THE MANAGEMENT OF NATIVE LANDS IN NEW ZEALAND
AND CANADA: A COMPARATIVE STUDY

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in the
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by
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PREFACE

Any attempt to write in an area as volatile as native law faces the danger of being overtaken by events. Indeed major developments occurred after the writing of this thesis had begun. I was fortunate enough to have contacts in New Zealand willing to send the details over to Canada. Similarly, what appears to be a significant decision concerning reserve land and the duties of the Minister in respect of surrenders was delivered by the Federal Court in Vancouver in June. Unfortunately efforts to obtain a copy of the decision proved unsuccessful. However, I have endeavoured to stay abreast of developments in the field of Maori and reserve land tenure and to make this study as up-to-date as possible.

This study is primarily a legal one and despite the obvious relevance of other disciplines, I have attempted to keep within a legal framework. Although mindful of Sutton's comment in his invaluable bibliography *Indian Land Tenure* that the study of native land tenure is an inter-disciplinary pursuit, I felt it best not to forage into sciences with which I am unfamiliar. For instance, an interesting comparison could be made of the different acculturation processes in New Zealand and Canada. However that is a task more befitting an anthropologist so, accordingly, I have been content to point to the cultural adaptations of the Maori and Indian to the legislation affecting them and their land and have not ventured into an analysis of these changes as examples of cultural dynamism.

My concern to keep a legal focus also kept me away from much of the abundant polemical literature that exists in the area of native rights. Such literature has been used as background in order to obtain a flavour
of the feelings that lie behind the native movements in New Zealand and Canada. In any event, these polemical works are plentiful and keeping track of them would have been well-nigh impossible. I found a better grasp of native feeling was obtained through the publications of the natives' national organizations, the Canadian National Indian Brotherhood and New Zealand Maori Council. Whilst not always free of political bombast and sloganeering, these bodies tended to be less intuitive about the legislation than the popular statements of native feeling and endeavoured, usually with success, to translate emotive response into reasoned argument.

The comparative nature of this study should be constantly borne in mind. That fact has resulted in some areas being given only a brief discussion. Examples in chapter three are the brief analysis of the equation of an Indian 'band' with an unincorporated association and the factual treatment of the laws affecting Indian status. Lengthy analysis of those two areas given above as examples would have produced detail superfluous to a comparative study.

Finally, I feel obliged to express the frustration I encountered at the absence of published data concerning on-reserve activity and the current use of the provisions of the Indian Act. The frustration was eased to a certain extent by reliance on interviews with Departmental officials. That dependance necessarily lends an impressionistic element to certain parts of this study and is, of course, a poor substitute for statistics and published data. If this study were concerned solely with the management of Indian lands the reliance in places on interviews with knowledgable persons would be less acceptable. However, the information
gathered from these sources has been more than adequate for present purposes.

Palmer-Patterson II and Sutton, to name but two writers, talk of the development of aboriginal self-awareness which comes from the drawing of what the former calls 'colonial parallels'. The aim of this study is to make a contribution, however slight, towards that consciousness.

P. G. McHugh
August, 1981
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INTRODUCTION
I. **INTRODUCTION**

The British came, they saw and, according to colonial law jargon, they 'settled'. But to the natives of New Zealand (the Maori) and Canada (the Indian) unacquainted with such terminology, the displacement they suffered at the hands of the white settlers would effectively amount to 'conquest'. Once the British had arrived in each country native land policy would figure highly on the new ruler's agenda, and eventually, regimes would be established affecting the regulation of whatever lands the native had left.

Various comparative studies have been made of the historical process of acquisition and its effects upon the native population.¹ This study will attempt to be more contemporary and investigate the current status of the regimes affecting the management of native lands in Canada and New Zealand. In that sense this study is an 'update' on the subsisting effects of colonialism.

Whenever comparisons of the contemporary position of the Indian and Maori have been made, they have usually centered upon the political representation the Maori have in the form of the four Maori Members of Parliament. The Canadian Indians once wished to emulate the New Zealand

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example and gain their own designated representation in both Canadian Houses of Parliament. Palmer-Patterson call this "...

"... an interesting though perhaps minor and ultimately fruitless instance of the colonial parallel in a situation of intra-commonwealth influence, in which a displaced minority tried to rescue some advantage from its situation by calling for emulation of the superior situation of another minority in its struggle with the expansionist European."

The above parallel would surprise most New Zealanders as they tend to view the Maori M.P.'s as ineffectual and talk periodically arise of abolishing the Maori electorates. If a useful colonial parallel is to be drawn between the Maori and the Canadian Indian such misunderstandings must be avoided.

The regimes regulating native land in Canada and New Zealand are a direct product of British colonialism and have remained in substance unchanged since their implementation over a century ago. During those years the natives of each country have gained a popular reputation as being lazy, their land untidy and poorly used. In both countries that image has been largely contributed to by the imposition and maintenance of land tenure regimes alien to native predilection. That common image

2 Canada, Senate and House of Commons, Special Joint Committee of the Senate and House of Commons appointed to continue and complete the examination and consideration of the Indian Act. Minutes of the Proceedings and Evidence (Ottawa: Kings Printer, 1947): 615, 641, 750, 766, 1321 [hereinafter SJC]; Canada, Senate and House of Commons Joint Committee of the Senate and House of Commons on Indian Affairs. Minutes of the Proceeding and Evidence (Ottawa: Queen's Printer, 1959-61): 149, 458, 607, 1071 [hereinafter JC].

has also been brought about despite the differences between the intrinsic nature of each regime. In New Zealand, the Maori's aboriginal title was transformed into an English-styled tenancy in common, by which each native took an alienable share in the tribal land. In Canada, the native population was kept on reserves with legal title to the land and, indeed, most powers of management being given to the Crown. The popular attitude towards native land in Canada and New Zealand suggests that the different intrinsic nature of each regime camouflages underlying similarities between reserve and Maori land tenure. The aim of this study is to analyze the extent to which these similarities exist.

To accomplish that task a separate chapter will be devoted to each regime. Each chapter will open with a discussion of the general features of the particular regime. The subsequent discussion in the chapter will be directed towards amplifying the nature of those general features through an investigation of the operation of the legislative detail.

With a clear idea of the nature of each regime we will be in a position to draw the 'parallel' threads from each and engage, in the final chapter, in a comparative assessment. In the final portion we will expand upon a recurring theme: a tension within the operation of the legislation between an 'assimilationist' view of the world and native resistance to a process seeking to replace their cultural instincts with those of the dominant, white group. The inquiry being made in the comparative assessment is of a novel nature and will seek in closing to look, however tentatively, at the broader policy questions which underlie the native land laws of either country.
CHAPTER ONE: THE MANAGEMENT OF MAORI LAND
A. THE MAORI AFFAIRS ACT 1953: GENERAL FEATURES

The Maori Affairs Act 1953¹ is the basic statute regulating Maori land in New Zealand with several other statutes being based upon the foundations it establishes.² Before the legislative details regulating Maori land are analyzed it is important that general features underlying the legislation be understood.

1. The origins and goals of the legislation

In the 1830's New Zealand was seen as a country affording splendid opportunities for British settlement: lush, green hills with fertile soil and a climate similar to England. However, the Maoris presence was a complicating factor with arguments being waged during the late 1830's as to whether or not it was proper for the British to colonize and disrupt the Maori.³ Economic interests eventually won out and settlement became inevitable. Nevertheless the influential humanitarian movement which had opposed the schemes of Edward Gibbon Wakefield to 'systematically colonize' New Zealand, successfully insisted that the settlement could not proceed without formal Maori consent and the recognition of their rights.⁴ Accordingly, in February 1840 Captain Hobson (who later became New Zealand's first

¹N.Z. Stat. 1953, No. 94.
⁴Mellor, British Imperial Trusteeship, p. 333; Morrell, British Colonial Policy in the Age of Peel and Russell, pp. 103-4
Governor) assembled most of the Maori chiefs and entered into a
pact with them. This pact became known as the Treaty of Waitangi, taking
its name from the idyllic site in New Zealand's Bay of Islands where it
was concluded. The contents of the Treaty of Waitangi were substantially
the same as those provisions of the Royal Proclamation of 1763 which
affected Indian land in North America. The Treaty recognized Maori aboriginal title and provided that the title could not be extinguished other than
by a voluntary sale or cession to the Crown.

The application of the Crown's pre-emptive right of purchase was
seen as a device through which it could control the pace of settlement
and discharge its duty of guardianship towards the Maori and their land. The protection of aboriginal peoples was considered "a duty peculiarly
belonging and appropriate to the Executive Government." Humanitarian
influence in Britain insisted the "[t]his was not a trust which could be
confided in the local Legislatures." It was feared that the local assembly

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4 Report of House of Commons Committee on Aborigines in British Settlements (June 26, 1837) reprinted in Bell and Morrell (eds.), Select Documents on British Colonial Policy, p. 545, 547.

5 Idem.
would reflect settler interest and be incapable of protecting the Maori.\(^1\) Accordingly, though Britain was following free-trade principles which recognized the right of her colonies to self-rule\(^2\), her adherence to that belief was qualified in respect of native policy. The 'qualification' on the principle of self-rule was strongly felt during the 1840's when colonization of New Zealand began. The vigour with which the Crown's pre-emptive right was applied in New Zealand was largely a result of the political influence the humanitarian movement had attained by then. New Zealand was a new colony and the Maori considered one of the most intelligent tribal people encountered by Britain.\(^3\) Accordingly, a lot of the movement's attention was focussed on New Zealand rather than the older, more established colonies. The role played by James Stephen, the Colonial Under-Secretary during the period, was also significant. Brought up in Wilberforce's anti-slavery 'Clapham sect', Stephen had sympathy towards the plight of the natives and harboured a deep (and, one may add, reciprocated) dislike of Wakefield and his Colonial Reform movement.\(^4\) Thus

\(^1\)Idem.


\(^3\)Adams, Fatal Necessity, pp.210-13. See also, despatch from Lord Stanley to Captain Fitzroy, extracted in Bell and Morrell (eds.), Select Documents on British Colonial Policy, p. 571, 572.

\(^4\)Knaplund, James Stephen, pp. 21, 93-94; Morrell, Colonial Policy in the Age of Peel and Russell, pp. 39-42. Morrell (p.39) quotes a despatch of Sir Henry Taylor to Lord Granville (7 December, 1869) "... for more than twenty-five years ... he [James Stephen], more than any other man, virtually governed the Colonial Empire."
in 1846-47 when a Constitution Act for New Zealand was being drafted by
the Colonial Office, Stephen, who was about to retire from public service,
ensured that the statute recognized the Crown's pre-emptive right. 1
Although Grey successfully sought a five year postponement of the passage
of the Act, when it was enacted in 1852, 2 section seventy three, the legacy
of James Stephen, ensured the maintenance of the Crown's pre-emptive right.

Thus from 1840 onwards, the acquisition of Maori lands for settlement
had to be channelled through the Crown. Initially, Maori acquiescence to
sale was readily obtained as they mistook the nature of the rights they
believed they were passing on to the white settlers. 3 The Maori soon
grasped however the 'absolute' nature of sale and adjusted to the situa-
tion by finding a method of selling land "in accordance with their own
tenure and custom." 4 The system which was developed gave the hapu's, the
kingroups into which the tribe was subdivided, the power to sell their
land subject however to a veto power in the tribe and paramount chief
(ariki). 5 As realization of the effects of sale began to dawn tribal
resistance to sale began to emerge. Moreover, once New Zealand formally

1 Stephen drafted the New Zealand Constitution Act: Morrell,
Colonial Policy in the Age of Peel and Russell, p. 313.


3 American and British Claims Arbitration Tribunal, 1925: Case of

4 Sinclair, Origins of the Maori Wars, p.47. See also I.H. Kawharu;
Maori Land Tenure: Studies of a Changing Institution (Oxford:

5 Idem.
became a British colony settlers began to flock in ever-increasing numbers to its shores. With the growth in settler numbers came a commensurate rise in demand for land for settlement. The Crown was unable to keep abreast with the increasing demand for Maori land with the result that squatters occupied the native's land. The intrusion of strangers onto their lands and anger at the vast profits the Crown was making from its land purchases intensified Maori resistance to sale\(^1\) and heightened their disillusionment with white settlement which, rather than enriching the traditional lifestyle, was beginning to pose a threat to Maori society.

Cannily recognizing that settlement depended on the acquisition of their land, a nation-wide resistance to sale began to develop in Maori society from the late 1840's onwards.\(^2\) As the 1850's progressed, the resistance became channelled into a 'Maori King Movement' through which the Maori hoped to halt the sale of their land and to obtain their own King capable of making laws for the Maori whilst the Queen continued to make laws for the settlers.\(^3\) The Maori resistance to sale frustrated settlement and as settler resentment grew, armed confrontation became inevitable.

Governor Gore Browne sought to pre-empt the resistance to sale, which had largely been evidenced by the arikis exercising their power of veto, through dealing with the lesser chiefs of the hapu. Browne's attempt

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led to the 'Wairau dispute', as the paramount chief of the Puketapu tribe sought to assert his veto power over land transactions whilst Brown, just as resolutely, insisted upon the sub-chief's right to sell his hapu's land.¹

The Wairau dispute led to the Maori Wars.² The eventual defeat of the rebellious Maori was inevitable given the numerical and military superiority of the whites. However the Wars had clearly shown the settlers and Imperial Government that Maori land could only be opened for settlement and their subjection to British dominion ensured through the disruption of their traditional forms of leadership and lifestyle.³ Accordingly, the colonial assembly was given power to repeal section seventy-three of the 1852 Constitution Act.⁴ With full legislative competence over Maori land, the settler government set about introducing a system which would break down the dangerous tribal bond. The first such legislation, the Native Lands Act 1862, was not very effective. It provided for a panel of important chiefs in each district to meet under the chairmanship of a pakeha (European) magistrate. The panel ascertained the rights of each member of a hapu in his kingroup's land and issued a certificate listing the individualized, alienable interests. The system could not deal satisfactorily with the frequent contending Maori claimants to particular areas of land. The view widely held amongst the settler


²See generally, above sources.

³Kawharu, Maori Land Tenure, p. 16; Ward, A Show of Justice, pp. 182-87.

community was that only a solemn legal tribunal would be respected by contending claimants. As a result, the Native Lands Act 1865 established a Native Land Court composed of judicial personnel and gave it the task of individualizing the aboriginal title.

Speaking in the colonial legislative in 1871 Henry Sewell, then Minister of Justice, encapsulated the dual aims of the 1865 legislation.

The object of the Native Lands Act was two-fold: to bring the great bulk of the lands in the Northern Island which belonged to the Maoris, and which, before the passing of that Act, were extra commercium—except through the means of the old purchase system, which had entirely broken down, within the reach of colonisation. The other great object was the detribalisation of the Maoris—to destroy, if it were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Maori race into our social and political system. It was hoped by the individualisation of titles to land, giving them the same individual ownership which we ourselves possessed, they would lose their communistic character, and that their social status would become assimilated to our own.2

2. The Maori Land Court

The primary vehicle through which the historical goals of the legislation, the assimilation of the Maori and the acquisition of his lands, were to be realized was through the Native Land Court. One of the major features of the legislation today is the continued presence of the Maori Land Court and the great amount of power which this Court of Record3 wields over Maori land. The recent Report of the Royal

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1Ward, A Show of Justice, pp. 180-182.


3Maori Affairs Act 1953, section 15.
Commission of Inquiry into the Maori Land Courts makes it clear that the Court is highly regarded today by the Maori as a 'court of the people.'\(^1\) That, however, has not always been the case and even as recently as ten years ago the accolade sat uneasily beside certain features of the Court's legislative mandate.

The first years of the Court's existence were confined to investigating the titles of land held according to Maori custom. This process became so repugnant to many tribes that a boycott was organized in several regions, notably the central North Island or 'King Country', and lasted several years. Maori resistance was however slowly but inexorably broken down, so that by 1909 this aspect of the Court's duty would be substantially complete.\(^2\) The first significant extension of the Court's jurisdiction beyond ascertainment of title came in 1894 when it was given power over alienations, successions, probate and other administrative matters concerning Maori land.\(^3\) Just as significantly provision was made for a special appellate court to hear appeals from decisions in the lower court.\(^4\) Allowance was also made for land which

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\(^3\)Native Land Court Act 1894, section 14.

\(^4\)Ibid, section 6.
had had title ascertained yet not given the status of Maori freehold
land, to be brought under the provisions of the Land Transfer Act.¹

Ironically enough, the extension of the Native Land Court’s powers
in 1894 was the result of criticism of the Court emanating from a W.L. Rees
who figured largely in Maori affairs at the time. Rees alleged that the
Court, through the liberal use of its partition powers over the tenancy
in common and failure to use section 23² of the 1865 Act, had "destroyed
the only safeguard which it contained for the tribal rights of the
Maoris."³ Rees’ criticism was echoed by a special commission in 1891
which he chaired.⁴ Sorrenson summarizes the unsatisfactory aspects of
the Court’s operation during the nineteenth century:

... apart from the interference of European interests
there were other unsatisfactory aspects of the operation
of the Court. Notification of hearings was often defective
and legitimate claimants were sometimes unaware that their
land had been dealt with. Before the mid-eighties there
was no attempt to hold Court sittings in Maori villages
and claimants had to travel, sometimes for hundreds of
miles, to the European towns. When sittings were arranged
all blocks were gazetted together with no indication when
each would be heard. Frequently two or three hundred
blocks were gazetted and all Maoris interested had to arrive
on the opening day but many of them had to wait several
weeks before their case was heard. Cases were adjourned
without being settled; others were advertised but not
heard. These circumstances too contributed to the impover­
ishment of Maoris attending the sittings.

¹Ibid, section 7.

²This section allowed blocks over five thousand acres in size to
have a certificate issued in favour of the tribe rather than being
splintered and allocated to hapu groups.

³Quoted in E.J. Haughey "The Maori Land Court" [1976] N.Z.L.J. 203,
207.

⁴Commission of Enquiry into the operation of the Maori Land Laws
[the Rees Commission] (Wellington: Government Printer, 1891):
Parliamentary Paper G1.
It is not surprising that many Maoris were embittered by land dealings and the operation of the Native Land Court. They sought redress by appealing to the Supreme Court and Court of Appeal, only to end up on the familiar merry-go-round of debt. The Makauri case, for example, which came before the Native Land Court four times and also before the Supreme Court four times, in fifteen years of litigation, was said to have cost the Maori owners 18,000 in legal expenses. Renata Kawepo, the friendly Hawkes Bay chief ran up accounts totalling 7,073 3s 8d with the solicitor W. L. Buller between January, 1879, and September, 1885. These had to be paid by the sale of land.

The 1894 legislation only half-heartedly listened to the 1891 Report, and set about giving the criticized Court greater power. Haughey observes that the 1894 legislation cleared up the state of administrative disarray then obtaining in respect of Maori land and that since the 1891 Commission "...the Court and its judges have always enjoyed the confidence and respect of the Maori people as well as that of the government and the community generally." That statement is hopelessly out of step with the facts for the legislation did little to correct the Rees Commission's criticisms or to inspire Maori confidence in the Court. In fact, Maori suspicion of the Court was probably fuelled by the 1894 legislation which re-installed the Crown's pre-emptive right of purchase. The product of the legislation was "...very great activity by Native Land Purchasers and the Native Land Court resulting in the further serious reduction of the Maori landed estate" during the closing years of the nineteenth century. That was hardly a situation from which Maori respect for the Court would grow.

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1 Sorrenson, "Land Purchase Methods," p. 187. For similar and just as incisive observation see the separate report of Mr. (later Sir) James Carroll in the Rees' Commission Report, pp. xi - xii.


Rather, the growth of Maori respect for the Court must be traced back, at the earliest, to 1909 when Sir John Salmond, New Zealand's well-known jurist, drafted legislation\(^1\) which gave "more protection for the Maori people by adding several social functions"\(^2\) to the Court's duties notably those relating to incorporation and customary adoptions. Also by then conversion of most land into freehold was virtually complete and the present day formulation of turwangaemae emerging\(^3\) and with it a respect for the Court as the instrument of 'cultural enfranchisement.' Kawharu seems to identify the years after World War One as the period in which the Court began to improve its standing in Maori eyes, mainly because that period was "a decade of radical improvement"\(^4\) in the Maori's lot. The Native Trustee Act was implemented in 1920, and a flurry of activity centering upon development of Maori land by its owners began.\(^5\)

\(^1\)Salmond explains his modus operandi in drafting this legislation in J. W. Salmond, *Jurisprudence* (London: Sweet and Maxwell, 1924): seventh edition, p. 49. He states that a 'do this except in those cases in which you consider that there are special reasons for doing otherwise' formula had been applied to the Maori Land Court's powers rather than a blunt 'do this in all cases whether you consider it reasonable or not' approach.

\(^2\)McCarthy (ch.), *Royal Commission on the Maori Courts*, p. 16

\(^3\)This formulation which equates turwangaemae with enscription on the Court's records as an owner of Maori land is discussed below, pp. 15-16.

\(^4\)Kawharu, *Maori Land Tenure*, p. 27.

The Court as a forum in which contesting Maori claimants battled over customary title slotted readily into the oral tradition of Maori society. Ngata acknowledged the Court's contribution to the survival of Maori culture, most particularly the reduction of genealogies into written form:

"Litigation gave meaning to the transmission of genealogies and incidents in tribal history, and from the lips of old men came priceless descriptions of customs and observances that might have been irretrievably lost."

This contribution, quite understandably, was not noticed in the early days of the Court as the elders continued to transmit orally the tribe's history as they had done before the Court's creation and, more especially, as the sinister elements of the Court's existence overshadowed its positive aspects. However, as the legislation became more suited to the Maori people and the Court's 'social functions' legislatively extended, this contribution would come to be acknowledged and add to the Maori's esteem of the institution.

The Court's conception of itself as a 'guardian' of Maori land has constantly been reiterated by the Courts since the turn of the century. A well-known judicial statement of that role was delivered by Hutchison, J. in re Mangatu Nos. 1, 3, and 4 Blocks when he said that it "has long been recognized that the policy of the Maori Land Legislation has been to protect the Maori in his ownership of his land


and that the jurisdiction exercised by the Maori Land Court has been of the nature of that of a guardian.¹ The 'quasi-parental' jurisdiction was however seen by the Court as a guide to the interpretation of the legislation rather than as a broad mandate of itself. Accordingly, the Court would adopt the position that it only had the powers legislatively given to it and that it would only act when matters were brought to its attention rather than seek out work for itself.² Thus if the Court was a 'parent' it was very much a conservative one, meticulously keeping within the legislative mandate it was committed to follow. For many years there were objectionable features of the legislation which allowed the Court to disentitle an individual seeking the vesting of an interest in Maori land.³ That the Court could be a 'court of the people' despite the unpopular aspects of its directing legislation attests to the rapport and significance as a forum it had established amongst the Maori. Judicial conceptions of the judiciary's role plus their sympathy with the goal of assimilation⁴ led the Court into its 'conservative' approach until the early 1970's. As the 1970's progressed and the Maori land movement roused


²The classic statement of this 'hear and determine' role is given by Edwards, J. in Puhi Maihi v. Mackay (1920) XVI G.L.R. 460, 462 (N.Z.S.C.). A well known example of the Maori Appellate Court's articulation of such a role is re Papatupu 5A2 (unreported) Maori Appellate Court, Wanganui, 28 February 1969: Whanganui A.C.M.B. vol. 12, folios 317-322.


⁴This sympathy was most strongly expressed by the then Chief Judge K. Gillanders-Scott, "The Role of the Maori Land Court in Land Utilization" Te Kauhinera Maori 2:6-12, 3:1-4 (1965).
a thereto unarticulated popular consciousness\(^1\), the Maori Land Court bench became more responsive to and sympathetic with the aspirations of the Maori people. The present Chief Judge of the Maori Land Court sees "the Court as existingly mainly to fulfil a definite social purpose\(^2\), namely "to assist the retention of Maori land in Maori ownership by facilitating its better use and management."\(^3\) Likewise Durie's predecessor, K. Gillanders Scott, once known for his adherence to the "hearth and determine" or 'conservative' approach, has become "a strong advocate for this overriding social and therapeutic approach."\(^4\) Though the degree of judicial activism varies from Judge to Judge it is clear that in the 1980's the Maori Land Court is much more active and dynamic than it has been since its early, eager days when it opened Maori land for settlement by transforming the customary title.

B. THE MANAGEMENT OF MAORI LAND

1. The regime of multiple ownership

Section 2 of the Maori Affairs Act identifies two forms of Maori land: 'customary land' over which the aboriginal title subsists and 'Maori freehold land'. Customary or papatipu land is that which has not been trans-

\(^1\) The most stunning example of this 're-awakening' was the Maori Land March in which many thousands of Maori walked the length of the North Island of New Zealand, culminating the March with the presentation of the Te Matakite petition on the steps of Parliament on 13 October 1975.

\(^2\) McCarthy (ch.), Royal Commission on the Maori Courts, p. 80.

\(^3\) E.T.J. Durie, Submissions to the Royal Commission on the Maori Courts (Unpublished, 1979): 72.

\(^4\) McCarthy (ch.), Royal Commission on the Maori Courts, p. 80.
formed into a tenancy in common by the Maori Land Court. Title to practically all papatipu land has long been ascertained and today any "remaining land of this nature consists merely of small pockets of land situated in out-of-the-way places and of little or no economic value, such as rocky islets lying off the coast."  

Pre-European Maori society was communally based. The co-operative and kinship base of Maori society was underlined in the major features of their culture most notably their practices affecting land.

The memories of forebears whose spirits roamed the ancestral land and allegiance to living kin enjoined the Maori to keep their "flame burning" or remain on the land. The Maori attachment to their traditional land is known as turangawaewae. Nowadays it is safe to say that the religious element with its groundings in Maori mythology has largely left the Maori conceptions of turangawaewae. However, turangawaewae remains a strong feature of modern Maori culture. Besides performing its narrow, strict function of giving a Maori rights on his tribal marae (meeting place), it has the larger role of symbolizing his identity as a Maori. It represents a selfless attachment to kin and ancestors and thus it provides an individual with mana or social standing amongst his own people, indicating pride and self-esteem in being Maori. Turangawaewae is an enduring feature of Maori society much underestimated by the pakeha (European).
Identity as a 'Maori' has always been closely connected with a relationship with the land. When the settler introduced the tenancy in common to the Maori he ethnocentrically underestimated the strength of turangawaewae and assumed that, as in most English tenancies in common, the owners would "find their own methods of handling their affairs and organizing the use of the property" they held. That, however, was not the case and though much Maori land fell prey to the wiles of European land speculators, the "familiar merry-go-round of debt" and Maori vulnerability to the transient temptations of the settler's world, what freehold land remained became subject to the phenomenon of fragmentation: as an owner died those kin statutorily entitled took their share of his interest. This problem of a highly fractionated tenancy in common is one of the enduring problems of Maori land and attests to the continuing exertion of turangawaewae.

Smith observes:

If we look in retrospect, we can see that the breaking down of the Maori social system could not have been achieved in a short space of time by the individualisation of Maori lands alone, but time has proved nevertheless that it has been an important influence in the gradual adulteration of the communal idea of ownership which the centuries have long since left behind in the English system.

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1 P.G. McHugh, An Overview of the Maori Land Laws of New Zealand (Saskatoon: University of Saskatchewan, Native Law Centre, forthcoming).


4 As to Maori customs relating to succession as 'applied' in the Maori Land Court see Kawharu, Maori Land Tenure, pp. 103-108; P.G. McHugh, The Legal and Constitutional Position of Maori Land from 1840-1865 (Saskatoon: University of Saskatchewan, Native Law Centre, forthcoming); Smith, Native Custom, pp. 88-104. The current status of the law is discussed by McHugh, Fragmentation, pp. 10-22.

5Smith, Maori Land Law, p. 12.
The 'gradual adulteration' produced by the individualization of title was that whereas traditionally *turangawaewae* was dependant upon occupation of land or 'keeping the fire burning', as time wore on it became more and more dependent upon an individual's status as an owner inscribed on the memorial of ownership held by the Court. In many respects this was an understandable development because from World War One onwards when many Maoris went overseas to war and afterwards as the Maori urban drift began, it had become clear that an individual's absence from the ancestral lands was a necessity which did not represent, as it once had, a diluting of the cultural bond. The ever dwindling areas of Maori land were also making it impossible for the ancestral lands to support all owners. The response was the equation of *turangawaewae* with listing on the memorial of ownership. One of the unfortunate results of this development was that those members of the owner group, particularly the younger ones, who were not 'legal owners' although acknowledged by the group, only precariously enjoyed such acknowledgment on the sufferance of those 'listed' until they too took their 'legal' interest.

The regime of the multiple ownership is the basis from which we begin an analysis of the law affecting the management of Maori land.

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For analytical purposes two broad possibilities can be postulated as arising in respect of the management of native lands: either management can be undertaken in whole or in part by or on behalf of the native owners, or the rights of management can be passed in whole or in part onto a non-native utilizing the land for his own profit.

The legal processes affecting the options will be discussed in this work. The second option will be discussed first because the present laws affecting the management of Maori land were in substance a reaction against those regulating its alienation\(^1\), and so an understanding of the first option has to be based upon a familiarity with the laws affecting the alienation of Maori land.

2. The Granting of rights in Maori land to non-owners
   
a) The issue in a historical and modern perspective

Smith observes that "originally a Native holding land by freehold title had exactly the same powers as a European, but by a long and very complicated course of legislation, however, this liberty has been restricted, the restrictions varying greatly in degree and nature at different times, and occasionally amounting to a general prohibition."\(^2\)

Under the 1865 legislation a certificate of title was not to be issued by the Court to more than ten persons and on the issue of such a certificate the Governor could make a Crown grant to the natives entitled.\(^3\) This "inadvertently"\(^4\) gave the ten listed "the right to absolutely alienate

\(^1\)Ngata, "Maori Land Settlement", p. 139.
\(^2\)Smith, Native Custom, p. 16.
\(^3\)Native Lands Act 1865, section 23.
\(^4\)Smith, Native Custom, p. 11.
the rights of those not mentioned in the grant". ¹ When a title was issued to the natives the Court was able to recommend restrictions on the alienation of the land which would be embodied in the Crown grant issued for the land.² These restrictions usually rendered inalienable the lands actually occupied and cultivated by the owners—inevitably a small proportion of the land covered by the certificate of title.³ The Governor, however, was given the power to remove these restrictions and otherwise approve of dealings with the land.⁴

The treachery of white settlers in acquiring Maori land through this 'free trade' soon became apparent. The government, keen (predictably enough) to maintain order in the colony, passed a Native Lands Fraud Prevention Act 1870. The Act gave Trust Commissioners the power to invalidate all alienations of Maori land if (a) they were contrary to equity and good conscience or (b) they were made for insufficient consideration or in consideration of the supply of liquor, arms or ammunition or (c) sufficient land was not left for the support of the Native.⁵

Up until the passage of the 1894 legislation, Maori freehold land was freely alienable, subject to, first, the terms of the Crown grant and,

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¹ Idem.
² Native Lands Act 1865, section 24; See also Smith, Native Custom, p. 16.
⁴ Native Lands Act 1865, section 23.
⁵ Native Lands Fraud Prevention Act 1870, section
secondly, approval by the Trust Commissioners. The protection apparently given Maori land was more token than anything else for private dealers and Government servants cleverly used the mechanisms established to solicit the sale of Maori land. Sorrenson describes the process:

The beginning of the process was simple. European purchasers could nearly always find one or two individuals of the tribe who were willing to sell land. If they did not make a cash advance they called on the assistance of the local storekeeper or publican, who often acted as "Native land agents" and who offered the Maoris liberal supplies of goods and liquor on credit. Through debts a hold was obtained on the Maori and his land and the next stage was to bring the law to bear on transactions. If Maori debtors were recalcitrant Europeans could always threaten civil law suits and imprisonment for non-payment of debts. A sitting of the Native Land Court was arranged and if possible certificates obtained for the land-sellers only. The Europeans could then go ahead and obtain a lease or the freehold. If they failed to obtain a freehold title immediately the credit-debt procedure was applied over again until the final conveyance was obtained.

Once land-selling individuals had taken tribal lands before the Court there was virtually no way that other members of the tribe could save even their own share of the land. The non-sellers had to attend the Court or lose their interests. At Court they usually had to face a lawyer employed by the European dealer to fight the case for the land-sellers, and in employing lawyers themselves as well as paying Court and survey expenses, on top of the cost of living in European towns sometimes for several months, generally lost the land even if they did win the case.

In 1891 the Rees Commission had made its report with the chairman recommending a resumption of the Crown's pre-emptive right to remedy the havoc created by the 'free trade' in Maori land, as well as a system of 'incorporation' to overcome the defects of the tenancy in common.²

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¹Sorrenson, "Land Purchase Methods", p. 186. For similar accounts see Carroll's note appended to The Rees Commission, pp. 11-12; Kawharu, Maori Land Tenure, pp. 16-17.

²The Rees Commission, p. 19.
These recommendations based upon what was clearly a genuine concern for the Maori's plight, would find a spurious recognition in the 1894 legislation which revived the Crown's pre-emptive right of purchase and allowed the restrictions on the alienation of Maori land contained in Crown grants to be eased by the Court instead of the Governor. The legislation also provided for alienation of land by an incorporated body of owners—hardly the view of incorporation envisaged by Rees. The pressure from settlers for land during this period was as relentless as it had been before, with government agents actively, and often connivingly, obtaining the sale of huge areas of land, so that during the closing years of the nineteenth century over three and a half million acres of Maori land were lost.

The 1909 legislation, in response to the celebrated 1907 Stout-Ngata Commission, revived 'free trade' in individual interests in native lands. This legislation was also the first serious attempt at constructing a legal scheme wherein the native owners could develop their land. Despite its positive aspects, however, the intended tighter restrictions on alienation within the Act did not produce a significant reduction in

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1 Native Land Court Act 1894, section
4 Native Lands Act 1909, section repealed the provisions of the 1894 legislation which had re-introduced the Crown's pre-emptive right.
5 For a fuller discussion see Smith, Maori Land Corporations, pp. 71-72.
the areas being alienated, for in the eight years from 1911 to 1919 nearly two and a quarter million acres of Maori land were sold. Under the 1909 legislation the impotent Maori Land Councils, established in 1900 and reconstituted in 1905 as Maori Land Boards, were given the power to confirm all private alienations of blocks held by more than ten owners in common and to have the land vested in the district's Board as legal owner and agent of the owners to effect the alienation. Alienation could also be made by incorporated owners or pursuant to a resolution passed by the assembled owners under Part XVIII of the Act. In both cases confirmation of the Court was required. This regime regulating alienation continues in much the same form today.

To the Maori people the on-going susceptibility of their land to alienation has always been a sore point. There can be no doubt that the policy of individualization has been at least partially successful in meeting its historical goals. Today Maori land occupies a bare 4.5% of the total area of New Zealand, a statistic graphically attesting to the "weary, dispiriting tale of loss" suffered by the Maori people. The process of individualization has also inculcated in some owners an equation of their Maori land rights with private property—

1Maori Councils Act 1900, section 6.
2Maori Land Settlement Act 1905, section 2.
3Native Lands Act 1909, section 14.
5McCarthy (ch.), Royal Commission on the Maori Courts, p. 2.
6Ngata, "Maori Land Settlement", p. 129.
exactly the result hoped for in 1865. The (usually vociferous) presence of such individuals has produced a parliamentary unwillingness to impose a blanket prohibition on the sale of Maori land or to limit the transferability of an individual's interest to within the kin group.\(^1\) The organized leaders of Maoridom think otherwise, and have called for such measures to prevent the further erosion of the narrow Maori land base.\(^2\)

The constant Maori cry has been that the laws encourage the alienation of their land rather than its retention and management by the native owners. We have briefly seen this complaint to be historically justified. We will now proceed to see if that assertion is still tenable today.

b) The alienation of private interests

A tenant in common in Maori land can transfer his interest by a number of means.

i) **inter vivos transfer**

An **inter vivos** transfer can be accomplished by an owner applying to the Court under section 213 of the Maori Affairs Act 1953 to have the interest vested in one of the four listed classes. These classes are any other beneficial owner, a Maori incorporation, a section 438 trustee and a Maori Trust Board.\(^3\) The section provides a detailed mechanism for such vesting orders, giving any party not included in the 'arrangement' the

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\(^3\) Maori Affairs Act 1953, section 213 as amended by Maori Affairs Amendment Act 1974, No. 73, section 28 (1).
right to be heard before the Court. Importantly, the first class limits the possible individual claimants to the kingroup. Prior to the appearance of this restriction in 1974 it was possible for the vesting order to be made in favour of a member of an "alien 'clan'"—a fact which was the cause of some major upsets within the owner group. However the section puts serious limitations on the transferability of shares worth less than $50—a category into which many shares in Maori land in multiple ownership fall. Shares worth less than $50 can only be transferred to someone who already possesses a share in the land or if it is proposed to vest the shares in one person (i.e. it is not being divided amongst members of the owner group). These limitations can frustrate an attempt by an owner to confer turangawaewae on his children while he lives.

An *inter vivos* transfer of private interests can also be accomplished through 'voluntary conversion' to the Maori Trustee. Once the Maori Trustee has acquired the interest he can sell it to any Maori or descendant of a Maori, a Maori incorporation, a Maori Trust Board, to any trustee of a continuing trust of the land concerned or to the Crown for the purposes of Maori housing or a Part XXIV development scheme (Governmental development of a block on behalf of its owners). By this method an interest can be sold to an 'alien clan' though not to a non-Maori.

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1 This term is used by Durie, *Submissions*, p. 196.

2 *Idem.*

3 Maori Affairs Act 1953, section 213 (2).


5 *Ibid*, section 152, as amended Maori Affair Amendment Act 1967, No. 124, section 125; Maori Purposes Act 1972, No. 135 section 4; Maori Affairs Amendment Act 1974, section 53; discussed below, pp. 42-44.
It is also possible for an inter vivos transaction to be made by way of mortgage to a state loan department.  

Under the current legislation it is impossible for a non-Maori to acquire an interest as tenant in common in Maori land from a living owner. This position stands in marked contrast to the earlier days of 'free trade' in such shares and the 'foot in the door' method by which Europeans used the purchase of one or several tenants' shares to ultimately overpower the other owners and acquire the whole block.  

ii) succession to interests

A Maori can will his interests to whomsoever he wishes. However, with kinship ties exerting themselves on the testator, this "loop-hole" has not produced European inroads into the tenancy in common. Moreover, many, if not most, Maoris die intestate. The law affecting succession to an intestate Maori's estate is covered by a host of provisions whose operation hinges upon the deceased's date of death. It can, however, be stated quite confidently that intestate succession, even in those limited circumstances where the European rules operate, has not opened the Maori tenancy in common to non-kingroup members. Such inroads tended to come from the pre-1975 provisions regulating inter vivos transfer.

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2 Discussed above, p. 20.
3 Maori Affairs Act 1953, section 113.
4 McHugh, Fragmentation, p. 11.
5 Idem.
6 Idem.
In summary, the law affecting a tenant in common's interests establishes a precise regime which effectively prevents their falling into non-owner group hands. This has only been the case since 1975, with the result that many titles are peppered with European or 'alien clan' interests acquired through the laws formerly regulating inter vivos transfer and still controlling purchase from the Maori Trustee.

c) The alienation of group interests

The land with which we are concerned is Maori freehold land under multiple ownership. Part XXIII of the Maori Affairs Act 1953 establishes the procedure to be followed for the passing of any of the rights which the tenants in common possess as holders of the legal title. After Part XXIII has been considered, an alternative device by which Maori land can be alienated will be analyzed.

1) alienation under Part XXIII

This Part of the Act provides for the assembled owners to deal with their land. On the whole the Part continues the nineteenth century legislator's ethnocentric insistence that as tenants in common the Maori find their own, rather than a legislative, way of managing their land if they were unwilling to partition it. The notable (and predictable) exception to that laissez faire attitude comes in regard to the alienation of Maori land with which much of Part XXIII is concerned. Thus Part XXIII is 'owner alienation' rather than 'owner utilization' concerned.

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1 That is, Maori freehold land owned for a legal estate in fee simple by more than ten owners as tenants in common: Maori Affairs Act 1953; section 215.
Under Part XXIII a meeting of owners is summoned by the Court to consider a resolution which will be placed before it.\(^1\) The legislation and relevant regulations\(^2\) are detailed as to the procedure at these meetings. Section 315 is crucial, specifying the resolutions that may be passed by assembled owners.

\(^1\)Maori Affairs Act 1953, section 307 as substituted by the Maori Affairs Amendment Act 1974, section 35. Note by section 305A a wider definition of the term 'alienation' is given in respect of such a process as it affects land under multiple ownership. By section 2:

"Alienation" means, with respect to Maori land, the making or grant of any transfer, sale, gift, lease, licence, easement, profit, mortgage, charge, encumbrance, trust, or other disposition, whether absolute or limited, and whether legal or equitable (other than a disposition by will), of or affecting customary land or the legal or equitable fee simple of freehold land or any share therein; and includes a contract to make any such alienation and also includes the surrender or variation of a lease or licence and the variation of the terms of any alienation as hereinbefore defined."

The above definition applies to all Maori land but is extended to include any contract, licence or grant to any person in respect of any timber, flax, minerals or other valuable thing (other than industrial crops) on Maori land in multiple ownership: section 305A. Note section 459 makes it an offence to remove timber, flax and other valuable things from Maori land, however, by subsection 3, a tenant in common is so able provided that the item taken or removed from the land is for his own use and not for disposition to any other person by sale, gift, exchange or otherwise. The definition of 'alienation' in sections 2 and 305A is adopted and used throughout this thesis.

\(^2\)Maori Assembled Owners Regulations 1957, N.Z.S.R. 1957/31. As to how the Court has interpreted these procedural requirements see P. G. McHugh "The Alienation of Maori Land under Part XXIII and section 438 of the Maori Affairs Act 1953" (1979) 10 V.U.W.L.R. 153, 156-159.
The provisions of section 315 completely centre upon the passage of resolutions concerned with the alienation of land. The exception to that pre-occupation with alienation is subsection (1)(a) which allows the owners to pass a resolution that they become 'incorporated' under Part IV of the 1967 Amendment Act. The formula in section 315 crudely, but accurately, stated, is that owners at a meeting convened under Part XXIII of the Act can either alienate or incorporate. Incorporation, as will be seen, involves the creation of a 'Maori land company' and may be an inappropriate regime for owners not wishing to alienate their land. Moreover, we will also see later that frequently meetings of owners are ill-equipped to discuss alternatives to alienation and the pros and cons of other such options as incorporation. Section 315 allows the owners to pass a resolution authorizing the Maori Trustee to act as their agent but only for purposes related to the alienation of the land ("by sale or lease or otherwise as may be specified in the resolution"). The Maori Trustee frequently does not live up to the expectations one might have of him as an agent to promote the owners' interests. In fact, the problems surrounding the leasing of Maori land and the Maori Trustee's role in the process led to the Mete-Kingi Report of 1978 which made many recommendations on the trustee's role, including one that the Maori Trustee "play an active role in advising owners of Maori land of the optional land uses

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1 See below pp. 55-9.

to which the land is suited so that they can make an informed decision on how they wish the land to be used. ¹

The Maori Trustee can also assume a role where the resolution, once passed and confirmed, grants a lease. The Maori Trustee becomes the agent of the owners to execute the instrument and necessary renewals. ² The legislation goes to lengths to make provision for the payment of compensation for improvements to lessees. ³ Significantly, leases containing options to purchase are outlawed. ⁴

The 1974 Amendment Act in keeping with its sponsor's policy of encouraging Maori land ownership ⁵ introduced rigid quorum requirements for meetings considering an alienation. At such meetings a fixed percentage of shares, the proportion dropping with the shortening length of the proposed lease, are required to be represented. Thus where the proposed lease is for longer than 42 years, owners "together representing at least 75 percent of the beneficial freehold interest in the land must be present." ⁶ For leases between 42

¹ Ibid., p. 27
² Maori Affairs Act 1953, sections 323 and 324.
³ Ibid., section 318B as substituted for the original section 318 by Maori Affairs Amendment Act 1967, section 116.
⁴ Maori Affairs Act 1953, section 234B as inserted by Maori Affairs Amendment Act 1974, section 33.
⁶ Maori Affairs Act 1953, section 309 as amended by Maori Affairs Amendment Act 1974, section 36(1).
and 21 years the quorum is 50%, and so on down to leases for less than 7 years which require only 20% of the shares to be represented.\(^1\) Prior to the 1974 legislation, it was possible and common for Maori freehold land to be alienated by a minority of owners.

Once a meeting has passed a resolution it is submitted to the Maori Land Court for confirmation.\(^2\) The Court must confirm any resolution favoring alienation of the land if it is satisfied that the alienation does not breach any trust to which the land is subject, that proper account has been taken of valuable things upon the land such as millable timber and minerals, that the consideration is adequate and, finally, that the alienation will not result in the undue aggregation of farm land.\(^3\) If the alienation involves a lease with provision for compensation for improvements, the Court must also be satisfied that the land does not have upon it any significant improvements and could not be leased profitably otherwise than on terms providing for the payment of compensation for improvements. Moreover, the resolution must provide with certainty for the identification of the improvements for which compensation is to be paid and give a formula for the means of determining the amount.\(^4\)

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\(^1\) Idem.

\(^2\) Ibid, section 317.

\(^3\) Ibid, section 318 as substituted for its predecessor (which had, in turn been replaced in 1967 by the Maori Affairs Amendment Act 1967, section 116) by Maori Affairs Amendment Act 1974, section 40.

\(^4\) Ibid, section 318B (inserted to replace the original by Maori Affairs Amendment Act 1967, section 116)
The Court is able to modify the terms of a resolution before confirming it, however such modification must be justified on one of the above grounds and must be in favour of the owners and with the proposed alienee's consent.\(^1\) Prior to the 1967 legislation, the Court had jurisdiction to ensure that any alienation was not "contrary to equity or good faith, or to the interests of the Maori alienating."\(^2\) Though Parliament and the Prichard-Waetford Report felt otherwise\(^3\), the indications are that this power was being used sparingly, in pursuit of 'assimilationist' goals rather than to ensure the retention of Maori land in Maori ownership.\(^4\) We can only speculate as to how the Court in its present 're-energized' state might use such a provision.

Part XXIII (except in its allowance for a resolution favouring incorporation), whilst feeling the need to provide a mechanism whereby the Maori can alienate their land, assumes that in all other respects the owners as tenants in common can find their own way of managing the land. Paradoxically, the legislation assumes an absence of individualistic, entrepreneurial traits from the Maori instinct in matters concerning the alienation of their land yet considers such traits to be present in all other aspects of the management of Maori land under multiple ownership. The practical result of that inconsistent assumption has been that the provisions of the Act regulating alienation have

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\(^1\) Ibid, section 318A (inserted to replace original by Maori Affairs Amendment Act 1967, section 116)

\(^2\) Maori Affairs Act 1953, section 227(1)(6) repeated by Maori Affairs Amendment Act 1967, section 100.


\(^4\) McHugh, "Alienation of Maori Land" p. 162.
operated smoothly whilst unalienated Maori land tends to be poorly utilized. Moreover, we should note the nature of the protection the legislation gives the owners in respect of the alienation of their land. The statute does not see anything inherently wrong with the alienation of Maori land. In fact, the making available of Maori land for alienation was seen to be one of the historical goals of Maori land legislation. Though the restrictions on the alienation of Maori land which developed over the years were designed to protect the Maori owners from entering into a 'bad bargain', their competence to make a 'good bargain' was never doubted. Thus the protective power the Court has over the alienation of Maori land is designed to ensure that the particular transaction the owners are entering into extracts adequate benefit for the owners. The legislation performs that task satisfactorily; however, its focus is narrow and it fails to deal with other aspects of the Maori's weakness in the face of forces encouraging the alienation of their land.

An alienation is considered by a meeting of owners convened by the Court. If the owners wish to call a meeting to consider utilization of the land it must be framed in terms of a resolution proposing incorporation. The quorum requirements frequently frustrate such meetings. Of course, the owners with sufficient motivation can always call an informal meeting; however, in such cases they cannot take advantage of the procedures under the Act whereby officials of the Court track down the (usually) dispersed owners and send notices to them. Moreover, the records of the Maori Land Court are not in a

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1 New Zealand Maori Council, Brown Paper, p. 43
healthy state and sifting through them would add to the time, cost, and frustration involved for individual owners wishing to call a full meeting. The result is that most meetings of owners are called to consider an alienation. Usually these meetings will centre upon a single proposal of alienation. The opportunity for the owners to consider alternative uses of the land is limited. As Durie observes:

The owners' attention is directed to the one proposal put before them and they rarely receive departmental or other advice (other than the advice of a recording officer) as to alternative land use proposals or on whether it would be advisable to test the market. Indeed, but for the interest of a prospective lessee, the land might lie idle, or be used on an informal basis only.

Moreover, the owners' understanding of the proposed alienation is often incomplete. Kawharu observes that the "full significance of a resolution is rarely appreciated by those most concerned with its effects." The same writer finds that post-mortem exchanges usually reveal that the majority of owners are unsure of the idioms and concepts employed in both the meeting and resolution they have just passed which is "inevitably weighed down with legal phraseology."

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1 This perhaps is describing the situation euphemistically, see McCarthy (ch.), Royal Commission on the Maori Courts, pp. 38-46, esp. p. 44; McHugh, Fragmentation, p. 47
2 Durie, Submissions, p. 17
3 Kawharu, Maori Land Tenure, p. 227
4 Idem.
For many years the Maori Land Court has been aware of those problems and over the past decade has taken some steps towards improving the owners' position at meetings considering the alienation of their land.

If the land under consideration has been formerly under the control of the Maori Trustee, the Court will ask for a report from the Maori Trustee as well as urging Departmental field officers to make recommendations as to its future use. These reports will be presented to the meeting. ¹ This measure relies on the good-will of the Maori Trustee and Department of Maori Affairs for the Court has no authority to give directions to those persons.

The Court has also adopted the practice of requiring the Recording Officer who arranges the meeting to bring matters which the Court feels are important to the owners' attention. ² The direction to the Recording Officer (or rather the advice the Court gives vicariously to the owners) can range from advice that reviews of rent at five or six year intervals are usual, to advice that their non-attendance at the meeting may stop the resolution going through. ³ We saw earlier that when land under multiple ownership is leased the Maori Trustee becomes the agent for the owners and administers the terms of the lease.

¹ Durie, Submissions, p. 18.
³ Idem.
Durie observes that the Maori Trustee neither gives annual reports to the owners on the care of their land nor calls a meeting at the expiry of the lease to review how the land has been cared for and to consider its future use. As a consequence, delinquent lessees are common as is their continuance in possession without the payment of rent at the expiry of the formal lease.¹ To counter that situation the Maori Land Court has also been issuing directions to the Recording Officer to advise owners that it is wise to include in the resolution a requirement that the Maori Trustee both furnishes annual reports to the owners and convenes a meeting when the lease expires. The Court has no direct power to make such directions but presumably feels it is implicit in its power to summon a meeting of owners.

The above efforts by the Court over the past decade have met with some success, but the Court still feels it is unable to go far enough in helping the owners come to an informed decision as to how their land is to be used.² Unfortunately, the recent Royal Commission on the Maori Courts had little sympathy with that goal³ and so legislative extension of the Court's powers seems unlikely. However, the Court's initiatives in the area attest to its concern for the owners and is indicative of an attempt to transcend an 'assimilationist' role.

¹Durie, Submissions, p. 19.
²Idem.
³See below, pp. 65-66.
ii) alienation through section 438.

Section 438 of the Maori Affairs Act allows the Maori Land Court, for the purposes of "facilitating the use, management, or alienation of any Maori freehold land", to vest that land in trustees. The section gives the Court wide powers to specify the terms of the trust. Powers are also given to alter the number of trustees or the terms of the trust and, if necessary, to terminate the trust.

After the 1974 legislation when quorums for meetings under Part XXIII became harder to obtain, this section became used as a device for alienation. The court would constitute an 'alienation' trust requiring the trustees to alienate the land according to the terms of the trust. The use of section 438 as an alienation device sparked controversy and culminated in the Supreme Court's decision in Alexander v. The Maori Appellate Court (popularly known as the 'Nagtihine case'). This decision, by a challengable process of reasoning, placed restrictions on the Court's competence in respect of section 438 trusts. Although no statistics exist as to the number of 'alienation' trusts created over the years, the accepted view is that in keeping with the Court's current conception of its role, this section is used less and less for the purposes of alienation and where so used, tends to be

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both after a Part XXIII meeting has failed to get a quorum yet the prevailing owner sentiment favours alienation, and for leases rather than sales.

3. The use of Maori land by or on behalf of its owners.

a) A historical and contemporary view of the issue.

During the late nineteenth century Rees had made several protestations that the legislation did not encourage the use of Maori land by its native owners, and would launch an ultimately unsuccessful experiment in the East Coast designed to encourage tribal corporate management. Rees realized the hopeless inadequacy of the tenancy in common as a utilization and management device and sought to construct a regime in greater accord with Maori predilection. His experiment with land in the East Coast region was designed to achieve that goal but, lacking governmental support, it floundered. By vesting the land in a corporate body the experiment prevented the operation of the ordinary rules of succession to Maori land, with the result that when the scheme failed the revesting of the land in those entitled was an extremely difficult, if not impossible, task. Accordingly, the East Coast Maori Trust was established. The basis of Rees' failure had been his inability to get legislation passed providing for the incorporation of the tenancy in common.¹ The prevailing Parliamentarian feeling was that if tenancy in common had served Englishmen well it could also serve the Maori. Besides, it was an eminently useful device in weakening the still strong tribal ties and encouraged the

¹For the full account of Rees' enterprises see A. Ward "The History of the East Coast Maori Trust" (M.A. thesis, Victoria University of Wellington, 1958),
alienation of the Maori's much needed land. And so Rees' efforts and Carroll's plaint in 1891 "that during all the years the New Zealand Parliament has been legislating upon native land matters, no single bona fide attempt has been made to induce the natives to become thoroughly useful settlers in the true sense of the word"\(^1\), would go unheeded for some years.

The 1907 Stout-Ngata Commission would observe:\(^2\)

"The necessity of assisting the Maori to settle his own lands was never properly recognized. It was assumed that because he was the owner according to custom and usage, and because the law had affirmed his right of ownership, he was at once in a position to use the land. He was expected to do so, and to bear the burdens and responsibilities incident to the ownership of land. Because he has failed to fulfil expectations and to bear his proportion of local and general taxation he is not deemed worthy to own any land except the vague undefined area that should be reserved for his "use and occupation." But the causes that have conspired to the failure have not been investigated with a view to remedial measures."

By then it had become quite clear that with "regard to the settlement of Maori land by Maoris ... the root difficulty was the character of the title as evolved by the Native Land Court."\(^3\) The incorporation principle was first seriously established as a management and utilization device in the 1909 legislation as a result of the Stout-Ngata Report and remains as one of the major mechanisms by which the owners of Maori land can organize against the fragmented, cumbersome tenancy

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\(^1\)Quoted in Ngata, "Maori Land Settlement," p. 125.


\(^3\)Ngata, "Maori Land Settlement," p. 139.
in common. In 1902 an East Coast Native Trust Land Act had been passed. The legislation was necessitated by the "chaotic conditions relating to native land settlement in the Gisborne district in the seventies and eighties of last century, when titles to large areas of native lands had not been fully investigated", mainly as a result of Rees' attempts to form tribal bodies in which the title could be vested. The 1902 enactment would herald the use of the statutory trust -- a feature which continues today.

The above two devices were however, insufficient, doing little to curb the alienation of Maori land and to bring much of it into production. As Ngata observes:

While the incorporation of owners and their organization under some system of trusteeship afforded a solution of some of the difficulties arising from individualization of titles, by suspending that process and consolidating authority and power of management, the solution could not be regarded as final in all or even in the majority of cases.

It was clear that financial backing was needed to encourage Maori land development. Ngata saw that resolution of the administrative problem of fragmentation unaccompanied by financial assistance was insufficient, and with other Maori would complain that while "the State placed its financial resources at the disposal of European farmers, who were also served by financial institutions, Maori landowners received no such assistance." The first significant attempt to remedy

1 Belshaw, "Maori Economic Circumstances," p. 201.
3 Idem.; Kawharu, Maori Land Tenure, p. 27.
4 Ibid, p. 142
the problem came in 1920 with the creation of the Native Trustee who was able to make loans to assist Maori farmers by using funds accumulated under various trusts. However, it was apparent that the funds made available through this method were inadequate and that sooner or later money would have to come from state coffers. Accordingly in 1929 a 'development scheme' funded by State loans was introduced, allowing the development of Maori land by its owners. These 'development schemes' were the precursor of the modern day Part XXIV schemes.

Thus the three major devices by which Maori tenants in common can step outside the limitations of the regime were established by 1930. These devices are:

a) incorporation  
b) statutory trusts  
c) development schemes

Historical statistics bear witness to the correlation between the non-development of Maori land and its alienation. From 1911 to 1919, nearly two and a quarter million acres of Maori land were sold yet from 1919 to 1937, during the height of the 'development boom', a little over 460,000 acres were sold. Whilst the fact that there was becoming less and less acreage of Maori land to alienate explains in part the reduction

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1 Native Trustee Act 1920, section 6.  
in figures, it appears that the major causal factor was the upswing from 1920 onwards in general Maori initiative and governmental Maori land development schemes. 1

The boom period in Maori land development came during the two decades after 1920 when the influence of Sir Apirana Ngata, a Maori Member of Parliament who became Minister of Maori Affairs in the period 1928 - 1934, was great. 2 After World War Two the initiative would slump until revived in the 1970's. 3 Today the Maori feeling confirmed by their historical experience is that development of their land and the application of its earnings to the benefit of the owner-group is the best way to ensure retention of a cultural identity. In short, economic development is an important ingredient in cultural identity. 4

That belief underlies the present Maori 'renaissance' which took root in 1967 as a reaction against the notorious legislation of the same year. 5 Most of the Maori objections to that enactment were removed in 1974; however, the 1967 legislation had proven to be a catalyst for much larger things. Now the generalizations and emotionalism


2 Kawharu, Maori Land Tenure, pp. 27 - 31; Price, White Settlers, pp. 180-83.


4 Kawharu, Maori Land Title, p. 7.

5 This reaction is discussed in Kawharu, Maori Land Tenure, pp. 251-93.
inherent in sloganeering have given way to detailed analysis of the legislation affecting Maori land, with the result that some provisions of the Act, notably those relating to incorporation and, to a greater extent, trusts under section 438, have recently realized a surprising degree of dynamism. Referring to the present legislation, Kawharu sees the Maori people asserting "that Maori values can be secured in Pakeha statutes and Maori goals can be achieved by Pakeha techniques." Given the unsuitability of the splintered tenancy in common to management by its owners and the implicit encouragement the legislation gives to alienation, our task is to investigate the devices by which the land can be both developed and retained in Maori hands and to find the extent to which Kawharu's representation is sustainable.

b) Part XXIV Development Schemes

It was earlier stated that these schemes were established in 1929 when Apirana Ngata was Native Minister. The schemes involve the provision of government funds for the development of Maori lands with the application of these funds and general management of the land being supervised by Departmental officers. Originally, the money could not be lent until the owners nominated an occupier who would be allowed the undisturbed use of the land upon payment of a rental. Today the possible users of the land are extended beyond the 'nominated occupier' to also include a lessee or the owner or owners under the control and supervision of the Departmental officers.

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1 Kawharu, Maori Land Title, p. 7.

of the Maori Land Board. The latter choice is the most preferred though it produces a number of problems, as we will see.

The Maori Land Board is charged with implementing Part XXIV Development Schemes.\(^1\) This body is composed of the Minister of Maori Affairs, the Secretary for Maori Affairs, the Director-General of Lands, the Valuer General, an MP representing a Maori electorate, a nominee from the New Zealand Maori Council and three other Maoris appointed by the Minister.\(^2\) The Board can delegate its powers to any committee it may appoint, to any Maori Land Advisory Committee or, finally, and most significantly, to any specified officer(s) of the Department.\(^3\)

After consultation with the owners, the Board is able to declare Maori freehold land or general land owned by Maoris to be subject to Part XXIV. Though legal ownership is not transferred the Board has the right to exclusive occupation and use, or to confer that right onto one of the three classes of persons.\(^4\)

The owners are usually the class selected. It should be noted, however, that Part XXIV schemes neither transform the tenancy in common nor give meaningful powers to the owners. The first complaint is addressed to some extent by the policy of not returning land to the

\(^1\) Maori Affairs Act 1953, sections 336 - 341.

\(^2\) Ibid, section 5(2) - (5) as inserted by Maori Affairs Amendment Act 1974, section 9.

\(^3\) Ibid, section 10 as inserted by Maori Affairs Amendment Act 1974, section 10.

\(^4\) Ibid, section 328.
control of the owners until they are reconstituted as an incorporation or trust. The second complaint is more deep-seated. The aim of such schemes is to increase Maori expertise and the managerial skills of the owners yet the schemes in practice do not substantially meet this goal. The profile of the Department is large, with one writer levelling the charge that such schemes were designed more to boost government revenue than to assist the Maori.¹ Henare Ngata, the son of Sir Apirana Ngata, summarizes other negative aspects of Part XXIV schemes:²

While the Schemes have brought about considerable improvements to the land, among owners some disillusionment has resulted. There have been many successes, but far too many schemes have produced disappointing results, many having been under a heavy burden of debt for a long period, some for over thirty years. The Department of Maori Affairs has on many occasions been accused of inefficiency and mismanagement—charges which the Department has denied, without, however, completely satisfying or convincing the Maori owners. "Empire building" is another charge levelled against the Department especially by those disenchanted owners whose lands have been burdened by debt for many years. Altogether the public relations surrounding the Department's administration of the Development Schemes leave a great deal to be desired. Owners in many districts say that as the land is theirs they ought to be given some voice in the administrative decisions. The land they say is only in the custody of the Department for a while, and they ought to be given some experience and practical knowledge in running their own properties. While token concessions have been made in recent years, in practice they have had little substance.

These Schemes have become less popular as other sources of government finance such as Land Development Encouragement loans³ have become available. Today Part XXIV regulates a little under 10% of Maori land.

¹Kawharu, Maori Land Title, p. 2.
³MacIntyre, "Future Maori Development", p.3 of the text of the address.
c) **Maori incorporations**

The constraining effect of Part XXIII and need to establish a legal entity over the fragmented title allowing not only the efficient management of the land but a culturally-oriented regime has long been realized by the Maori people. The incorporation principle has a long and notable history as a device by which the Maori owners can readily manage their own lands. Incorporation maintains the protective aspects of the regime of multiple ownership, notably the status of the land as Maori freehold land and the protection of both the land and a Maori (but not European) individual's shares from bankruptcy, execution or any form of judicial process for the payment of debts or liabilities. The corollary of this protection, however, is the subjection of the incorporation to a degree of supervision by the Maori Land Court.

Prior to the 1967 Amendment Act the differences between an incorporation and 'Maori trust' existed in the popular rather than legislative mind, for though the body corporate, the Maori incorporation, took the legal estate in fee simple section 275(2) provided that it held "the land . . . vested in it . . . in trust for the incorporated owners, in accordance with their several interests in that land". Thus prior to

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1 Maori Affairs Amendment Act 1967, section 31(3) removed this feature which was re-enacted by Maori Purposes Act 1975, No. 135, section 17.

2 As to how a European may acquire shares in an incorporation see below.

3 Maori Affairs Amendment Act, section 37A as inserted by Maori Affairs Amendment Act 1974, section 78(1).

4 Maori Affairs Act 1953, section 273(3).
1967 the interests the owners held in an incorporation were interests in the land (realty) rather than shares in a body corporate (personalty) such as those owned by a shareholder in a joint-stock company. An owner seeking to enforce the terms of the incorporation order was in the legal position of a beneficiary rather than shareholder. The incorporation was an elaborate, legislatively directed trust.

The Prichard-Waetford Report, however, felt that the law concerning Maori incorporations should conform as near as possible to the law governing private companies.¹ This recommendation was based upon the popular, but legally erroneous, view of a Maori incorporation as a Maori land company and ignored the intrinsic and significant differences between the Maori incorporation and joint-stock company. The recommendation resulted in section 31(2) of the 1967 legislation which established a new basis for incorporations. Section 31(2) provides that upon incorporation the body corporate takes the legal and beneficial estate of freehold in fee simple and the owners cease to have any interest legal or beneficial in the land.

Thus when a group of owners incorporate themselves they acquire shares similar to those held by any shareholder in a joint-stock company. This 1967 transformation has brought little change in the Maori shareholder's conception of possession of an Incorporation share as conferring ‒ and the New Zealand Maori Council, finding "no reason"² for the 1967 change, has suggested a return to the prior position.

¹The Prichard-Waetford Report, p. 120
Section 41 of the 1967 legislation prescribes the persons to whom shares in an incorporation can be transferred. Although shareholders are given priority in purchasing another's interests, if they are unwilling or unable to accept the offer to purchase 'open market' trading becomes possible within two years of the making of that offer.\(^1\) In addition, incorporation shares can be transferred to the Maori Trustee, any other state loan department on the Crown.\(^2\) There is nothing to stop those bodies also placing shares onto the 'open market'. This open marketing of shares, a possibility with which the Maori have never been pleased,\(^3\) has been avoided by the incorporation's ability to purchase its own shares.

Such a system of share purchasing is also some safeguard against the infiltration of "outsiders" -- non-descendants in the land -- into the incorporation. Were there no such fund for the purchase of shares, pressure from those who wished to sell could build up to a point where they forced agreement among a majority to the principle of selling shares on the open market. If this were to happen, a Maori incorporation would be fair game for investors and would probably cease to be Maori in no time at all.\(^4\)

To prevent the anomaly of an incorporation becoming a major shareholder in itself, those purchased shares are deemed to have been purchased by the body corporate on behalf of all the remaining shareholders and are held in trust.

\(^1\) Maori Affairs Amendment Act 1967, section 41(b).

\(^2\) Ibid., section 41(2)(c).


\(^4\) Kawharu, Maori Land Title, p. 5.
until the end of the financial year in which they were acquired, at which time the total number of shares is reduced according to the number acquired during the year.¹

The shareholders in general meeting have a number of powers which are usually subject to scrutiny by the Maori Land Court. For instance, a general meeting of shareholders has the power to pass a resolution restricting the sale of shares.² This power can be used to prevent a stranger coming into the shareholder group or to place a ceiling upon the proportion of shares which an individual can accumulate. The Court must be informed of such a resolution and is required to confirm it if it has been duly passed by a properly summoned and constituted general meeting of shareholders.³ Another important power allows the incorporation to set in general meeting a minimum shareholding unit.⁴ Again the Court is required to confirm this step if it is satisfied that the procedural requirements of the Act as to general meetings have been followed. The Court is also required to ensure that the relative interests are not disturbed of those who possess sufficient shares.⁵ The Maori people have asked that this provision with its inherent challenge to turangawaewae be discarded.⁶

¹ Maori Affairs Amendment Act 1967, section 41(7).
² Ibid., section 4(2)(1).
³ Ibid., section 40(2).
⁴ Ibid., sections 33 and 34.
⁵ Ibid., section 33(3).
Section 27 prescribes the objects for which an incorporation can be established. These objects are all in relation to the land which the incorporation owns. Section 28 gives the Court power upon the application of a Maori incorporation, to change or modify the objects though such a change must still leave the objects "in relation to the land".

The incorporation is administered by an elected committee of management which is required to keep full accounts and convene an annual general meeting at which an audited set of accounts must be presented. These accounts must also be lodged with the Registrar of the Maori Land Court. The elected position is a fiduciary one, analogous to a company directorship.

Section 46 covers the application of the revenues of the incorporation. The scope of this section has been the subject of some debate which need not detain us here, however, we can note that the expenditure of the funds must be "in relation to the land". This restriction has caused some concern amongst various incorporations on two counts. First, it restricts the economic activities of incorporations to the 'land', retarding in particular those wanting to expand into and/or invest in fishing enterprises. Secondly, it prevents 'welfare payments' to needy shareholders.

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1 Maori Affairs Act 1967, section 28. As to the Conduct of meetings see Maori Incorporation Regulations, N.Z.S.R. 1969/49.

2 Ibid., section 58(5).


except in the form of a dividend, in which case the moneys distributed
must go to all the shareholders relative to their interests. Accordingly,
it has been suggested that Maori incorporations be able to set up a
putea or 'bag' account from which welfare payments can be made and into
which dividends falling below a certain sum fixed in general meeting can
be placed.¹ Such a measure would also have the effect of easing the prob-
lem caused by unclaimed dividends. At present an incorporation can
retrieve for its funds, by resolution in general meeting, any 'unclaimed
dividend', twelve months after publication of its status as such in the
Gazette.² The establishment of a putea account would partially alleviate
the administrative and financial complications caused by such dividends
which on an individual basis are normally of inconsequential amounts, yet
when cummulated can constitute a sizeable sum.

The Maori Land Court exercises a great deal of power over Maori
incorporations most notably that granted by section 61 of the 1967 legis-
lation.³ This section allows the Court of its own motion or upon the
application of shareholders owning at least 10% of the shares, to conduct
and investigation of the incorporations affairs. The Court's power to
proceed of its own motion arises once it finds "sufficient cause".⁴
Although section 61 as enacted in 1967 has been replaced, it gave an indi-
cation that such matters as "apparent excessive expenditure, excessive
stock losses, inadequate expenditure for maintenance of pastures and

² Maori Affairs Amendment Act 1967, section 47.
³ As inserted by Maori Purposes Act 1970, No. 120, section 10.
⁴ Maori Affairs Amendment Act 1967, section 61(2)(c)
improvements, apparent mismanagement or poor administration, inadequate reserves"\(^1\) would constitute "sufficient cause". As in so many other areas of the Court's jurisdiction, the judge exercising his powers under section 61 must combine legal skill with administrative and financial know-how and be ready to draw on the help of other sciences such as agronomy and soil science. That this power has and continues to be exercised without major owner dissatisfaction underlines the respect the Court has earned amongst the Maori people.

The documents relating to an incorporation are filed at the Maori Land Court of the Registry wherein the particular incorporation is located. The files are supposed to contain comprehensive and current details as to the management personnel of the incorporation,\(^2\) its shareholding\(^3\) and annual performance.\(^4\) The records are designed to allow the Judges and staff of the Court to keep a watchful eye on the progress of incorporations within the district. Unfortunately that scrutiny shows no signs of being conducted on a consistent basis. The inconsistency is largely a result of the clumsy manual retrieval system used to house the Court's records, combined with staffing shortages and a propensity for many incorporations to go about their business, overlooking the necessity of reporting to the Court. The commencement of the Royal Commission's investigations sparked several administrative reforms within the Court, most notably an increase in staff and establishment of a program to transfer the Court's records

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\(^1\) Maori Affairs Amendment Act 1967, section 61(2) [since repealed].
\(^2\) Ibid., section 55(3) and (4).
\(^3\) Ibid., sections 32 and 35.
\(^4\) Ibid., section 58.
onto computer. ¹ Those steps should produce much improvement in the Court's overseeing of incorporations.

The Act establishes a precise and even exacting regime for the management of the incorporation's land. The committee of management has significant powers and though subject to the Court's scrutiny, there have never been any major ruptures between Court and owners. In fact, the Court provides an easily accessible and sympathetic forum to which the owners can take a grievance.

The major sources of Maori dissatisfaction with the incorporation principle are inter-related but can be broken into three reasons:

i) many Maoris feel incorporations are insufficiently welfare-oriented;

ii) the regime is established within a rigid legislative framework and whilst appropriate for some blocks, may be too inflexible for others; and

iii) many Maoris are suspicious of the principle.

First, the commerce orientation of incorporations

Kawharu has said: ²

Whatever else it may appear to be, an incorporation is certainly kin-based. Individuals are recruited to it only through the accident of their birth. And since succession is, more often than not, to shares in intestate estates, the number succeeding (i.e. the membership of an incorporation) increased, rapidly at each generation... An incorporation is, in fact, something of a hybrid, born out of the legislation. It is now more a category of kin than a local

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¹McCarthy (ch.1, Royal Commission, pp. 67-69.
²Kawharu, Maori Land Tenure, p. 194.
community, since individuals can succeed to interests without having as in former times, to keep the 'fires of occupation' alight. Indeed, the operations of a farming incorporation are usually dependent upon there being no actual occupation of the land (by the owners as a group). Finally, while an individual can contract in or out of an incorporation (e.g. for the purpose of consolidating interests), the right to do so is determined by prior membership in the (owners) kin group. Kinship status not contract is the critical factor.

Thus the Committee of Management is more analogous to a traditional tribal council rather than a Board of directors. Kawharu observes:  

The idea of a committee of management elected by a group of owners to act on their behalf found ready acceptance in Maori society, for in essence it is one well grounded in the cultural tradition. It may perhaps be viewed as a latter day approximate to a feature of the old political system, insofar as rights of administration over a tribal group's estate were once vested in the leaders and spokesmen of the group. Whatever else may have disappeared, been modified or changed in scale, the reciprocity between 'trustee' and beneficiary, the majority to whom, moreover, are also kin to one another, remains. This is the moral and political basis of incorporation.

Despite that basis in cultural ties the legislation largely defines an incorporation in economic terms.  

In the East Coast region where the incorporation principle was pioneered, the infiltration of the economic element is revealed by the local belief that receipt of an incorporation dividend rather than ownership of the share accords turangawaewae. Other tribes not as warm in

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2 Discussed more fully in McHugh, Fragmentation, pp. 42-44.

3 The establishment of the incorporation principle in the East Coast was largely a result of Rees' unsuccessful experiment, see above, pp. 37-8; see also McHugh, Fragmentation, pp. 35-39; E.G. Schwimmer "Land Under Maori Management" Ao Hou (The New World), no. 11 (November, 1955): 6,7.

their acceptance of the incorporation, are keen to avoid such an adul-
eration of the kinship basis of land tenure not only because it places
considerable pressure on the Committee of Management to declare a
dividend (which, of course, can be very unwise if the incorporation's
coffers are not sturdy), but because ultimately they consider it to be
'un-Maori'. However, this economic formulation of turangawaewae has
been able to grow in a district where incorporations usually do well and
where realization of the land's economic potential has assisted cultural
identity. Thus Metge draws attention to the district's and country's
leading incorporation:

Among incorporations, Mangatu on the East Coast occupies
a rather special place as one of the earliest and
largest, and an inspiring example of what can be
achieved under Maori management. Mangatu covers 104,000
acres of heavily dissected hill country inland to the
north west of Gisborne. Established by Act of Parliament
in 1893, it consists of 2,400 members of Te Aitanga-a-
Mahaki tribe. Mangatu is farmed as eighteen separate
sheep and cattle stations which function independently
under an overall management committee. Increasingly
economies are made by combined purchasing and planning.
When delegates to the incorporation conference visited
Mangatu in November, they were told that the incorpora-
tion had: a permanent workforce of up to 130 men,
boosted to 200 by seasonal workers; 113,448 sheep
including 78,633 breeding ewes; 17,817 cattle of which
nearly 7,000 were breeding cows; a fat lamb kill of
39,000 for the year of June 1974; more than 2,200 fat
bullocks killed in the same period; a wool clip of 3,328
bales; Angus and Hereford studs, plus newly established
breeding programmes for Romney, Perendale and Coopworth
rams; a station truck fleet and permanently employed
building gang; and an administrative office in Gisborne
35 miles away with a secretary and a staff of 8. About
25,000 acres are still in native bush, and small quan-
tities are being milled.

1Metge, The Maoris of New Zealand, p. 119.
With certain and largely isolated exceptions, the success of incorporations in the East Coast region has not been mirrored in other areas and even within the East Coast, the successes tend to overshadow those incorporations eking out a precarious existence. Generally, it is felt that the cultural benefits derived from successful incorporations tend to be a by-product rather than goal of the incorporation principle. The legislation gives credence to this belief.

ii) Too exacting a regime?

We have seen that the legislation makes demands of the incorporated body most notably the requirement of an annual audit and presentation of the financial statements to the Court and a properly convened general meeting of the shareholders. In many cases, however, these requirements are too exacting or unnecessary, a fact often exacerbated by the disarray of many Maori Land Court records. The history of one block, Rawhiti 3B2 in New Zealand's sunny Northland region, is an example of a situation in which an incorporation was the improper mechanism for the management of the tribal lands concerned.

Rawhiti 3B2 comprises 1539.8187 hectares of scenic, unspoiled land in Northland. Under the regime of multiple ownership the block experienced a series of problems with the payment of local body rates. The owners were incorporated in December 1970, partially in order to quell the local body dissatisfaction but, more importantly, to provide a means whereby administration of the land would be taken out of Part XXIII and placed under the aegis of a more efficient system. Accordingly, three orders were made by
the Court sitting in the Tokerau District on 22 December 1970. First, an order of incorporation was made under section 26 of the 1967 legislation. The incorporation was established with the commonplace objects of farming, growing selling and marketing, mining and alienating portions of the land should the need arise. A second order was made under section 52 appointing a Committee of Management. Finally, pursuant to section 32, the Court determined the total number of shares in the incorporation and fixing the number at 228,833.900, allocated the shares in the respective proportions amongst some 1137 shareholders. A small portion of the shares were allocated to an individual(s) subject to a trust. In addition the body corporate also held a small portion of the shares in trust for various individuals. Thus the incorporation originally held 293.300 shares in trust for the Ngatiwai tribe but a few years later an order was made under section 443 of the 1953 legislation appointing the Whangaruru-Ngatiwai Trust Board as a new trustee.

The incorporation was established to develop and manage the land. At the time of incorporation this land had produced no income for the owners and was greatly in arrears with its rates. On 1 July 1973 the land was valued at $39,500 with improvements worth a meagre $500, making its total value $40,000. Five years later the land's value had increased astronomically to be worth $250,000. Why this dramatic rise? The capital required to develop the land for agricultural or forestry purposes had been found during those five years to be prohibitive making any development by the owners unfeasible. The Department of Lands and Survey was, however, interested in the land and during 1974 made attempts to lease the land in
perpetuity on a pepper corn basis. Talk about using the idyllic coastal 
land as a scenic reserve had surfaced some time prior to these initiatives 
and, undoubtedly explains the increase in value. However, the owners 
are steadfast in their refusal to alienate the land.

Given the prohibitive cost of development and reluctance to alienate 
the future use of the land remains uncertain. However, in such a situation 
the regime of incorporation is highly inappropriate because it predicates 
a revenue producing, business-like operation which Rawhiti 3B2 was not and 
still is a long way from becoming. The requirements of the 1967 Act, such 
as the annual presentation to the owners of audited accounts and elections, 
become unnecessary and expensive formalities.

Not surprisingly, the file in the Tokerau Registry on the Incorporation 
was not kept up to date indicating, amongst other less important things, 
the Incorporation's failure to meet the requirements of the 1967 Act. The 
Registrar of the Court responded on 15 December 1975, requesting the 
Incorporation either to fulfill the requirements of the Act or reconstitute 
itself as a section 438 trust which does not require such stringent and 
expensive administrative necessities. The Committee responded by calling 
an S.G.M. on 8 November 1976 which was attended by some 380 owners. This 
meeting resolved to dissolve the incorporation and reform as a section 438 
trust. Fifteen prospective trustees were selected by the meeting but when 
this group met as a Steering Committee they decided on 26 March 1977 to 
remain as an incorporation. However, the requirements of the Act were 
still not being met despite this activity. Soon after, on 2 June 1977, the 
Deputy Registrar of the Tokerau Registry applied to the Maori Land Court 
for an order winding up the Incorporation. The chairman of the Management 
Committee, Mr. Clendon, submitted a report dated 23 May 1977 to the Court
stating that matters were now proceeding and that the requirements of
the Act would thenceforth be met. Judge Nicholson responding to this
undertaking, dismissed the application.

Clendon had furnished information on the composition of the Com-
mittee of Management in his report yet, interestingly, three years later
on 31 July 1980, when the writer investigated the file, this information
had not been entered into the appropriate official sections of the file
though Clendon's report was appended. When inspected the official file
incorrectly indicated the 7 people appointed in 1970 to still comprise
the Committee of Management yet of that seven, one had died and three had
resigned. Thus the file's lack of currency might not be entirely attri-
butable to the Incorporation's officers. Still despite the Court hearing
of 2 June 1977, no evidence to indicate the Act is being complied with
has been inserted in the file. It is therefore somewhat surprising to
find Judge Nicholson on 5 July 1977 making an order under section 93 of
the 1967 Act in respect of an individual's shares in the incorporation
and not picking up the apparent lack of adherence to the Act's require-
mments. Rawhiti 3B2's fate is still unresolved -- a huí (learning
assembly) was held on the weekend of 2 August 1980 on the potential use
of the land and it seems probable that a section 438 trust will be
constituted.

Rawhiti 3B2 is a typical example of a block of Maori land that was
unsuitable for incorporation. It was not productive at the time of
incorporation, nor did it ever show much potential at that time of ever
so becoming. Lawyers, accountants and auditors had to be employed, thus
contributing to an accumulating debit balance formed by the rate arrears
and achieving little other than confirming the inappropriateness of the regime. The rejection by the nominated trustees on 26 March 1977 of a section 438 trust seems crucial and is explicable only in terms of the then intense Northland Maori distrust of section 438 trusts produced by the bitter wrangling over the Ngatihine block.

Thus the proper regime for Rawhiti 3B2 would be constitution as a (recreational) trust under section 438 which allows a management regime to be 'tailor-made' for the owners. The suitability of the trust concept, which is not so onerous in its administrative demands, is highlighted by the concept's increased popularity and employment in situations where incorporation might formerly have been employed and produced similar results (to some lesser or greater degree) as those seen in Rawhiti 3B2. Examples seen in the Tuwharetoa District around Lake Taupo are the East Taupo Forest Trust, the Owhaoko (Deer and Recreational) Trust and Rotoaira Forest Trust.

iii) Maori suspicion

Maori incorporations flourished in the East Coast of the North Island and their success in this region has contributed to some suspicion of the principle in other parts of the country. The tribes within the Tairawhiti District Maori Council's region held onto their land during the nineteenth century.

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1 Mr. Graham Alexander, the plaintiff in Alexander v. The Maori Appellate Court, was a nominated trustee for the Rawhiti 3B2 block.

2 Metge, The Maoris of New Zealand, p. 117 observes the failure of many incorporations during the 1960's as a result, inter alia, of circumstances similar to those of Rawhiti 3B2.

3 These examples taken from McCarthy (ch.), Royal Commission on the Maori Courts, p. 106. Kawharu, Maori Land Title, p. 1 provides more examples.
century, tenaciously refusing to alienate it. These tribes' substantial exemption from the historical process of loss is further seen by their avoidance of entering into the fray during the Maori Wars. The strong leaders that emerged from Maoridom at the turn of the century tended to come from those tribes that had suffered least at white hands and, not surprisingly, the East Coast was well-represented in that group. The Tairawhiti profile in Maori affairs continues today, contributing to a certain degree of jealousy and wariness amongst the Maori of other regions.

The above suspicion of the incorporation principle based as it is on historical grounds, tends to be a confirmation rather than cause of the growing disillusionment in most regions with incorporation which is summarized in these words of Kawharu: One, perhaps inevitable, consequence of the growth of the incorporation system has been an increase in shareholders' preoccupation with the size and market value of their shares, rather than with the land itself and with each other, the tribal group that formerly the land would have sustained.

Although Kawharu qualifies the above by pointing to practices such as the incorporation purchasing its own shares and being able to restrict the sale of shares, it would seem he overstates the use of these devices as a 'non-Maori' technique of achieving "Maori goals defined in terms of values of the corporate kin group."

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2 Kawharu, Maori Land Title, p. 5.

3 Idem.
move away from the incorporation towards section 438 trusts\(^1\) but quite dramatically in the Tairawhiti equation of incorporation dividend with turangawaewae.

**d) Maori trusts**

A method of administering native lands, dictated by similar circumstances, was evolved at the same time as incorporation of owners, namely, the vesting of lands or of the authority to administer them in trustees or statutory bodies. The primary purpose was to concentrate the authority, distributed by the process of individualization, so that the land might be dealt with in all aspects, subject to the special conditions of the trust, as if it were the property of a single individual. This system was not the creation of the Maori, but was accepted by him as a method of escape from the handicaps of the communal title.\(^2\)

The use of the trust device as a means for the owners to secure corporate control of their lands has flourished over recent years. The trust system has come to be preferred in most areas of New Zealand to the incorporation because of its focus on group welfare rather than individual profit.\(^3\)

Two methods of introducing a trust regime exist. First, a special statute can be passed constituting the owners as a Trust Board, or secondly and less ostentatiously, the Maori Land Court can use its powers under section 438 and constitute the owners as a trust.

\(^1\)Interestingly, this trend was predicted nearly twenty years ago by Smith, *Maori Land Corporations*, p. 81.

\(^2\)Ngata, "Maori Land Settlement", p. 140.

i) Maori Trust Boards

A Maori Trust Board is established as a body corporate by Act of Parliament. These Boards have usually been established as a result of land claims settlements, which explains why they are created by special legislation as a sort of public governmental penance, rather than through the use of the flexible enough provisions of the Maori Affairs Act. That fact also explains the Ministerial rather than Maori Land Court role in the legislation.

Section 24 of the Maori Trust Boards Act 1955 indicates that "the aim of these Boards is much wider than the mere utilization of the land, in contrast to incorporations which have as their direct object the utilization of the land." This section establishes the functions of the Board with subsection one containing a general provision requiring the Board to administer its assets in pursuit of the "general benefit of the beneficiaries". Subsection two proceeds to elaborate upon (without limiting) that general provision, outlining four broad purposes towards which funds can be applied: the promotion of health, social and economic welfare, education and vocational training and "such other or additional purpose as the Board may from time to time determine".

The Board must apply its funds and assets towards the "general benefit of the beneficiaries". It is felt that limitation of the Boards'
activities to the application of funds and assets is unnecessarily constraining, and prevents the Board undertaking welfare activities which do not involve the use of its financial resources. A notable example of that feeling is the recent suggestion by the New Zealand Maori Council that Trust Boards be empowered to administer the estate of deceased beneficiaries.¹

Section 26 allows the Board with the consent of the Minister, to occupy and manage its land, to sell lease or otherwise dispose of its interests in land or to use its lands for communal purposes. The Minister's involvement is further seen in section 33 which allows the Minister to order an investigation of the Board's affairs. The section provides a detailed procedure for the conduct of such investigations and the Minister's powers of enforcement should the Board fail to comply with any decision he might make. However, section 33 clearly makes the actual decision relating to the Board's affairs within the "absolute discretion" of the Minister. The prevailing feeling amongst the Maori people is that the Maori Land Court rather than the Minister should be given the powers of investigation, "along the lines of the provisions now applying to incorporations."²

The Board is required to keep a roll of beneficiaries who vote for its membership³ and must keep it current, though an onus is upon the beneficiaries to ensure their name is included. Beneficiaries are usually ascertained either as a result of descent from a list of tribal beneficiary-

² Ibid., p. 27.
³ Maori Trust Boards Act 1955, section 42.
ies determined years previously by the Maori Land Court,\(^1\) or from membership of a tribe specified in the legislation constituting the particular Trust Board. In some cases, the second or 'tribal' qualification is modified by the legislation, as in the Tainui\(^2\) and Wairoa\(^3\) Maori Trust Boards. However, generally speaking:

Status as a beneficiary in a Trust Board arises by fact of birth whereas status in an incorporation is dependent upon a vesting order by the Maori Land Court. The Trust Board system is more akin to the traditional Maori concept of turangawaewae arising from occupation rather than inheritance of shares (by a section 213 Maori Affairs Act vesting order or through devolution on death). Thus Maoris in an incorporation or land in multiple ownership have no turangawaewae until a vesting order is made -- a process that may well be out of the hands of the individual seeking a share. In the Trust Board system a person can enrol in the register of beneficiaries and through that voluntary action be taken to have shown an intention to 'occupy' or become connected to the land. Legal jargon might call the registration 'constructive occupation'.\(^4\)

Despite the above-noted reservations, notably those relating to the Minister's involvement, Trust Boards have shown themselves to be quite dynamic and successful bodies though some, such as the Taitokerau and Taranaki Trust Boards, are large, encompassing several tribes with the resultant feeling that some of the local flavour of Maori land ownership is diluted.

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\(^1\)As in the Aorangi, Ngaitahu and Ngati Whatua Trust Boards - Maori Trust Boards Act, section 3 and 6. The last named Board was established as a result of the Bastion Point controversy by special legislation (Orgkei Black (Vesting and Use) Act 1980) and the Court is currently determining the roll of beneficiaries.

\(^2\)Maori Trust Boards Act 1955, section 7(5).

\(^3\)Ibid., section 11(1) imposes a requirement that beneficiaries reside in the tribal locality.

\(^4\)McHugh, Fragmentation, p. 46.
ii) Section 438 trusts

Section 438 gives the Maori Land Court power to vest land in trustees. The Court is able by the same section to specify the terms of the trust and can vary or terminate the trust order. In making the trust order, the Court can "make such provisions as to the keeping, filing, inspections, and auditing of the accounts of the trusts as it deems necessary or desirable." The Court's wide powers in respect of such trusts is not only seen in the above subsections and those allowing the Court to appoint/replace trustees, but, most graphically, in subsection five:

Any trust so declared may authorize or direct the trustees to use and manage the land for any purpose, or to subdivide the same, or to alienate or dispose of the same, or any part thereof, or any interest therein, in any manner whatsoever, and whether for consideration or otherwise. The order made by the Court may confer on the trustee or trustees such powers, whether absolute or conditional, as the Court thinks fit, but, subject to any express limitations or restrictions, the trustees shall have all such powers and authorities as are necessary for the effective performance of the trusts.

The Maori Land Court has been an active proponent of hapu trusts i.e. transforming the kingroup's tenancy in common into a more precise yet flexible regime. The Maori Land Court received an indirect 'rap over the knuckles' from the Royal Commission on the Maori Land Courts for its active promotion of such trusts:

1 Maori Affairs Act 1953, section 438(6).

2 The extent of the powers of the Maori Land Court over section 438 trusts in relation to the High Court's general jurisdiction under the Trustee Act 1956, N.Z. Stat., No. 61, remains unclear as a result of Alexander v. The Maori Appellate Court. It has been suggested (McHugh, "Alienation of Maori Land", p. 175) that the Maori Affairs Act ousts much of the High Court's jurisdiction creating a "mini Trustee Act" for the Maori Land Court to administer.

3 McCarthy (ch.), Royal Commission on the Maori Courts, p. 81.
The Maori Land Court should be a court of justice with traditional judicial standing and independence. But if it is to be that, it must strive to be predominantly a judicial and less of an administrative body. Once a court involves itself substantially in administrative action, especially in areas which are traditionally the fields of State administration, it places in jeopardy its claim to independence and sows the seeds of conflict between itself and the machinery of State. Furthermore, it runs a real and substantial risk of being not only interfering, but of being partisan in its rulings, not consciously but by allowing itself to become a promoter of its own opinions about the use of land to the exclusion of those of the litigants before it.

The Commission felt that the Department of Maori Affairs should be encouraging efforts to redress the effects of fragmentation rather than the Court. This view is however based upon a fixation with the separation of judicial and administrative functions -- a distinction which, as the Commission concedes then appears to overlook, is one which has never been possible to make in defining the Court's functions. Moreover, the Maori people's wariness of the Department of Maori Affairs and their (perhaps historically undeserved) devotion to the Court are both made light of by the Commission. The Commission also assumes that the Court is most often cast in an adversary situation which is not in fact the case. As if in realization of the Commission's rather conservative tone the Maori Land Court, aware of its duty as 'guardian' and cognizant that it rather than the Department of Maori Affairs has the means at hand by which to assist in overcoming the problems of fragmentation, has continued to encourage the

1 Ibid., pp. 81-83.
2 Ibid., p. 13.
3 The Commission in fact acknowledges this fact earlier in its report (p.13) then proceeds to appear to forget it.
use of section 438 trusts. The most noteworthy instance of that is the compilation by Chief Judge Durie of a booklet of 'model' trust orders which has been distributed amongst Judges and Court staff.

The preface of the booklet notes: ¹

It has become a matter of major importance to find effective systems of management for Maori lands. Trust orders are increasingly being made the instrument for that purpose. The great variety of existing trust orders shows that trust orders can be tailored to meet the particular circumstances and aspirations of any particular groups of owners. There is some hope that eventually every block of Maori land will be placed under some system of management for its future control.

Durie constructs three types of trust from section 438: wide power trusts, special trusts and single purpose trusts. The latter category is self-explanatory and need not be considered here, though Durie's comments on such trusts and their mode of employment can be noted: ²

Some trust orders are made for specific purposes. They are generally called "single purpose trusts". Increasingly single purpose trusts are giving way to "wide power trusts" that give to the trustees the freedom to act in a variety of ways to meet a variety of circumstances and to oversee the total management of the land. While the trustees of wide power trusts have generally a wide discretion and freedom to act, they bear a corresponding duty to operate in an active and positive manner to promote the interests of the trust beneficiaries.

Hapu trusts fall into two broad categories:

i) wide power (or putea) trusts

ii) special purpose trusts: Runanga/custodian trusts.

In a putea trust the trustees are given power to "do all or any of the things which they would be entitled to do if they were the absolute owners of the land" ³ subject, however, to the terms of the trust which will


² Idem.

³ Ibid., para. 15.
frequently and most significantly place limitations on the alienability of the land. The trustees are empowered to distribute revenue reserves amongst the owners according to the extent of their beneficial "share", however, they can set a minimum distribution figure with the undistributed sums being placed into a putea or 'bag' account. The moneys in this account can be used for 'General Welfare' payments to beneficiaries. Typically, such a payment would be to finance a tangi or traditional funeral of a deceased beneficiary, to assist an elderly beneficiary, for any educational/artistic/cultural pursuit or to assist with the purchase of a house. The trustees are empowered to make distributions as they wish but will usually act upon the advice of elders constituted as a formal committee.

The establishment of the putea account is seen as achieving a number of purposes. On the one hand, it realizes that those beneficiaries who have a relatively large number of shares (acquired through purchasing or soliciting their kin's interests) will usually be those taking the most active interest in the affairs of the trust and, consequently, are deserving of some financial return. Those whose interests are small yet wish to retain contact with the trust, find their cultural identification tangibly recognized through the accessibility of the putea account. In this way the interests of the beneficiaries who have taken an interest relative to their previous shareholding are kept in balance, although, in many situations nearly all the funds allocated for distribution will end up in a putea account.

By establishing a fund overseen by the elders and trustees from which welfare-oriented payments are made, the pitfalls of the incorporation system and the demands many of them receive from the owners for a dividend
are avoided. In trusts **turangawaewae** emanates from beneficial entitlement rather than receipt of a dividend or individual possession of a shareholding interest.

The status as a beneficiary is one Durie's **putea** model either ascertained upon presentation to the satisfaction of the trustees of proof of ownership or descent from an owner at the time of the trust's constitution or, more usually and efficiently, through enrollment on a list of beneficiaries held and kept by the trustees. The latter approach to entitlement is considered more akin to the pre-European concept of **turangawaewae** deriving from a conscious and deliberate act by those seeking it.

The other major form of a trust order is a **Runanga** or custodian trust. These trusts are established for owners who, unlike those in **putea** trusts, lack the capacities to conduct administrative routines of management yet wish to control the management of the land and ensure its group orientation. Thus **Runanga** and custodian trusts allow the owners of these usually smaller blocks to 'plug into' an already existing system.

Title to the land is vested in a custodian trustee. In the case of a **Runanga** trust the trustee will be a Maori Trust Board whilst in custodian trusts a trustee such as a Maori incorporation, a Trust Company, **putea** trust or Maori Trustee is appointed. This is the only substantial difference between a **Runanga** and custodian trust. The custodian is appointed "to handle accounts, call meetings and the like and to ensure that the trust continues to operate in a proper and efficient manner and with the

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1 Durie, p.3, insists "there is some doubt as to whether a [Maori] Trust Board can be appointed as a custodian trustee". The practical differences between the two types of trust are inconsequential and matters of form only.
best advice and research assistance available". The trustee looks after the routine administration of the block; however, on all policy and administration matters of any significance, the custodian must consult the managing trustees (custodian trust) or advisory trustees (Runanga trust) and is unable to act without their authorization.

The extent to which such trusts as the above types have been spreading is not documented, though the huge growth of the concept is widely accepted in the Maori community. The employment of section 438 in such a way as to cater for the need of each block and group of owners has been made possible by a Maori Land Court willing to read its legislative mandate in a much wider way than previously. The Court, in consultation with the owners, will construct a legal regime reflecting the potential capabilities and wishes of the owners. Thus a Runanga or custodian trust would be appropriate for owners who cannot muster their own administrative resources or who wish their land to become part of a larger network of tribal interests. A wide power on putea trust accommodates a group of owners capable of conducting all of their affairs (mundane and otherwise) and who wish to maintain some independence from, say, nearby incorporations or Trust Boards who can act as custodians for the less able, less independent groups of owners. In any event, the nature of land management as a group rather than individual project is stressed. More particularly, the dignity of the hapu or landholding group is highlighted and reform achieves a local and customized flavour.

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1Ibid., para. 15.
Thus the Maori people have stated that:

"...the traditional tribal group system of land ownership and use is of sufficient value to form the basis of all Maori land legislation."

The use of section 438 in the dynamic style outlined above is indicative of how the Court is attempting to transcend its assimilationist role of earlier times by allying itself more closely with the aspirations of the Maori people. The transformation of many blocks into a section 438 trust or incorporation means the increasing redundancy of those provisions of the Act which are based upon the tenancy in common as the unit of land holding. The present movement towards land tenure models in greater harmony with Maori instinct than the regime of multiple ownership is an acknowledgement that the 'traditional tribal group system of land ownership' can form a viable model of land management.

Though the Maori may be unhappy with many other features of their situation, the outlook for what lands they have left is far from gloomy.

Kawharu observes:

Where incorporations and trusts exist they do so on the pre-Maori Land Court principles that the individual suffers or benefits along with his group -- family, village, clan or tribe; a multiplicity of owners is not synonymous with inertia; and the land is "intact" because the owners have agreed not to transfer their interests out of their group. But that of itself is not quite enough for survival today; loan finance and the application of a development technology demand a statute -- defined title. Indeed, the Maori people need an effective land legislation and a Court to administer it as never before. But

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2 Ibid., p.7.
equally, the authority of the Court needs to be complemented by effective authorities among the people. And since the land is, in its essence, of tribal origin the authorities must themselves be tribal. Put another way, the Maori political system and the culture that is based upon it must be re-integrated with the land provided with the tools to survive...

Quite simply [the Maori people] assert that Maori values can be secured in Pakeha statutes and Maori goals can be achieved by Pakeha techniques.
CHAPTER TWO: THE MANAGEMENT OF INDIAN LAND
The Indian Act is the basis of the regime affecting Indian lands in Canada. It was enacted by the federal government under the jurisdiction given to it by section 91(24) of the British North America Act. There are a number of features of the legislation which should be understood initially before embarking upon an assessment of its detail. These features will be discussed in part A, the detail in parts B and C and, finally, part D will investigate the broad provisions in the Act which act as 'escape hatches', enabling particular bands to avoid subjection to certain parts of the legislative detail.

1. The goals underlying the legislation

Like the New Zealand legislation affecting Maori land, the Indian Acts of Canada are intimately connected with the process whereby Indian land was opened for white settlement. The present Indian Act, like its antecedents, is based upon the treaty and reserve system by which the Crown obtained the cession of large tracts of Indian land in return guaranteeing, amongst other things, to set aside a portion of the land as reserved for the Indian's undisturbed use and occupation. By basing the Act upon the treaty and reserve system, the legislators were quite clearly adhering to the model of dealings which had emerged in Upper Canada and which during the 1870's

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2 C.R.S. 1970, app. 5.
was being employed in the Prairie regions.\(^1\) This method of dealing had not been utilized or incorporated into the practices adopted by the colonial administrators; in the Maritimes and British Columbia. Despite Imperial direction, the aboriginal title had tended to have been ignored in those regions with allocations of land being made to the natives whenever the local administrators felt the need, as when restive, dispossessed natives threatened the order of the region or as a consequence of 'humanitarian' pressure from home or abroad.\(^2\)

However, some salve was needed for the land-acquiring activities of the new rulers and would be supplied by the Indian Act of 1876\(^3\) which came barely nine years after Confederation. As well as repealing and consolidating the piecemeal enactments which had been in force in the pre-Confederation colonies, this legislation made several innovations, most notably the introduction of the location ticket.\(^4\) The treaty and reserve system employed in the former Canadas and Prairie provinces and upon which the Act was

\(^1\)The process is recounted by Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiations on which they were based, and other information relating thereto* (Toronto: Belfords, Clarke and Co., 1980; reprint ed., Toronto: Coles Publishing Co., 1970).


\(^3\)Indian Act 1876, S.C. 39 Vic., C-18.

\(^4\)Discussed below pp. 97-102.
based, had always had an ostensible justification. It was reasoned that it was in the Indian's best interests to live on reserves where although occupying land a shadow of their former holdings, they would be safe from the excessive rigours of the European world and could be trained to adapt to and acquire the traits of Western life at a pace suitable to the capacity of each band.¹ By the 1876 Act all lands held by Indians became reserves whether so intended historically or not.² Accordingly, the rationale underlying the treaty system also came to be applied in the Maritimes and British Columbia.³

The 1876 Indian Act therefore created a uniformity throughout Canada. It made all lands set aside for Indians into 'reserves' and sought to apply a policy of assimilation in respect of the regulation of these lands. However, it was felt that the Indian could not withstand sustained pressure to mix into the fabric of Western life and that each band or group of Indians would need customized exposure to the process of assimilation. Accordingly, a policy of 'protection' would sit alongside the goal of 'assimilation'.


²An interesting example is seen in Davey et al. v. Isaac et al (1975), 51 D.L.R. (3d) 170, 5 O.R. (2d) 610 (Ont. C.A.). The Ontario Court of Appeal held that the grant of lands under patent by Governor Simcoe to the Six Nations did not give the tribe legal title to the land but rather constituted it as a reserve. On appeal the Supreme Court of Canada left the point open ([1977] 2 S.C.R. 897, 901; 77 D.L.R. (3d) 481, 484).

³See, notably, MacInnes (Secretary to the Indian Affairs Branch) in evidence. SJC (1946): 83; Scott, "Indian Affairs 1867-1912", p. 594.
This 'protection'/'assimilation' mix underlies the present legislation.¹

Immediately after the passage of the 1876 Act and throughout the last quarter of the nineteenth century, especially under the National Policy of John A. MacDonald, the Indians were subjected to active policies of assimilation.² In 1881 MacDonald said that "[t]here is no doubt that the proper sentiment to inculcate among Indians is one of self-reliance",³ which could only be achieved through 'civilization' of the native. However, disillusionment with the progress towards the goal soon set in and from the turn of the century the protective aspect came to the fore as officialdom exercised greater, almost complete, control over the reserve.⁴ In the Prairie provinces the great influx of white settlers, many demanding unused reserve land for agricultural purposes, combined with the dismal failure of native-run on-reserve farming enterprises also contributed to the protective aspect's predominance.⁵

After the substantial native contribution to World War II Indian Affairs took a national focus and a Committee comprised of members of both federal


³Quoted in the brief of the Indian Association of Alberta, JC (1960), p. 128.

⁴Moore, Historical Development of the Indian Act, pp. 89-132; Tobias, "Outline History of Canada's Indian Policy", p. 22

⁵Above sources, see also Scott, "Indian Affairs 1867-1912", p. 618.
Houses, was appointed to investigate the Indian Act. The policy of assimilation was accepted and never challenged by the Committee though it was agreed that in the revised Act (which would eventually appear in 1951) the harsher excesses of the protective overlay should be eased. Thus the goal of the assimilation continued to underlie the Indian Act.

That aim is becoming increasingly repugnant to native people. Likewise it is fashionable for the informed academic comment which once so actively pushed the barrow of assimilation also to reject that goal. The final portion of this thesis will discuss assimilation and whether a blanket acceptance or rejection of it is a viable imperative for legislative action. In the meantime, the native insistence on a policy which recognizes their cultural identity and which seeks to reinforce and strengthen rather than erase it will be accepted as forming a valid value position from which we can assess the operation of the Canadian and New Zealand laws.

2. The power of the Minister

We have seen the involvement of the Indian Acts in a process through which European society asserted (and continues to assert) itself over the Indian. The legislation was part of a scheme whereby Indian land was acquired and as an adjunct to the process, a policy of assimilation and protection was introduced to ensure the continuing mastery of the dominant group. As part of the protection of the on-reserve Indian, white officialdom was given broad power over the management of Indians and their lands. Today that feature remains, being seen in the vast amount of discretionary power

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\(^1\) SJC (1948), p. 186.

\(^2\) Below, pp.
the present Act, like its predecessors, vests in the Minister of Indian Affairs. It is reasoned that such discretionary powers give the Minister the needed flexibility to oversee the progress of each reserve towards 'civilization'. Thus flexibility and adaptability to local circumstance is equated with broad, discretionary powers.\textsuperscript{1} Grenfell Price, recognizing the Minister's role as being that of a lubricant in the "process of cultural evolution from primitive status to modern conditions",\textsuperscript{2} agrees with praise of the Indian Act as "a brilliant innovation in native administrative law".\textsuperscript{3}

Unfortunately, such dated enthusiasm for the Indian Act\textsuperscript{4} is difficult to share. As we will see, the Ministerial profile has not been that of an agent encouraging self-management. Moreover, in contrast to the New Zealand legislation's detail, the Indian Act is cast in bare and broad terms and though the Minister is able to grant the bands a degree of self-management, the Act fails to prescribe the details of the grant and to give the band any protection from its arbitrary recall.

In reviewing the provisions of the Indian Act we should therefore bear these two points in mind.

\textsuperscript{1}Scott, "Indian Affairs 1867-1912", p. 594. The belief permeates the submissions of Government officials before the Special Joint Committee in 1946, notably those of leading officials of the Indian Affairs Branch (as it then was) see SJC (1946), pp. 120-262.

\textsuperscript{2}Price, White Settlers, p. 83.

\textsuperscript{3}Idem.

\textsuperscript{4}Another outstanding example is the report commissioned by the U.S. Government of the Canadian system: F.H. Abbott (Secretary of the Board of Indian Commissioners), The Administration of Indian Affairs in Canada (Washington, D.C., 1915). This report was used by the Branch in 1946 as justifying the wide "elastic" provisions of the Indian Act SJC (1946), p. 83.
First, because the legislation is so broad and unspecific a number of 'practices' and 'policies' have emerged in the Department relating to the provisions of the Indian Act. These practices and policies are as important to understanding the legislation as the formally enacted laws. We can react with appropriate unease to the fact that a significant portion of the Act's operation relies on practices which cannot be identified as 'law'. We see, then, a three-tier base upon which the Indian Act operates: the legislation itself; the regulations, Orders in Council and orders passed pursuant to the Act; and, finally, the policies and practices of the Department in respect of the legislation. The Department's policy affecting lands surrendered for lease upon the expiry of the lease is an excellent example of Departmental practice 'filling the gaps' in the legislation. The Indian Act makes no provision for reserve land surrendered for a lease to regain reserve status upon completion of the term. Until a few years ago the Department had the policy of 'unsurrendering' the land or returning it to reserve status upon the request of the band council. Nowadays the Department requires a band vote.  

Secondly, the legislation gives the Minister broad, discretionary powers which are not subject to any right of appeal. A typical section opens: "[w]ith the consent of a band, the Minister may . . .". The absence of a right of appeal from a Ministerial decision caused some comment before the two Parliamentary Joint Committees of the 1940's and '50s appointed 

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1 The mechanics of the surrender process are discussed below, pp. 103-6. 

to investigate Indian Affairs. The Departmental reaction was to justify the absence of such a right on the rather weak grounds that Indian dissatisfaction with Departmental decisions was usually aimed at the agent on each reserve and that the agent's decision could always be appealed informally to the Minister. All Committees seemed reassured by this and in their final recommendations made no mention of a right of appeal. As if to acknowledge that situation as well as in an attempt to give bands greater powers of control, in 1954 the Hawthorn Report on the Indians of British Columbia recommended a rewording of the relevant sections to allow the band or council to exercise the powers currently conferred on the Minister, "provided the Minister does not indicate dissent ...". Such a change would have altered the nature of the Minister's discretion making the band rather than the Minister the formal manager of reserve land. By giving the band the legal right of management it could be argued strongly that that right could only be affected by the Minister acting on reasonable grounds.


2 As above, notably CC, pp. 29, 87.


4 'Abuse of discretion' is a well-established area of administrative law. Courts will insist that a statutorily-conferred discretion is exercised with reason and according to the legislative scheme. The Courts have been anxious to see that legal rights are not arbitrarily interfered with. Under the Indian Act the Indians have few legal rights in the management of their land, the legislative scheme being one of Ministerial decision-making and native consultation rather than vice versa. At present one can argue the extent, if any, to which the rules of administrative law apply to Ministerial discretion under the Indian Act. The change suggested by Hawthorn would make such rules more clearly implanted. As to 'abuse of discretion' see, generally, H.W.R. Wade, Administrative Law (Oxford: Clarendon Press, 1977): 332-392.
by way of contrast, the 'guardian' of Maori land is the Maori Land Court rather than the appropriate Minister, with the Maori Affairs Act and resultant judicial interpretation having built an elaborate structure upon which a disgruntled Maori land owner's right of appeal is based. ¹

3. An East/West Division and a mattress of heterogeneity

As we discuss the operation of the detail of the legislation it will constantly been seen that the origin and operation of various provisions can be assessed on the basis of a distinction between tribes of the Prairies and those of other regions. It was the deliberate policy of the Department, at least until the end of the second World War, to draw a distinction in the operation of the Act between the 'advanced' tribes of the East and British Columbia and the 'less advanced' bands of the Prairies with whom the treaties had barely been concluded. ² For instance, it was Departmental policy to peddle actively the elective mode of leadership in the East whilst restricting the operation of it in the West. ³

During the 1880's and 1890's assimilation was the policy pursued vigorously in the East, whilst in the Prairies that goal was blended with the aim of 'self-support'. This was a reaction to the Western situation. In


1879 and the succeeding years when the buffalo failed to appear, starvation was taking its toll of the Indian population. The buffalo's disappearance brought hundreds of Indians into white settlements seeking sustenance. This constituted not only a serious threat to order in the region but also a drain on the federal government's coffers: ¹

How else other than as gardeners could the Indians eat? And if the Indian had nothing to eat, how would it be possible to keep them off the warpath and on the reserve? The first step was to give out food rations until the gardens were well grown. This was costly but an Indian with a full belly was not as dangerous as a hungry Indian . . . Officialdom expected that as the gardens increased and cattle were issued, it could gradually withdraw this costly beef, flour and tobacco. ²

Thus was born the administrative preoccupation with bringing the Prairie Indians' land into agricultural production. That concern was to be a lasting one even after the fixation with 'self-support' declined and was replaced in the 1900's with a policy of departmental protection or, less euphemistically, control. ³ As the tide of European settlers into the West grew larger and consequently white contact with Indian communities increased along with the demand for land for settlement, we see the enactment of laws and policies designed to render Indians less obtrusively offensive and to open their unused reserve lands for white farmers. These laws and policies have had a lasting effect.

¹Scott, "Indian Affairs 1867-1912", p. 602.
One of the major themes underlying the operation of the Indian Act is, therefore, an historical cleavage between the Prairie reserves and the others throughout Canada, manifest in both the Indian Act and Departmental practice. Although such a crude division is not made today, it has had a continuing influence on the operation of the Act.

Section 32 is the last overt manifestation of the East/West division in the Indian Act, providing in subsection one that:

A transaction of any kind whereby a band or a member thereof purports to sell, barter, exchange, give or otherwise dispose of cattle or other animals, grain or hay, whether wild or cultivated, or root crops or plants or their products from a reserve in Manitoba, Saskatchewan or Alberta, to a person other than a member of that band, is void unless the superintendent approves the transaction in writing.

The section has been explained as existing because "at the time of the Act it was believed Indians were not sophisticated enough to understand the true value of their resources". Though Parliamentarians considering the Indian Act in 1946-48 had expressed bemusement at the section's existence, it is apparent that the Department considered the provision necessary not so much to protect gullible Indian producers from being duped, as to ensure that the money earned by them was applied to meet debts and other obligations they had incurred. In other words, the Department was concerned with the Indian producers 'cheating' other people, rather than with the Indians being cheated.  

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3 Ibid., pp. 83-84.
about the permit system and its adverse effect not only on Indian agriculture, but on wheat marketing within the Prairie provinces. In order to avoid the scrutiny of the Department (usually, the local agent) many Indians were selling their grain to white farmers at gross undervalue, creating a 'black-market' effect. This was the kind of situation the section was designed to prevent. Nowadays the section is redundant as a policy directive in the 1970's instructed Department officials not to enforce the section.

The East/West division understood today was a rudimentary and perhaps (we can observe in retrospect) clumsy way in which the Department distinguished between those bands able and those less able to handle European contact and practices. The dichotomy, then, was a device to acknowledge the heterogeneity of the Indian population under the Department's reins. By contrast, a notable feature of New Zealand's Maori population is its homogeneity and cohesive nature. The heterogeneous character of Indian society continues today and though no longer recognized in a crude 'Prairies'/ 'others' split, subsists as a vital ingredient in Indian policy formation. However, as we will see, the historically-drawn East/West distinction has had a lasting effect on the operation of the Indian Act. The diverse nature of Indian society is accommodated today on the less centralized basis of decision-making at the local level. In recognition of this diversity the Hawthorn Report identified three types of band: a) the relative isolated and underdeveloped; b) the transitional; and c) the developed or advanced.

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2 Interview, Government official, 22 July 1981.
In assessing the legislation of Canada in a comparative context it would be tempting to try and make a generalized assumption that all bands fall into Hawthorn's last or, at least, the upper quartiles of the second category. Whilst this assumption is clearly tenable in the New Zealand context it is apparent that some bands either do not want or would be unable to handle complete control of their own affairs. By the same token, it is just as, in fact probably more obvious that many bands are so able. The Hawthorn Report observed that:

It is clear that in view of . . . the wide range of differences among Indian bands with regard to the degree of economic development, ownership or access to resources and to markets, location in relation to White communities of various kinds, and degrees and patterns of participation in Canadian society, all facets of policy will need to be highly flexible and call for different priorities in different situations.

It would be a mistake, however, and one which this paper will studiously reject, to equate flexibility in native policy with legal imprecision. We have seen in New Zealand and will discuss more fully at a later stage, how flexibility can be attained at no cost to legal detail. The 'flexibility' within the Indian Act consists of broad, discretionary powers in the hands of the Minister without a system of checks and balances.

The themes of this section can be summarized in the following themes which (like the others already discussed) constantly appear in an assessment of the Indian Act.

a) the East/West distinction and its effects on the operation of the Act;

b) the heterogeneous nature of Indian society and the need for legislation to accommodate the diversity; and

\[1\] Ibid., p. 357.
c) the 'flexibility' that may be said to reside in the Indian Act is usually without a sound legal backing, its existence operating on 'policy' rather than 'law'.

B. THE ORGANIZATION OF THE INDIAN PEOPLE

1. The 'Indian'

In Canada, as in New Zealand, the law takes a central role in defining a native individual's position amongst his people. In New Zealand we saw that a Maori individual's status is assessed according to ownership of an interest, legal or beneficial, in Maori land (turangawaewae). In Canada it is not ownership which forms the basis of an individual's cultural identification but classification as an "Indian" within the definition of the Indian Act. In this section the law affecting "Indian" status will be briefly described; however, the issues underlying that law will not be addressed. It can be noted that the heat which the issue generates attests to the importance which Indian people give to being a 'status Indian' within the terms of the Indian Act.

Indian status hinges upon eligibility to be registered or remain registered upon the lists for each band and General List kept by the Department.\(^1\) Sections 11 and 12 of the Act define those who can and cannot be registered.

There are six categories of persons entitled to be registered under section 11. First, there are those persons who are members of a charter

\(^1\) Indian Act 1951, section 6.
group established under previous statutory enactments. Secondly, a person can be registered if s/he is a member of a band meeting any one of these three requirements:

i) a band for whose use and benefit lands have been set apart;

ii) a band which since 26 May 1874 has agreed by treaty to have lands set aside for it; or

iii) a band which has been declared by the Governor in Council to be a band for the purposes of the Indian Act.

A third category of persons entitled to be registered is a male who is a direct descendant in the male line of a male described in the first two categories. Fourthly, the illegitimate child of a female in the first, second and fourth categories can be registered if the child has been born after 13 August, 1956. Finally the wife or widow of a person in any of the above categories can be registered. By the Act status is defined with reference to parentage, there being no requirement of Indian blood or affiliation as in the previous Act of 1927.

Section 12 specifies those who cannot be registered as "Indians". The two major disentitled groups are the half-breeds (or Metis) and those who are enfranchised.

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1 Section 11(1)(a) provides that subject to section 12, a person is entitled to be registered if that person "on the 26th day of May 1874 was, for the purposes of An Act providing for the organization of the Department of the Secretary of State of Canada, and for the management of Indian and Ordinance Lands, being chapter 42 of the Statutes of Canada, 1868 ... considered to be entitled to hold, use or enjoy the lands and other immovable property belonging to or appropriated to the use of the various tribes, bands or bodies of Indians in Canada".

2 The patrilineal line of descent runs counter to the custom of some major Indian tribes and bands in Canada. See, for example, D. Jenness, The Indians of Canada, 7th ed. (Toronto: University of Toronto Press, 1977), pp. 123, 134, 142; Scott, "Indian Affairs 1763-1841" Vol. 6, p. 702.

3 Indian Act, R.S.C. 1927, C. 98, section 2(d).
A Metis is a person or descendant of a person who has "received or been allotted half-breed lands or money-scrip". Bartlett makes this observation:

It appears that a Commissioner made the determination of who was Metis and who was Indian in the late 19th century based on a complex of factors including reputation, blood and manner of living. At the time that treaties with the Indians were entered into in Western Canada individual allotments of land or money scrip were granted to the Metis. These grants were manipulated for great profit by land and trading companies such that the Metis were deprived of any landbase. The Federal Government has always maintained that the grant of land and money scrip extinguished any claims to special status the Metis might have preferred.

Enfranchisement is a process of either a voluntary or compulsory nature.

Voluntary enfranchisement was conceived of as a device whereby the Minister clicked open the turnstile to 'civilization' for each Indian as and when the native was able to cope with the European world. Enfranchisement gave access to rights formerly denied Indians, most notably alcohol and the right to vote. Added to that was the expectation that the person voluntarily enfranchising would take with him the land which he had been allotted by the band council and used for his own gain. This expectation was not realized in the face of Indian disinterest in both voluntary enfranchisement and, to a lesser extent, the formal allotment procedure. An attempt in 1919 to induce more enfranchisements by the introduction of a monetary enticement did not significantly increase the rate. The provisions relating

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1 Bartlett, Indian Act of Canada, p. 10.

to enfranchisement did not operate in the 'less advanced' Prairie regions\(^1\) until 1920.\(^2\) By then, however, the resistance of Prairie Indians to the process was assured and underlined by their continuing resistance to the allotment system by which each family was to be allocated reserve land to use and cultivate under a 'location ticket' system.

A status Indian woman's marriage to a non-status person results in loss of her classification as an Indian.\(^3\) If the woman marries an Indian of another band, however, her name goes onto her husband's band list. The loss of status resulting from marriage to a non-Indian, a feature not present when an Indian male marries a non-Indian, has aroused bitter controversy. In Attorney-General (Canada) v. Laval\(^4\) it was held that the Canadian Bill of Rights which, inter alia, makes unlawful discrimination based on sex, was not effective to render inoperative section 12(1)(b) of the Indian Act which was passed by Parliament in discharge of its constitutional function to specify how and by whom Crown lands reserved for Indians are to be used. Automatic enfranchisement is further seen in the operation of the 'double mother' rule of section 12(1)(a)(iv). By the rule, persons whose mother and father's mother are non-Indians lose their entitlement to be registered once they reach the age of twenty-one.

\(^{1}\) Indian Act, S.C. 1880, C. 28, section 107.

\(^{2}\) Indian Act, S.C. 1919-20, section 3; amending Indian Act 1906, section 107.

\(^{3}\) Indian Act 1951, section 12(1)(b).

Accordingly, entitlement to live on a reserve centres upon a person satisfying the requirements of section 11 and not falling within section 12. Status as an "Indian" is the all-important criterion for access to the benefits of reserve life. On the whole, the legislation establishes with a measure of specificity absent in most other provisions the rules relating to registration as an Indian. It has been held that the law affecting registration is precise and severe, and must be strictly complied with. Broad discretionary powers, the hallmark of most other areas covered by the Act, are absent in the rules affecting registration. The rationale would appear to be that identification of a class and the regulation of its affairs are considered distinct processes, demanding different approaches to legislative drafting. The former requires precision and legal certainty, the latter flexibility.

2. The 'band'

The Department of Indian Affairs and Northern Development is required to maintain a register of all persons entitled to be registered as an Indian. The name of every person entitled to be a member of a band is entered on the appropriate Band List whilst the name of every person not a band member but entitled to be registered is entered onto a General List. A band is defined as a body of Indians (a) for whose use and benefit in common lands have been set aside, legal title being in the Crown; or (b) for whose use and benefit in common moneys are held by the Crown; or (c) declared by the Governor in Council to be a band for the purposes of the Indian Act.


2 Indian Act 1951, section 6.

3 Ibid., section 2(1) and (2).
3. The 'band council'  

The legislation provides for the establishment of a band council. The leadership or government of Indian bands is normally undertaken by those traditionally selected. However, section 74(1) provides that "[w]henever he deems it advisable for the good government of a band" the Minister can introduce an elective mode of selecting band council members in favour of the traditional forms of leadership selection. The elective mode has been frequently forced onto the Indian, and thus has been a rich source of conflict. As with enfranchisement, it was once envisaged that the elective mode would spread westwards as the Prairie tribes became more 'civilized'. The elective system was designed to pave the way for the Indian adoption of the European's more advanced form of government in the shape of municipal institutions. Like enfranchisement and, to a lesser extent, the allotment system, the elective mode was not actively embraced by the Indian and today has only been adopted in a little under 65% of Canada's bands, mainly as a result of active government encouragement. The government often tried to introduce the elective mode to reluctant bands, such imposition being upheld in Logan v. Styres where King, J. allowed the enforcement of the elective mode.
of government even though it "might be unjust or unfair under the circum-
stances for the Parliament of Canada to interfere with their system of
internal Government by hereditary Chiefs".\textsuperscript{1} The Hawthorn Report's as-
sumption that as bands obtained greater management responsibility the elective
mode would come to be preferred\textsuperscript{2} has not been substantiated. In fact in some
areas, notably Ontario and Manitoba, there has been a reversion to the tra-
ditional form of selection.\textsuperscript{3} Such a step is only possible, however, with
the assistance of a benevolent Minister who introduces (and discards) the
elective mode.\textsuperscript{4}

Thus there is a distinction in the legislation between a 'band' and
'band council'. This distinction must be borne in mind as we assess the
law affecting the management of Indian resources for both bodies have
differing capacities which have been summarized this way:

\textquote{\ldots a Band Council basically is responsible for the
internal relationships and conduct of the reserve and
Band members. Bands on the other hand are responsible
for the care, control and management of the Band's
assets. Unlike a Municipal Council, Band Councils are
not given authority to conduct the business of the Band.}\textsuperscript{5}

For our purposes the capacities of the Band are most relevant though

\begin{itemize}
\item \textsuperscript{1} Ibid., 424.
\item \textsuperscript{2} Hawthorn (ed.), \textit{Survey of the Contemporary Indians}, pp. 164, 173-79.
\item \textsuperscript{3} D.I.A.N.D., \textit{Indian Conditions}, p. 85.
\item \textsuperscript{4} Indian Act 1951, section 74(1).
\item \textsuperscript{5} H. LaForme, \textit{The Legal Status and Extent of Powers of Indian Bands
in Canada} (Toronto: Department of Indian Affairs and Northern Development,
\end{itemize}
the most significant power of the council, apart from that relating to allocation of reserve land, can be noted at this stage. The Indian Act allows the band council to make by-laws, but this power is "confined to matters with which a rural municipality might normally be concerned".

These bylaws must be consistent with the Indian Act, are subject to regulations made by the Governor in Council and, like most other matters in the Act, are subject to a Ministerial veto. Statistics reveal that this by-law power is used with respect to 'housekeeping' matters rather than in furtherance of any concept of Indian self-government.

4. The 'agent'

Until the practice was discontinued and on-reserve offices closed down in 1966-1969, the Department placed officers on or near each reserve who acted as 'agents' of the Department, administering its duties at the local level. This form of 'direct rule' was the cause of extreme Indian discontent from the time it first commenced and until its long overdue disappearance.

1 Indian Act 1951, section 81.
3 Indian Act 1951, section 82.
4 D.I.A.N.D., Indian Conditions, p. 85.
5 Ibid., p. 82.
6 The agent system provoked some of the most forceful Indian objections before the Parliamentary Committees on Indian matters sitting after World War II. In the 1946-48 hearings these objections were strong and insistent (see, for example, SJC (1947), pp. 1273-6, 1297, 1304, 1345, 1405, 1427, 1432, 1438, 1511, 1526, 1585). By 1959-61 a further decade of the system had strengthened Indian hostility considerably (JC (1959), pp. 96, 140, 152; (1960), pp. 83, 137, 296, 309, 347, 380, 440, 458, 475, 725).
C. THE MANAGEMENT OF INDIAN LAND

In the previous chapter discussing the Maori land laws of New Zealand an approach was taken of dividing considerations relating to the management of native lands into two aspects. It was postulated that utilization of native land could either be undertaken by the native owners or else passed in whole or in part on to non-natives. The legal mechanisms by which either option became favoured or the two set into some sort of balance were investigated. Because the laws affecting the passing of rights onto non-Maoris were so central to an understanding of the laws affecting native owner utilization, the rules relating to the sale and lease of Maori land were first discussed. This approach will also be taken in assessing the Indian Act once the basis of the regime regulating reserve land is established.

1. The regime of the reserve

(a) the nature of Indian 'ownership'

Reserve land is a tract of land, the legal title to which is vested in the Crown, that has been set apart by the Crown for the use and benefit of a band.\(^1\) Section 36 of the Indian Act provides for special reserves, legal title to which is not vested in the Crown. This section is designed to cover those reserves, notably the clergy reserves in eastern Canada, which were set aside as reserves by missionaries during the eighteenth and nineteenth centuries. Strictly speaking it is thus inappropriate to talk of those Indians entitled to live on the reserves as being 'owners' because they do not have legal title - a fact which has produced some confusion over the

\(^{1}\) Indian Act 1951, section 2(1).
nature of Indian title in reserves. One school of thought held that the Indians enjoyed a personal property right similar to the roman law concept of the usufruct. The other school of thought employed the equitable concept of trustee and beneficiary, placing the Crown in the position of trustee and the band as beneficiary. The Indian Act neither used the terms "trust/trustee/beneficiary" nor referred to a usufructuary right.

One case took an outlandish view "... out of step with both the practice of the Department of Indian Affairs and other judicial comment on the question". This case, Point v. Dibblee Construction Co., ruled that as the reserve was Crown land the prerogative right of the Crown to deal with its own property was unlimited. However, none of the above approaches are of much practical benefit. In Calder v. Attorney-General (British Columbia), Judson, J., although speaking in respect of aboriginal title, made the observation that the concept of the usufruct was not helpful.

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1 Attorney-General (Quebec) v. Attorney-General (Canada) [1921] 1 A.C. 401 (P.C.). In this decision, known as the 'Star Chrome case', the Privy Council applied the position it had adopted in respect of aboriginal lands (Saint Catherines Milling and Lumber Co. v. The Queen (1889), 14 A.C. 46, 54 (P.C.)) to reserve lands. A usufruct is the right to use and enjoy the things of another, their substance remaining unimpaircd (Justinian Inst. II. 4 pr.). At roman law the usufruct was inalienable so if the concept is to be applied to the Indian Act it must be understood as being expanded to include transferability and devisability. See also Sanders, Legal Aspects of Economic Development, p. 5.


3 Sanders, Legal Aspects of Economic Development, p. 5.


Berger, J. in Mathias v. Findlay agreed, pointing out that the nature of Indian title to reserves rested simply upon the construction of the Indian Act.¹ This approach reflects the views of Sanders that "[T]he nature of band rights and the nature of federal government rights are found in the detailed provisions of the Indian Act, not in traditional property law concepts or alternative theoretical models of property relationships".² Accordingly, though there is no doubt in the Indian mind that they 'own' reserves, that assertion, however morally sustainable, must be understood to be legally imprecise. In isolating the exact nature of the interest which the band holds in reserve land, we can go no further than stating that it holds a possessory right subject to the terms of the Indian Act.³

(b) the allotment and registration system

A concept of allotment or use of the land by individuals rather than groups forms the basis of the reserve land tenure envisaged by the Act. By this process it was expected that each individual (and his family) would be granted a piece of land upon which they would settle and eke out a living. The allocations of land in British Columbia and the Maritimes as well as the reserves of the Prairies and former Canadas were frequently given a size based upon an acreage per family. The idea of a grant of Indian land to each family had surfaced both in Nova Scotia in 1783 when 'tickets of


² Sanders, Legal Aspects of Economic Development, pp. 5-6.

³That has been the approach of recent cases, see Mathias v. Findlay, supra; see also Piche et al. v. Cold Lake Transmission et al., unreported, December 28, 1979 (F.C.T.D.) per Primrose, J.
location' were issued to Indian individuals for lands on which they promised to settle and in the practice of the missionaries on their reserves in the Canadas. The foundation laid by these earlier practices was developed by the 1876 legislation which encouraged the formation on the reserves throughout Canada of something akin to individual property rights.

"The introduction of the location ticket, as it was called, was a means by which an Indian could demonstrate that he had adopted the European concept of private property." As part of the attempt to transform on-reserve tenure into a system similar to that of the settler's, the Indian Act establishes a Torrens system of registration of Indian lands. The Act provides for a Reserve Land Register and a Surrendered Lands Register; however, unlike the Torrens system there is no legislative guarantee of title.

The Reserve Lands Register keeps a record of the transactions respecting the lands in a reserve. The accuracy of this Register is frequently frustrated by the fact that some reserves are unsurveyed and hence their exact metes and bounds unascertained. This problem exists because when reserves were initially established there was normally no pressing need to define the boundaries and, besides, surveys were costly. Moreover, the Indians, particularly in the Prairies, frequently felt that survey was the

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3 Indian Act 1876, sections 6 and 7.
5 Indian Act 1951, section 21.
6 Ibid., section 55(1).
the first step taken in depriving them of their lands. The problem of unsurveyed boundaries has largely been confined to Prairie provinces. For the past four years a technique of aerial photography pioneered in Alberta by the Department of Energy and Resources has been employed, replacing the traditional method of ground survey. Officials expect to complete the aerial survey of reserves by the end of 1981 and claim the technique has an accuracy of within half a metre.

The allotment provisions of the Indian Act are found in sections 20 to 29. Though an Indian might be entitled to reside on a reserve he cannot be "lawfully in possession of land in a reserve unless with the approval of the Minister, possession of the land has been alloted to him by the council of the band". Thus a band council must allot land pursuant to the Act to an individual before his exclusive use and occupation is endowed with legal standing - uncertified occupation confers no legal rights. The band council is under no obligation to make formal allotments. An argument before the Supreme Court of British Columbia in Mathias v. Findlay that where land is unallotted the relationship of band members inter se is analogous to that of a tenancy in common was roundly rejected. Wallace, J. made the same point as that seen earlier. The nature of Indian 'ownership' rests upon the terms and overall policy of the Indian Act, not in "[r]esort

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1 SJC (1946), p. 548.
2 Interview with Departmental official, 22 July 1981.
3 Indian Act 1951, section 20(1).
to authorities dealing with quite different relationships, in quite different circumstances".¹

The Minister must approve the council's allotment of land before a 'Certificate of Possession', the latter-day manifestation of the location ticket,² can be issued.³ If the Minister in his discretion withholds his approval a 'Certificate of Occupation' must be issued.⁴ This Certificate enables the Indian to occupy the land and to attempt to meet the conditions as to use and settlement prescribed by the Minister as necessary before he would approve the allotment.⁵ The Certificate of Occupation can be extended by the Minister for a further two years. Once that period has expired the Minister can either approve the allotment made by the band council four years earlier if "in his opinion" the conditions as to use and settlement are fulfilled or refuse approval and declare the land to be available for re-allotment by the band council.⁶ The Minister's power to disapprove an allotment made by the council is therefore qualified by the automatic grant of a Certificate of Occupation when such disapproval occurs. This feature, implemented in 1951, was a deliberate attempt to give the band council greater control and to curb the Minister's power.⁷ However, what in reality has been achieved is that the effect of a veto is simply postponed for two years while a prospective allottee 'proves himself' to his Ministerial overlord.

² Indian Act 1951, section 20(3).
³ Ibid., section 20(1).
⁴ Ibid., section 20(5).
⁵ Ibid., section 20(4).
⁶ Ibid., section 20(6)(b).
⁷ CC, p. 72.
A Certificate of Possession or Occupation can be expropriated by the Minister under section 18(2). There is no prior requirement of band council consent where the lands taken are to be used for the purpose of Indian schools, the administration of Indian affairs, burial grounds or health purposes. If, however, expropriation is for "any other purpose for the general welfare of the band" the same section requires band council consent. Compensation is payable in all instances. The policy of the Department has been to exercise these powers with the consent of the band council, even in situations where consent is not legally required. If the band wishes to expropriate an individual's certified interest, a compelling band need must be shown beyond the desire simply to get the land back under community control.

Allotment was seen as part of a process whereby an individual obtained a parcel of reserve land, exploited it himself and eventually, once he had 'progressed' enough, it was expected he would enfranchise with his band's blessings, take the land with him and enter the European world a propertied individual. This equation of the certificated holder's interest in reserve land with private property remains in the Act, being seen in both the provisions relating to its expropriation for band purposes and in the rules regulating its transfer to others. With Ministerial approval the allottee is able to transfer his interest to other band members or to

1 Indian Act 1951, section 18(2).
2 Interview with Departmental official, 22 July, 1981.
5 Indian Act 1951, section 24.
devise it amongst his kin or fellow band members. In addition, the Minister is able to lease the individual's interest (possibly to a non-Indian) on his behalf.

The formal allotment process contained in the Indian Act has not found favour throughout Canada, notably in the Prairie regions and, to a lesser extent, in British Columbia. There are a number of reasons for that situation. During the 1880's and 1890's we have seen that a policy of 'assimilation through self-support' was followed in the Prairies. As a result, the allotment system, along with other assimilationist devices as the elective mode and enfranchisement, was not as actively peddled to the 'unadvanced' Western Indian so much as the need to get the land agriculturally productive, and so the traditional concepts of land tenure were not rigorously attacked. Hence, when the allotment system was encountered by the Prairie tribes it was icily received as a threat to tribal authority, providing a means whereby individual rights achieved a primacy over communal rights. This in fact was the case, for once an individual obtained a certificate it was (and still is) very difficult for the community to assert any control over the land. Prairie resistance to formal allotment was also based upon the non-provision for such a process in the treaties. However, Sanders points out that in some reserves the allotment of land through a

1 Ibid., sections 45(1) and section 48. As to the requirement of Ministerial approval see sections 45(3) and 49.
2 Ibid., section 58(3); discussed below, pp.
5 Ibid., p. 462.
'customary' or 'traditional' method rather than through certification
"is considered by the band council as being as sacrosanct as a fee simple
system".¹

On reserves where uncertified occupation was the norm, the Department
of Indian Affairs would once issue a 'licence at occupation';² but this
practice has been discontinued and the Department, in keeping with its
current preparedness to pass greater powers onto Indian communities, has
eased its once intense concern with protecting the interests of uncertified
occupants who had been on a site for a long period.³ This heralds an aware-
ness that the band and council are as aware of these persons' rights as the
Department.

In summary, a reserve is a tract of land set aside for the use and
benefit of a band with legal title being vested in the Crown. The Indian
Act contemplates tenure of the land being on an individual allotment basis,
but in many instances this expectation has not been realized. This creates

¹Sanders, Legal Aspects of Economic Development, p. 7.

²Idem. Sanders (p. 8) observes that some proof of ". . . a right of
occupancy has been required by the Farm Credit Corporation and the Depart-
ment, currently, will issue a Notice of Rights of Use and Occupation for
that purpose to describe a "custom" allotment. Central Mortgage and Housing
Corporation have also wanted some proof of individual rights of occupation.
In British Columbia the term "communal entitlement" has been used for both
C.M.H.C. purposes and for provincial home owner grants. The declaration
that an Indian has a "communal entitlement" to particular reserve lands
is made by the band council, not the Department of Indian Affairs."

It must be remembered that a company, even if wholly owned by band
members, is not an Indian and not a band member. There is no company which
would have the right to an allotment of land on a reserve.

³Following Departmental advice the final report of the Joint Committee
of 1959-61 recommended that uncertificated occupants should get location
a legal vacuum in those frequent cases where allotment has not been made or where substantial areas of reserve land remain unallocated, for the Indian Act is ill-equipped to deal with development of the land by a collective body. We will see this problem in the proceeding discussion, particularly in Part C-4.

2. The granting of rights in Indian land to non-Indians

The various mechanisms by which grants of a right to use reserve land are made to a non-Indian will be analyzed in detail below. Once that discussion is complete some observations will be made on the historical origins and general features of the various provisions.

a) Surrender

Rights to use and occupy reserve land are normally passed on to non-Indians by a process known as surrender. Section 27 of the Indian Act provides that except "... where this Act otherwise provides, lands in a reserve shall not be sold, alienated, leased or otherwise disposed of until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart". A surrender may be absolute or qualified, conditional or unconditional.\(^1\) By section 39 the surrender of reserve land must be made to the Crown, assented to by a majority of the electors of the band (in general or special meeting or by referendum), and accepted by the Governor in Council.

Under section 39(1) a 'majority of the electors' must approve the surrender. A second meeting of electors can be held if a "majority of the

\(^1\)Indian Act 1951, section 38(2).
electors . . . did not vote"\(^1\) at the first and then a simple majority is sufficient.\(^2\) If, however, a 'majority of electors' did vote at the first meeting and a majority of those present approved the surrender, a second meeting cannot be held. The 'first meeting' process must be repeated until a 'majority of all eligible voters' approves the surrender. In other words, where a majority of electors can be mustered for a meeting or vote, the surrender must be approved not by the majority of those present, but by the majority of the electors.\(^3\) If a second meeting is called as a result of the absence of a majority of the electors it is possible for a simple majority to pass the surrender. This second meeting is called by the Minister and though it is conceivably possible for a minority to approve a surrender the practice of the Minister is to ensure that as large a number as possible is in attendance.\(^4\)

At such meetings a secret ballot may be held at the band council's request.\(^5\) All meetings must be held in the presence of a duly-designated

\(^1\)Ibid., section 39(2).

\(^2\)Ibid., section 39(3).

\(^3\)Cf., Cardinal v. R. (1979), 97 D.L.R. (3d) 402, [1980] 1 F.C. 149, [1979] 1 C.N.L.R. 32 (F.C.T.D.) affirmed (1980), 109 D.L.R. (3d) 366 (F.C.A.). Motion for leave to appeal to the Supreme Court of Canada was granted April 22, 1980. This case concerned the Indian Act, R.S.C. 1906, C. 81, section 49 which regulated meetings for surrenders and held that a simple majority vote was sufficient. The legislation contained no provision similar to section 39(2) of the present Act and, accordingly the reasoning used in the case (which drew a strong dissent by Heald, J. in the Federal Court of Appeal as well as editorial criticism [1979] 1 C.N.L.R. 32, 42) is submitted as inapplicable to the present Act.

\(^4\)CC (1951), p. 95.

\(^5\)Indian Act 1951, section 39(4).
Departmental official. Once proper documentation of the surrender has been made after the meeting,\(^1\) it is submitted to the Governor in Council for approval. The Crown has no power of modification - it can only accept or refuse the surrender.

Before the surrender can be carried through it must be ascertained whether there are any band members with rights of possession to the lands to be surrendered or if any non-Indians have obtained rights (as by the processes discussed below) over those lands.\(^2\) To remove an Indian with a Certificate of Possession over lands proposed for surrender, the provisions of the Act relating to removal and compensation must be followed. Similarly, a non-band member's rights must be bought out or otherwise extinguished.\(^3\) In the former case, it is usual for the allottee to share in the revenue from the surrender although the Act specifies neither a formula nor how one is to be ascertained. Sanders points out that the division of revenues does not appear in the lease document prepared by the Crown but in the surrender document.\(^4\) An example of such an agreement is seen in Corporation of Surrey v. Peace Arch.\(^5\)

The policy of the Department has long been not to accept surrenders for sale though, as we will see, this policy has been an elastic one. Nowadays sales are extremely rare.

\(^1\)Ibid., section 40.

\(^2\)Sanders, Legal Aspects of Economic Development, p. 9.

\(^3\)Idem.

\(^4\)Ibid., p. 58.

Technically speaking, a surrender can be used for any alienation of reserve land, be it of a minor nature, such as the granting of rights to a person owning a cabin on the reserve, or of a major character, such as the surrender of mineral rights. As a matter of practice, surrender is only used in those situations where the rights sought do not fall into the Department's informal categorization of the other alienation provisions of the Act or where the alienation, if it proceeded, is of a major character likely to have a significant effect on reserve life.

It should be noted that there are a number of problems for the band using the device of surrender. For a start, conditional surrenders are "slow, cumbersome and because the Department must provide Program staff, expensive". Secondly, surrendered lands are not part of 'reserve land', and therefore are excluded from the band council's powers (however diluted) of local government. Finally, in some reserves, mainly in Quebec and Prince Edward Island, legal title to the land is not in the federal Crown and any conditional surrender might affect the federal government's practices in respect of that land, notably its practice of returning conditionally surrendered land to reserve status once the lease or rights have expired.

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1 The surrender of mineral rights is not dealt with in this study, as it is subject to a special regime; see: Indian Oil and Gas Act, S.C. 1974-75-76, C. 15.
2 Below, pp. 121-22.
3 Manitowabi, Governing of Indian Reserves, p. 5.
5 Sanders, Legal Aspects of Economic Development, p. 4.
b) Agricultural lease under section 58(1) and (2)

Section 58(1)(b) and (c) allows the Minister, after obtaining band council consent, to lease reserve land, be it band or allotted land, to any body for agricultural or grazing purposes as well as allowing certificated land to be leased "for any purpose".

The basis of this section first appeared in 1918. Ten years previous to that the Deputy Superintendent had announced a new policy to be undertaken in respect of the Prairie region:

The large influx of settlement of recent years into the younger provinces has dictated a certain modification of the department's policy with relation to the sale of Indians' land.

So long as no particular harm nor inconvenience accrued from the Indians' holding vacant lands out of proportion to their requirements, and no profitable disposition thereof was possible, the department firmly opposed any attempt to induce them to divest themselves or any part of their reserves.

Conditions, however, have changed, and it is now recognized that where Indians are holding tracts of farming or timber lands beyond their possible requirements and by so doing seriously impeding the growth of settlement, and there is such a demand as to ensure profitable sale, the product of which can be invested for the benefit of the Indians and relieve pro tanto the country of the burden of their maintenance, it is in the best interest of all concerned to encourage such sales.

However, though surrenders for sale of huge areas of Prairie land were obtained during this period, it was still felt that uncultivated reserve land was not becoming accessible enough for the ever-growing numbers of westward-bound prospective farmers, especially those men returning from

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1 Indian Act 1918, S.C. 8-9 Geo. V, C-26, section 4 which inserted section 90(3) into the Indian Act 1906.

2 Department of Indian Affairs, Annual Report 1908, p. xxxv.
service in the first World War. Adding to this pressure on reserve land was the fact that during 1916 wartime shortages had increased and would help to keep grain prices up for a period.\(^1\) The present section 58 in its earlier forms was enacted as a way of circumventing the growing resistance of Prairie Indians to departmental control\(^2\) and to further open their lands for agricultural production. Thus, section 90(3) of the 1906 Indian Act, as amended in 1918, allowed the Superintendent General, without the band's consent, to make available the band's capital for such expenditure as necessary to cultivate the unused land or to lease it to non-Indians. The latter option was by far the most preferred.

By 1951 a lot of reserve land, particularly in the Prairies, had been leased under this section. Accordingly, the Department noted in 1951 how during the 1940's, as the demand for reserve land declined, the section had come to be used in limited situations where a surrender with its consent requirement was inappropriate. First, it was employed where an Indian had abandoned his farm and another wished to use the land. Secondly, the section was used in those situations where a pressing weed menace necessitated the immediate leasing of the land to white farmers without the formality of native consent. Thus, the Department stated that "leases under this section are only given under exceptional circumstances, and then only when the advisability of such action has been carefully considered".\(^3\) However, the return of servicemen from World War II again brought unused reserve land

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\(^1\) Hanks and Hanks, Tribe Under Trust, p. 63.


\(^3\) SJC (1946), p. 546.
under scrutiny\(^1\) and the 'limited use' which section 58 had obtained by the War's commencement was plainly intended to be expanded despite the new requirement in the revised Act of band council consent. This post-War concern with bringing land into agricultural production saw a large proportion of Prairie reserves being leased to white farmers, adding to the acreage leased in earlier years.\(^2\)

Today this section is mainly used for renewing leases granted under its provisions in earlier years,\(^3\) though it can be noted that the section provides no specific authority for the Minister to execute renewals. The section is also used for any 'new' leases of reserve land for agricultural purposes. White farmers gaining leasehold interests in additional areas of reserve land is an increasingly rare though still occurring feature. More common is the use of the section to give 'native corporations', by law a 'non-Indian',\(^4\) leases over reserve land.\(^5\) The Department insists that its use of this section is finely attuned to band and band council wishes and that, in practice, they play a large role in defining the terms of a renewal or lease. As we saw, section 58(1) requires band council consent before an agricultural lease can be granted so this sensitivity is logically necessary. Moreover, in most instances the substance of the negotiations is conducted between the

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\(^1\) Ibid., p. 151, 375.


\(^3\) Interview with Departmental official, 22 July, 1981.


\(^5\) Interview with Departmental official, 22 July, 1981.
lessee and band council rather than, as in the past, the Department and the lessee. ¹

In 1960 Prairie Indians complained that too much emphasis had been given by the Department towards leasing Indian land to non-Indians for agricultural purposes. ² The province of Saskatchewan agreed, pointing out how one quarter of reserve land in that province was leased, mainly to white farmers. ³ Despite the changes that have occurred in the operation of section 58(1), a great deal of reserve land, particularly in the Prairies, remains leased under the provisions of this section. ⁴

   c) locatee lease under section 58(3)

Section 58(3) allows the Minister to "lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered".

The origins of this section stem back to 1894. The innovation of the 'locatee lease' allowed the Superintendent General to lease "for the benefit of Indians engaged in occupations which interfere with their cultivating land on the reserve, and of sick, infirmed or aged Indians, and of widows and orphans or neglected children, lands to which they are entitled without the same being released or surrendered". ⁵ This power was broadened the next

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¹ Interview with Departmental official, 22 July, 1981.
⁴ Interview with Departmental official, 22 July, 1981.
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year to allow the Superintendent General to lease the land of any locatee without it being surrendered.¹ This provision, like the other subsections of section 58, was a reaction to frequent band council refusal to consent to the surrender of an allottee's land for use by a non-Indian, which was construed by the Department as hindering the allottee's progress towards 'civilization'.² The provision was especially designed for the 'advanced' eastern reserves where the allotment process operated and where the increasing pace of on/off reserve mobility frequently left an allottee's land unused.

Locatee leases were, therefore, a device to short-circuit band consent and to pass an allottee's land over for use by a non-Indian. This process brought white persons onto reserve lands and in 1946 the Department, noting the large number of leases issued to whites by this device, said that "... it is questionable whether the resulting encroachment of white tenants is desirable".³ Moreover, the Department felt that many 'lazy Indians' used the device to avoid utilizing the allocated land themselves by allowing whites to develop it and then living off the fruits of white endeavour.⁴

The procedure adopted for such leases usually involved a prospective lessor approaching the allottee (rather than in the case of leases of band land, the Department) and arranging a contract which was submitted to officialdom for consent which, though in the Minister's complete discretion,

² Tobias, "Outline History of Canada's Indian Policy", p. 20.
⁴ Ibid., pp. 544, 650.
was "never unreasonably withheld".¹

Today, as a matter of policy, the Department only grants locatee leases with band council approval. Those leases which are for a long term or "which would have a significant impact on the character or quality of life on the reserve"² must, according to a Departmental policy directive, have band approval.³ The scrutiny of the terms of the proposed lease is conducted mainly on the reserve. The Department once had a criteria it exercised in assessing such leases, notably a policy against any sub-leasing provisions and terms which did not allow for the regular review of rent.⁴ With the passage of greater powers onto the reserve, the Department no longer employs the criteria with the vigour it once did. Instead, the major formulation and negotiation of the terms of locatee leases is undertaken on the reserve.

Locatee leases have in recent years "... been used as a method of securing band control of an enterprise, while avoiding a surrender".⁵ Thus:

One or more individual members of the band will be allotted land by the band, which they will hold on trust for the band. The allotted land is leased pursuant to s. 58(3) and the revenues go to the band, through the allottees. The use of the locatee lease has largely replaced permits in Quebec, to avoid the problem with surrenders which exists in that province and Prince Edward Island.⁶

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¹Ibid., p. 545.
²Sanders, Legal Aspects of Economic Development, p. 12.
³idem.
⁴SJC (1946), p. 545.
⁵Sanders, Legal Aspects of Economic Development, p. 12.
⁶Ibid., p. 13.
d) permit under section 28(2)

Under section 28(2) the Minister can, by written permit, "... authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve".

This type of permit was designed to cover "occupancies of short duration".¹ Departmental practice is to secure approval of the band council for those occupancies requiring less than a year's permission. Examples of such uses might be to allow the coming onto the reserve of a party surveying a road, power lines or somesuch; a logging company using the foreshore of the reserve to anchor booms; traders dealing at the time of payment of treaty or annuity money; or the rental of cottages for recreational purposes.²

The absence of a requirement of council consent for periods less than a year was justified rather flimsily on the grounds that "[t]he council of many Indian bands cannot be found for several months of the year"³ because the members may be out trapping or fishing. If that was so, no attempt was made by the legislation to limit the Minister's powers to such situations. Such a restriction would emanate from Ministerial conduct rather than legislative direction. It would also appear that in the past this 'restriction' was not always heeded as in some instances the Crown would issue permits for a year, then, at the expiry of twelve months, grant a fresh permit.⁴

¹CC (1951), p. 77.
²Until 1951 this section also allowed the granting of rights to hunt on reserve land which, following extreme Indian pressure, was removed in the revised Act. For a longer list of the "occupancies of short duration" see CC (1951), p. 254.
³Ibid., p. 77.
⁴Idem.
Nor does the section limit the type of permits to the 'occupancies of short duration' outlined above. In 1951 the Minister said that he doubted "if leasing land for cattle grazing is within the expression 'exercising any right'."¹ That view must sit uneasily with the broad word "use" in the section, as well as with the recounting by a Member to the same Minister of a situation under this provision where a lumber company cleaned a reserve out of its timber resources.²

The possibility of an expansive interpretation of section 28(2) has been realized through the recent use of the permit system to allow business enterprises such as that in the Four B case³ to come onto the reserve. This device was preferred to surrender because it was thought, incorrectly as it turned out,⁴ that through a permit the application of provincial laws to on-reserve business activities might be avoided. Whether or not section 28(2) continues to be used in this way in the wake of the Four B decision is still uncertain. The enterprises which operate on a reserve under section 28(2) will normally have modest plant requirements and not be concerns involving major development - such enterprises would be given rights on a sounder, more enduring basis through a surrender.⁵

¹Idem.
²Idem.
⁴Ibid.
⁵Interview with Government official, 22 July, 1981.
e) miscellaneous provisions

If an alienation of reserve land is to be sought for public purposes, the procedure specified in section 35 of the Indian Act must be followed. To emphasize the important nature of such an alienation, section 35(1) provides that the province, local body or other 'public body' seeking the alienation can only proceed with the consent of the Governor in Council. Where reserve land is to be taken for a band (as opposed to public) purpose by section 18, the operation is overseen by the Minister.

A further miscellaneous provision by which rights in a reserve can be acquired arises in respect of clay, gravel, sand and other non-metallic substances. Section 58(4) allows the Minister, with band council consent, to issue permits allowing the exploitation of such resources. However, the legislation does not require band council consent if it "cannot be obtained without undue difficulty or delay".

f) the granting of rights in reserve land to non-Indians: an overview

We can note three phases in respect to the granting of rights to non-Indians in reserve land. The first phase lasts from Confederation until the turn of the century when the granting of rights in reserve land to non-Indians was relatively rare. During the second phase, from the 1900's until the 1960's, we see what was once a rarity becoming commonplace as bureaucratic control over the reserve tightened. The frequency with which non-Indians obtained rights in reserve land began to taper from the 1950's onwards as native consciousness grew. The Department became more willing to pass rights of management onto bands during the 1960's as our third phase, that of greater Indian involvement in the management of their land, emerged.
During the 'first phase', the emphasis in Indian policy was on making the Indians self-supporting. On-reserve farms were established under the auspices of government-paid farming instructors. The only device whereby reserve lands came into non-Indian hands was by way of surrender. Although that was a possible use of the process, it was envisaged that surrender would be more commonly used as a device by which an enfranchising individual took his allotted land with him as he entered the European world. That, however, was not to be the case as allotment failed to find widespread acceptance in the East, as Indian farms throughout the country floundered, and as official disillusionment and impatience with the policy set in.

The 'second phase' saw the earlier policy of actively encouraging assimilation being replaced by one of Departmental 'protection' or, more aptly, control. This change had emerged not only from Departmental unhappiness with the earlier policy but also sprung from the influx of white settlers into the Prairies demanding land for settlement. The earlier Departmental policy of not selling or leasing reserve lands which had shown signs of easing in 1894 to meet the situation in the East, would almost completely disappear during the first half of the century. Departmental officials tried at first to cater to the demand for reserve land by seeking surrenders of reserve land from Prairie tribes; however, this process, with its requirement of Indian consent, was not meeting the demand. As a result, legislation was enacted allowing the leasing of reserve land without the

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1 Above, p. 81-2.

2 This was the year the locatee lease, designed to deal with absentee and/or inactive allottees, was first introduced. See above, p. 110-11.
bother of Indian consent. The same legislation provided for the use of a band's capital funds, again without any consent requirement, to develop land for agricultural purposes. The funds of many bands had been significantly boosted by their agreement to surrenders and this provision enabled the Department to operate farms out of band rather than Departmental appropriations. Once the leasing provisions were implemented the Department's solicitation of surrenders appears to have declined; however, the granting of rights in reserve land of a less permanent nature than sale continued.

Several observations of the process whereby non-Indians obtained rights in reserve land, as it operated during the second phase, can be made.

During this period the Department, rather than the band or council, would conduct most of the negotiations, with a 'package' being sent to the band for approval. Thus Indian complaints arose that no attempt or requirement was ever made of giving the Indian owners independent advice and that they were ill-equipped to reject let alone insist upon alterations to a proposal. This situation was considered by the Commons Committee in 1951 but did not result in any legislative action. As we have seen, the legislation made the government the granting body and frequently the band would find it difficult to get the Department to take action when the terms of a grant were not adhered to. Related to that was the length of time and 'red tape' it took before revenue from the grant reached the band, producing on-reserve cash flow problems when, for example, rental did not come through in time for

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1 Above, p.


3 CC, pp. 97, 116-17.
the purchase of supplies for winter or a trapping season.\footnote{\textit{SJC} (1946), p. 376 \textit{et seq.}} It comes then as no surprise that delinquent and illegal lessees paying gross undervalue were not uncommon.\footnote{\textit{JC} (1961), p. 462.} Compounding the Indian frustration caused by red tape (in the Indian's case a singularly inappropriate phrase) and Departmental reticence, was the (continuing) failure of the Indian Act to provide for a band or council to take steps of their own motion against a recalcitrant grantee.

The Department's tacit encouragement until the early 1960's of the alienation of reserve land was justified in a number of ways. It insisted that it had a policy of not selling reserve land which it strictly adhered to.\footnote{\textit{SJC} (1946), pp. 391, 512, 551.} It conceded that sales were allowed of unused land which was unsuitable "to any attempt by the Department to assist the band in utilizing",\footnote{\textit{Ibid.}, pp. 551-2.} and which through sale could bring in funds to acquire more land or assist band revenue. That presumably was the justification for the sale to white farmers of massive areas in the Prairies\footnote{Dempsey, "Century of Treaty Seven", p. 27; Hanks and Hanks, \textit{Tribe Under Trust}, p. 37; Madill, "Band Council Powers", p. 51; Scott, "Indian Administration 1867-1912", p. 618.} during the first quarter of the century. The increase in band funds was also a reason used to justify the leasing of Indian land.\footnote{\textit{SJC} (1946), p. 552.} The Department acknowledged that most often dealings with lessees and prospective purchasers were conducted by officials, with a recommendation being passed on for the band's reaction.\footnote{\textit{Idem}; \textit{CC} (1951), p. 93.} That explained

\begin{itemize}
\item[\footnote{\textit{SJC} (1946), p. 376 \textit{et seq.}}]{\textit{SJC} (1946), p. 376 \textit{et seq.}}
\item[\footnote{\textit{SJC} (1946), pp. 391, 512, 551.}]{\textit{SJC} (1946), pp. 391, 512, 551.}
\item[\footnote{\textit{Ibid.}, pp. 551-2.}]{\textit{Ibid.}, pp. 551-2.}
\item[\footnote{\textit{SJC} (1946), p. 552.}]{\textit{SJC} (1946), p. 552.}
\end{itemize}
what they felt was only an appearance of collusion. Furthermore, the Department insisted that it drew a hard bargain and had developed a reputation for its tenacious defence of band rights. In fact, so good a guardian of the band interest was the Department that a provision for independent advice was unnecessary because 'head office' would pick up the unfair transactions before forwarding them for formal approval. Finally, the leases in the Prairies were defended not only on the above bases, but also as serving purposes both instructional and practical. The Department reasoned that once a white farmer had broken the land in and shown the nearby Indians the benefits of his industriousness, the leased land would be returned to the Indians and they could follow the former lessor's example, having been spared the initial, difficult spadework. That expectation was not, however, realized to any extent. Further undermining the Department's attempted justification of leases was the Province of Saskatchewan's brief of 1961 which quite clearly showed that income from those leases using a sizeable percentage of reserve land did not make anywhere near a significant contribution to band funds.

The provisions of the Indian Act affecting the alienation of reserve land are nowadays all used with band or council consent, even where that is not legislatively required. This policy requirement is seen by the Department as the best way of countering Indian complaints about the Department's

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1 Ibid., p. 554.
2 Idem.
involvement in the process as well as being a response to Indian demands for greater powers of self-determination. Accordingly, the Department has made its criteria in respect of alienations (such as those we saw employed in respect of locatee leases) known to the bands and tends to act as a 'rubber-stamp' to most agreements entered into between the band and non-Indian. Occasionally a proposed alienation will be re-submitted to a band or the council where its terms appear too imbalanced but that is an extreme step which the Department is increasingly reluctant to take. The extent to which the Department's practice goes towards placing the Indian band and councillors in a better position to make an informed decision is doubtful. The Department insists its officers are available for assistance yet Indian hostility to the Department frequently negates that availability. It appears that alienations retain some of the unsatisfactory elements noted above as existing before the Department's 'rubber-stamp' policy came into practice. In many cases the natives will not be aware of alternatives to alienation, having the one proposal placed before them for consideration, independent advice may not be forthcoming and many individuals may be unclear as to the nature of the interest being granted. Whilst the

1 Interview with Departmental official, 22 June, 1981.

2 Although unable to locate major documentary evidence, the writer found this situation confirmed by his general enquiries and interviews. Comments such as these were often encountered: 'many bands and their councils still aren't sure of what they're doing', 'they try to keep the Department right out of it', 'lots of good Indian land is leased to whites when Indians could use it, often that's the band council's fault', and 'if bands want to go it alone, we generally let them and try not to interfere too much, except in extreme situations'. Implicit Departmental acknowledgement of the problem is seen in its Annual Report 1967-68, p. 65, where it states that during the year more than 1,000 leases "were reviewed to achieve fairer returns to Indians from leased lands" (emphasis added). Similarly, Sanders ('Native People in Areas of Internal National Expansion', (1974), 38 Sask. L. Rev. 63, 80) observes: "... the inequality of negotiating positions between the native and non-native sector will probably be much the same today as it was in the past" (emphasis removed).
Department's present practices might meet the blatant instances of alienations imbalanced against the native, in general it is submitted that the Department's measures do not go anywhere near confronting those situations where the terms and method of alienation are more subtly weighed against the native.

The 'rubber-stamp' policy is used in respect of relatively 'minor' alienations such as renewals of agricultural leases and grants of permits of the 'short duration' type noted earlier. In major on-reserve developments involving an alienation, Departmental involvement is still quite strong.

One of the notable aspects of the provisions in the Indian Act regulating the alienation of reserve land is the extent to which they overlap. For instance, timber rights can be obtained through a surrender or through the grant of a licence under section 28(2). Similarly, a right to cultivate reserve land can come through a surrender, permit, locatee lease or agricultural lease under section 58(1). Thus a feature of the present use of the Indian Act by the Department, besides the practice of always obtaining Indian consent, is the practice of using an informal 'classification' system by which the type of rights the non-Indian seeks determine the relevant provision.¹ This 'classification' system and the ways in which rights are granted to non-Indians can be summarized in the following manner:

a) acquisition of rights for 'public' purposes: section 35
b) acquisition of rights for 'band' purposes: section 18
c) acquisition of agricultural rights: section 58(1)

¹Interview with Departmental official, 22 June 1981.
d) acquisition of an individual's rights (except for a 'public' or 'band' purpose): section 58(3)

e) the type of rights that can be obtained through a permit under section 28(2) are i) rights of a temporary nature; ii) rights for businesses of a 'non-major development' type. Note any development seen by the Department as a major project will not acquire rights through this section.

f) acquisition of rights to non-metallic substances: section 58(4)(b)

g) the acquisition of all other rights, most notably those of a significant character (e.g. oil and gas, mineral and forestry rights); surrender.

As we saw, band council consent is sought except in those major developments likely to have a significant impact on reserve life and here band consent (even if not legislatively required) is sought.

Once the demand for reserve land for agricultural purposes began to decline and became accommodated in the leasing provisions of what is now section 58(1) and (2), the Department gradually returned to its policy of not selling reserve land. Today it is a matter of strong policy.1

A precise analysis of the extent to which non-Indians enjoy temporary rights on reserve land is hampered by the lack of statistical data.2

1Ibid.; Sanders, Legal Aspects of Economic Development, p. 8.

2The most useful and recent information can be found in D.I.A.N.D., Annual Report 1968-69, p. 45 where a table of alienations in respect of Indian lands is given. The notable features of this table are the large number of agricultural leases in Saskatchewan, Alberta, British Columbia, and Ontario, 'cottage' leases in Quebec, Ontario, Saskatchewan and British Columbia, 'commercial' leases in Ontario and low number of reserve alienations in the Maritimes and, to a lesser extent, Quebec. The present lack of data may be corrected in the near future - the Annual Report 1979-80, p. 20, states that "a comprehensive review of recorded materials was initiated in order to provide a detailed, up-to-date history of land and status for Indian people and others with an interest in Indian land". The planned computerization of Indian land records will also eventually provide more accessible information (idem.).
information the writer was able to obtain places rights (c) to (g) above into a general category of 'leases, permits and licences'. Approximately 4,000 of these are granted per year.¹ That figure tells little and can hardly provide an accurate picture of current on-reserve activity by non-Indians. In that respect the vista one gets is necessarily impressionistic, being based upon the informed views of persons involved in the administration of Indian affairs. It seems that over recent years there has not been a significant decline in the on-reserve activity of white persons; however, there has been a dramatic increase in activity by both bands and 'native corporations'. The development potential of many reserves is great,² and the trend has been for native-run bodies to undertake this development where they feel able. Thus the Indian reluctance to grant interests in reserve land to Europeans provides an informal qualification to the continued Indian vulnerability in matters concerning the alienation of their land which we noted earlier.

In closing, we can note the generous extent to which the Indian Act makes provision for the alienation of reserve land. In fact it makes such generous provision that the Department has engaged in its own 'streamlining' in order to prevent confusion arising from the overlapping of the 'alienation' provisions. The Indian Act's concern with the alienation of Indian land will be seen later to contrast with its lack of provision for the management of reserve land by the band.

¹ Interview with Departmental official, 22 June 1981. This figure is confirmed by the Department's Annual Report 1979-80, p. 19 though the precise nature and mode of the alienations is not specified. The figure given above indicates an increase in the alienation of Indian land over recent years; ten years ago the average figure was approximately 2,000 (see Annual Report 1968-69, p. 37; Annual Report 1969-70, p. 138; Annual Report 1970-71, p. 20). The extent to which the increase is a result of Indian rather than European initiative is unclear.

3. The control of Indian funds

The treatment the law gives the application of Indian funds is a vital ingredient in the management regime regulating Indian lands. An inquiry into the topic is made at this stage because although important in respect of monies derived from the granting of rights in Indian land to non-Indians, the laws affecting the use of Indian moneys become more directly important when we consider development by the native people of their lands. Hence, they should be understood before the laws affecting such development are discussed.

All band funds are held by the Crown and can be spent how the Minister directs, subject, however, to the Act and the terms of any treaty or surrender. Band funds are divided into 'revenue' and 'capital' funds. Under section 62 all moneys derived from the sale of surrendered lands or the sale of capital assets of a band are deemed capital moneys with all other Indian moneys being revenue.

a) capital moneys

Section 64 specifies the instances in which the Minister may, with the band council's consent, expend capital moneys. This section mainly relates to asset or capital formation on the reserve with the exception of paragraphs (a) (disbursement of not more than 50% of the capital monies derived from the sale of surrendered lands) and (b) (the meeting of expenses incurred in managing reserve or surrendered land and any other band property). In addition, section 64(k) is a broad empowering provision enabling the use of capital moneys for "any other purpose that in the opinion of the Minister is for the benefit of the band".

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1 Indian Act 1951, section 61(1).
Section 65 gives the Minister power to pay from the band's capital money account, without council consent, compensation to an Indian who has "land compulsorily taken from him for band purposes" and for expenses incurred in protecting Indian property from natural emergencies. Section 58, a provision to which we will return at a later stage, allows the Minister to improve or cultivate "uncultivated or unused" reserve land and to make such expenditure "as he considers necessary" for such improvement or cultivation.

The powers of the Minister to expend capital sums without band consent were considerably whittled down in the 1951 legislation from those previously applying. The most notorious and significant provision was that introduced by the 1918 amendment to the Indian Act which provided:

In the event of a band refusing to consent to the expenditure of such capital moneys as the Superintendent General may consider advisable for any of the purposes mentioned in subsection 1 of this section, and it appearing to the Superintendent General that such refusal is detrimental to the progress or welfare of the band, the Governor in Council may, without the consent of the band, authorize and direct the expenditure of such capital for such of the said purposes as may be considered reasonable and proper.

This amendment was implemented in 1918 at the height of Prairie settlement when, as we have already seen in respect of other provisions of the current Act, the European fixation with the use of the plains for agricultural purposes was strong. The purpose of the above section was to deal with band unwillingness to expend its capital moneys to improve the agricultural productivity of its land. Scott, the famed administrator and apologist for

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1 Below, pp. 133-34.

2 Indian Act 1906, section 90(3) as enacted by the Indian Act 1918, section 4.
Indian policy during the period, justified the amendment:\textsuperscript{1}

[T]o deal with cases wherein the council of a band, through some delusion, misapprehension or hostility, acts in a manner contrary to the best interests of the band, and refuses to sanction expenditures which the Governor in Council may consider necessary for the welfare and progress of the band, and, as, for example, some permanent improvement such as drainage system. The need for expenditure which would greatly increase the productiveness of the soil is particularly emphasized at the present time.

The reduction of the Ministerial discretion in the matter of capital money expenditure was largely a reaction to the Indian demands before the Special Joint Committee of 1946-48 for greater control of their affairs. However, the fact that the Minister is the body formally expending capital money gives him a great deal of power even if only in the form of a veto. Moreover, unlike his powers in respect of revenue moneys, the Minister's powers over capital money cannot be delegated\textsuperscript{2} despite Departmental representations to the contrary.\textsuperscript{3}

b) revenue moneys

Section 66 is a broad enabling provision with subsection 1 providing that "[w]ith the consent of the council of the band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in his opinion will promote the general progress and welfare of the band or any member of the band".

The requirement of band council consent is dispensed with in subsection 2 which empowers the Minister to expend revenue moneys in assisting the sick,

\begin{itemize}
\item \textsuperscript{1}D.I.A., Annual Report 1918, p. 19.
\item \textsuperscript{2}Under section 69(1) a band can only be handed power of management over its revenue and not capital moneys.
\end{itemize}
disabled, aged, destitute and unemployed Indians on a reserve, as well as facilitating Ministerial withdrawals to finance the burial of deceased band members. This subsection has caused discontent amongst the Indians who feel that it is used as an avenue to avoid welfare payments which normally would be made to non-Indian citizens. The absence of a council consent requirement continues in subsection 3 which allows revenue moneys to be spent on destroying weeds, controlling pests and blight, disease, sanitary and hygiene within reserve housing, and the construction of fences.

Significantly, section 69(1) allows the Governor in Council by order to "permit a band to control, manage and expend in whole or in part its revenue moneys". Under subsection 2 of the same section the Governor is empowered to make regulations which give effect to subsection 1 and declare the extent to which the provisions of the Indian Act and Financial Administration Act shall not apply to any band receiving management powers over its revenue moneys. Band funds have grown sizeably over recent years with the vast majority now managing in whole their revenue funds.\(^1\) The Indian Band Revenue Moneys Regulations\(^2\) provide that any expenditure is subject to the terms of the Indian Act.\(^3\) Paragraph 8 of the Regulations requires every band to engage an auditor and to post the annual report in a conspicuous place as well as requiring a copy to be supplied to the Minister of Indian Affairs. Presumably, the latter requirement is designed to provide the Minister with a power of overseeing the development of the band so that if unhappy he can exercise his powers under section 69(1) to amend or revoke the band's powers.

\(^1\)D.I.A.N.D., Indian Conditions, p. 85.
\(^3\)Ibid., para. 4.
Ministerial control is also exercised by the Department requiring each band council to submit annually to its members and the Department a budget and estimates which are then approved by both bodies.1 This exercise serves two functions. First, section 69 refers to the 'band' and not the 'band council' as controlling the revenue moneys. Securing band approval of a budget allows the council to carry out band directions.2 Secondly, submission of a budget to the Department allows for it to scrutinize the year's proposed activities.

It should be noted that though section 69 can and has been used to give the band wider powers of self-management it is enacted in bare terms, relying on administrative practices to 'fill the gap' and avoid the conundrum of requiring formal 'band' approval for every single transaction in respect of the revenue moneys. The legislation provides for bureaucratic scrutiny yet establishes no grounds for departmental intervention, nor gives the band any redress for an unpopular exercise of the power.

c) some observations on the control of Indian funds

The relationship between the Minister as holder of the funds and the band is said to be that of trustee and beneficiary. If that concept is to be applied, it must obviously be understood as being subject to the Indian Act for the band does not enjoy all the traditional equitable rights of

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1 This procedure commenced in 1959 when section 69(1) first began to be used in response, one is sure, to the convening of the Joint Committee on Indian Affairs (1959-61): JC (1961), p. 484. Hawthorn (ed.), Survey of the Contemporary Indians, p. 269 provides a table tracking the increasing use of section 68 (as it then was).

2 This is important for we will see below (pp. ) that the legal status of the band and its relationship to the council is plagued with legal uncertainty. This requirement is designed to formally ensure the 'band' rather than the 'council' is controlling the revenue moneys.
beneficiaries. In Chisholm v. R.\(^1\) legal services were rendered to a band without instructions from the Crown. The Crown was held to be under no obligation to pay for these services, the decision of the Minister to pay or not pay not being subject to review by the courts. Thus the fact that the Crown might hold money as 'trustee' imposed no liability on it to pay for debts incurred by the Indians without the proper consent. However, in Miller v. The King the Supreme Court used the 'trustee' analogy, holding that an action against the Crown would lie if it exercised its duties as trustee of Indian funds in a manner inconsistent with the interests of the Indian beneficiaries.\(^2\) Although this case largely turned on the Act of Union 1840 which specifically used the words "in trust" in respect of the plaintiff band's property, the Court's reasoning clearly applies to Indian funds held by the Crown under the general provisions of the Indian Act.

As if in fear of the repercussions of that decision as well as in reaction to the Indian insistence on a greater control of its funds, the Department introduced in the late 1950's a policy of handing control of revenue funds over to the bands under section 69.\(^3\) During the late '50's the Indian unhappiness with the government's control of its funds was marked and sparks, judicial or otherwise, seemed bound to fly.


\(^3\) JC (1959), p. 154. In 1959 only one band had control of its funds but by the end of 1961 36 had control (JC (1961), p. 464; see also, Hawthorn (ed.), Survey of the Contemporary Indians, p. 269). The causal connection between the sitting of the Parliamentary Committee and the spread of section 69(1) is obvious. In fact, the Committee (JC (1960), p. 608) finally recommended the greater use of section 69.
Though the Minister is cast in the role of 'trustee' there is no statutory requirement that he furnish financial statements to the band. Though the Department adopted the practice of preparing such statements, Indian complaints before Parliamentary committees that they were not seeing such documents prompted a defensive Departmental reaction but in the end, one can note with a measure of cynicism, no legislative response. Nowadays this complaint is largely pre-empted by the disappearance of the Indian agent against whom most Indian complaints concerning their funds were levelled and, secondly, by the grant of wider powers under section 69 to most bands.

The 1951 legislation dropped most of the distinctions in the 1927 statute between the 'Governor in Council' and the 'Minister', giving most of the power over band funds to the latter. Each of these bodies had had a network of powers in respect of band funds which was complicated and wound up many requests for funds in red tape. To short circuit this problem measures involving a rather generous, if much needed, interpretation of the earlier legislation were taken. The clarification of the Governor in Council's and Minister's roles was also taken, one suspects, to prevent the ignominous occurrence of the Department making a decision, relaying it to the band and then finding itself overruled by the Governor in Council where a decision was not as readily rubber-stamped as when it fell on the Ministerial desk.

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2 Examples of Indian complaints are seen in SJC (1946), pp. 462, 776.
3 Ibid., pp. 463-66.
4 An interesting, almost amusing, incident is discussed in SJC (1946), pp. 776 ff., where a band council sought and obtained Departmental and the Minister's approval of expenditure of band moneys on musical instruments, only to have the Minister's colleagues reject in Council the proposal supposedly vetted by the Department.
Still, despite the clarification and insertion of band council consent requirements contained in the 1951 revised Act, the fact that a band and/or band council resolution requesting funds (revenue or, more usually, capital) is, according to Departmental policy, merely a formal request for funding reveals the fundamental lack of control over their funds under which the band labours. As we have seen, although the Minister must act in the interests of the native beneficiaries, once a decision to use funds is made the Minister must act in the natives' interests; however, the initial decision is beyond scrutiny.

It is relevant here to recall the point made earlier about the heterogenous nature of Indian society. Some bands are quite content with Ministerial control of their funds, others not. The point to be taken, however, is that where a band is capable of assuming control it should be able to do so in a manner which clearly establishes the duties and responsibilities of the council, the band, the band members and the Minister. We may well come to the conclusion that some form of ultimate control in a body acting as 'guardian' is appropriate even where a band has assumed powers of management over all its funds. However, the exercise of such control should rest upon a base of legal certainty. Sadly, in Canada the imprecise nature of the legislation provides a tenuous base for the exercise of native decision-making. By conferring such wide powers on the Minister it exposes the government to a political vulnerability which might, in some instances, be unfairly tested.

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1Native Law Centre, University of Saskatchewan, Legal Information Service, Report No. 1, Band Council Resolutions and By-laws (Saskatoon: Native Law Centre, University of Saskatchewan, 1980): 1.
4. The management of Indian lands

We have seen that in all cases concerning the passing of rights in reserve land onto non-Indians the legislation makes the Minister the formal conveying party. The restrictions that this legal fact imposes have only been eased as a result of the government's policy of following the wishes, wherever possible, of the band on such matters. In most cases, except notably surrender, there is no legal guarantee that the wishes of the band, however articulated, will be observed.

What, however, if the band does not wish to see management rights passed onto non-Indians? How can the Indian lands be developed by or for Indians? At this stage two options become clear: either development can be undertaken completely through the Minister with the Department making all arrangements and securing band acquiescence where necessary or the band can attempt development itself. In fact the latter option is more a mix of 'Ministerial'/'band' development, for provisions of the Indian Act (notably those relating to expenditure of capital moneys) give the Minister vital powers which the band is unable to assume.

a) the Minister as 'manager'

Under the provisions of the Indian Act it is clear that the Minister can assume complete management of a particular reserve. Two notable legislative examples of such development are discussed below. The sight of the Minister and Department doing everything (or nearly everything) for a band in respect of their land is a feature rapidly disappearing, as is revealed, most notably, by the extent to which section 69 (which allows the Minister to grant a band control of its revenue moneys) has been employed amongst
the various bands of Canada, all at varying stages of economic development.

The proceeding discussion then is concerned with development devices which are disappearing and which will soon be clothed in greater redundancy than they already wear.

i) farms run by the Minister

Two provisions of the Indian Act allow the Minister to run farms on reserve land.

The first is section 58(1)(a) which provides that the Minister can, with band council consent, "improve or cultivate such land and employ persons therefor, and authorize and direct the expenditure of so much of the capital funds of the band as he considers necessary for such improvement or cultivation".

Section 71(1) is the second provision by which the Minister can operate reserve farms. It provides that the Minister can "... operate farms on reserves and ... employ such persons as he considers necessary to instruct Indians in farming and ... purchase and distribute without charge, pure seed to Indian farmers".

On the face of it these provisions are similar yet in practice they are, or, more appropriately, were used for different purposes.

Section 58(1)(a) is concerned with farming operations undertaken from band funds. As we saw, when first enacted in 1918¹ this provision allowed for the leasing without Indian consent of unused revenue land to white farmers, as well as for the use of a band's capital funds in improving or cultivating the land. This provision was a response to the influx of white settlers into the Prairies and the Indian unwillingness to engage in

¹ Indian Affairs Act 1906, section 90(3) as enacted by the Indian Act 1918, section 4.
agriculture, fostered by the dominant on-reserve role of the Department which encouraged Indian dependence rather than independence. The Department, ever conscious of the draining effect the reliance was having on its appropriations and anxious to provide a public display of how the Indians, through the diligence of the Department, were progressing towards 'civilization' and contributing to the Western agricultural boom, sought the passage of this legislation. In essence these motives were self-serving giving the Department access, without band or band council consent, to Indian funds which, unlike the Department's appropriations, were growing, especially those of Western bands, as a result of the active solicitation of sales and leases. Thus, by using the growing band funds for Departmental farms, the Department could cast itself in a good light: through the reserve farms the Indians were becoming less of a drain on the taxpayer and progressing towards 'civilization'.

Section 71, on the other hand, was designed for less negative ends, allowing the Minister to run farms for instructional purposes. The profits from these operations would usually go into the Consolidated Revenue Fund rather than coffers of the individual band held by the Department. That was a fact which did not pass unnoticed when the present Act was in Bill form. However, no legislative response was forthcoming largely as a result of Departmental protestations that these farms rarely made a profit.  


2 CC (1951), pp. 243-44.
Neither of these two devices are used on the basis historically intended. In 1951 there were only a few instructional farms under section 71, mainly in Saskatchewan.¹ The vestiges of these farms have been embraced by the Saskatchewan Indian Agricultural Programme.² Section 58 can and has been used to enable bands to develop reserve agriculture under Ministerial 'auspices' rather than the farms being, as they once were, part of bureaucratic self-entrenchment. Assisted by the insertion in 1951 of a requirement of band council consent, the operation of the provision has lost the negative flavour it contained upon its first enactment. However, the section maintains close Ministerial involvement notwithstanding the 1951 change and most bands are reluctant to use it. Government programs to assist Indian farmers nowadays rely on arrangements concluded outside the Indian Act. It is felt that only outside the Act can satisfactory arrangements be made, allowing the application of government funding and expertise whilst giving the Indian farmers direct powers of management.³

b) the band as 'manager'

We now come to consider the powers of management which a band has over its lands. In the discussion in part two of this chapter we saw that although Indians have some involvement in the procedure by which non-Indians acquire rights in their land, often such 'involvement' (with the exception of surrender) is not established as a legal requirement, its existence

¹ Ibid., p. 261.
² Interview with Government official, 22 July, 1981. As to statistics on the Saskatchewan scheme and a similar one in Manitoba, see D.I.A.N.D., Indian Conditions, p. 77.
³ Interview with Government official, 22 July, 1981.
being reliant upon officialdom's policy. Moreover, the role for the band contemplated by the legislation in such situations is essentially a 'reactive' one - the band or its council responds to another person's initiative which usually has been vetted and often is sponsored by the Department.

Our inquiry now seeks to investigate the law affecting the means by which a band might turn its 'reactive' role into an 'active' one. In other words, we will analyze the laws affecting the management of reserve land by the band.

When an individual, group of band members, or band attempts to manage reserve land to their own advantage, a mix of powers and abilities in officialdom's and the band's hands arises in respect of that attempt. If the on-reserve enterprise is, say, crop growing or tree-felling in Ontario and the band wishes to use its capital money to purchase the necessary equipment, then under section 64 the purchaser of the item will be the Minister, who, being privy to the contract, must enforce the terms of the purchase. If, however, the Minister makes a loan to the band then the purchaser will be the 'band' rather than Minister. Where the purchaser is an Indian or band under section 89(1) "... 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". The exception to this section relates to a chattel acquired by the Indian(s) under a conditional sales agreement. In such a transaction the seller is entitled to "... exercise

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1 Indian Act 1951, section 89(2).
his rights notwithstanding that the chattel is situated on a reserve".\(^2\)

For sale agreements incorporating a chattel mortgage, no such rights extend to the seller.

Such provisions regulating Indian contracts and dealings in the commercial world extend to individuals, groups of them and the band. Thus, where Indians are transacting as a group they are recognized as a sum of individuals rather than as a distinct entity. However, when the band is engaging upon some enterprise, should it not be treated as an entity in its own right rather than as a collection of individuals? This question becomes more important as bands obtain greater powers over their revenue moneys under section 69(1) and embark upon their own economic development plans rather than those under the Departmental mantle.

We must, therefore, clarify the legal position of this body - the 'band' - which seeks to manage its lands and moneys.

i) the legal character of the 'band'

Section 2 of the Indian Act defines a band with subsection (3)(a) providing that "a power conferred upon a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band". The Act therefore contemplates the band acting pursuant to some official statement of the majority will, ascertained either through a referendum\(^2\) or a general meeting passing a vote with the support of the majority of electors (as opposed to a majority of those present).

\(^1\)Idem.

\(^2\)Conducted pursuant to the Indian Referendum Regulations, C.R.C. 1978, C. 957.
However, as LaForme observes:

The Act does not indicate . . . how decisions of the Band are to be implemented or by whom. Generally it is assumed that this function is carried out by the Band Council or its staff, but the Act does not specifically say so. Powers of the Band are expressly indicated, as are powers of the Band Council. In essence the Act treats these bodies as separate and distinct local governing agencies. There exists a definite distinction between the community as a governing body for local purposes and the Band as a unit owning certain assets in common.

Thus, though the Act envisages the 'band' as somehow being a possible unit of management, it fails to specify the band's relationship with the council and its relationship with outsiders encountered in the course of its management. Though various legal opinions were circulated concluding otherwise, the feeling of the Department of Indian Affairs once was that "... there is no authority in the Indian Act to make regulations giving Bands legal capacity to contract and legal capacity to sue and be sued".  

That position was, however, modified by the Manitoba Court of Appeal's decision in 1977 upholding the judgment of Solomon, J. in Mintuck v. Valley River Band #63A. The previous year in Lindley v. Derrickson, Anderson, J. had acknowledged the capacity of the band to sue and be sued but did not elaborate beyond finding the capacity arose by implication from the Indian

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1 LaForme, Legal Status and Extent of Powers of Indian Bands, p. 3.

2 Departmental memo cited in LaForme, p. 12; see also SJC (1946), p. 381.


ii) the band as an unincorporated association

Williston and Rolls make this observation: ¹

An unincorporated association, other than a partnership, or a quasi-corporation, has no legal existence apart from its members. It is not a legal entity capable of suing or being sued *eo nomine*; it is not capable of contracting or appointing an agent, and service cannot be effected against its officers. Any proceedings against such an association are a nullity and not a mere irregularity which can be waived by the entry of an appearance, and judgments by or against it are null and void.²

However, the law has developed a device by which the existence of such groups can be recognized in some way. What are the circumstances in which this device, the representative action, will come to be employed?

- When can a representative action be used?

In *Mintuck* an action in tort was taken against the 'band' alleging that it had wrongfully interfered with the plaintiff's contractual relationship (his lease) with the Crown. Both Courts found that the band on whose behalf the Crown had made the lease, owed a duty to the plaintiff which had been breached by the band council when it passed a resolution purportedly cancelling the lease.³ This decision is authority for the proposition that

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the device of a representative action by which an unincorporated association is brought into court, can be used for actions in tort against the band. For example, the band can sue in tort when the nuisance of a neighbour interferes with the band's enjoyment of its possessory right. Similarly, actions in tort, as in Mintuck, against the band are possible.

The other situation in which a representative action could be employed is in respect of contracts made between the band and third parties. In most cases a band would be making contracts as a result of powers given it by section 69 of the Indian Act to manage its own revenue moneys. However, as section 60(1) (power to control and manage reserve lands) comes to be increasingly used, as the signs indicate, contracts in respect of reserve land will also be concluded by the band. Thus, the device of a representative action will be available for or against the band making contracts which flow from its powers of management over its revenue moneys (section 69) and/or reserve land (section 60(1)).

- the question of vires

Before a Court will address the question of a representative order it will look first to the issue of vires.

One of the hallmarks of the unincorporated association is "... the absence of any limiting of powers on what the association can do by virtue of its existence . . .". Thus, a doctrine of ultra vires is generally inapplicable to actions by the unincorporated body. When a band is granted

1Discussed below, pp.

management powers of its moneys and lands the Minister may qualify the
grant and place limitations on the band. These limitations will create
a restriction on the band's power. Is a person contracting with a band
whose powers are limited to be taken to be aware of the restrictions
by virtue of the existence of the Ministerial order? That question
awaits judicial resolution.

When a representative order is made the persons it names will
inevitably be the Executive of the unincorporated body.¹ In the
band's case this will be the council. A concept of the ultra vires
arises in respect of an Executive's activity.² In Mintuck the band
council was held to be the executive arm of the band with the power
to "adopt"³ the tortious actions of the individual band members and
thereby commit a tort by the 'band'. The vires of a band council
may be challenged in circumstances where they exercise a 'band power'
(management of moneys and, more rarely, land) on behalf of the band.

¹In Taff Vale Railway v. Amalgamated Society of Railway Servants
[1901] A.C. 426 (H.L.), the leading case in the area and one extensively
relied upon by both Courts in Mintuck, Lord Macnaghten said that the
represented individuals must be persons who "from their position,
may be taken fairly to represent the body" and not persons "selected
in defiance of all rule and principle" whose names "seem to have been
taken in random" (pp. 438-39).

²Ibid, p. 433 per Farwell, J.; Orchard et al v. Tunney (1957),
8 D.L.R. (2d), 273, 282-83 (S.C.C.) per Rand, J.

³Mintuck v. Valley River Band [1977] 2 W.W.R. 309, 326
(Man. C.A.) per Matas, J.A.
To show their actions were *intra vires* the council must prove actual or apparent authority.\(^1\) It seems from Solomon's judgment in *Mintuck* that such authority will be easily found in cases where the band acts as a "closely knit entity"\(^2\) which "owns property, has bank accounts, signs cheques, pays wages, and receives money."\(^3\) If the council has acted *ultra vires* personal liability will be imposed.

Though the actions of the band council may be *intra vires* they might still be found unlawful. It is at this stage that the representative action comes to be used.

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**The representative action**

The basis of a representative order is summarized by rule 75 of the Ontario Rules of Practice:

> "Where there are numerous persons having the same interest, one or more may sue or be sued or may be authorized by the court to defend on behalf of, or for the benefit of all."\(^4\)

As said, the persons named in a representative order will normally be the Executive of the group. The unincorporated association enjoys no identity distinct to that of its members. Thus even though the Executive might have acted *intra vires* personal liability will not be escaped, since the basis of a representative action rests upon placing personal liability upon the named persons. If the action is in tort the

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\(^3\) *Idem.*

personal liability can be met out of and limited to the common funds
of the association.\(^1\) Indeed, the approach of some Canadian courts has
been to insist upon the presentation of proof of a common fund out of
which the 'personal liability' can be met.\(^2\) Thus for actions in tort,
liability can be and often is limited to the group's funds. That was
the result in Mintuck. The Courts have shown no similar approach to
liability of the association in contract, insisting upon the personal
liability of those who each individually entered the contract and/or the
committee if they can be proved to be principals.\(^3\) Thus a band
performing a tort can meet its liability out of band funds but when it
breaches a contract lawfully entered into, the law will make no demands
on the common fund. Essentially the Courts appear to have taken a
divergent approach to the "same interest" requirement. In actions in
tort, membership of the unincorporated association appears to have been
sufficient to be named in a representative order. However for actions
in contract each represented person must be a principal to the contract,
membership alone is insufficient.

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Musicians' Union [1955] 3 All E.R. 518 (H.L.); Orchard et al. v.
Tunney (1957), 8 D.L.R. (2d) 273 (S.C.C.); Mintuck v. Valley River

\(^2\) Barrett v. Harris (1921), 50 O.L.R. 484 (Ont. S.C.): This case
has been the subject of widespread judicial and academic comment
(for a full discussion see Williston and Rolls, Civil Procedure,
pp. 217 et seq.) The requirement of proof of a common fund seems to
have been limited to Ontario, see Mintuck v. Valley River Band [1977]
2 W.W.R. 309, 320-21 (Man. C.A.) per Matas J.A.

\(^3\) The case law is discussed in depth by K.L. Fletcher "Unincorporated
Associations and Contract: the Development of Committee Liability
and the Unresolved Issues", (1979), 11 Queensld. L.J. 53; J.F. Keeler,
"Contractual Action for Damages against Unincorporated Bodies",
(1971), 34 Mod. L. Rev. 615.
The above situation makes those prospective contractors aware of the law unwilling to deal with unincorporated associations. Moreover, most commentators acknowledge the unsuitability of the association as a device to undertake economic development. Paton, to take a colourful example, felt compelled to talk of the "difficulties which beset the path of the hardy adventurer who would seek to make the funds of the association liable in contract or tort."  

- the legal position of the band member

What is the nature of the right an individual band member enjoys in the property held by the band?

An unincorporated association may hold property for its members on either a 'trust' or co-ownership' basis.

It is difficult to see how the trust device might explain an individual's standing in the band (as opposed, of course, to the band's relationship with the Crown). For a start, those unincorporated associations which the law accredits with 'trust' status are normally created by a trust instrument rather than implication of law. Secondly, it is difficult to see how any implication of a trust relationship between 'band' and 'band member' could be imported into the Indian Act. Though the powers of management are given to the 'band', it is not,  

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4Discussed above, pp. 128-30.

5Paton, Jurisprudence, p. 427.
as we have seen, a legal person. Hence, it is impossible for the band to be a 'trustee' since the basis of the trust relationship lies in property being vested in a 'person(s)' who exercises powers of management on behalf of the beneficiaries.

Support for the contention that band property is held by the band members in co-ownership is found in section two. This section makes it clear that whoever holds or manages Indian land does so for the "use and benefit in common" (emphasis added) of the band members. Thus when the band holds or manages property each member has the right to the "use and enjoyment in common" of the property. However rights of co-ownership in an unincorporated association are regulated by the regime under which the body is created. In Mathias v. Findlay an attempt to refine the band members' unelaborated rights of co-ownership into more precise legal concepts of proprietary rights was rejected. Wallace, J. held that an individual's right to unallotted reserve lands was not able to be explained in terms of a tenancy in common relationship, but in terms of the provisions and overall policy of the Indian Act. It seems, therefore, that established concepts of proprietary rights cannot be imported into the Indian Act to explain the position of individual band members within the group. Our next question must be how the Indian Act provides for the regulation of the rights of co-ownership?

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1Ibid, p. 426.

By the Act the band is given the power to handle its property except in respect of the 'housekeeping' powers the Act expressly gives the council. The only way in which the Act specifies how the band is to exercise its powers is found in section 2(3)(a). This section provides that "a power conferred upon a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band". Thus, except to the extent of possible possession of an allotted interest and his right to vote, it appears that a band member has no legal rights whenever actions by the band affect his interests in band property. It can be noted that a shareholder or beneficiary, to take two notable examples, have more legal rights in their collective body than the band member has in his unincorporated band.

- the band as an unincorporated association: an overview

The equation of a band with an unincorporated association which comes from Mintuck has imbued the band with some juridical character. The equation contains, however, elements which are unsuitable for a band attempting to manage its own affairs.

First, the law of unincorporated associations is inconsistent in its treatment of the association's liability in tort and contract. It is extremely difficult to get at an association's common funds in actions in contract whilst the Courts have been more willing to make the funds available for actions in tort. The result of this inaccessibility of common funds and property when the action against the group is in contract, has been to give the unincorporated association an unsavoury reputation in the commercial world. Unincorporated bodies frequently find it difficult to get contractors willing to enter into agreements with them.
Secondly, the law of unincorporated associations does not establish a precise relationship between its members and the Executive, except to the extent that the latter must act with actual or apparent authority. The judgments in *Mintuck* although holding that the council can be the executive arm of the band, do not clearly establish the situations in which the council can act in such a capacity. This problem may be eased in situations where the band has specifically conferred a power on the council. However in situations where council authority to exercise a band power arises by implication, the question of council vires and its extent becomes unclear.

Finally, the law of unincorporated associations is of little use in clarifying the nature of the band's relationship with its members. It seems that the individual's rights in the band are restricted.

It is not surprising therefore to find that the policy of the Department has been to encourage bands attempting their own development to step outside the Indian Act and into some legal existence where both legal certainty and administrative flexibility is accommodated.

**iii) Finding more suitable legal forms**

Given that the present legislation's provision for the band as a managing entity is inadequate, the question arises as to suitable alternatives. Hunter postulates that two forms of such legal arrangements are feasible for Indian purposes: incorporation or the creation of a partnership.¹

¹P.D. Hunter *Legal Principles and Economic Development: General Considerations* (Ottawa: Department of Indian Affairs and Northern Development, 1977): 2
Incorporation, Hunter claims, is appropriate for a situation in which economic development is "... understood to mean the process whereby goods and services are produced, exchanged, sold and traded... [and is] discrete from the social and political needs of men and women"\(^1\) whereas partnership because it permits a "greater flexibility"\(^2\) is best for economic development "understood to mean the process whereby men and women organize themselves in order that they may meet present [and define future] needs and wants."\(^3\) Hunter's report proceeds to analyze the pros and cons of partnership and incorporation as models of development. Whilst observing that the chosen framework for development must always be a response to the needs and circumstances at the local level, he seems to prefer the partnership model because of its acceptability to the Indian people (a partnership is based on the law of agency\(^4\) and hence no loss of Indian status arises from its creation) and its inherent flexibility (a partnership agreement is a contractual and more readily adapted document than the articles of association and objects of incorporation). In New Zealand, where the tenants in common of a block can transform themselves into a Maori incorporation, such arguments against incorporation cannot be made because of the special status given such bodies and the presence of

\(^1\) Idem.

\(^2\) Ibid.

\(^3\) Ibid, p. 2.

the Maori Land Court as a forum in which 'flexibility' is attained. That is, a form of incorporation, is possible which both retains native status and contains sufficient flexibility to react to changing climates.

The Department of Indian Affairs policy has been to favour incorporation for a number of reasons. There is the obvious benefit that incorporation allows for the limiting of liability. The corporation also has perpetual succession which allows it to maintain its identity and personality notwithstanding changes in its membership, which may occur from day to day. A third important reason lies in the uncertainty which attaches to the liability of an unincorporated association. Fourthly, certain Provinces require incorporation before some forms of business can be conducted. Finally, the nature of an incorporation provides for a better form of business activity because of the advantages which that form has for the purposes of raising capital.¹

Despite the obvious advantages of incorporation, the Indian people have raised objections to it on a number of grounds. First, they dislike the fact that incorporation will mean the application of Provincial legislation and regulation with respect to the business' activities on reserves. Secondly, they are worried that the rights they give an incorporation to come onto a reserve might be taken as part of the company's 'property' if a judgment is made against it and, hence, a 'non-native' body might gain access to the reserve. A third worry is that by incorporating, band members will lose the tax advantages they hold on a reserve. Fourthly, it is felt that in some cases

¹ Hunter, Legal Principles and Economic Development, pp. 9ff discusses these reasons.
incorporation may be too drastic a step for the type of activity the band wishes to engage in. Related to that is an uneasiness about the alien codes and rules under which a company is run. Finally, it is felt that creating a corporation as a distinct entity from the band and council a vehicle for potential conflict is being established.\(^1\)

Hunter points out with respect to the first objection, that other forms of business organization on the reserve may be just as susceptible to Provincial legislation and that machinations to avoid its effect "may be self-defeating."\(^2\) An incorporation is not an 'Indian'\(^3\) and to obtain rights on a reserve must go through the normal processes of the Indian Act relating to the obtaining of rights by a non-Indian. This second objection to incorporation cannot be avoided nor can the third objection that tax advantages are lost by the creation of such an entity.\(^4\) Hunter acknowledges the Indian insistence on tax exemption as a treaty right but insists that "cold reality must at some point prevail"\(^5\) regarding this third objection:

\(^1\)Ibid, p. 9.

\(^2\)Ibid, p. 15. As to the applicability of provincial legislation to an 'Indian' company operating on its reserve land see Four B Manufacturing Ltd. v. United Garment Workers of America et al. [1979] 4 C.N.L.R. 21 (S.C.C.); Western International Contractors Ltd. v. Sarcee Developments Ltd. et al. [1979] 3 W.W.R. 631 (Alta. S.C. App. Div)

\(^3\)Four B Manufacturing Ltd. v. United Garment Workers, Western International Contractors Ltd. v. Sarcee Developments Ltd., supra.

\(^4\)In Kinnookimaw Beach Association v. the Queen (in right of Saskatchewan) [1978] 6 W.W.R. 749 (Sask. Q.B.) Johnson, C.J.Q.B. was willing to pierce the corporate veil to give an 'Indian corporation' the benefit of tax exemption under section 87. The decision was reversed on appeal: [1979] 6 W.W.R. 84 (Sask C.A.). See generally R.H. Bartlett Indians and Taxation in Canada (Saskatoon: Native Law Centre, University of Saskatchewan, 1980): 22-25.

\(^5\)Hunter, Legal Principles and Economic Development, p. 17.
are the tax losses real or imaginary; are the concerns symbolic rather than economic? If, as a matter of course, those advantages now held by Indians are real and could contribute towards economic development, then full consideration must be given to them. But, if consideration of the appropriate form, from a functional perspective is skewed because of a limited gain because of a tax advantage, then consideration should be given to persuading such parties to forego the tax advantage.¹

The fourth objection is that the requirements and methods of operating a company are both too onerous and alien to most band personnel and unsuited to the level of business at which it is usually wished to be conducted on the reserve. This problem is partially an educational one, being tackled to some extent by the Department's band training programme which is designed to teach managerial skills to band members so they can handle community-based socio-economic development.² However, as in New Zealand, there are cases where incorporation is an inappropriate device for native management and in those cases it might be best to leave well enough alone and labour under the rules of unincorporated associations. The final objection relating to potential conflict between an incorporation and the band rests upon an almost exclusive association of the incorporation with a profit-oriented concern. However, English law knows companies not formed for the purposes of profit aggrandizement but for charity or on a co-operative basis. Here we may note the success which the co-operative principle has enjoyed and continues to enjoy on some reserves and its

¹Idem.

seeming suitability to native predilection.\footnote{The co-operative has enjoyed some success amongst Indian people and has been encouraged by the Department: D.I.A.N.D., Annual Report (1968-69), pp. 51-2; (1969-70), pp. 146-7; (1975-76), p. 37; A. MacDonald, "Co-operatives and People of Native Ancestry", Canadian Co-operative Digest 3:1 (1960): 31-38; SJC (1946), pp. 250, 1460, 1493; JC (1960), pp. 457-9, 526, 564, 1110; (1961), p. 379. The co-operative flourished during the 1960's. H. Cardinal, The Rebirth of Canada's Indians (Edmonton: Hurtig Publishers, 1977): 54-5 gives a (polemical) account of the general failure of the initiative.} In addition, the problem of potential band-incorporation conflict is lessened if community leaders take a large role in the company and if the contract signed by the Minister granting the company rights on the reserve makes provision for dispute resolution.

Interestingly, the National Indian Brotherhood has recommended the Indian Act make provision for "Indian companies" (much like, one supposes, Maori incorporations), which would be an 'Indian' for the purposes of the Indian Act and which would be a federally incorporated body under band council control.\footnote{National Indian Brotherhood, A Strategy for the Socio-Economic Development of Indian People: National Report (Ottawa: National Indian Brotherhood, 1977): 152-57.}

D. TOWARDS GREATER SELF MANAGEMENT

We have investigated the Indian Act and analyzed its provisions so far as they relate to the management of Indian lands. The great amount of power in the hands of the Minister was noted. We have also seen the trend towards the Minister handing over greater powers to the reserve community as Indian insistence upon band rather than individual and/or non-Indian utilization of their lands grows.
It is at this stage that we can analyze in greater depth those provisions of the Indian Act by which subjection to its detail can be sidestepped, allowing the band to achieve greater powers over its land. In this respect we should constantly recall that it is the band being granted such powers, and the attendant legal complications as to the judicial character of that body.

There are three provisions of the Indian Act by which subjection to its detail can be suspended.

1) **Section 4(2)**

Section 4(2) provides:

The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 37 to 41, shall not apply to

(a) any Indians or any group or band of Indians, or

(b) any reserve or any surrendered lands or any part thereof,

and may by proclamation revoke any such declaration.

This section produced an interesting exchange when considered before the 1951 Commons Committee considering the revised Indian Act. To protestations that the section was a two-edged sword enabling the removal not only of the Act's restrictive but its protective provisions, the Minister replied, somewhat inconclusively, that "... the power will be exercised in the light of parliament trying to get on with the job". The Committee was led to believe that the power exists to release an 'advanced' band from the onerous provisions of the Act, not to remove any protection it might give Indian status, yet that impression rests uneasily beside the failure

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1 **CC** (1951), p. 30 et seq.
of the Committee to pay heed to an effort to insert a requirement of band consent into the section.

The section gives power to exempt a band from the operation of certain sections. It does not give the Governor in Council the competence to modify the effect of a certain section or to attach certain conditions to any exemption. ¹

2) Section 60(1) - management of Indian lands

Section 60(1) of the Indian Act enables the Governor in Council at a band request to grant it "... the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable".

Conceivably this provision can give a band greater powers of self-management; however, it is wide and imprecisely worded. First, do the words "occupied by that band" exclude land allotted to band members? Sanders calls that a possible "but unlikely" ² interpretation, though those provisions of the Act such as section 58(1)(c) which draw a distinction between unallocated and allotted land might suggest that an 'unlikely' interpretation is not a remote possibility. Secondly, this provision excludes management of surrendered lands from its coverage, as these lands are not part of 'reserve lands'. ³ In this respect, section 60(1) may well have to be used

¹ Section 4(2) found its first use on July 28, 1981, when three bands were exempted from the provisions of section 12(1)(b) out of the 27 bands which had volunteered. Sixteen bands out of the 198 that applied won the suspension of the 'double mother' rule. It should be noted that only approximately 10% of the applicant bands successfully obtained the exemption under section 4(2). See: "Indian women to retain status after marriage", Star-Phoenix (Saskatoon), 29 July, 1981, p. A17.

² Sanders, Legal Aspects of Economic Development, p. 21

in conjunction with section 53(l), which allows the Minister "... or a person appointed by him for the purpose ... [t]o ... manage, sell, lease or otherwise dispose of surrendered lands in accordance with this Act and the terms of the surrender". Finally, Sanders raises the problem of what powers can be transferred by the section. He states that it is clear that section 60(1) can be used to authorize the band to maintain a reserve lands register parallel to or in place of the Department's register. He also thinks it possible that the Minister's powers to authorize the use of reserve land for 'band' purposes can be ended by the transfer to the band of powers under section 60(1). He is, however, unsure whether it could be used to end the Ministerial powers in relation to allotments (section 20), to the establishment of a surrendered lands registry (section 55), to the power to correct Certificates of Possession (section 26) or to the approval of transfers of interests amongst band members (sections 24 and 54).

In 1961 the Joint Committee recommended the greater use of section 60. In fact, until nearly twenty years later, the Department's observation before the same Committee that it was "... moving in that general direction" would only come to fruition once, when the provision was employed to allow a band to develop reserve land for cottages to be used by non-

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1The problem here is that the 'band' cannot be given powers under section 60(l) as it is not a 'person'. The way around that would be to appoint a 'person(s)' and make that appointment, in practical terms, a nominal one subject to band council direction.

2Sanders, Legal Aspects of Economic Development, p. 21.

1979-80 saw the first tentative use of this section when four bands were given authority to issue leases and permits and approve transactions between band members for reserve lands. If the Department's application of section 69 is any indication, it will take approximately fifteen years before the use of this section reaches to most bands.

3) Section 69 - management of Indian funds

We have seen the operation of section 69 giving a band control of its revenue moneys and noted its widespread use. However, it does not give a band power over its capital moneys. If the grant of such a power to a band is in fact thought desirable, it could possibly come through a proclamation by the Governor in Council under section 4(2) exempting the band from the operation of the Act's provisions regulating capital moneys. However, under that section, unlike section 69, there is no power to impose conditions and establish a regime of supervision because section 4(2) gives an unqualifiable power of exemption.

The competence of the Governor to attach conditions and retain some degree of supervisory power (as he can in sections 60(1) and 69(1)) can cut two ways. If used in pursuit of a genuine goal of Indian self-management with the powers of supervision being exercised in furtherance of a 'facilitator' and 'consultant' role, then retention of some powers can be useful. If, however, the powers of supervision retained by the grant

1LaForme, Legal Status and Extent of Powers of Indian Bands, pp. 23-4.
3The progressive application of section 69 is charted by Hawthorn (ed.), Survey of the Contemporary Indians, p. 269.
4These are the labels of the Manitoba Indian Brotherhood, Wahbung - Our Tomorrows (Winnipeg, 1971): 160.
of powers under sections 69(1) and 60(1) are used by the Department seeing itself as an 'administrator'\(^1\) in respect of Indians and their land, then self-management will not be realized. We now come to the final section of this chapter, in which it will be suggested that, at least in respect of section 69, the latter approach has unfortunately prevailed.

4) **Self-management or administrative extensions?**

The development potential of Indian lands is immense. Increasingly conscious of their cultural identity, the Indian people wish to ensure they control the development of their lands. This desire is manifest by the ever-growing redundancy of the Indian Act which, by placing so much power in the hands of officialdom, frustrates Indian self-management, forcing resort to devices such as incorporation whereby the band can step outside the Act. That a band seeking greater self-management in respect of a particular enterprise must abandon that which they seek to preserve by economic development (identity as an Indian), is one of the cruelest and most telling testaments to the inadequacy of the legislation. Another bitter criticism is that where, for the purposes of economic development, the band does not relinquish status managing its resources as a 'band' rather than 'incorporation', its internal and external relationships are subject to an undefined mix of statutory and common law regimes hardly conducive to legal certainty.

LaForme's conclusion made after an extended analysis of the Indian Act, particularly sections 60 and 69, that "... a Band may have total responsibility over its economic development"\(^2\) deserves some attention.

\(^1\) Idem.

\(^2\) LaForme, *Legal Status and Extent of Powers of Indian Bands*, p. 42.
LaForme assumes that legal structures can be erected in the extension of powers under sections 60 and 69 which are capable of forming a sound base of self-management. Such structures being not statutorily provided for must necessarily be constructed in the instrument extending the powers to the band which would establish the metes and bounds of the band's power, the administrative requirements and relationship with officialdom. In short, the terms of the instrument handing over power to the band must strike a balance between native independence and Ministerial supervision. Given the historical tension between the government and the Indians, and, apart from regulations and practices establishing basic administrative procedures for those bands operating under section 69(1), the failure of instruments giving bands powers under section 69(1) to establish a balance between native self-management and Departmental supervision, we must doubt the future capacity of a balance to be struck under sections 60(1) and 69(1) as presently enacted.

The above paragraph points to an even more fundamental assumption underlying LaForme's statement. In making the observation he is analyzing the legislation in its bare terms and assuming the ability of the actors in the legislative scheme to transcend the historical reception and application of the Act. Is that possible? The indications are that it is not. As LaForme observes:

Over the past few years there has been in existence a policy of the Department of Indian Affairs that purports

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1 In the case of section 69(1) the Indian Band Revenue Money Regulations, C.R.C. 1978, C. 953 only partially redress the absence of a specific legal regime.

2 LaForme, Legal Status and Extent of Powers of Indian Bands, p. 1.
to promote self-government of Indian Bands. However, upon close examination of this policy it becomes apparent that it is really one of administration. That is, programs are previously established and concurred upon by the Department in all areas of ordinary community responsibility which include: education, community development, and economic development. The Bands are then at liberty to determine their priorities in these given areas and within specified limits. Thus a Band may determine that community development has a priority interest in its community and that within that community residential housing has priority over community facilities, such as recreation centres. If everything is approved by the Department of Indian Affairs, funding and accounting guidelines are provided to the Band who in turn administer those funds. In the end, self-government for Bands means an ability to administer funds provided for pre-existing government programs.

The Department also tellingly concedes: ¹

As a result of the limited degree of self-determination provided by the present system the primary activity of most band governments is to administer Departmental programs, the authority for which stems from the Government of Canada and not from the band government.

Over the last decade the Department has gradually transferred to bands administrative and financial control over numerous Departmental programs. In the 1978-79 fiscal year bands controlled $191 million or 47% of all funds allocated for community affairs, economic development and education programs.

These transfers have resulted in a dramatic increase in the range of activities that councils are involved in and in the number of people councils employ. The fundamental reality is, however, that the programs are designed by the Department, administered according to Departmental guidelines, and the Minister remains responsible and accountable to Parliament for their administration. Band councils function essentially as administrative extensions of the Department and not as governments with their own powers and authority.

Although the above words refer to the wider question of band local government, it is clear that the greater powers of management which appear

to have been handed over to the band are in fact sponsored by the Department. The possibility of bands attaining some degree of meaningful self-management, therefore, must also be construed in the light of the Departmental reluctance to give up its administrative role.

E. CONCLUSION

The Indian Act gives most powers over Indian land to officialdom and is ill-equipped to handle management of Indian lands by the band. By contrast, it establishes relatively efficient means by which rights of management of the native lands can be passed on to non-Indians. This fact produces the need for a band seeking greater powers of self-management to either labour under the legal vagueness of the 'band' or to become a 'non-Indian' for the purposes of the particular enterprise it wishes to undertake. More than anything this situation points to the outdated nature of the Indian Act and its conception of the 'reactive' rather than 'active' Indian. The band is viewed as sitting on its land waiting for a development initiative to come from 'above' (the Department), rather than as an actor actively seeking to further its own development. As the Indian becomes more 'active' and conscious of their collective bond, those provisions of the Indian Act embedding a 'reactive' view of the management of Indian lands will become more and more meaningless than they are already, whilst those provisions which can accommodate an 'active' role will be stretched and their inadequacy become more pronounced.

That in a paragraph is the situation today concerning the management of Indian lands.
CHAPTER THREE: A COMPARATIVE ASSESSMENT
A. INTRODUCTION

In 1942 Price concluded that a historical study of racial contacts between British settlers and the aboriginal peoples of North America and Australasia revealed a picture of "similarities rather than contrasts."¹ This vista, although limited to a comparative analysis of circumstances prior to World War Two, holds substantially true for a contemporary, comparative study of the Maori and Canadian Indian and the laws affecting the management of their lands.

The experience of these peoples is strikingly similar. Both share the same fate of being subjected to a huge tide of European settlement during the nineteenth century. For the Maori and Indian, settlement meant loss of their lands and disruption of the traditional lifestyle. With their subjugation to British rule the native peoples found regimes being introduced to regulate their lands, the basic characteristics of which would remain unchanged for over a century. Today, the natives of both nations are popularly viewed as lazy, their land idle and unkempt. That the apparent state of native land might be a direct product of a regime imposed in colonial times, subsisting in substantially the same historical form, seems to escape the notice of the popular mind.

In identifying a methodology for studies of native peoples at a comparative level, Sutton has said that "...a scholar must reject the impulse to elaborate on the plentiful distinctions between individual contact situations; instead one must search for universals."² Our brief discussion so far in this chapter indicates that underlying similarities

¹ Price, White Settlers, p. 190.

exist between the Maori and Indian experience at white hands. Indeed, the reader may have gained such an impression whilst reading the previous chapters. It is felt that these similarities are strong enough to make a comparison between the two peoples possible. In fact, the writer feels these similarities are so strong as to constitute a natural invitation for comparative study which strangely has been largely neglected, for a comparative analysis not only raises international consciousness but can add an extra dimension to local understanding of the local situation.

Accordingly, we will now proceed to discuss on a comparative basis the birth, history and present features of the laws affecting the management of native lands in New Zealand and Canada.

B. COMMON FOUNDATIONS - DIVERGENT REGIMES

The settlers came to New Zealand and Canadian shores determined to build a replica of the world they had left behind. Inherent in that determination was an economic ambition and ethnocentric belief in the virtues of Christian civilization. Those traits, which would underlie the settlers' dealings with the Indian and Maori, required the acquisition of native land for settlement and introduction of a policy of 'assimilation' by which the natives were to acquire the habits of a 'civilized' lifestyle. We should note that those two characteristics ruled out conquest of the Indian and Maori by physical force. First, in both countries the settlers initially lacked the
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wherewithal to overcome the natives.1 Taking the new lands by force
would have impeded and retarded settlement. Secondly, the Englishman's
'cant of conquest' with its basis in Christian principle, proscribed
the use of unnecessary force.2 Force would only be employed against
the natives of New Zealand and Canada once European society had
established itself.

We must ask then why it was that despite the similar goals of
the European in settling New Zealand and Canada, two quite different
regimes came to regulate the native lands within those countries? The
answer to that question focusses onto the Crown's pre-emptive right to
extinguish3 native title, the use of which laid the basis for the
different regimes. Putting it simplistically, one could state that

1In fact, in New Zealand the Maoris made a substantial contri-

bution to settlement during the 1840's and early 1850's by providing
the settlers with significant amounts of food: R. Firth Economics of
the New Zealand Maori, pp. 448-49; R.J. Walker "A Cultural Perspective
on Maori Land Use" (Auckland: University of Auckland, Centre for
a Competitive Society. A study in Nineteenth Century Maori History"
Civilize Savages: Some Answers from Nineteenth Century New Zealand"
N.Z. Jour. His. Vol. 9 (1975): 97, 100. This contribution towards
settlement parallels that given by the Indians in Eastern North America
during the settler's early days, see generally Jennings, The Invasion
of America, pp. 58-84.

2Jennings, The Invasion of America, pp. 3-14, Knorr, Colonial
Theories, pp. 379 et seq.

3The word 'extinguish' is used in this chapter to mean an
extinguishment of aboriginal title by purchase or cession rather
than by a legislative act.
the successful use of the Crown's pre-emptive right produced the 'reserve' whilst its notable lack of success resulted in the Maori's tenancy in common.

Before investigating the reasons for that result we should recall that though the Indian Act is based on the treaty and reserve system and applies the rationale of that system to all reserves, the system was not used throughout Canada. The organized use of the Crown's pre-emptive powers was largely confined to the former Canadas, the Prairie region and some coastal areas of British Columbia. In British Columbia and the Atlantic provinces the Crown's pre-emptive right to purchase or obtain the cession of native land was used sporadically. In the Atlantic provinces the "pragmatic and comparatively piecemeal approach to Indian reserves"¹ disappeared in the 1840's when the governments adopted the rationale of the reserve system of the Canadas and began to pass legislation regulating the use of the remaining Indian lands.² Settlement of British Columbia began essentially in the middle of the nineteenth century. During the time that James Douglas was Chief Factor of the Hudson Bay Company and (later) Governor of the colonies of British Columbia and Vancouver Island "he had followed closely the prevailing policies of the Imperial Government in regard to aboriginal populations, for it was during this time that much of the groundwork for future treaty-making procedures in Canada

¹Cumming and Mickenberg (eds.), Native Rights in Canada, p. 103.
was being set in Ontario by William Robinson.\(^1\) Accordingly the Crown's pre-emptive right was used to create a 'reserve' system of sorts in certain parts of the Pacific colony. When Douglas retired in 1861 Indian policy in the region "changed drastically"\(^2\), and the use of the Crown's pre-emptive right with its implicit recognition of aboriginal title was discontinued. Thereafter lands were set aside for Indians on a pragmatic 'as the need arises' basis.\(^3\) Still despite the fact that the pre-emptive right was not applied uniformly throughout Canada it was used in most of the regions and the 'assimilationist' rationale behind its employment in the treaty and reserve system would come to apply with the passage of the 1876 Indian Act to all lands set aside (whether as 'reserves' or not) for Indians.

There are a number of reasons why the Crown's pre-emptive right to purchase or accept the cession of native lands was so successful at opening Indian lands for settlement yet failed dismally when applied to Maori land. These reasons relate to, first, the state of Indian and Maori society during the formative years of the present regimes affecting their land and, secondly, to the nature of colonial and Imperial relations during the same period.\(^4\)

Perhaps the most important determinant in the pattern of race relations was the geography of each nation. New Zealand was small,

\(^1\)Cumming and Mickenberg (eds.), Native Rights in Canada, p. 179.


\(^3\)Ibid, Palmer-Patterson II, The Canadian Indian, p. 145.

\(^4\)In making this classification the approach of Fisher, "Some Comparative Dimensions", at p. 1 is being adopted.
temperate and fertile whereas Canada was part of a huge continent with a varied topography and climate. That fact contributed to the homogeneity of the New Zealand Maori which stood in contrast to the heterogeneity of the Canadian Indian. The Maori population was much more dense than the Indian, living mainly in the top half of the North Island and numbering over 200,000 at the beginning of the nineteenth century.\(^1\) Whilst estimates of pre-contact Indian numbers vary\(^2\), there can be no doubt that their population density did not approach that of the Maori. Besides contributing to the homogeneous character of Maori society, the geographical constraints of New Zealand meant that close European contact with the Maori was inevitable and prevented the Maori being removed to 'reserves' where out of sight was out of mind.\(^3\)

The homogeneity of Maori society was not only a function of the geography of New Zealand but of the Maoris' shared historical and cultural background. Six centuries ago the Maori migrated to New Zealand from the islands of Polynesia, and the richness of their culture and history can be traced back to this time.\(^4\)

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2 These varying estimates which have been the subject of some debate are discussed in Jennings, The Invasion of America, pp. 15-31.

Zealand from islands in northern Polynesia\(^1\) and even today it is common to find Maoris able to trace their genealogy back to an ancestor who travelled to Aotearoa ("land of the long white cloud") in the fleet of canoes from 'Hawaiki'. That common history ensured that the inter-tribal conflict of Maori society, whilst frequent and violent, was more competitive and rivalrous in nature than the deep tribal cleavages in North America.

The above differences between Maori and Indian culture had important consequences upon the pattern of racial contacts when settlement of the two countries began. Maori society was homogeneous. Its large population and density as well as shared historical background had made inter-tribal conflict commonplace and encouraged the emergence of well-defined concepts of leadership.\(^2\) Internecine rivalries inherited from pre-migration and the early post-migration days had made Maori society intensely competitive\(^3\) but the necessary adjustments it had to make in establishing itself in New Zealand had also made it adaptable.\(^4\) Maori society was thus at once able and willing to make adjustments to white contact yet, being so competitive, it was acutely aware of the ordering of social relationships, and so was anxious to see

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\(^1\)The standard text on the migration is P. Buck *The Coming of the Maori* (Wellington: Maori Purposes Fund Board, 1949).


dispersed, dependent and heterogeneous nature of Indian society presented no barrier to the 'reserve' policy.

It would be facile, however, to leave the explanation of the differences between the New Zealand and Canadian regimes with a discussion solely of the different nature of Indian and Maori society, for a significant though less important determinant in each regime's emergence was the attitudes and actions of the Europeans.¹

Settlement of New Zealand began in the 1840's when the humanitarian movement was at its height. The monolithic nature of Maori society impressed the British who viewed the Maori as the most 'advanced' aboriginal peoples it had till then encountered.² Accordingly, adherence to the Crown's pre-emptive right was stressed as an important device through which the Maori could be protected. The humanitarian influence as well as the geographic smallness of New Zealand meant that departures from the Crown's pre-emptive right were both more keenly looked for and easier to spot than in Canada. However the nature of Maori society prevented the pre-emptive right from being used to facilitate the wholesale settlement of New Zealand. Accordingly, and as we saw in chapter two, the European had to resort to devices which would weaken the inter- and intra-tribal bond and make Maori land available for settlement. That device was the tenancy in common introduced by the


²Adams, Fatal Necessity, pp. 210-213; Sorrenson, "How to Civilize Savages", p. 97.
legislation of 1862 and 1865 which established forums through which the 'communal' title was individualized. By that time the humanitarian influence had waned considerably and, in the wake of the Maori's active resistance to settlement, the impression with Maori culture had become replaced by te riri pakeha, the white man's anger.\(^1\)

When the Crown's pre-emptive right was engineered during the 1830's to produce the official 'treaty and reserve' system in Canada, the humanitarian movement did not hold as much sway as it would ten years later. A more pressing concern for colonial relations at the time was the growing number of settlers and the increasing demands in Canada for self-rule. The British, for their part, were also concerned with easing the financial drain of the colonies on Westminster's coffers. It was from those pressures that the official 'treaty and reserve' system was born in the two Canadas.\(^2\) To satisfy local and Colonial Office conscience as well as the incipient humanitarian movement, the 'treaty and reserve' system was dressed up in the modish jargon and pointed to the missionary reserves for justification. The 'humanitarians' made no significant objection, counting it a victory that Sir Francis Head's plan to remove all Indians to Manitoulin Island and north had failed.\(^3\) Although the 'treaty and reserve' system was not employed


\(^2\)See, Surtees "Indian Reserve Policy in Upper Canada"; Upton, "Origins of Canadian Indian Policy".

\(^3\)Palmer-Patterson II, The Canadian Indian, pp. 119-22, 139-140; Upton, "Origins of Canadian Indian Policy", p. 58.
throughout Canada, its conception of the reserve as a protected environment in which the Indian learnt the 'civilized' lifestyle became applied in the 1840's to the Atlantic Provinces\(^1\) and after Confederation to the lands allocated to the Indians of British Columbia.

The British colonists took with them their steadfast belief in the superiority of their own civilization and intention to create 'little Englands' in the new lands of New Zealand and Canada. Despite that 'conceptual constant' underlying colonization, the settlers' relations with the natives were not mirrored in New Zealand and Canada. The different regimes regulating native lands which emerged in both countries whilst reflecting the 'conceptual constant', were a function of the different states of native society and attitudes and actions of the European. Still despite the differences we have noted there are underlying similarities between the regimes affecting Maori and Indian land which point to a symmetry between the experience of the two peoples. This symmetry exists not only in relation to the establishment of the regimes but in the historical development and contemporary position of each regime. Thus we will proceed to look at the symmetry in an historical context and then, as we see two models of native policy emerging, engage in a comparative assessment of the contemporary laws of New Zealand and Canada regulating the management of native lands.

\(^1\)Above p. 164 note 2. For a discussion of Indian policy in the Maritimes tracing how the policy of assimilation emerged in the 1840's to regulate dealings which until then had been largely on a pragmatic basis, see Gould and Semple (eds.), Our Land: The Maritimes, pp. 29-70; Palmer-PattersonII, The Canadian Indian, pp. 107-128.
C. THE SYMMETRY IN THE HISTORY OF EACH REGIME

The tenancy in common which came to regulate Maori land was designed to make Maori land readily available for settlement and to provide the means for the Maori's civilization. By contrast, the Indian Act, at least in its early form, was not designed to expose reserves to the prey of white purchasers. Unlike the Native Lands Act 1865 of New Zealand, the Indian Act 1876 did not create the primary device by which the bulk of native land was to be opened up for settlement. The major losses of Indian land came from processes, treaty or otherwise, outside of the Act. Though the Act did provide for surrender, originally that was seen as part of the means whereby an Indian became 'civilized' rather than as a valve through which reserve land went into white hands. In short, whilst the New Zealand regime was designed for the 'alienation' and 'regulation' of native lands, the Indian Act was primarily 'regulation' orientated. As we have seen, the 'alienation' aspect of the New Zealand legislation was a reaction to the lack of success of the Crown's pre-emptive right of purchase in opening Maori land for settlement.

The 'alienation' ingredient in the New Zealand regime installed a degree of vitality and urgency into the application of the legislation by the white administrators. The individualization of the communal title was actively undertaken in order to make Maori lands readily procurable. The European also remembered that tribal resistance to alienation had necessitated the introduction of the individualization process and so it was felt pressing throughout the closing years of the nineteenth century to destroy the tribal bond, so that it could no longer impede settlement and the individual Maori's progress towards a 'civilized' state.
No similar urgency attached to the operation of the Indian Act in Canada because the dominant white group had little to gain from the active application of its provisions encouraging 'civilization'. Though strong policies of assimilation were practiced on the Indian during the last quarter of the nineteenth century, the vigour of their application does not match that with which Maori customary title was individualized. The practices soon disappeared in the face of bureaucratic disillusionment and the demand, especially in the Prairies, for reserve land for agricultural purposes. And so it was that the 'protective' aspect of the Canadian legislation came to the fore and marked officialdom's application of the Indian Act during most of this century.\(^1\) In New Zealand a 'protective' aspect would have been entirely inconsistent with the aims of the 1865 legislation since it would 'protect' the tribal lifestyle which it was designed to attack.

The urgency with which the tenancy in common was introduced to the Maori resulted from an anxiety to make Maori lands available for settlement and to dismantle the tribal bond which had frustrated that goal. Thus the Maori was not being exposed to forces of 'assimilation' so much as being rendered vulnerable to the loss of their land.\(^2\) In 1891 James Carroll joined with Rees in protesting that the European

\(^1\)Tobias, "Outline History of Canada's Indian Policy", p.

\(^2\)See Ward, *A Show of Justice* pp. 305-315 who argues that the advancements by Maori society towards what appeared to be 'assimilation' were made despite rather than because of the actions of white society.
had failed to make an active effort to instruct the Maori in the European lifestyle. Carroll made the "melancholy reflection"¹ that "during all the years the New Zealand Parliament has been legislating upon native land matters, no single bona fide attempt has been made to induce the natives to become thoroughly useful settlers in the true sense of the word."²

Thus in New Zealand, as in Canada, the aim of assimilation upon which the regimes affecting native land were based was not pursued actively. From the time of the establishment of the regimes onwards there was little organized effort to show the natives how to become 'civilized'. In New Zealand the Maori were losing their land, whilst in Canada the Indians were left on reserves. 'Assimilation' was the justification both countries gave for that situation but it was an expiation to which lip-service and precious little else was being paid. It was as though the establishment of each regime was of itself sufficient to achieve the goal. The Canadian and New Zealand legislators seemed to expect the natives to become assimilated by osmosis.

Until the early twentieth century, a common feature of the Maori and Indian experience was their neglect by white administrators. Though the Maori were a comparatively organized and mobile people, their initiatives during the late nineteenth century were based largely on the kotahitanga movement which looked back to the King movement and

¹Quoted in Ngata, "Maori Land Settlement", p. 125.
²Idem.
hoped to establish a separate Maori parliament.\textsuperscript{1} As long as they were making such outlandish demands the Maori were easily ignored by politicians and their situation glossed over as the loss of their land continued. Similarly, the unorganized Indians were left on their reserves and receded into the forgotten reaches of Canadian society as their reliance on Departmental aid became greater and greater.\textsuperscript{2}

Palmer-Patterson II characterizes that period of Indian history as a stage of "irrelevance".\textsuperscript{3} It is a label equally as applicable to the fate of the Maori in New Zealand society during the same period. What relevance the Maori had was only as an object from which land was to be extracted, and as the Maori's utility in that respect became less and less, his relevance suffered a commensurate decline.

The 'irrelevance' suffered by Indian society was to be deeper-seated than that of the Maori, due to both the (already noted\textsuperscript{4}) inherent characteristics of Indian society and the insulated nature of the reserve on which white administrators ruled and succoured the Indian population. Despite their 'irrelevance' the Maori had maintained their independance and homogeneity and had shown themselves to be an adaptive and canny people. The King and kotahitanga movements show a perceptive but naive reaction to white rule which probably assisted, rather than frustrated,

\textsuperscript{1}Fisher, "Some Comparative Dimensions", pp. 4-5; Kawharu, Maori Land Tenure, pp. 20-4; Ward, A Show of Justice, p. 291-92.

\textsuperscript{2}Palmer-Patterson II, The Canadian Indian, pp. 39-40; Tobias, "Outline History of Canada's Indian Policy", p. 18.

\textsuperscript{3}Ibid, p. 40.

\textsuperscript{4}Above pp. 168-69.
the onset of Maori 'irrelevance' in the late nineteenth century. The Maoris were to become better organized by the leaders which emerged in the early twentieth century from the Young Maori Party. These leaders, who were graduates from the Anglican school at Te Aute, were able to channel the Maori's activities away from fruitless political demands into more concrete and realizable goals.¹ For our purposes the most notable product of the 'new leadership' was, first, the provisions in the 1909 legislation for the incorporation of owners and establishment of a regime for the alienation of Maori land requiring the consent of a body which scrutinized each transaction.² The second important result of the 'new leadership' was the land development schemes of the 1920's to 1940's.³ Thus the inherent characteristics of Maori society enabled it to emerge from irrelevance as it faced the continued loss of land and disruption of the cultural nexus. The Indian people were neither possessed of such an ability at that period nor were faced with such threats to their culture, and so during the 1920 - 1940's their irrelevance continued.

The Maori's emergence from irrelevance between the two World Wars was only partial and did not last. Incorporation had found an incipient but not widespread acceptance and the development schemes did not embrace a significant percentage of Maori land. Both devices,


²Above pp. 21-22.

³Above pp. 39-41.
particularly the latter, were tied to an attempt to prevent the disappearance of Maori culture which it was thought would come from the loss of Maori land and drift of the Maori to the city. Ngata along with other Maori leaders therefore conceived of the schemes as a way of keeping the kingroup together on the ancestral lands.\(^1\) However, during World War II the urbanization of the Maori increased radically and the impetus began by the emergence of incorporation and land development schemes started to wane.\(^2\) Faced with urbanization and the dispersal of the kingroup, as well as the passing on of the 'new leaders', irrelevance once again became the Maori's fate.

Thus at the end of World War II we see both the Maori and Indian in a state of irrelevance. The inherent characteristics of Maori society, notably its cohesiveness and strong leadership, which had remained constant since white settlement and fostered the King, kotahitanga and land development movements were weakened by urbanization. Meanwhile in Canada, the Indian's lot on the reserve had not changed substantially since the early twentieth century when 'protection' rather than 'assimilation' became the keynote of governmental policy.

Though both peoples had become irrelevant their cultural instincts survived and with it their rejection of assimilation. In New Zealand, the survival of the cultural bond was seen by the Maori's patterns of association and settlement in the urban regions\(^3\) and, more especially


\(^2\)Kawharu, *Maori Land Tenure*, p. 31

for our purposes, in the continued fragmentation of interests in
the tenancy in common. The Maori may have been drifting to the
city but the interest in turangawaewae was clearly persisting. In
Canada, the rejection of assimilation was manifest in the failure of
many of the provisions of the Indian Act designed to achieve that
goal. Voluntary enfranchisements were almost negligible, the elective
mode of leadership did not enjoy catholic usage nor did the allotment
system. Thus one of the major indicators of the rejection of assimila-
tion by the natives of Canada and New Zealand after World War II was
tacit, and seen in the operation of the laws affecting their land.

In New Zealand, despite their urbanization, the Maori continued to
cherish their ties with the land and the cultural identity that the
represented. In Canada, the Indian remained on the reserve with the
cultural instinct substantially intact. The natives of both countries
were aware, however, of how much the survival of their cultural
identity was tied to the operation of the European's law. In New
Zealand, turangawaewae depended upon the succession to or vesting of
an interest in Maori land by the Maori Land Court. In Canada, status
as an "Indian" and the accompanying right to live on a reserve and
enjoy the benefits of Indianhood, depended upon the Indian Act.

Attempts by the New Zealand and Canadian governments in the late
1960's to unsettle the law which was so central to native identity
roused the Maori and Indian from their political quiescence. The
activism produced by the governmental initiatives and fuelled by the
international 'third world' movement, resulted in what is now popularly
called the 'native movement'. The Indians attained a political unity
which had thereto eluded them whilst the Maori resurrected their 'dormant' unity with a fervour similar to that of the King and kotahitanga movement days.

The process by which the native movements of both countries emerged is strikingly similar.

Native participation in World War II was sufficient to prick the white conscience, so that in both countries we find the post-War scrutiny of the laws which affected the natives, culminating in the Indian Act of 1951 and Maori Affairs Act of 1953. However, this legislation did little other than to strengthen the policies of assimilation embedded in earlier legislation and produced, like its predecessors, tacit native rejection. The rejection was evidenced by the continuing failure of the legislation to produce material advances towards the hallowed goal of 'assimilation'. The Canadian and New Zealand legislation enacted in post-War idealism contained what both governments saw as the panacea to the native problem and as this vision became more and more discredited, governmental scrutiny through officially sanctioned reports produced, in New Zealand, the 1960 Hunn Report and, in Canada, the 1966 Hawthorn Report. Both of these reports shared an ultimately self-defeating mix of insight and ignorance. Most notably, both insisted that assimilation was not a goal which the government could properly hold for its native people yet proceeded to make recommendations in

support of that goal.\(^1\) The Hunn and Hawthorn warning against assimilation as an aim for government policy appeared to cause a contrary reaction as both governments sought to increase, rather than slacken, the pace of assimilation. In New Zealand, after a mirage of Maori consultation, the increase in the tempo of assimilation was seen in the notorious Prichard-Waetford Report and subsequent legislation of 1967.\(^2\) The Indians of Canada were more fortunate as the Federal Government's attempt, again after an illusion of native consultation, to lift the pace of assimilation through its infamous 1969 White Paper\(^3\) met almost instantaneous death and native rejection as promoting 'cultural genocide.'\(^4\) Both of these Governmental initiatives actively encouraging assimilation

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\(^1\)The Hunn Report (p.10) recommended an increase in the pace of the processes introduced in the 1953 legislation to arrest fragmentation of the tenancy in common. These processes had the effect of depriving many persons of turangawaewae and had a necessary assimilationist tinge. Hunn rejects 'assimilation' as a Governmental goal at p. 15. The Hawthorn Report rejects assimilation (p.6) yet proceeds to recommend that the provinces take over the provision of services to the reserve (p.18) which "is a major element in the attainment of the goal of assimilation" (Bartlett, The Indian Act of Canada, p.8).

\(^2\)As to the procedure, contents and Maori reaction in respect of the Prichard-Waetford Report and the 1967 legislation see Kawharu, Maori Land Tenure, pp. 251-93; see also Sinclair, "Land Since the Treaty", pp. 163-67.


\(^4\)S.M. Weaver Making Canadian Indian Policy: The Hidden Agenda 1968-1970 (Toronto: University of Toronto Press, 1981) tracks the secretive deliberations within Government from which the White Paper was born. The activities within Government were undertaken whilst extensive consultations with the Indian population were proceeding. The various critics of the White Paper are discussed by Weaver, pp. 172-189.
were counter-productive. They produced a unified native resistance and laid the basis of the modern native land movements in both countries. The resultant native cry for 'self-determination' spawned by those official efforts resulted in a reversal in policy - in Canada's case the reversal was sudden whereas in New Zealand it has been more gradual but, nevertheless, equally as noticeable. Today the governments of both countries insist they will not legislate contrary to the wishes of the native people.

The tension underlying the operation of the Canadian and New Zealand regimes between an 'assimilationist' view of the world and one insisting upon the maintenance of the native's cultural identity is no longer tacit. Noting how this dialectic has become overt, we are now in a position to discuss the two models of native policy and from there assess the extent to which each statute is able to step outside the historical goals and policies within it.

D. THE TWO MODELS OF NATIVE POLICY

Two models of native policy have been formulated, an 'order/assimilation' model and a 'conflict/pluralist' model.

The first has been summed up thus:

... existing values and policies of dominant institutions are viewed as healthy and good and problems of racial and ethnic groups are due largely to subordinate racial and ethnic groups' failure in adjustment. Assimilation, or the shedding of unique cultural traits and identity, and adoption of those of the dominant group is felt to be the primary way to bring about a stable and healthy society. ²

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¹ Ibid., p. 185.
The same writer describes a 'conflict/pluralist' model: 1

Pluralism is viewed as a viable alternative to assimilation which considers the point of view of race and ethnic minority group members. Pluralism... is given a cultural meaning emphasizing differences in language, religion, kinship forms, nationality, tribal affiliation, and/or, other traditional values and norms distinguishing an ethnic group from the dominant group and the ethnic minority groups' desire to preserve their own way of life even though it differs from the dominant group.

It is contended that neither model is 'right' because each makes assumptions about the nature of society and suggest what the good society would look like. 2 Yet, as we look beneath the laws affecting the management of native lands in New Zealand and Canada, it is clear that the two models form a dialectic underlying the operation of the legislation manifested, most notably, in the failure of the regimes to achieve their historical goal of 'assimilation'. The existence of the dialectic indicates that some people, the legislators and native people, consider one model to be the 'right' one. Though neither model may be 'right' it would seem proper that the persons whose land is regulated by the legislation, the natives, have a choice between either model and in this respect it is clear they have opted for the 'conflict/pluralist' model.

The discussion so far in this chapter has taken us into broader fields than the topic of this study might suggest. However, the foregoing

1 Idem.

has a necessary relevance to an assessment of the New Zealand and
Canadian laws affecting the management of native lands, for the shape
and operation of these laws at any given time is closely connected with
the relationship of the native people with the dominant group. In
many ways, to study the laws affecting the management of native lands
in Canada and New Zealand is to study the history of the native people.

Our comparative analysis of the establishment and history of each
regime has revealed underlying similarities between the Maori and Indian
experience at white hands. Important differences between the nature of
Maori and Indian society have also been noted. Maori society had a
homogeneous and non-dependent character which enabled it to rally
against the threats of the European world. The heterogeneous and
dependent nature of Indian society combined with the lack of perceived
threat to their culture (i.e. their 'protection' on the reserve)
ensured their political quiescence. The 'native movement' in each
country has in many ways reduced the significance of these differences.
The Indian people now have a political unity on a par with, if not in
excess of, that of the Maori. Like the Maori, the Canadian Indians
are insisting upon the creation of legal regimes regulating their land
which actively preserve their way of life and which will facilitate a
larger native socio-economic profile.\footnote{National Indian Brotherhood, Indian Government: The Land ... The People...The Resources, (Ottawa: National Indian Brotherhood, 1980): 123.}

Before we proceed to analyze the extent to which the natives of
either country can realize that goal through the present legislation
affecting their lands, we should note first an important difference between the Maori and Indian formulation of the 'conflict/pluralist' model. The varying formulations are a direct result of each country's different regime and the reasons for their establishment. Thus though the 'native movement' may signify a converging of the modern-day characteristics of Indian and Maori society, the historical differences between the nature of Indian and Maori society which were so influential in defining the shape of the regimes have a bearing upon the pressures placed by the natives onto those regimes.

As a result of the regime introduced in New Zealand the remaining blocks of Maori land are dotted amongst areas of general land and, where utilized by the owners, the involvement of even the majority of the owner group in the day to day administration would be the exception rather than the rule. Most often many of the owners live in the cities or away from the land returning to it for weddings, tangis (traditional funeral) and other special occasions. In other words, Maori land is a centre for cultural and, to a lesser extent, social life whereas in Canada the reserve is a focus for cultural, social, political and economic life. Thus in New Zealand the fact that most owners cannot or do not live on the ancestral lands is accepted. This fact does not however diminish the Maori's sense of cultural identity. As Kawharu observes:

1In 1976 76.2 percent of all Maoris were urban dwellers, of those 52% live in the 'urban triangle' formed by Auckland, Hamilton and Rotorua in the upper half of the North Island: McCarthy (ch.), Royal Commission on the Maori Courts, p.21.

2Kawharu, Maori Land Title, p.4

3Idem.
...the value of land as an "identity marker" has risen with the increase in the Maori population, with their growing urbanization, and with the decrease in the absolute amount of land in Maori title. People with little prospect of material gain from their landed inheritance are now seeing it an entitlement to membership of a tribal group (of whatever size); and for the urbanized Maori especially, for whom much is strange and little is certain, nothing is more reassuring than to have tangible existence of one's roots. And this money cannot buy.

Economic development of Maori land (through incorporations and trusts) is therefore not tied as it is in Canada to any sense of complete territorial integrity. Rather, it is viewed as a device by which the scattered members of the owner group can retain turangawaewae yet also allow those members of the owner group who wish to remain on the land to work under a regime not frustrated by fragmentation or absenteeism, and allow the application of whatever profits are made for 'communal' purposes.¹

The current Maori formulation of the 'conflict/pluralist' model upon which they wish to manage their lands has not always been constructed in the way we have just seen. The previous 'boom' in the development of Maori land by its owners was during the 1920-1940's when under the leadership of Sir Apirana Ngata large areas of Maori land were brought into production.² This boom was a response to the threat to Maori society seen in the losses of Maori land and the incipient, urbanization of the Maori.³

²Kawharu, Maori Land Tenure, pp. 27-31.
However as fragmentation continued, Maori population grew, agricultural mechanization flourished and paid employment on the labour market beckoned the Maori, the inability of the remaining Maori lands to support the whole or even most of the owner group became pronounced. Thus urbanization and the movement of kin away from the family lands became accepted. As we have seen, however, the Maori’s interest in his kin and land remained. There was a stretching but not a breaking of the cultural tie – it had simply adapted and taken forms different to those of pre- and early-contact days.

In Canada the economic development of reserves is tied to an attempt by Indian leaders to maintain the Indian population on reserves. This aim is substantially similar to that held half a century ago by Ngata when he devised the land development schemes. In both situations similar reasons for the native drift to the city can be found: low economic productivity on native lands and a desire on the individuals’ part to improve his or her socio-economic status. However, we should note that Ngata’s schemes only postponed the Maori urban drift and once the schemes’ impetus began to decline in the 1940’s, the cityward movement of the Maori continued. If the Maori experience is any indication, the efforts of Indian leaders to maintain the reserve as the


3Kawharu, Maori Land Tenure, p. 31.
basic socio-economic as well as cultural unit of Indian life may be ill-fated. Though the development potential of many reserves is great, most studies insist that reserves are unable to provide, even when fully developed, an economic base for all their current and projected population.¹ Thus the Indian might eventually become like the Maori: the economic importance of reserves in the Indian lifestyle might lessen with the Indian becoming primarily an urban-dweller or, at least and especially in the more remote areas, relying on work in the general rather than tribal labour market. That statement can only be conjecture and describes a transformation which the Indian appear resolute to avoid. If it is a transition which Indian society is to make, it will be much more traumatic than the pain suffered by Maori society during its urbanization. Indian reliance on the reserve is deep-seated with a propensity being noted for outmigrants to return to the reserve after several (usually unsuccessful) years in the city.² No similar trend has been noted in the Maori’s urban drift. The adaptability and independent nature of Maori society has facilitated a relatively painless transition. Unfortunately, it seems Indian society will not be so lucky.

¹ D.I.A.N.D., Indian Conditions: A Survey, p. 70; see also and most notably Hawthorn (ed.), Survey of the Contemproary Indians, pp. 101-44.

² Frideres, "Urban Indians," p. 90; A.J.Siggner, An Overview of Demographic, Social and Economic Conditions among Canada's Registered Indian Population (Ottawa: D.I.A.N.D., 1979) suggests that poor economic opportunities in the city combined with on-reserve improvements in housing supply, economic development and Indian control of education are discouraging out-migration from and remigration to reserves (pp. 14, 17).
Accordingly, the Maori 'conflict/pluralist' formulation stresses cultural rather than socio-economic goals whilst the Indian model is tied not only to an affirmation of the cultural tie but also to job-creation and stemming the flow of reserve residents into the city. With the comprehensive nature of the Indian view of self-management in mind, we can progress to analyze on a comparative basis the capacity of each country's regime to accommodate the native demand.

E. THE MANAGEMENT OF NATIVE LANDS: COMPARATIVE DIMENSIONS

1. The legislative guardian

The 'trusteeship' duty vested in both governments in respect of its native peoples has been delegated to a legislative guardian. In New Zealand, the legislative guardian is the Maori Land Court whilst in Canada, the Minister of Indian Affairs has been given the bulk of the role. Thus the immediate and major difference between the two guardians is a contrast between a judicial and political body. It should be noted that the guardianship role given the Maori Land Court was not the result of a calculated decision so much as the gradual product of political convenience. The Court's jurisdiction was limited initially to individualization of the customary title, but as the need became apparent to regulate aspects of the tenancy in common (such as succession and inter vivos transfers) the Court found its powers were widened.¹

We have seen the dialectic underlying the operation of the New Zealand and Canadian laws. One of the modern features of this dialectic

¹Kawharu, Maori Land Tenure, pp. 89-92; Smith, Maori Land Law, pp. 11-19.
is an attempt by the legislative guardians to transcend the 'order/assimilation' model within the legislation and move towards a 'conflict/pluralist' model which is more in harmony with native wish. Thus in New Zealand we see the movement towards the 'pluralist model' evidenced by the increasing use of section 438 and increasing redundancy of the legislative detail carrying a predominantly assimilationist view of the world. Likewise in Canada, we find section 69(1) of the Indian Act finding widespread usage and, it appears, the incipient employment of section 60(1). However, though that trend is common there are important differences, at least in a legal context, between the effectiveness of this move towards land management by the cultural groups in New Zealand and Canada.

a) political vs. judicial body

The major reason for the relative impotence of the Canadian movement when contrasted with that in New Zealand lies in the inherent characteristics of the body the government has delegated its guardianship duty to. In New Zealand the guardian of Maori land is the Maori Land Court, a body which has enjoyed a measure of respect amongst the Maori people for some time despite the fact that viewed historically this esteem might not be warranted. By contrast, the Canadian guardian is a political body with whom the Indian continue to associate their greivances, historical and contemporary, real or imagined. This fact has implications for the management of the land as owners attempt to assert more meaningful powers of self-management. In Canada, the grant of increased powers even to a single band is quite clearly construed as a political act made in furtherance of political (i.e. Departmental) ends.
Thus in Canada the provisions of the Indian Act are being exercised to give the Indians greater self-management of their lands, not because that goal is intrinsically desirable but because Departmental policy demands it. That is, politics rather than the merits of Indian self-management underlie the current use of the Indian Act.\(^1\) The result of this is that the appearance of the gain of greater powers of management is largely illusory as bands and their councils become 'administrative extensions' of the Department. In New Zealand, political considerations barely enter into the Maori Land Court's work. In fact, the Royal Commission on the Maori Courts noted the frequent strain between the Court and government officials.\(^2\) The Court quite properly sees its task as being to work purely on the local level, rather than within a hierarchy of national, regional and local levels. Thus it is immediately responsive to pressures from the local level and has been able to keep within the bounds of its legislative mandate, yet also able to transcend the view of native policy embedded in most of that legislation. Where, for example, the Court investigates the affairs of a trust or incorporation, the Court's scrutiny is accepted and there is no 'hierarchy' through which the 'political' effects will reverberate. In short, the presence of the Minister of Indian Affairs as delegated guardian of the Canadian Indian and his land politicizes, in many cases needlessly, a role which need not be so.

\(^1\) Weaver's discussion (Making Canadian Indian Policy, pp. 21-32) is a fine analysis of how political considerations underlie the Department's use of the Act.

\(^2\) McCarthy (ch.), Royal Commission on the Maori Courts, pp. 50-51.
provision of rights of appeal from Maori Land Court decisions\(^1\) and in the special corrective powers given the Chief Judge.\(^2\) In our discussion of the Indian Act we saw the constant rejection by politicians and departmental officials of the insertion of such rights into the Act.

The legislation in New Zealand is perhaps so detailed because the 'guardian' is not the Minister and the legislators felt the need to regulate closely the body onto whose shoulders they placed the bulk of their guardianship responsibility. Certainly where the Minister of Maori Affairs is given discretionary powers, as in his ability to investigate and make decisions concerning the affairs of the Trust Boards, his powers are not subject to qualification and regulation like most of those given the Maori Land Court. In Canada the same reasoning also applies: where the guardian is a political body legislative qualification and regulation of his discretionary powers is seen as inappropriate.

The Maori Affairs Act's specificity and regulation of the Maori Land Court's discretionary powers stands in contrast to the Indian Act's imprecision and grant of wide powers to the Minister. Besides the clear reluctance of legislators to regulate the activity of their Ministerial colleague, the grant of such broad powers was seen as being necessary to accommodate the heterogeneous nature of Indian society. The provisions of the Indian Act reveal a belief that Ministerial adaptability to the range of local circumstances can only be attained by giving the Minister broad, adaptable powers. Therefore underlying much of the Indian Act is

\(^1\)Maori Affairs Act 1953, sections 37-52.

\(^2\)Ibid, sections 452 and 453.
b) regulation of the guardian

One of the major features of the New Zealand legislation is its careful, almost obsessive, attention to detail. This detail regulates the conduct of the owners, the managing entity and the Court with elaborate specificity. Thus, with respect to incorporations and to a lesser extent, though this is most often corrected in the trust instrument, section 438 trusts, the legislation spells out the rights, duties and powers upon which the Maori owners manage their lands. Where the legislation is devoid of detail as, for example, in more closely regulating renewals of leases by the Maori Trustee and in the question of land utilization by the tenants in common, it tends to produce a commensurate degree of administrative disarray and owner inertia. Thus the legislation gives the Maori Trustee power to renew leases of land made pursuant to Part XXIII yet does not elaborate beyond the grant of that power, with the unsatisfactory result of frequent failure to renew and delinquent lessees. Similarly, Part XXIII of the Maori Affairs Act establishes a process for the tenants in common to alienate their lands as tenants in common, yet is silent on how they can utilize their land. The result is that unalienated land under Part XXIII tends to be, at best, inefficiently run, usually plagued with local body charges and subject to internecine disputes which cumulatively and usually result in the land being left idle, under-utilized, alienated or in the owners seeking to escape the uncertainty of utilization as tenants in common to come under the Court's umbrella as an incorporation or trust. A further example of the New Zealand legislation's attention to detail is seen in its careful
1 equation of flexibility with lack of specificity and broad discretionary power. It was that aspect of the Indian Act which undoubtedly prompted rice's already-quoted agreement with praise of the Act as a "brilliant innovation in native administrative law." ¹

Our comparative study reveals the flaw within that equation. In New Zealand the guardian is closely regulated without an impairment of flexibility or responsiveness to the local situation. It is true that in places the legislation places too constrictive limitations on the Court's protective powers, for example, in its jurisdiction to confirm alienations and ability to correct the confusion owners frequently find themselves in at meetings held under Part XXIII of the Act. However the Court has shown enterprise in trying to counter these limitations in those cases where it feels the need ² and though its judges may feel some 'fine tuning' is needed, in general they do not feel constrained by the legislation. ³

When the laws of Canada and New Zealand affecting the management of native lands are compared the major feature that appears is the role which the legislative guardian in each country has taken and is able to take.

It may be recalled that earlier we divided the laws affecting the management of native lands into two aspects. It was postulated that management involved either the use of the land by the natives or the granting of rights in the land to non-natives. That division provides a convenient base from which we can amplify the points of a comparative nature made above.

¹ Price, *White Settlers*, p.84.
² Above pp. 33-36.
³ Durie, *Submissions*, pp. 8-10.
2. The management of native lands

a) The granting of rights in native land to non-natives.

One of the reasons for the native articulation of a 'conflict/pluralist' approach has been their unhappiness with the process whereby non-natives gained rights in their land.

In New Zealand the fact that the tenants in common held legal title necessitated the obtaining of their consent to an alienation. However the legislation would qualify and practically render nugatory the need for consent through its extremely lax quorum requirements which, until tightened in 1974, enabled a small minority to approve an alienation. In Canada many of the provisions enabling non-Indians to gain rights in reserve land were first enacted with no consent requirement. Though in some cases that absence persists, the policy of the Department has been to seek band council approval for 'minor' alienations and to obtain band consent to those of a 'major' nature. In the latter situation if surrender is being used to pass the rights, approval of over half the band electors is required. However if the alienation simply seeks band consent as a matter of policy, a simple plurality is taken as sufficient. Thus in all cases except surrender the alienation of reserve land by a minority is possible.

The basic objection shared by the Maori and Indian to the process whereby rights in their lands are granted to non-natives lies in the manner in which proposals for an alienation are usually presented to them.

In New Zealand a proposed alienation of land under multiple ownership must be presented to a meeting called pursuant to Part XXIII of the Maori Affairs Act. Similarly, to place a proposal before a band a referendum or, more usually, a


...ing of electors must be held. Thus a formal meeting normally with a 
\storeditary proposal of alienation before it, is the usual device in both 
countries through which rights to use native land are sought by non-natives. 
re natives come together to consider the proposal, make a decision and 
isband. Frequently they do not have alternatives to the proposed alienation 
laced before them with the departmental officials present at the meetings ten supporting the 'package'. Thus native consent is often based on both 
incomplete view of the land's potential and the one-sided views of the 
ponents of the alienation. Added to that is the common tendency of those 
porting the alienation to 'baffle the natives with science'. Frequently 
atives agree to alienation out of a sense of frustration at the legal 
iments to group development. These barriers stand in contrast to the 
elative ease with which an alienation can be made.

The dissatisfaction of Canadian Indians with the process whereby non-
indians gained rights in their land was recounted earlier. We also noted an 
tempt to ameliorate this disquiet by the passing of greater powers in respect 
of alienations onto the reserve. We may wonder, however, about the extent to 
ich any 'amelioration' has occurred. The Department insists, on the one hand, 
hat it still scrutinizes proposals according to its policies developed over 
eyears yet it also feels a growing reluctance to intervene. It may well 
se that the 'imperfect' nature of many agreements continues and that the only 
ange brought by the Departmental policy has been to remove itself from the 
rocess. This situation is a fine example of how political considerations 
affect the Department's 'guardian' role.
In New Zealand, unlike Canada, the legislation makes some attempt to tackle the weak position of Maoris in meetings where even at the best of times, the idioms and concepts will be beyond the ken of most owners -- a fact which does not usually emerge until 'post-mortem' exchanges. As we saw in chapter two, the Maori Land Court is given power to assess the terms of the alienation within specified criteria, notably those relating to the adequacy of consideration. It also has special powers in respect of leasing arrangements with improvement provisions. Despite those powers the Court still feels that its ability to bring certain information before the owners and place them in a less defensive role is limited. We saw some of the practices adopted by the Court to meet this problem, notably its issuing of instructions to the Recording Officer who organizes the meetings. However the Court lacks sufficient power to substantially reduce the problem and in general the uninformed nature of Maori consent to most alienations of their land persists.

The Maori situation in respect of the alienation of their land closely resembles that of the Indian. Consent to alienation is made without a complete understanding of the alternatives involved, frequently clouded with confusion as to the precise nature of the alienation and often acquiesced to from frustration or disillusionment with the processes, legal and administrative, whereby the owner group can undertake management. The writer's impression, however, is that the New Zealand legislation and Maori Land Court initiatives go much further towards correcting the natives' vulnerability in matters concerning the alienation of their land than the 'practices' of the Department of Indian Affairs.

b) The management of native lands by the natives.

The basic regimes regulating Maori and Indian land are inadequate vehicles
for the natives to undertake management of their lands. Maori tenants in common are frustrated by the unwieldiness of the fragmented title and dispersed owners. However through the Maori incorporation or a section 438 hapu trust the owner group is able to transcend the limitations of multiple ownership. The Indian band is pre-empted from exercising powers of management over its lands by the Indian Act which reposes most powers in the hands of the Minister. However as the Minister relaxes the restrictions of the Act and passes greater powers over to the band either formally (section 69 or section 60(1)) or informally (i.e. as a matter of policy) the legal incapacities of the band are not substantially removed since it must labour under the law affecting unincorporated associations. Alternatively, it can incorporate and forsake Indian status with the loss of all that status' attendant benefits, legal or cultural, symbolic or real.

Thus in terms of the ability to step outside the strictures of the regime imposed on them in colonial times, the Maori have a distinct advantage over the Indian. Section 438 trusts and incorporations can accommodate and reaffirm the cultural peculiarities of the Maori as well as maintain the land's legal status as Maori land. Both incorporations and trusts draw upon well-established principles of law which guide with certainty the vires of the group, the actions of the Executive and the rights of members and third parties. The legal certainty within which these regimes are encased is enhanced by the accessibility of the Maori Land Court, an institution of no small significance to the Maori, through which flexibility and precision is obtained.

In some respects there is a similarity between the use of the legislation by the Canadian and New Zealand guardians in that both use the wide provisions in their legislative mandate to respond to the native demand for a regime which
commodates their cultural instincts. In New Zealand the wide terms of section 38 are being used with much more regularity than those allowing for incorporation of the tenants in common whilst in Canada we see the use of the broad powers sections 69(1), 60 and 4(2) give the Minister. However the consequences of the exercise of the Minister of Indian Affairs' powers contrast sharply with those flowing from the Court's exercise of its wide powers. In New Zealand section 138 is used to give the owners powers of self-management within specially and precisely constructed constraints. The hapu trust constructed under the section is regulated not only by the (usually detailed) trust instrument but also by the Trustee Act and general principles of equity concerning trusts. Moreover the Maori Land Court is a forum in which administrative and legal problems are quickly resolved. No such certainty is a consequence of the Minister exercising any of his powers under sections 60, 69 or 4(2) to give bands powers of self-management. The band can turn to no trust instrument or the like for guidance and regulation, the general principles of law affecting the band's status as an 'unincorporated association' are unsettled and, anyway, the extent of their applicability vis à vis the Indian Act is unsure. Thus, though the legislative guardians in both countries are resorting to the wide provisions of the legislation the consequences that flow from the use of those provisions differ.

It is unwise to set the New Zealand laws up as a panacea for they are gravely flawed in many respects. However for comparative purposes it can be noted that they have an affinity with native ambition concerning the management of their lands which is absent in the Indian Act. Thus the Maori Affairs Act is able to accommodate with relative comfort a 'conflict/pluralist' model whereas the Canadian legislation can only do so clumsily. That, it is suggested, is the
major conclusion to be drawn from a comparative analysis of the Canadian
and New Zealand laws affecting the management of native lands.

1. CONCLUSION

This study has been concerned primarily with the contemporary laws of
New Zealand and Canada affecting the management of native lands. Although the
focus has been largely a contemporary one it was also necessary to discuss
the historical origins and development of the Canadian and New Zealand laws as
those aspects have an important bearing upon the current shape and operation of
the legislation.

The creation of the regimes of both countries was connected above all else
with the process whereby native land was made available for settlement. As if
to acknowledge the moral precariousness implicit in that activity the European
justified the land-acquiring process through a policy of 'assimilation'.

'Assimilation' was a convenient excuse for the regimes of Canada and
New Zealand rather than a goal towards which either country made a concerted
drive. Except for a brief flurry of on-reserve activity during the 1880's and '90's,
no concerted effort was made in either country to transform the native into a
'civilized' state. There seemed to be an almost mystical belief in the power
of 'law' to bring about that result. In practice though the laws' contents may
have revealed strong 'assimilationist' goals, it was operating so as to confirm
rather than erase the separate cultural identity of the native peoples. In
New Zealand the tenancy in common became splintered into fragmented and frequently
valueless shares, as each owner sought his turangawaewae in the ancestral land.
In Canada the continuance of the cultural tie was evident in the dismal failure
of the Indian Act's enfranchisement process and the lack of widespread acceptance
encountered by the Act's elective mode of leadership and land allotment provisions. The tacit native rejection of the goal of assimilation embedded in the legislation evidenced a dialectic underlying the laws affecting native land: a tension between an 'order/assimilation' and 'conflict/pluralist' model. Nowadays that tension has become vocalized and the Maori and Indian are insisting upon land management regimes which reflect their cultural identity.

The above dialectic gave us a basis from which we could compare the contemporary New Zealand and Canadian regimes. The major feature emerging from the comparative analysis was the capacity of the New Zealand legislation to recognize the Maori's wish for regimes based upon their cultural needs which stood in contrast to the incapacity of the Indian Act.

The capacity of the New Zealand legislation to construct systems of land management by the native group appeared with the 1909 legislation's provisions affecting incorporation. Until then, the New Zealand and Canadian regimes were similar in content despite the intrinsic differences between the reserve and tenancy in common. Both contained no recognition of the native group as an entrepreneurial unit, focussing instead on the individual. The exception to that reluctance to view the native group in an entrepreneurial light arose, not unexpectedly, in relation to the alienation of native land, being seen in both regimes' precise and detailed mechanisms whereby the natives 'managed' their land by alienating it. The introduction of the land development schemes in the 1920's marked a further departure in the content of the New Zealand legislation from its earlier similarity with the Indian Act.

The New Zealand legislation's departure from a non-entrepreneurial view of the native group was largely a response to the nature of Maori society. The Maori had always been homogeneous, adaptable and economically independent. These
characteristics had meant their continued insistence on a share of the European's pie yet also produced a determination to retain their cultural identity. Faced with the continuing loss of their lands and threat of urbanization, Maori society, with its 'new leadership' versed in the political ways of the European, was able to gain legislative recognition of its entrepreneurial capacities. Though these capacities received legislative and practical recognition in the incorporation and development schemes, their continued manifestation was reliant on a state of agricultural technology and leadership, neither of which were permanent. As the leaders passed on and new agricultural methods meant fewer employment opportunities for the growing Maori population, their cityward movement became inevitable. The urbanization of the Maori from the beginning of World War II onwards brought a significant reduction in the activity of native groups developing their land and resulted in the leasing of large areas of Maori land to European farmers. Thus, though the New Zealand legislation did not contain the Indian Act's non-entrepreneurial view of the native group, in practice the earlier similarity had reappeared. The Maori was once again 'irrelevant' to white society, his fate the same as that of the Indian, with rejection of 'assimilation' being expressed in its former tacit manner: the fragmentation of the tenancy in common.

When the native movement emerged in the late 1960's the 'dormant' provisions of the Maori Affairs Act were given new life by an insistent Maori population and sympathetic Maori Land Court. With the 'grass roots' nature of its operation and removal from the political process, the Maori Land Court has always been in close contact with the Maori. As they asserted their cultural identity the Court responded, not unnaturally, to the pressures the owners placed upon it to use its legislative mandate in order to construct regimes which avoided the
The greatest pressure placed upon the Maori Land Court therefore emanated from the local level, from the owner groups the Court was dealing with constantly. By contrast the Canadian guardian, the Minister of Indian Affairs, operated within a hierarchy of pressures at the local, regional and national level. In a moment of almost amusing naivety the Hawthorn Report called upon the Minister and his Department to act as the national conscience in respect of the shortcomings in the Government's treatment of the Indians. In fact (and, one may add, not surprisingly) the application of the Indian Act by the Minister and his Department was a product of policy formulated in terms of governmental rather than local need. Political criteria shaped on a national basis became the focus into which local needs and concerns were channelled.

The above difference between the nature of the legislative guardians gave a further basis from which we could compare the contemporary regimes in terms of an underlying dialectic. We saw the protection the legislation gave the Maori owners in matters concerning the alienation of their land and how the Court attempted to deal with the shortcomings of that protection. By contrast, it was seen that the Minister of Indian Affairs had given the Indian bands 'more control' in respect of the alienation of reserve land but it was queried whether or not that grant of control was matched with the use of safeguards to ensure that the owners were making an 'informed' decision. In general, it seemed safe to conclude that the New Zealand guardian did more than its Canadian counterpart to ensure that the owners alienating their land made an 'informed' decision.

With regard to the non-alienation aspects of management, we saw how the Maori

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and Court was able to construct a regime suitable to the needs of the native owners of each block and was not constrained by the type of political considerations which governed the Minister and Department of Indian Affairs. Moreover, where the provisions of the legislation were used in either country to allow the natives to manage their lands as a group the results were seen, from a legal point of view, to be vastly different. In Canada the Indian Act, although creating the band as the management unit of reserve land (and band moneys), made no provision for the regulation of the band as an entrepreneurial body. Therefore the band which obtained powers of self-management had to labour under the unsettled law affecting unincorporated associations and, even then, the extent to which that body of law was applicable remained doubtful. By total contrast, the Maori owners escaping the tenancy in common were able to organize as a Maori incorporation or trust under section 438 of the Maori Affairs Act. Both of those options were seen to be encased within legal certainty and under the benevolent supervision of the Maori Land Court.

The above observations disclose the theme which the writer has attempted to stress throughout the work and which forms the short conclusion of this study: if the native goals within a 'conflict/pluralist' model are to be realized in Canada revision of the Indian Act is necessary, whilst in New Zealand the existing law is substantially able to meet the Maori's 'conflict/pluralist' aims.

We saw earlier that commentators have rejected the 'order/assimilation' and 'conflict/pluralist' models because each embedded a view of the nature of society and what the good society should be. That position was seen as unhelpful because the actors within the legislative shemes quite clearly see the two models as the exclusive choices and, besides, legislation has always contained a prescriptive view of society and articulated desirable social goals. The writer's sympathy
with the native goal of 'self-determination' or, more descriptively, cultural 
reservation through the management of their lands, has in all probability 
become apparent. Reading various texts one is struck however by the sincerity 
of many of those articulating a goal of assimilation and perhaps the native wish 
of maintaining a distinct identity is ultimately ill-fated. Maybe that under-
estimates the resilience of the native cultures: after all, Oriental cultures 
have survived and adapted to many centuries of Western contact. Here we get 
into the speculative questions necessarily underlying any discussion of native 
law and policy. If 'assimilation' is inevitable (and that is a doubtful assumption) 
then it must be a process which takes its natural course rather than one ex-
pedited by legislative soothsayers. If it is to come natural and not artifical 
processes must produce it, it must come from within native culture rather than 
be imposed from 'above'. In the meantime, the European dominant group must 
acknowledge its duty towards the native people upon whose former lands its 
wealth has been built and strive to respect the wishes and cultural integrity of 
these people. To tinker with social processes and 'play God' by encouraging 
assimilation is only to foment social unrest.

In a celebrated article Hallowell identified the core nature of a system 
of property rights:

If the core of property as a social institution lies 
in a complex system of recognized rights and duties with 
reference to the control of valuable objects, and if the 
roles of the participating individuals are linked by this 
means with basic economic processes, and if, besides, all 
these processes of social interaction are validated by 
traditional beliefs, attitudes and values and sanctioned 
in custom and law, it is apparent that we are dealing with 
an institution extremely fundamental to the structure of 
human societies as going concerns. For, considered from
a functional point of view, property rights are institutionalized means of defining who may control various classes of valuable objects for a variety of present and future purposes and the conditions under which this power may be exercised. ... Consequently, property rights are not only an integral part of the economic organization of any society; they are likewise a coordinating factor in the functioning of the social order as a whole. ... Social recognition of values is integrally connected with ownership regulations and these in turn are supported by social sanctions. In any society human relations must be ordered so that basic interests are recognized and secured. Property as a social institution fulfills this task.¹

The laws regulating property are a vital way in which a society identifies itself and therefore become an affirmation of that particular society's goals. When a dominant culture enacts laws regulating the property of a minority group the content of those laws and environment within which they operate are an expression of the nature of the relationship between the two cultures. In that sense the study of the laws affecting the management of native lands is also a study of cultural interaction. Thus, though that may ultimately be more than a legal study it is, nevertheless, a study in which the law figures predominantly.

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Appendix One: An Example of a hapū trust order.

1 Title and Interpretation

(a) This trust order shall apply to each of the trusts this day constituted in respect of each of the blocks named in the schedule hereto.

(b) The trusts in respect of each of the blocks aforesaid shall be collectively known as the Ngati Ngahere Lands Trusts.

(c) In this trust order the word "Runanga" shall refer to the decision making body hereinafter constituted and the word "Board" shall refer to the Executory trustee, the Whakatohea Maori Trust Board.

2 Objects

(a) Except as hereinafter may be limited the objects of the trust shall be to provide for the use management and alienation of the lands and any other property or assets of the trust to best advantage of the beneficial owners, to make provision for the better utilisation of the land by rearrangement of titles or the like, to make provision for the better habitation or user of the lands by beneficial owners by making appropriate divisions of the land or in any other manner, to maintain support and develop communal facilities upon or near the land which are directly or indirectly to the advantage of the beneficial owners including the facilities of the Te Rere Pa and Marae, to promote maintain support or to carry on any one or more businesses undertakings or enterprises either upon the land or upon any part or parts thereof or upon the land containing any communal facilities as aforesaid or in connection with some user of the land or in connection with such industries that might involve a number of the beneficial owners resident in the area, and, to represent the beneficial owners on all matters relating to the land and to the use and enjoyment of the facilities associated therewith.

(b) It is the further intention of this trust that the above objects be achieved by the Executory Trustees fostering, advising and maintaining a Runanga, as hereinafter constituted, and upon the basis that the Runanga be the decision making body and the Executory Trustees a means whereby those decisions might be effected.

3 Mode of Operation

(a) A Runanga is hereby constituted to consist of 2 or more persons duly appointed as a committee by the Board
pursuant to section 20 of the Maori Trust Board's Act 1955 (in this trust order referred to as representatives of the Board) and the advisory trustees meeting together at one and the same time.

(b) The Runanga shall meet at such time and places as it shall determine.

(c) Notice of meetings of the Runanga shall be given to all members thereof at their last known place of residence at least 7 days prior to each meeting.

(d) A quorum for a meeting of the Runanga shall be at least 3 advisory trustees.

(e) At meetings of the Runanga only the advisory trustees shall have a vote provided however that in the event of a tie a vote may be exercised by the Chairman.

(f) The Board shall act only in accordance with such policy as may have been approved by the Runanga and shall give effect only to such proposals as the Runanga may have confirmed PROVIDED HOWEVER that the Board may act without reference to the Runanga on any matter that may demand prompt action but shall report thereon to the Runanga as soon as practicable thereafter.

(g) Notwithstanding anything hereinbefore contained the Board shall not be obliged to follow or to implement any determination of the Runanga where in the opinion of the Board such determination conflicts with the trusts contained herein or with any rule of law or otherwise exposes them to any personal liability.

4 Powers

The Trust is empowered

(a) General

In furtherance of the objects of the trust and except as hereinafter may be limited to do all or any of the things which the trust would be entitled to do if it were the absolute owner of the land PROVIDED HOWEVER that it shall not

(i) alienate the whole or any part of the fee simple by gift or sale other than by way of exchange on the basis of land for land value for value and then effected by Court Order or in settlement of a proposed acquisition pursuant to the Public Works Act or similar statutory authority;
(ii) lease the whole or any part of the land for any purpose for any term exceeding 42 years inclusive of any right of renewal, or with provision for compensation to a lessee for his improvements.

(b) Specific

Without limiting the generality of the foregoing but by way of emphasis and clarification as well to extend the power of the trust it is declared that the trust is empowered:

(i) To buy

To acquire any land or interest in land whether by way of lease purchase exchange or otherwise, PROVIDED HOWEVER that no purchase or exchange shall be effected unless the trust is satisfied that the land so acquired can be vested in the appropriate beneficiaries as Maori freehold land, AND, to acquire and sell, hire, or otherwise deal in any vehicles, plant, chattels or equipment;

(ii) To acquire interests

To acquire the interests in any of the lands the subject of this trust order from any beneficial owner for the benefit of all or some of the beneficial owners of each of the blocks affected by this trust order.

(iii) To subdivide

To subdivide the lands in any manner permitted by law into such subdivisions or parts as may seem expedient to it;

(iv) To improve

To develop and improve the trust lands and to erect thereon such buildings fences yards and other constructions or erections of whatsoever nature as may seem necessary or desirable;

(v) To employ

To engage, employ and dismiss managers, secretaries, servants, agents, workmen, solicitors, accountants forestry or other consultants, surveyors, engineers, valuers and other professional advisers required to carry out the powers of the trust and to fix their remuneration;

(vi) To borrow

To borrow money for the purpose of the furtherance
of any of the trusts or powers herein contained whether or not with security over all or any real or personal property of the trust;

(vii) **To set aside cash reserves**

To set aside such reserves as it in its discretion shall think fit for contingencies or for capital expenditure or for expansion in accordance with the objects of the trust or in connection with any business carried on by the trust pursuant thereto, or to retain in an accumulated profit account any portion of the profits which it thinks prudent not to distribute to the beneficial owners;

(viii) **To lend**

To lend all or any of the money coming into its hands upon any securities in which trust funds may be invested by trustees in accordance with the Trustee Act 1956 or in accordance with any other statutory authority or upon any first or second mortgage or contributory mortgage or to lend through any solicitor's nominee company; and with power to combine the moneys of anyone of the trusts hereof for the purpose of any investment as aforesaid with any of the other trusts hereof or with any other trust moneys of the Board in respect of other Maori Land Trusts;

(ix) **To operate with others**

To enter into arrangements or agreements or contracts in the name of the Board or jointly or in partnership with any other person or organisation;

(x) **To pay own costs**

From the revenues derived from the operation of the trust to reimburse the Board or its representatives and the advisory trustees for all their out-of-pocket expenses actually and reasonably incurred in the attendance to the affairs of the trust and to either pay them a reasonable travelling and accommodation allowance for attendance at meetings of the trust or otherwise to travel to attend to the business of the trust or to reimburse them for expenses actually and reasonably incurred in attending thereat;

(xi) **To take applications to the Maori Land Court**

At its discretion to bring and prosecute in the
Maori Land Court on behalf of the beneficial owners any applications for amalgamation of titles: aggregation of owners, the inclusion of any further lands in this trust order, the exclusion of any lands from this trust order, the variation of this trust order to increase, reduce or otherwise vary the powers hereby given to the trust or to bring any other application for orders within the jurisdiction of the Court that might facilitate the operation of the trust;

(xii) To distribute to owners

Subject to due compliance with the provisions hereof requiring separate accounts for each block, to distribute to the beneficial owners in each block in accordance with their shares the whole or such part of the net proceeds apportioned to that block as it shall at its sole discretion from time to time determine with power to pay moneys to the Maori Trustee for the purpose of effecting a distribution to the beneficial owners;

(xiii) To permit occupation or enjoyment by owners

At its discretion to reserve in any lease, or to licence or otherwise provide for any one or more of the beneficial owners to personally occupy use or otherwise enjoy such defined part or parts of the land as it shall determine having regard to comparative shareholdings, and, if any such right is reserved, licensed or otherwise provided for but to one or some only of the beneficial owners, then it will determine the extent to which participation in rentals and profits are to abate for those persons receiving the benefit of such reservations licences or provisions or otherwise be adjusted.

(xiv) To make other special provision for beneficiaries

At its discretion to alienate by way of lease or licence to any beneficial owner or to any blood relative of a beneficial owner free of rent or otherwise upon terms more favourable to the lessee than might be given if the land were dealt with on the open market without favour PROVIDED HOWEVER that such proposal has been approved by each of those in attendance at a general meeting of the beneficial owners of those lands affected called by the Trust after due notice of such meeting and of the terms of the proposed lease or licence have been given by it in manner hereinafter provided for the calling of general meetings.
(xv) **To make General Welfare payments**

At its discretion and in such manner as it shall determine to apply funds for the maintenance support and development of communal facilities upon or near the land (including Te Rere Pa and Marae) or communal scheme (including Marae enterprises and cottage industries) or for general welfare matters (including assistance with tangi and tribal hui) where in its opinion such facilities schemes or matters have some direct or indirect connection or association with the beneficial owners or any group thereof.

(xvi) **To take over existing leases**

To assume all the rights duties powers and obligations heretofore held by the lessors under any lease having force or effect of any of the lands or of any part or parts thereof and to assume and to have all the rights duties powers and obligations that may have accrued to the former trustees of any of the lands the trusts in respect of which have been cancelled on the making of this trust order.

5 **Personal Interest of Trustees**

Notwithstanding any general rule of law to the contrary no person shall be disqualified from being appointed or from holding office as an advisory trustee or as a representative of the Board by reason of his employment as a servant or officer of the Board or of the trust or by his being interested or concerned in any contract made by the Board provided that he shall not vote or take part in the discussion on any matter that directly or indirectly affects his remuneration of the terms of his employment as a servant or officer of the Board or Trust or that directly or indirectly affects any contract in which he may be interested or concerned.

6 **Protection of Trustees**

In any case where the Board is of the opinion that any direction determination or resolution of a meeting of the Runanga or general meeting of beneficial owners' conflicts or is likely to cause conflict with the terms of this trust or with any rule of law or otherwise to expose it to any personal liability or is otherwise objectionable then, and in reliance upon the effect of the provisions of subsection 2A of section 438 and of paragraph (e) of subsection 1 of section 30 of the Maori Affairs Act 1953 and of section 49 of the Trustee Act 1956 the Board may apply to the Maori Land Court for directions in the matter PROVIDED HOWEVER that nothing herein shall make it necessary for the Board to apply to the Court for any such directions.
Protection of Minorities

In any case where any representative of the Board, advisory trustee or beneficial owner feels aggrieved by any direction determination or resolution of a meeting of the Runanga or of any action of the Board he may either

(i) give to the Board notice of his intention to have the matter complained of referred to the beneficial owners and then provided that within 14 days thereafter he is able to file a requisition supporting that notice executed by not fewer than 20 beneficial owners then the Board shall fix a time and place and convene a general meeting accordingly in manner hereinafter provided or

(ii) give to the Board notice of intention to have the matter complained of referred to the Maori Land Court provided that he shall within 14 days thereafter file an application pursuant to paragraph (b) of subsection 3 of section 438 of the Maori Affairs Act 1953 for the variation of this trust order to make particular provision for the matter in dispute and serve a copy thereof upon the Board AND upon and following receipt of a notice of intention as aforesaid and for as long as the matter remains unresolved, but then provided the further particulars are filed within 14 days, and except as may be necessary for the avoidance of an action by any third party affected or as may be directed by a Court on application for injunction, directions or the like, the Board shall take no steps or no further steps as the case may be to implement or otherwise give effect to or enable the continuance of the matter complained of.

General Meeting

(a) A general meeting of the beneficial owners may be convened at any time by the Runanga.

(b) A general meeting of the beneficial owners shall be convened by the Runanga upon service upon the Runanga at the offices of the Board of a requisition in writing signed by not less than 20 beneficial owners stating the purpose for which the meeting is required.

(c) A general meeting of the beneficial owners shall be convened if required by the provisions of this trust order relating to the protection of minorities.
(d) The Runanga shall in any event call a general meeting at least once in every 4 years.

(e) Notice of any general meeting shall be given by the insertion approximately 3 weeks and again approximately 1 week before the meeting of advertisements in at least 2 newspapers and with individual notices for those owners for whom the Runanga has an address at least 14 days prior to the meeting.

(f) Matters resolved upon at general meetings of beneficiaries shall prevail over any direction determination or resolution of a meeting of the Runanga.

(g) In addition to the grounds upon which advisory trustees might be removed from or appointed to office by the Maori Land Court, it shall be a ground for removal or appointment that an individual was elected or failed to be re-elected as the case may be, provided however that the Court shall not be bound to appoint or remove upon that ground.

(h) The reports and accounts hereinafter provided for shall be submitted at the first general meeting convened after such accounts have been duly completed and audited.

(i) No general meeting shall be deemed to be properly constituted unless at least 15 beneficial owners from one or other of the blocks in the schedule hereto are present in person throughout the meeting.

9 Reports and Accounts

(a) Annual reports

The Runanga shall complete an annual report of the activities of the trust each year ending on the 31st day of March. Such report may be a composite report for all the trusts collectively known as the Ngati Ngahere Lands Trust and the Runanga shall not be obliged to report separately in respect of each trust block.

(b) Annual Accounts

The Runanga shall cause to be prepared and audited proper accounts of the assets and liabilities, and of income and expenditure for each year ending on the 31st day of March. Such annual accounts may be composite accounts for all the trusts affected in this trust order and except as hereinafter provided the Runanga shall not be obliged to provide annual accounts for each trust block.
(c) **Individual block accounts**

In addition, the Runanga will from time to time and in any event prior to any distribution of moneys to any beneficiary, cause separate accounts to be prepared for each trust block showing the apportionment of the assets and liabilities and income and expenditure of the collective trusts to the individual trust blocks, except that separate accounts need not be done for any blocks the owners of which have been aggregated by order of the Court.

(d) A copy of all reports and accounts in this clause provided shall be deposited with the Registrar of the Maori Land Court within 3 months of completion and audit of the same.

(e) Nothing herein shall be construed to restrict the right of the Board or of any advisory trustee to seek alternative provisions for accounting by an application to the Court for a variation of this trust order.
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<th>Description</th>
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<tbody>
<tr>
<td>1</td>
<td>Lot 340A2B Parish of Waioeka constituted by a partition order of 4. 3.1955.</td>
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<tr>
<td>2</td>
<td>Lot 340B1 Parish of Waioeka constituted by a partition order of 16.11.1932.</td>
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<td>4</td>
<td>Lot 340C1 Parish of Waioeka constituted by a partition order of 6. 5.1938.</td>
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<td>5</td>
<td>Lot 340C2 Parish of Waioeka constituted by a partition order of 6. 5.1938.</td>
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<td>6</td>
<td>Lot 340C3 Parish of Waioeka constituted by a partition order of 6. 5.1938.</td>
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<td>7</td>
<td>Lot 340D1 Parish of Waioeka constituted by a partition order of 4. 3.1941.</td>
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