed optional piece of legislation that "would have allowed First Nations to grant fee simple interests to First Nations members. It faced stiff opposition from much of the First Nations community due to an unfortunate history of proposals to privatize reserve land, such as the *Dawes Act* in the United States and the 1969 White Paper on Indian policy in Canada."[258] The policy was quite intended to eliminate treaties and to abolish all legal documents relating to indigenous peoples in Canada, notably the *Indian Act*. The introduction of private property was a threat to Indigenous lands and a reminder of past wrong-doing. Such proposals might be considered again, but for the moment there are other options.

Author Graydon Davidson notes, "Statistics Canada has indicated that eighty two percent (82%) of the non-liquid net worth of Canadian homeowners is contained in the value of their real estate. In a broad economic system where 'life, liberty, and property' form the basis for decent

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[257] For information on the proposed *First Nations Property Ownership Act* (FNPOA), see: House of Commons, Standing Committee on Finance, Evidence, 40th Parl, 2nd Sess, No 39 (15 September 2009) at 3-4 (Manny Jules), online: < http://www.parl.gc.ca/content/hoc/Committee/402/FINA/Evidence/EV4099400/FINAEV39-E.PDF>, archived: < https://perma.cc/P765-SVW2>. It was also committed to in 2012. See House of Commons, Minister of Finance, Jobs, Growth, and Long-Term Prosperity: Economic Action Plan, 2012 (29 March 2012) at 171, online: < http://www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf>, archived: < https://perma.cc/FU25-D94E>; A draft of the proposed Act was not presented to a parliamentary committee or to Parliament, so the exact details of the legislation remain speculative. The essence of the Act, however, would have been to allow First Nations to have fee simple title over reserved lands

[258] Sasha Boutilier, "An unsung success: The *First Nations Land Management Act*" (August 2016). The policy was intended to abolish previous legal documents relating to Indigenous peoples in Canada (specifically, the Indian Act.) It also aimed to eliminate treaties and assimilate all "Indians" fully into the Canadian state.

living standards, exclusion from private real estate can present a massive barrier to financial prosperity."[259] It is easy to recognize even without significant data analysis that private property rights create a wide range of opportunities. It is important to engage in ongoing research in relation to how these rights can effectively be used for First Nations going forward.

This thesis discussed the *Indian Act* land tenure and the Framework Agreement possibilities, with a suggestion that the Framework Agreement is one possible step towards self-government for First Nations. Total self-government for any First Nation and the process to get to that point is outside the scope of this thesis but worth mentioning in that these self-governing approaches have included some sort of private property rights for their members. Unlike First Nations that have lands codes under the Framework Agreement, most self-governing First Nations prepare a constitution that sets out additional rules to their legislation or agreement.[260]

Even though widespread opposition halted the FNPOI, the trend of the legislation is still seen where First Nations and government relationships are being redefined to implement or lean towards the establishment of private property regimes on reserve. This can be seen with the Nisga'a Final Agreement, the Tsawwassen Final Agreement, and similar treaties negotiated throughout the British Columbia Treaty Process. For Indigenous peoples in Canada, it is therefore important for us to understand how FNPOI supporters are attempting to motivate support for the legislation, paying special attention to their attempts to differentiate this proposal from past initiatives.[261] This is truly an acknowledgement to indicate that private property rights for First Nations is not a one-size fits all approach.

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[259] Graydon Davidson, "Private Property on Reserve: Poverty Fix or Neocolonialism", *McGill International Review*, December 23, 2020, <https://www.mironline.ca/private-property-on-first-nations-reserves-poverty-fix-or-neocolonialism>.
[260] Fligg and Robinson, *supra note* 57 at 5
[261] Michael Fabris, "Decolonizing neoliberalism? First Nations reserves, private property rights, and the legislation of Indigenous dispossession in Canada:, in Maja Hoer Brun et al, eds., *Contested Property Claims: What Disagreement Tells Us About* Ownership (London: Routledge, 2018), 185-204.

CHAPTER 4 - CONCLUSION

Given the history of the oppressive, paternalistic *Indian Act*, it is no wonder that property rights were not given any thought for First Nations people. Property ownership means empowerment. Any empowerment of an individual or group means having control over all aspects of one's life, which includes property rights. First Nations people were never provided the same opportunities. While this thesis is focused on property rights, the above-mentioned points are important to understand because they set out the realities of how First Nations people have been treated and how their lives and rights have been controlled over time. First Nations people were considered unworthy of the rights and privileges enjoyed by the white settlers. As described, common notions such as mobility, education, making a living and any form of property ownership were denied.

A. Recap

The land tenure system under the *Indian Act* has failed in many respects. This thesis has covered land tenure systems under the *Indian Act* particularly related to CPs. A CP holder has a large bundle of rights short of rights in fee simple yet the holder is still considered to have lawful possession of a particular piece of land. They have the right to lease the land, sub-divide it amongst heirs, receive revenue, transfer the land to other members, build a home on the land and so forth. Despite the very dark, oppressive history of CPs along with their limitations, we see the continued usage of these instruments for some First Nations. These points are importantly discussed as First Nations moving under the Framework Agreement tend to uphold these forms of land interests, for the most part, for their members.

A few cases related to CPs were provided above to give a general sense of the litigation and problems that can arise where CPs are not supported amongst other legislation and to note the differences between these lesser property rights under the *Indian Act*. The case law shows indeed the unique characteristics and highlights some of the inconsistencies within the case law. Importantly it shows the gap with Matrimonial Real Property (MRP) law on reserve that may or may not be confidently addressed with the implementation of federal legislation, the *Family*

Homes on Reserve and Matrimonial Interests or Rights Act[262] as well as by those First Nations that have made their own MRP laws pursuant to their land codes.

Briefly, reserve lands are surveyed and recorded under the Canada Lands Survey Records. The Department's obligation under the *Indian Act* regarding approval and registration of interests on reserve lands is lengthy and has many inconsistencies. Recall, First Nations with land codes under the Framework Agreement are put into the First Nations Land Registry which is a bit of a step in the right direction yet the inconsistencies are mirrored when transferring some interests. It will be a positive move when First Nations can gain greater control of their own land registry systems which no doubt will be more accessible, user-friendly and contain improved transaction rates, descriptions of registered interests and plans for example.

The Framework Agreement has been designed from the outset to maintain the connection of individual members to their lands by blocking entirely the risk that fee simple ownership could be lost in the marketplace. Individuals, subject to any restrictions established in a land code or laws, can enter into long-term leases of their lands to third parties, but with these leases putting into the marketplace the leasehold interest rather than the fee simple interest. In addition to this fundamental restriction blocking fee simple sale of lands, the Framework Agreement maintains historic protections under the *Indian Act* against seizure of lands for debts.

Property rights are important according to many economic studies related to economic wellbeing.[263] While this may hold true, First Nations under the Framework Agreement have a broader agenda than economic development as evident in their allotment laws for members. Over one third of First Nations have signed the Framework Agreement. While this movement has generated hundreds of millions of dollars of economic activity, it also has the impact of seeing employment opportunities increases on reserve and those members wanting to stay and live within their home communities. Some First Nations are responsive to these needs and increasing both housing and allotment interests on reserve.

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[262] *Family Home on Reserve and Matrimonial Interests or Rights Act*, SC 2013, c 20.

[263] Various authors including describe DeSoto, Flanagan, Alcantara, and Brinkhurst have written on how economic opportunities are limited or constrained on reserve lands partly or wholly, due to lack of formal property rights.

We see most operational First Nations are concentrated in certain provinces, although First Nation leaders know of the success of the Framework Agreement and there will be further growth in all regions. There are a number of those within the developmental stage and a waiting list to opt-in. One of the enticing factors is the law-making ability and increased self-governing aspects on land and natural resources. The Framework Agreement allows First Nations to utilize a number of different tools to enforce their laws. Depending on the type and seriousness of the violation of certain laws, enforcement might be handled internally by the First Nation, or else may require the assistance of the court.

This thesis provided examples from a First Nations perspective on how private property rights can work for those living on reserve. It is incorrect to say that First Nations people have never maintained property rights in any sense, even if their traditional notions of property rights may have been different. Culture, tradition and rights have evolved over time for every group. The land codes and allotment laws First Nations have passed are a handful of examples that highlight the beginning of private interest rights on reserve outside of the *Indian Act.* First Nations people have had their land, language, and culture taken away. For those First Nation groups that want to create, maintain, or even restore property rights on reserve, it should be an option. As this thesis shows, there are outstanding examples of how private property works on reserves.

This thesis stated concerns surrounding colonial *Indian Act* bylaws. This is due to the fact that they tend to be considered a secondary level of law-making power exercised under the authority of a more senior government. For example, the bylaw-making powers available to municipalities are typically spelled out in very precise terms in laws enacted by provincial governments. Also, there has been a significant lack of enforcement of *Indian Act* bylaws. These bylaws are federal statutes that should be enforced by RCMP yet here we are, decades later following their implementation without any enforcement or direction on how to move these through to prosecution. This is unacceptable and a larger public safety issue especially given the recent COVID-19 pandemic times.

Even though Ministerial approval is no longer required to validate bylaws under section 81(1) of the *Indian Act*, section 81 bylaw-making power remains a bylaw power because of the very limited penalties that may be imposed for violation of those bylaws as compared with laws

enacted by the federal or provincial governments.[264] The maximum financial penalty for violation of some intoxicant bylaws is only one hundred dollars.[265] First Nations have devoted considerable effort to advance more effective governance under the Framework Agreement, including law-making and enforcement of those laws. The use of *Indian Act* bylaws seems to be a giant step backward.

Another drawback for the bylaws made pursuant to the *Indian Act* is that Canada has dictated exactly what kinds of by-laws are allowed under the *Indian Act* although it has provided direction or reference manuals for First Nations. First Nations with land codes do not need any approval from Canada to enact their laws: "Canada does not have unilateral authority to dictate or modify the scope of this law-making authority."[266] Penalties for violation of First Nation laws under land codes are also considerably stronger than for *Indian Act* bylaws, matching the penalties for summary conviction offences under the *Criminal Code* and with even stronger penalties for violation of some environmental protection laws.[267]

When it comes to alienability of land interests, the approaches adopted by First Nations under the Framework Agreement differ widely. There are a variety of factors which would influence a First Nations decision in this area. While First Nations are not able to provide for the transfer of fee simple interests in their land to either members or non-members, they do have a relatively free hand in designing provisions relating to leasehold interests, which can be held by both members and non-members, as well as provisions relating to the possessory interests of band members, most known as CPs or allotments.

While this thesis advocates for First Nations to move under the Framework Agreement and enact land codes specific to their community, it is not the end all, be all of self-governance over lands and resources. There are other options although the Framework Agreement is a significant step towards taking control of a shattered land tenure system under the *Indian Act*. Again, the Framework Agreement is a government-to-government agreement where the

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[264] *Indian Act*, *supra* note 1, s 81(1)p.4(r)The maximum fine for violation of a bylaw under section 81(1) of the *Indian Act* is up to one thousand dollars and up to thirty days imprisonment.
[265] *Indian Act*, *Ibid* s 85.1(4)(b).
[266] *Ibid.*
[267] Framework Agreement, *supra* note 2, s 24.3 notes that the First Nation environmental protection standards and punishments will have at least the same effect as those in the laws of the province in which the First Nation is situated.

authority of First Nations to make laws under their land code is recognized by Canada and that law-making authority is broadly stated. This is not merely an exercise of making laws related to private rights for members on reserve, such laws are only a piece of a larger self-governing option or suit of law-making capabilities.

The Framework Agreement recognizes First Nation governance authority and establishes a far more effective legislative and land management system than the colonial and outdated *Indian Act*. Many Framework Agreement First Nation governments and individual members have successfully pursued commercial and residential development far beyond anything that could be imagined under the old *Indian Act*. The success is due to a variety of factors, many outside the scope of this thesis, although managing lands through leases, licenses, permits and individual holdings remains an essential part of land management authority. It is more efficient and allows for expansive options for First Nations**.**

Many First Nation communities have been using alternative forms of private property management systems only for the past few decades. Only recently have First Nations enacted laws related to private land interests on reserves. We are not yet in a position to capture the total effects of these individual land laws, nor can we look at any jurisprudence for direction on exact enforcement or prosecution of these laws. Acknowledging this, the ability to make laws with respect to individual interests on reserve lands is an important component of land governance that First Nations have responded to, resulting in allotment laws for example or similar endeavours.

It is reiterated above that moving under the Framework Agreement is not simply a proposal to implement private property regimes on First Nations reserves in Canada. While there are some arguments utilized by proponents of the First Nations Property Ownership Initiative (FNPOI) to motivate support for the legislation, this thesis demonstrates how the implementation of private property on reserves is not restoring pre-colonial property rights regimes. The Framework Agreement offers a different approach where the land can never be turned into fee simple or sold.

B. Looking forward

As mentioned, one of the possibilities with the Framework Agreement is the land registry system that has evolved for those operating under their own land codes. One of the main pushes for Framework Agreement First Nations is to have a First Nation-controlled land titles registry system. This would eliminate some of the inconsistencies with the current land registry system still run by Canada. There has been some discussion on the theory underlying a First Nations land titles system within recent international development scholarship on land tenure formalization. While this is outside the scope of this thesis, it is worthwhile to consider under what conditions net benefits from these types of tenure reform are likely to be realized.

Many scholars have also drawn on the experiences of Indigenous communities with tenure formalization in the United States, New Zealand, Australia, and South Africa. The overall conclusions predict economic outcomes and rely heavily on historical, political, social and geographic factors unique to each community. This thesis does not follow the route of an international approach however it does realize the uniqueness factors of land codes and specific laws to each First Nation community. It is essentially arguing a similar premise in that First Nations will likely need to consider creative strategies for tenure reform tailored to their particular circumstances and traditions in order to meet their goals. These goals have a broad spectrum but can include economic development.

This thesis does not begin to touch upon the *Tsilhqot'in Nation v. British Columbia*[268] and the relationship between Aboriginal title and private ownership. The decision essentially secured a declaration of "ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land."[269] An examination or comparison on the scope of these rights along with the methods uses to enforce such rights could be useful for First Nations adopting private interest rights under a land code.

While it seems impractical to re-examine the need for a separate piece of legislation to introduce private property rights on reserve, perhaps a thorough review of where the previous legislation failed would help generate something better for the future, although considering the

[268] *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257.
[269] *Ibid,* [73].

strong opposition to the First Nations Property Ownership Initiative, this will be a hard sell. At least under the Framework Agreement, First Nations can choose what they want in terms of private interests under their land codes and laws. It will be important to assist in the process of drafting and implementation of these laws. Further, their choices will not deteriorate any of the land base of the community.

What will be most important for future work is to look at the development of additional allotment laws. We also require the issue of enforcement to be addressed and further guidance from the courts on how these laws are being enforced. It will be interesting to see how the courts effectively address the complexities of these laws going forward. The *K'omoks* case is the only example so far and while it is useful, it is not a sustainable model given the expenses incurred by the First Nation to pursue prosecution. We must look forward to self-determining laws of First Nations achieving enforcement through prosecution.

While the idea of property rights may differ traditionally for First Nations people, and the formal definition may have alternative meanings, the fundamental point is that property rights have been a privilege for upper-class society. It is wrong to deny any group of people such a significant right to ownership. It is wrong to say that to enjoy property ownership and take part in mainstream society, First Nations people need to move off of their respective reserves. Some First Nations people have lived and worked their entire lives on their reserve, some for their bands, schools or nearby businesses. They may have made improvements to their home and have a cultural attachment to the surrounding land. Moving into a city is not a viable option in many cases.

The thesis touches upon the sovereignty and distinctive approaches to land tenure for First Nations across Canada with a particular emphasis on those under the Framework Agreement. At the very least, it outlines a set of promising alternative arrangements that might reconcile the interests at stake in ways other than through a rigid prohibition on alienation to private parties. At the very least, it is a small contribution to the literature of private property rights on reserve lands.

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