"Formalizing" Land Tenure in First Nations:

Evaluating the Case for Reserve Tenure Reform

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The authors gratefully acknowledge invaluable comments on earlier drafts by Douglas Sanderson, Darlene Johnston, and a special working group of the First Nations Tax Commission.

A proposal is currently being drafted by the First Nations Tax Commission to create a national First Nations Land Title System (FNLTS) for reserve lands in Canada. This paper examines the implications of the FNLTS proposal for some economic development outcomes across diverse First Nations communities. The authors aim to situate the theory underlying a FNLTS within recent international development scholarship on land tenure formal-

ization, asking whether and under what conditions net benefits from tenure reform are likely to be realized. Their evaluation begins with a brief overview of the history of reserve land tenure in Canada, followed by a survey of the tenure regimes currently available to First Nations, thus providing context for suggested reforms. The second half of the paper draws on the experiences of Indigenous communities with tenure formalization in the United States, New Zealand, Australia, and South Africa. Overall, the authors conclude that the predicted economic outcomes of a FNLTS will depend heavily on historical, political, social and geographic factors unique to each community. First Nations will likely need to consider creative strategies for tenure reform tailored to their particular circumstances and traditions in order to meet economic development goals.

I INTRODUCTION

Consider the following three scenarios:

First Nation is a densely populated community in the arid interior of the Okanagan Valley. The community's lands are designated by the federal government as an *Indian Act* reserve.[1] Located just two kilometres from a

1 We use the terms "Indian reserve community" and "First Nation reserve community" interchangeably to mean a community or Band ("body of Indians") on land, the legal title to which is vested in the federal government (under Canadian law), that has been set apart for the use and benefit of an Indian Band, as defined in s. 2(1) of the federal *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*]. The term "reserve" is also used to refer to lands designated under s. 38(2) of the *Indian Act*; see Part III, 'Investor', below. We employ these terms in order to explore their economic consequences, mainly under Anglo-Canadian law, recognizing that some First Nations use alternative definitions for their communities and lands.

In general, we use the term "First Nation" to replace "Indian". However, the term "Indian" is used when we need to distinguish between "Status Indians", who are individuals registered under the *Indian Act,* and "non-Status Indians", who are not registered. The federal requirements for registration are laid out in two subsections of the *Indian Act*:

Section 6(1): both of an individual's parents are entitled to Indian registration

Section 6(2): one of an individual's parents is entitled to Indian registration under s. 6(1) and the other parent is not registered.

As a result, individuals who have only one Indian parent registered under s. 6(2) do not qualify for registered Indian status. Additional complications in the definition of Indian status exist because amendments to the *Indian Act* in 1985 (Bill C-31) (i) reinstated the status of individuals who had lost their registration through earlier versions of the *Act*, causing a leap in the number of Status Indians, and (ii) provided the opportunity for individual First Nations to create their own rules regarding First Nations membership, meaning that those eligible for membership, as defined by the First Nations, are not necessarily those eligible for registration, as defined by the federal government. For further discussion see S. Clatworthy, "Indian Registration, Membership and Population Change in First Nations Communities" (2005), online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/ai/rs/pubs/re/rmp/rmp-eng.pdf>.

Registered Indian status is significant for land tenure on reserves because legal eligibility to hold certain land title interests on reserves under the *Indian Act* is contingent on registration; see Part III, below.

mid-sized city centre, First Nation has a few businesses and a small pulp and paper industry. But the community's vision for a strong commercial sector has failed to materialize, despite having designated a business development area on the reserve and despite a growing number of skilled individuals from active training and education initiatives. A full one-third of First Nation's citizens now live outside the community, many of them far away in major cities such as Vancouver or Winnipeg. Those who remain turn to the surrounding areas to access most public services and to look for jobs.

First Nation is a remote northern reserve community whose people are struggling to maintain vibrant cultural identities and social cohesion in the face of enormous socio-economic challenges. Inadequate water-treatment facilities contribute to an ongoing health crisis, but the community's government cannot afford to invest in new infrastructure. Federal transfers provide what little public revenue is available, while opportunities for public enterprises or the creation of a community tax base have been limited. First Nation's considerable forestry resources have been responsibly managed for centuries, but the community strains to balance possibilities for resource use under current regulatory schemes against a priority for environmental stewardship.

First Nation is a small coastal Atlantic reserve community with a crumbling public housing infrastructure. More than half of First Nation's citizens are on waiting lists for home repairs or affordable housing subsidies. In consequence, the existing housing supply is hugely overburdened, with two or even three families occupying single-family dwellings. The value of these residential units continues to plummet, offering little incentive for residents to invest in property improvements or contribute to upkeep costs.

The First Nations in this study are hypothetical reserve communities in Canada that are confronting real-world economic challenges: high unemployment;[2] nascent business development and investment opportunities; and crises in affordable housing.[3] These challenges are pervasive in reality,

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When we use the singular "First Nation" in this paper, we do so in reference to an abstracted and stylized First Nations community in order to discuss some of the features of real-life communities relevant to connections between tenure reform and economic development. In Part III, below, we similarly employ several individual, stylized economic actors, including Entrepreneur, Investor, Homebuilder, and Vendor. "First Nation" plays a similar role in our discussion, albeit as a communal rather than individual entity. Our intention is not to represent "First Nation" as a "typical" First Nations community. To the contrary, we repeatedly draw attention to the diversity of and difference between First Nations in Canada throughout the paper.

2 Of First Nations peoples living on reserve in 2006, 51.9% were employed, compared with 66.3% of the off reserve First Nations population (the statistics for Registered Indians living on and off reserve were 51.9% and 64.8% respectively). Statistics Canada, *Canada's Changing Labour Force, 2006 Census: The Provinces and Territories*, online: 2006 Census Analysis Series <http://www12.statcan.ca/english/census06/analysis/labour/ov-cclf-25.cfm>.

3 Over one-quarter (26%) of First Nations peoples on reserves lived in crowded conditions. Of those, 11% lived in dwellings with 1.5 people or more per room. However, housing conditions on

though not in every combination nor in every community.[4] What legal options are or should be available for First Nations to improve economic and social well-being? Land tenure reform is one possibility.[5] Internationally, land tenure has attracted attention from among the legal institutions considered foundational for economic development. But past lessons demonstrate that the people of a First Nation must discover the arrangement suitable to their community's unique social, economic, political, geographical and historical context to craft a successful development strategy. Existing land tenure regimes may be unreflective of local traditions and capacities, and insufficiently flexible to meet the development objectives of some First Nations in Canada. Where some of the community's goals are to use resources more efficiently and to promote growth by participating in national and international economies, harmonizing land tenure inside the community with regimes outside and enforcing rights at the level of the state may provide greater tenure security for interest holders and produce net economic benefits. However, these reforms may entrench inefficient regimes, undermine traditional tenure systems, pose serious threats to community cohesion and fail to consider crucial supporting institutions, thus creating greater uncertainty and diminishing prospects for community-led development.

In this article we consider the potential economic outcomes of further formalizing land tenure in reserve communities under a proposed First Nations Land Title System (FNLTS) using insights from Indigenous experiences around the world. The proposal for a FNLTS is currently being developed by the First Nations Tax Commission, a statutory organization formed in 2007 under the federal *First Nations Fiscal and Statistical Management Act (FNFSMA)*.[6] A functional FNLTS would create a national land-title registry for First Nations communities that attempts to clarify how

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reserves showed some improvement since the 1996 census conducted by Statistics Canada, when 33% of the population on reserves were living in crowded conditions. Statistics Canada, "Aboriginal Peoples in Canada in 2006: Inuit, Métis, and First Nations, 2006 Census" (January 2008) Statistics Canada Catalogue no. 97-558-XIE [Statistics Canada, "Aboriginal Peoples"] at 45.

4 *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996), vol. 2, part 2, Ch. 5, Part A [RCAP, "Economic Development"] at 4-5.

5 We use the term "land tenure" as a system composed of rights and responsibilities related to land, rather than the narrower of concept "property rights" which focuses primarily on the rights of users. See Part II, 'Definitions', below, for a more complete discussion of these concepts.

6 *First Nations Fiscal and Statistical Management Act*, S.C. 2005, c. 9, [*FNFSMA*] at s. 17(1). The FNLTS proposal, while still in an early stage of development, is supported by a considerable body of research undertaken by the Commission. Some of these research findings are discussed below. While we attempt to provide a comprehensive framework in this paper for assessing the impacts of formalizing land tenure under a FNLTS, our discussion should not be taken to imply that the Commission is necessarily failing to consider a given factor in its ongoing process of proposal development and consultation. The Commission has extensive experience in working with First Nations communities through its taxing initiatives. In keeping with our respect for the Commission's special expertise, we anticipate that this paper will contribute to constructive dialogue on reserve land tenure reform.

property rights are held on reserves (for community members and non-community members) and to make land title more easily transferable (within the community and to outsiders).[7] As an initiative to promote commercial development in reserve communities, a FNLTS also has direct implications for increasing community government revenues under Band-administered property tax systems facilitated by the Commission. In general, a FNLTS is intended by the Commission to coexist with the other institutions and supporting programs already available to First Nations under the *FNFSMA*.

In Canada today, First Nations' land tenures on and off reserves are subject to multiple layers of oversight[8] and to rapidly shifting common law interpretations of Aboriginal title.[9] In turn, land tenure systems themselves may be premised on diverging—sometimes competing—traditions and world views within a wide diversity of communities.[10] There are more than 600 First Nations in Canada and approximately 3,000 reserves,[11] many with

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7 For a discussion of distinctions between community members and non-community members, see Part II, 'Definitions', below.

8 These layers of legislative jurisdiction for reserve communities are surveyed in detail in Part III, below.

9 A watershed example is the decision of the Supreme Court of Canada in *Guerin v. The Queen* [1984] 2 S.C.R. 335 [*Guerin*] where the Court acknowledged that a fiduciary duty was owed by the federal Crown in the management of lands for Aboriginal peoples. In *Guerin*, the Musqueam Indian Band approved a surrender of a portion of their reserve lands to the Crown for the purpose of leasing the land to a golf club. The Court found that the federal government vitiated its duty to act in the best interests of the Band members by unilaterally modifying the terms of the lease agreement. For further discussion on contemporary common law developments see B. Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Canadian Bar Review 196.

10 Leroy Little Bear eloquently describes his interpretation of First Nations' property concepts:

> The linear and singular philosophy of Western cultures and the cyclical and holistic philosophy of most native peoples can be seen readily in the property concepts in each society. Indian ownership of property, like Indians' way of relating to the world, is holistic. Land is communally owned; ownership rests not in any one individual, but rather belongs to the tribe as a whole, as an entity. The members of a tribe have an undivided interest in the land; everybody, as a whole, owns the whole. Furthermore, the land belongs not only to people presently living, but also to past generations and future generations, who are considered to be as much a part of the tribal entity as the present generation. In addition, the land belongs not only to human beings, but also to other living things (the plants and animals and sometimes even the rocks); they, too, have an interest.

M.J. Mossman, *Property Law: Cases and Commentary*, 2d ed. (Toronto: E. Montgomery Publications, 2004) at 82-83, quoting L. Little Bear, "Aboriginal Rights and the Canadian Grundnorm" in J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) [Little Bear]. See also J.Y. Henderson, *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000) [Henderson] at 406.

For an argument in the Australian context that concepts of Indigenous ownership rooted in differing and distinct ontological systems may be non-transferable to a system of private ownership, see S. Hepburn, "Transforming Customary Title to Individual Title: Revisiting the Cathedral" (2006) 11 Deakin Law Review 63 [Hepburn].

11 Socio-Economic and Demographic Statistics Section, Indian and North Affairs Canada (personal email correspondence, 20 February 2009) ("There are 615 First Nations/Bands in

their own unique tenure arrangements and goals for economic development. Mapping international experiences with reforms onto this complexity therefore presents a special challenge. First Nations peoples in Canada are not, of course, without guidance from their traditions and experiences about how to use their own resources for community economic development. Strategies developed from these roots have the best chance of being informed by, and being consistent with, community values. But given that land tenure in reserve communities has been directly influenced by non-Indigenous governments for well over 350 years,[12] traditional roots and non-Indigenous institutions have become inextricably intertwined. As a result, First Nations may find that current reserve tenures are mismatched to their own traditions, or to tenure off reserve, or both. When outside investment is a key source of capital for economic development, First Nations also have strong incentives to improve the legal linkages that allow them to tap into the flow of wealth and resources from the national and international economies. As with other issues arising from intersections between Canadian and Indigenous law, recognizing common ground between Indigenous and Western legal practices can provide valuable guidance for First Nations decision-makers in forging these connections.[13] For example, some traditional land tenures may provide for access to and use of community land by individuals or groups outside the community. Outside users and investors can potentially find methods to translate and adapt to these traditional arrangements, based on their own familiarity with common law leases, in ways that do not diminish their willingness to engage in commercial activity on reserves. Some traditional land tenures also employ forms of private title that permit exclusionary rights similar to land tenure off reserve, contrary to persistent stereotypes.[14] In other respects, decision-makers will benefit from attention to First Nations' differences when called on to use traditional laws and

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Canada and an estimated 3,003 reserves of which about 38% are inhabited, or potentially inhabited (Indian Lands Registry System as of Dec. 31, 2008)"). See also Indian and Northern Affairs Canada, "Registered Indian population by sex and residence 2007" (2008) Minister of Indian Affairs and Northern Development [INAC, "Registered Indian population"].

12 O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 2nd ed. (Toronto: Oxford University Press, 1997) [Dickason] at 207. While setting a starting point for British colonial involvement directly in administering land tenure in First Nations communities is somewhat arbitrary, Dickason notes that the first "reserve" in Canada was probably started in 1637 at Sillery, near Quebec City.

13 See J. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) [Borrows]. Borrows provides probably the most comprehensive exploration of how Indigenous law can provide an authentic basis for legal pluralism in Canada, in a way that seeks common ground between two distinct and equal legal cultures.

14 Indigenous communities are often perceived by outsiders as employing only communal forms of land "ownership" without individual use rights, or as having only open access regimes where property rights are undefined. This presents a vastly oversimplified view of traditional land management and tenures in Indigenous communities. See Henderson, *supra* note 10 and Part III, below.

knowledge in addressing development goals. Group or communal tenures, for example, may provide economic benefits over individual title regimes and can enable the community to steer development collectively.[15] Aspects of Indigenous law may also be incompatible with indefeasible transfers to community outsiders in some cases, meaning that the opportunity to alienate title can entail high social costs, including the risk of dispossessing individuals or entire communities.[16] Recognition of differences may ultimately help to determine the appropriate scope and form of federal and provincial involvement in structuring land tenure for economic development on reserves, by focusing attention on the level of autonomy demanded by First Nations peoples in shaping reforms themselves.

Some authors have observed that Indigenous communities around the world are increasingly confronting globalized economic systems that strain traditional practices, values and world views.[17] In a similar way, Indigenous peoples now face a growing international development scholarship—attended by influential polities—that regards centralized, formal land tenure regimes as superior to alternatives.[18] Our study attempts to confront this

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15 RCAP, "Economic Development", *supra* note 4 (makes clear that economic development from an Aboriginal perspective is likely to be defined with reference to the well-being of the community as a whole:

> [p]olicy makers and the general public have tended to assume that the economic problems of Aboriginal communities can be resolved by strategies directed to individuals thought to be in need of assistance ... This approach ignores the importance of the collectivity in Aboriginal society (the extended family, the community, the nation) and of rights, institutions and relationships that are collective in nature. It also overlooks the fact that economic development is the product of the interaction of many factors—health, education, self-worth, functioning communities, stable environments, and so on. Ultimately, measures to support economic development must reach and benefit individuals, but some of the most important steps that need to be taken involve the collectivity—for example, regaining Aboriginal control over decisions that affect their economies, regaining greater ownership and control over the traditional land and resource base, building institutions to support economic development, and having non-Aboriginal society honour and respect the spirit and intent of the treaties, including their economic provisions (at 3)).

16 Little Bear, *supra* note 10 ("To Natives it is as though the Creator, the original one to grant the land to the Indians, put a condition on it whereby the land remains Indian land 'so long as there are Indians,' 'so long as it is not alienated,' ... In other words, the Indians' concept of title is not equivalent to what today is called 'fee simple title'") at 83.

17 Hokulani Aikau, "The Political Economy of Development in Indigenous Communities" *Alternatives* (2007) 32(1) (for Indigenous peoples, "establishing their claims on the grounds of maintaining tradition, [I]ndigeneity becomes counterposed to modernity, development, and globalization" at 2). For a discussion in the Canadian context see R.B. Anderson, B. Honig & A.M. Peredo, *Communities in the Global Economy: Where Social and Indigenous Entrepreneurship Meet* (Northampton, MA: Edward Elgar Publishing, 2006); R.B. Anderson, L.P. Dana & T.E. Dana, "Indigenous Land Rights, Entrepreneurship, and Economic Development in Canada: 'Opting-in' to the Global Economy" (2006) 41 Journal of World Business 45 [Anderson, "Indigenous land rights"].

18 For example, the World Bank has lately become a vocal—at times unequivocal—champion of property rights formalization. See World Bank, *World Development Report 2005: A Better*

predicament from the diverse vantage points of First Nations communities in Canada by considering their existing tenure regimes, their current economic, social and political environment, their natural and human resources and their geography. By engaging with the broader debate on tenure formalization, we speak directly to "mainstream" economic development goals of using resources more efficiently and growing local economies by increasing commercial activity and promoting residential and enterprise investment. We consider the consequences of land tenure choices for some, but not all, development outcomes. Recognizing that land occupies a central place in many areas of social, cultural and political life for First Nations distinct from, but not necessarily unconnected to, economics, a core assumption of this development focus is that some communities will want to consider these efficiency and growth factors along with other priorities.[19] For some First Nations, these development goals may be secondary, even oppositional, to overriding concerns about socio-economic equity (for example, between community members), social upheaval and redress for historical injustices. For those who view these mainstream economic development goals as con-

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Investment Climate for Everyone (New York: World Bank and Oxford University Press, 2004). However, a more nuanced approach to property reforms has also been advocated at the World Bank: K.W. Deininger, *Land Policies for Growth and Poverty Reduction* **(**Washington: A World Bank Publication, 2003). For a general overview, see M. Trebilcock & P. Veel, "Property Rights and Development: The Contingent Case for Formalization" (2008) 30 University of Pennsylvania Journal of International Law 397 [Trebilcock & Veel].

19 Some development scholars have attempted to articulate Aboriginal economic development goals or aspirations in Canada more generally. Anderson characterizes what he calls a collective "Aboriginal approach" to development focused predominantly on the Nation or community, with four key components: (1) improving socio-economic circumstances of Aboriginal people; (2) attaining economic self-sufficiency; (3) attaining greater control over activities on the First Nation's traditional lands; and (4) strengthening culture, values, and languages as part of the development process. See R.B. Anderson *et al.*, "Indigenous Land Claims and Economic Development: The Canadian Experience" (2004) 28 The American Indian Quarterly 634 [Anderson].

RCAP, "Economic Development", *supra* note 4 at 6 mirrors these elements of Aboriginal economic development: (1) to respect the economic provisions of treaties and to remedy past injustices concerning lands and resources; (2) to provide jobs, with decent incomes, that do not necessarily require moving from Aboriginal communities; (3) to create self-reliant and sustaining economies; (4) to ensure autonomy in economic decision-making; and (5) to structure economies in accordance with Aboriginal values, principles, and customs so that development contributes to, rather than erodes, Aboriginal culture and identity.

It is worth noting that even when First Nations have as their ultimate goal the community's collective well-being, mainstream economic perspectives on efficiency and growth can still be concomitant with this end in some circumstances. For example, even when the primary objective for First-Nation-run enterprises is fuller employment for community members, rather than profit maximization, Cornell suggests that a focus on business profits can facilitate the employment goal by encouraging good business practices, highlighting competitiveness, and ultimately growing the business to provide more jobs. See S. Cornell, "What Makes First Nations Enterprises Successful? Lessons from the Harvard Project" in D.A. Dorey and J.E. Magnet, eds., *Legal Aspects of Aboriginal Business Development* (Markham: LexisNexis Canada Inc., 2005) 51 [Cornell, "Lessons from the Harvard Project"] at 57-58.

gruent with their present situation and ambitions, the success of land tenure reforms to meet these goals will be contingent on the full range of considerations that we discuss below.

In considering the outcomes of tenure reform, our emphasis on reserve communities should not be taken to diminish the significance of constitutional Aboriginal rights litigation and land claims for First Nations' economic development strategies in Canada. As Mark Walters argues, "it is important to acknowledge that Aboriginal rights litigation has, in the recent past, had a profound though perhaps indirect effect upon the abilities of Aboriginal peoples to pursue their own business and economic development projects."[20] The 1973 Supreme Court of Canada decision in *Calder*,[21] involving the Nisga'a First Nation's claim to Aboriginal title in British Columbia, not only enabled the Nisga'a, eventually, to pursue economic development in their own territory, it has also shaped the institutional and political environment for future claims.[22] There are numerous other examples from modern Aboriginal rights jurisprudence in Canada where the legally recognized content of rights to use resources and to access lands has circumscribed economic possibilities for First Nations, although not necessarily in ways regarded as legitimate by Aboriginal peoples.[23] With attention to these perspectives, there are clearly close linkages to be forged between land tenure design on reserves and rights-based development strategies. For example, as the international evidence suggests in Part V of this paper, a central condition for successful tenure reform may be the expansion of a First Nation's legally recognized land base in order to accommodate greater flexibility in allocating interests. Land claims may play a prominent role in achieving this end, making the interface between tenure reform and other development strategies an important area for future research.

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20 M.D. Walters, "Constitutional Law and Aboriginal Economic Development in Canada" in D.A. Dorey and J.E. Magnet, eds., *Legal Aspects of Aboriginal Business Development* (Markham: LexisNexis Canada Inc., 2005) [Walters] at 247. For an example of the practical implications of emerging legal doctrines of Aboriginal rights for land use and resource management, see D.C. Natcher, "Land Use Research and the Duty to Consult: A Misrepresentation of the Aboriginal Landscape" (2001) 18 Land Use Policy 113 [Natcher]; Anderson *ibid*., (tracing the significance of land claims agreements in promoting community-led economic development for Northern communities, using the example of the Inuvialuit Agreement in negotiating the McKenzie valley pipeline project).

International experiences also demonstrate the close connection between land title redistribution, land rights restitution, and land tenure reform. For example, Cousins notes that these have been the "three legs" of land reform policies in post-apartheid South Africa. See B. Cousins, "More than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy" (2007) 7 Journal of Agrarian Change 281 [Cousins] at 283.

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

22 Walters, *supra* note 20 at 247.

23 See Borrows, *supra* note 13.

Commentators have also emphasized the link between development on reserves and the activities and livelihoods of First Nations people off reserve, particularly in urban areas.[24] Much of the current policy connecting land tenure and land rights to First Nations economic development fails to draw these connections in a way that acknowledges the significance of migration patterns between reserves and urban areas where First Nations individuals from reserves often go to seek employment or to find housing. As a result, "[u]rban Aboriginal societies do not connect well, sometimes not at all, with reserves. Disconnect and fragmentation are the norms."[25] We are clearly beyond the time when economic development policy in reserve communities can be implemented in a vacuum. Overall, we take the view that land tenure design as an economic development strategy on reserves, for those whose choose to pursue it, is part of the larger picture of development for First Nations communities.

In Part II of this paper we locate our hypothetical First Nation's land tenure reform options within the broader academic debate that has generated many of the insights applied in sections below in this paper. We argue that a contextual weighing of the full economic benefits and costs of formalizing land tenure should supplant inflexible and overly broad approaches to reform. While the empirical evidence is sometimes ambiguous as to the outcomes of formalization programs on a general level, it is clear that successful reform strategies are rarely decontextual or ahistorical.

In Part III we move away from theory to examine the menu of land tenure choices available to First Nation under the *status quo*. We also explore briefly the histories of the *status quo* regimes and note their implications for path-dependent reform.

The *status quo* regimes are evaluated against the proposed benefits from a First Nations Land Title System (FNLTS) in Part IV. In its present form, the proposal for a FNLTS has at least four significant characteristics: (1) the underlying allodial title in the reserve land passes from the Crown to First Nation as a communal interest, so that the land governance provisions of the *Indian Act* no longer apply; (2) First Nation acquires jurisdiction, under Canadian law, to grant indefeasible title to private owners, transferable to

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24 Statistics Canada, *Aboriginal Peoples supra*, note 3 at 41 (according to Statistics Canada, in 2006 an estimated 40% of First Nations peoples (Status and non-Status Indians) lived on reserve, while the remaining 60% lived off reserve, with the off reserve population growing slightly from 58% in 1996. Of those living off reserve, 76% lived in urban areas. Of First Nations people living off reserve, 68% were Status Indians, while 32% were non-Status Indians. First Nations people were also more likely to move compared to the non-Aboriginal population). INAC, "Registered Indian population", *supra* note 11 (according to Indian and Northern Affairs Canada, 52% of the registered Indian population lived on reserve as of December 31, 2007).

25 J.E. Magnet, "Introduction and Overview" in J.E. Magnet and D.A. Dorey, eds., *Legal Aspects of Aboriginal Business Development* (Markham: LexisNexis Canada Inc., 2005) at 4-5.

third parties, including to non-Aboriginal individuals or entities; (3) a title registry to implement a title registry at the national level to record all interests in lands under the new regime; and (4) to adopt the FNLTS is optional for First Nation. In evaluating whether a FNLTS might be appropriate for First Nation, we employ a cast of hypothetical economic actors attempting to engage in various activities within the community. Using these scenarios, the opportunities under a FNLTS to overcome *status quo* impediments to development are explored.

In Part V, we bring international experiences to bear on the challenges that First Nation is likely to face. Given that the proposed title system merely creates a legal framework, First Nation may have a degree of flexibility to define and administer the land tenure system created within this legislative scheme. But the past and present experiences of Indigenous communities with formalization programs in the United States, New Zealand, Australia and South Africa also demonstrate that FNLTS tenure reform will surely be inappropriate for First Nation in Canada in some contexts.

Finally, in Part VI we draw conclusions about when a FNLTS may or may not be appropriate for First Nation and we provide suggestions for future research relating to the First Nations Tax Commission's proposal.

II LAND TENURE AND DEVELOPMENT IN THEORY

Debates

Beyond the apparent consensus in academic and policy fora that land tenure 'matters' for economic development, there is substantial debate on two issues. First, what is the economically optimal form and content of a land tenure system given the particular context of the community in question, accounting for pre-existing socio-economic and political institutions? Second, how and under what conditions do land tenure regimes change over time? Divergent answers to these questions are frequently attributed to property formalists on one side and informalists on the other. Formalists tend to endorse government-sanctioned, designed and imposed land title systems that leverage the coercive power of the state as a source of greater certainty and stability for defining and enforcing property rights. Conversely, informalists emphasize the adaptive capacity of more localized social norms and customary land tenure regimes[26] as decentralized control

26 Daniel Fitzpatrick notes that the term "customary tenure" can be problematic in that it fails to characterize the "dynamic interplay between State authority, local power relations and inter-group resource competition." Some commentators prefer the term "socially-determined land-use rules." Fitzpatrick defines customary tenure according to the following criteria: "over-arching ritual and cosmological relations with traditional lands; community 'rights' of control over land disposal (sometimes delegated to traditional leaders); kinship or territory-based

mechanisms that evolve over time.[27] While a constructive discourse has emerged at points between these competing views, the question of when land tenure should be formalized in a given context is not greatly illuminated by fixing formalists and informalists at opposite poles. A more rigorous approach, we suggest, is to understand the underlying rationales for enacting tenure reforms and to assess proposals on the basis of their capacity to meet the development objectives of the relevant community.

Sometimes positions in the formalization debate also reflect ideological lines drawn between individual and communal property rights—a dichotomy prominent in discussions about Indigenous communities and economic development.[28] But a careful distinction should be made between the reasons for formalizing land tenure and the means employed for creating private property rights. It is correct to say that many of the state-supported regimes advocated by development scholars are typical of Western legal traditions, where private property rights are vested in individual actors. An emphasis on private property rights by institutionalists has evolved from early attempts to give a historical explanation of disparities in economic growth rates between the developed and developing world. In particular, they have tried to explain why the West has sustained rapid economic growth in contrast to less successful economies elsewhere. Douglas North and Robert Thomas were among the first modern scholars to draw the connection between private

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criteria for land access; community-based restriction on dealings in land with outsiders; and principles of reversion of unused land to community control": D. Fitzpatrick, "'Best Practice' Options for the Legal Recognition of Customary Tenure" (2005) 36 Development and Change 449 [Fitzpatrick, "Best Practice"] at 454. See also P. Lavigne Delville, "Harmonising Formal Law and Customary Land Rights in French-Speaking West Africa" in C. Toulmin & J. Quan, eds., *Evolving Land Rights, Policy and Tenure in Africa* (London: DFID/IIED/NRI, 2000) International Institute for Environment and Development Issue Paper at 2. For a description of the terms "customary tenure" and "Indigenous tenure" as used in this paper, see Part III, Potential Economic Actors, below.

27 Informal institutions governing property relationships should be distinguished from the mere factual reality of property uses in the absence of enforceable rules or norms. These types of "mere uses", apart from a coherent institutional structure, lie outside standard (Western) legal concepts of relational rights: D.H. Cole & P.Z. Grossman, "The Meaning of Property Rights: Law Versus Economics?" (2002) 78 Land Econ. 317 at 322.

28 See C.S. Galbraith, C. Rodriguez & C. Stiles, "False Myths and Indigenous Entrepreneurial Strategies" in T.L. Anderson, B.L. Benson & T.E. Flanagan, eds., *Self-Determination: The Other Path for Native Americans* (Stanford, California: Stanford University Press, 2006) at 6 (making the argument that Indigenous populations in North America prior to contact with Europeans did not have a "more communal sense of property ownership" compared with non-Indigenous settlers: "[o]ne of the most commonly repeated false myths, often put into the context of landownership, is that Indigenous populations historically did not view property as private ... There is little historical basis for this myth"). While it is clear that Indigenous peoples in Canada hold a wide array of individual rights to land according to traditional tenures, the view that concepts of property ownership do not differ from European and common law concepts would appear to be contradicted by many Indigenous peoples themselves, as well as Indigenous and non-Indigenous scholars in Canada. See Little Bear, *supra* note 10.

property rights and development, and a number of authors have since followed or extended this theme.[29] More recently, Hernando DeSoto has advanced the claim that state-supported private property protections provided the security of ownership over physical resources that allowed capital to serve as the primary engine for economic growth in Western states.[30] His central conclusion is that these mechanisms are commonly absent in developing countries, creating vast amounts of "dead" or unproductive capital in the form of land and other resources.

But while the link between private property regimes and economic growth can be persuasive from historical and explanatory standpoints, broad claims about the independent role of private rights are insufficiently precise for crafting successful development policies for the future. In spite of the fact that economic historians frequently aggregate the features of Western and non-Western regimes, the reality of diverse land tenure systems across the globe requires consideration of a range of constituent elements.[31] And while formal land tenure has typically enshrined private rights, there is no reason to believe that granting private title is viewed as a worthwhile objective in itself. As with the relationship between formal and informal institutions, certain contexts will invariably force decision-makers to abandon an all-or-nothing approach to land tenure reform and to think creatively about regimes that combine relevant features of both individual and communal systems.

In a recent synthesis of property rights and development research, Michael Trebilcock and Paul-Erik Veel challenged researchers and policymakers to take a more nuanced approach to identifying optimal land tenure regimes by considering the full range of costs and benefits associated with formalization, by accounting for institutional pre-conditions, and by contemplating the interconnected processes of institutional change.[32] This approach is particularly useful for addressing First Nations reserve communities in Canada that have a diversity of economic, social and political characteristics. A more nuanced approach also has the benefit of avoiding triumphalist

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29 D.C. North & R. Thomas, "An Economic Theory of the Growth of the Western World" (1970) 23 The Economic History Review. See also D.C. North & R. Thomas, *The Rise of the Western World: A New Economic History* (Cambridge: Cambridge University Press, 1973); T.L. Anderson & P.J. Hill, "The Evolution of Property Rights: A Study of the American West" (1975) 18 J. Law Econ. 163.

30 H. DeSoto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails* (New York: Basic Books, 2000). Claims that the state is necessary to enforce private property claims, however, are not new, dating back to Enlightenment thinkers such as Thomas Hobbs, John Locke, Adam Smith, and David Hume; see Trebilcock & Veel, *supra* note 18.

31 In fact, it was the observation that institutions vary widely—even among the developed capitalist nations—that motivated North and his contemporaries to concentrate on institutional analysis in the first place. See D.C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge:Cambridge University Press, 1990) [North, "Institutions"].

32 Trebilcock & Veel, *supra* note 18.

accounts of world economic history that seek to frame development by narrating an overly simplified story about how the West has "won".

Institutional Perspectives

Since the mantra that "institutions matter" was famously articulated a decade or so ago, the new institutionalism has refined this idea in two significant ways.[33] First, institutions such as land tenure provide a foundation for market-oriented economic development. Whether enforced by the state or some other mechanism of social regulation, land tenure and other institutions are pre-conditions for functional markets because they lower transaction costs and address potential externalities for economic actors. In other words, if institutions as "rules of the game" are not well matched to development goals and community circumstances, then there is little point in trying to play in the first place. For example, a main conclusion to come out of the long-running Harvard Project on American Indian Economic Development is that effective and community-specific political institutions—in particular good governance and the relationship between tribal councils and business enterprises—are a key indicator of successful enterprise development and entrepreneurial activity in American Indian reserve communities.[34] In a similar vein, Ezra Rosser argues that institution-led growth holds the potential for Indigenous communities to reconcile sometimes competing economic, social and political development objectives.[35]

Of course, while land tenure will impact on economic development, the converse will be true only to a limited extent. Economic outcomes will be one factor among many policy and non-policy (ethical, historical, religious) considerations for land tenure design. As Mele Rakai illustrates, designing land tenure in a holistic way necessarily involves integrating and utilizing appropriate world views and values in addition to instrumental concerns.[36]

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33 North, "Institutions", *supra* note 31.

34 S. Cornell & J.P. Kalt, "Where's the Glue? Institutional Bases of American Indian Economic Development" (1991) Harvard Project on American Indian Economic Development, Project Report Series, John F. Kennedy School of Government, Harvard University. However, researchers at the Harvard Project have also attempted to prioritize governance institutions over land tenure, intimating that these other "systemic features of Indian Country" present only secondary challenges: M. Jorgensen & J.B. Taylor, "What Determines Indian Economic Success? Evidence from Tribal and Individual Indian Enterprises" (2000) Harvard Project on American Indian Economic Development .

35 E. Rosser, "This Land is My Land, this Land is Your Land: Markets and Institutions for Economic Development on Native American Land" (2005) 47 Arizona Law Review 245 [Rosser] at 281.

36 Mele Rakai, *A neutral framework for modelling and analysing Aboriginal land tenure systems* (Ph.D. Thesis, University of New Brunswick Department of Geodesy and Geomatics Engineering, 2005) [unpublished] [Rakai]. Rakai develops what she calls a "neutral framework" for modelling Aboriginal land tenure from a systems perspective and applies her model primarily to a land tenure regime for the Mi'kmaq of mainland Nova Scotia.

That is not to say that aspects of tradition, custom and culture do not have a role to play connecting land tenure to economic development outcomes. As discussed in Part III, below, cultural practices and traditions can themselves be viewed as institutional forms that have direct impacts on development outcomes, such as creating incentives for efficient land use. Thus, while our study does not attempt to consider fully what cultural views and values will necessarily inform land tenure design holistically from an Indigenous perspective, it does, to some extent, address the economic impacts of some of those views and values if and when they operate within a given community.

The second lesson from the institutionalist perspective is that there may be more than one optimal land tenure arrangement. A research focus on tenure reform does not necessarily strive to define a singular development path for all groups. Rather, the outcomes of reforms are to some extent dependent both on initial conditions and on contextual or exogenous factors, such as the existence of other institutions and the accumulated physical, intellectual and social capital of the community.[37] This multiple-equilibria approach to institutionalism implies that the appropriate mode of analysis is both historical and contextual, taking into account past practices and present situations as relevant to next steps for land tenure reform. Significantly for First Nations in Canada, this approach means paying attention to existing institutions and their past development—from colonial history and from their traditional roots. Institutionalism also requires policy-makers to account for the resources that are available, or should be available, to make tenure reforms successful. Speaking to the case of American Indian economic development, Rosser notes that this approach is "particularly important for Native American groups who have for too long been told, through force or advice, that their cultural norms and rules are not the right ones to follow. For despite the ... belief that there is but one single path to development, 'there cannot be one kind of development which suits every tribe.'"[38] Given the appropriate institutions—or given the conditions in which those institutions can evolve—the productive capacities of the community are unleashed. If those capacities have too often been ignored or denigrated, it may be time for policy-makers to pay more attention to supporting First Nations' existing capabilities and institutions. If and when First Nations require additional resources, educational opportunities and institutional reforms, these factors cannot be overlooked when considering land tenure reforms.

37 D.C. North, *Understanding the Process of Economic Change* (Princeton, NJ: Princeton University Press, 2005) [North, "Economic Change"].

38 Rosser, *supra* note 35 at 285.

A Contingency Model

Definitions

In this article we use the broader concept of "land tenure" as inclusive of, but not limited to, the term "property rights" to describe reform options confronting First Nations under a FNLTS. In addition to defining rights to use land, to appropriate value from that use, and to transfer rights to a third party, land tenure regimes may also attach positive duties or responsibilities to rights holders as incidents of "ownership".[39] Land tenure reforms also require decisions about the initial arrangement or allocation of property rights, which will be key considerations for First Nations communities under a FNLTS. Property rights do, however, attract most of our attention when examining economic outcomes and we use two aggregate concepts to describe them.[40] "Tenure security" concerns the use of and appropriation of value from property. The greater an interest holder's tenure security, the more predictably he or she can enforce his or her claims to use and appropriation. Conversely, tenure is insecure when use and appropriation rights are either undefined or vulnerable to invasion from illegitimate claimants or from the state.[41]

A recurring theme in our discussion of reforms is that First Nations members and non-members (outsiders) may experience different degrees of tenure security under the same tenure regime. Part of the reason for this divergence will be because use, appropriation, and transfer rights are defined differently according to Indian status and/or community membership under a given regime.[42] In this situation, "community outsiders" refers to individuals legally differentiated from members of the community or Band, even though some of those individuals may self-identify as members and be recognized

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39 Rakai employs yet a broader definition of "land tenure" as including "rights, restrictions, responsibilities, and possibilities." Since property rights can be defined to incorporate property-specific restrictions, we import the concept of restrictions directly into our use of the term 'property rights'. Rakai, *supra* note 36 at 33.

40 Whereas the term "property rights" is commonly used to denote a collection or bundle of distinct entitlements that may be arranged in any number of ways, we employ the aggregate concepts of "tenure security" and "transfer rights" derived from Eggertson's useful characterization: T. Eggerston, *Economic Behavior and Institutions* (Cambridge: Cambridge University Press, 1990) at 34.

41 In discussing "best practices" for formal recognition of customary rights, Fitzpatrick emphasizes that the nature and degree of formalization should primarily be determined by how reforms address the causes of tenure security: Fitzpatrick, "Best Practice", *supra* note 26 at 455.

42 For example, under the current *Indian Act*, possessory and use rights in the form of Certificates of Possession can only be held by Status Indians of a given Band, and these Certificates cannot be transferred to outsiders, although the Act does make provisions for lease arrangements; *Indian Act*, *supra* note 1 at ss. 20-28; see Part IV, below.

as such by the community itself.[43] But an important implication of our emphasis on predictable enforcement of rights is that perception—individuals' anticipation or risk assessment that property rights might not be enforced—determines tenure security alongside and as a reflection of the formal rules that define property rights. For example, whereas the content of traditional tenures may be comprehensible to community members, apprehension about or mistrust of unfamiliar rights can render that same regime less comprehensible, and thus less predictable, to outsiders. In this situation, "community outsider" is not a formal or legal designation, but a cultural and experiential one. Tenure security, then, is in part a matter of perception based on past experiences and world views. We draw attention to both rule-based and perceptual differences in tenure security whenever they lead to potentially different economic outcomes for interest holders under a given regime.[44] Another organizing concept, "transfer rights", defines the way a title holder can transfer use and appropriation rights to third parties, either temporarily (as with lease agreements) or permanently (as with the sale or bequest of title). The central idea driving calls to formalize land tenure is that improved tenure security and greater transfer rights can contribute positively to a well-defined set of economic development goals for interest holders under certain conditions. We provide a detailed examination of this contention, in the context of First Nations reserve communities, in Parts III, IV and V of this paper.

This leaves, admittedly, some room for confusion about the term "formalization", which we define as recognition and enforcement of group-specific tenure regimes at the level of the state. Our definition seeks to characterize formalization in terms of goals to improve tenure security and transferability. In this sense, formalization captures attempts to create greater predictability by: (1) leveraging the coercive power of the state—for example, through the judiciary—to enforce land tenure regimes for rights holders against counter-claimants; and (2) harmonizing the group's land tenure regime with the regime that is already administered by the state for outsiders, potentially increasing the familiarity of the group's system for *some* rights holders. It would be an oversimplification to regard formalization merely as a process of imposing private property rights on individuals

43 For example, an individual who has one parent who is a non-Status Indian and one parent who is a Status Indian under s. 6(2) of the *Indian Act* will be non-Status; *Indian Act*, *supra*, note 1. However, this individual may have grown up on her home reserve and identify as a First Nations individual and as a member of the community. Under the *Indian Act* land tenure regime, she would still be considered an "outsider".

44 While our discussion of formalization proceeds from the perspective and interests of a given First Nations community, this does not restrict considerations of tenure security and transferability to claimants within the community since development outcomes may be highly contingent on the claims of outsiders. Examples are the community's ability to attract outside investors and the willingness of off reserve financial institutions to provide loans.

within the group; the state can recognize and enforce land tenure at various levels of governance. For example, the federal government in Canada might directly administer a tenure regime in a First Nation by granting individuals limited possessory and use rights. Alternatively, a First Nation might be vested with a sphere of protected communal rights, which the federal government enforces against outsiders, but within which the community defines the parameters of its own land tenure regime. Both of these scenarios exist to some degree under the *status quo* in Canada today. Finally, given autonomous and well-supported Indigenous institutions such as bureaucracies, courts, and social services, "formal" land tenure can be interpreted as a property regime that is defined and enforced by a First Nation's *own* government—an arrangement that accords more closely with some First Nation peoples' ultimate visions of self-governance. Overall, our definition of formalization reinforces our emphasis on exploring how tenure security and transfer rights relate to development outcomes, rather than fixating on the process of formalization itself.

In order to analyze whether a FNLTS may be appropriate for our hypothetical First Nation, below, Trebilcock and Veel's contingency model poses three questions. First, do the benefits of strengthening property rights outweigh the costs at all stages of economic development? Second, do the necessary pre-conditions exist in First Nation for tenure reforms to be successful? Third, to what degree is the involvement of state and/or community government required for land tenure freeform to actually occur? We discuss each of these questions in turn.

Costs and Benefits

In a comprehensive survey of existing theoretical work and empirical evidence, Trebilcock and Veel identify four potential benefits from improving tenure security and transfer rights: more efficient land use; improved access to credit; improved investment incentives; and a reduction in socially wasteful resource competition. First, tenure security can lead to more efficient land use by causing rights holders in First Nation's lands to more fully internalize the costs and benefits of their resource use and by preventing inefficient "resource mining" when individuals seek to appropriate resources as quickly as possible. Transfer rights may also promote efficient use by allowing First Nation's lands to be sold or traded to more efficient users. Second, tenure security and alienability can increase access to credit for interest holders because land can be used as collateral for loans from financial institutions. When the supply of credit is increased, interest holders will have more investment capital for land improvements and for business and housing developments. Third, tenure security can enable interest holders to realize the gains from investments by reaping the benefits

from both increased productivity and the resulting higher value when the land is sold. Fourth, stronger enforceability of property rights claims potentially decreases the incidence of socially wasteful disputes both within First Nation, by providing clear rules against invasion by other members of the community or by outsiders, and between First Nation and the federal government, and by clarifying or modifying jurisdiction over transactions and dispute settlement.

But a formal land tenure regime can also entail high costs. Perhaps the most significant costs come when formalization undermines non-formal tenure regimes and impairs social cohesion. Decentralized property rules, traditions and norms can go some distance towards meeting development goals that flow from predictable rights of use, appropriation and transfer. Trebilcock and Veel observe that two different models have been used to explain how non-formal arrangements can lead to efficient land use, increased credit access and investment, and decreased disputes over resources.[45] The "evolutionary model" uses the repeated interactions that occur between individuals in a small community to explain stable pro-social strategies of co-operation that mitigate adverse commons-type tragedies. The "social norms model," by contrast, identifies ways in which welfare-maximizing rules can emerge based on individuals' desire to increase their esteem and credibility through behavioural signalling. Norms in this model play the role of centralized or state-supported institutions as mechanisms of social control. For either of these models to apply in First Nation, the community must be sufficiently close-knit so that both positive and negative feedback can be played out and reinforced through repeated interactions.

Given rich non-formal regimes, formal institutions may map poorly onto First Nation's existing land tenure arrangements, thus creating conflict and greater insecurity where interest holders are unsure which system applies. Even in the absence of strong Indigenous institutions, formalization may create insecurity and conflict where individual property boundaries have been left intentionally fuzzy or undefined by the community.

Additional costs to formalization also exist. The monetary cost of designing and administering a formal titling system can obviously be quite high, depending on the complexity of the system and the quantity of registered interests and transactions. Land held in communal ownership by all members of First Nation may also serve an important social insurance function against the risk associated with market uncertainty or catastrophic events. If institutional reforms replace communal ownership with private rights in First Nation, but fail to provide for the dispersal of risk, economic welfare may suffer. Similarly, economic activity might be adversely affected

45 Trebilcock & Veel, *supra* note 18 at 412.

if redistribution of wealth and resources under a formal system changes the way rights are allocated.

Finally, the costs and benefits of a formal tenure regime may be unequally distributed among First Nation's members. In particular, women risk being adversely affected if gender inequality is already pervasive and where the process of formalization internalizes those biases. Other demographic and class-based factors—such as different levels of wealth and political power—may also lead certain individuals or subgroups within First Nation to bear an unequal share of the cost or to be denied an equitable share of the benefits of reform.

An important conclusion derived from this model is that the costs of formalization are likely to be lower as economic development increases—because individuals become more mobile, which leads to less-close-knit communities, because the value of land, goods and investments increase the benefits from tenure security; and because the implementation and administration of a formal regime becomes relatively more affordable.

Institutional Pre-Conditions

The second question is whether the necessary pre-conditions exist in First Nation for a FNLTS to be successful. Trebilcock and Veel's model underscores three institutional forms: the existence of informal norms and traditional practices; the effectiveness of First Nation's government; and the existence of other markets on and off reserve. Formalization programs that conflict with pre-existing customs, norms and practices often fail because of the costs of abandoning informal institutions and/or a perceived illegitimacy associated with the formal system.[46] More successful formalization programs, by contrast, generally take informal institutions as a starting point and attempt to recognize those rights at the state level.[47] Even if this process if effective, the capacity of First Nation's government to provide for the administration of complex title systems and to enforce legal rules is also a key consideration. Not only does governance need to be stable and reliable, but both a competent bureaucracy and an effective system for dispute resolution must exist to facilitate administration and enforcement of the system in a fair and efficient way. Finally, the presence of well-functioning land, labour and credit markets will determine to a large extent what portion of the potential benefits rights holders can capture. For example, any potential gains from the ability to collateralize land will be diminished if credit markets within First Nation are underdeveloped or inaccessible.

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46 Fitzpatrick, "Best Practice", *supra* note 26.

47 DeSoto, *supra* note 30.

An additional pre-condition not discussed by Trebilcock and Veel, but that may be relevant to land tenure reform in First Nation, is the existence of strong social support networks and community cohesion. Given that First Nation's land base is unique for the community, a reform program that creates alienable and indefeasible interests may require community social cohesion as a pre-condition for maintaining some minimum land area on which the very existence of that community is premised. Where socio-economic problems or other sources of instability lead to insufficient social cohesion to maintain the basic social structures of the community, formalization may provide a mechanism through which the basic socio-economic unit meant to benefit from economic development ceases to exist altogether. On the other hand, when existing tenure arrangements are a source of conflict leading to social instability, increased tenure security may lead to stronger social cohesion in some cases. The separate and distinct impacts of tenure security and transferability need to be closely examined in this respect, particularly when their implications for social cohesion pull in opposite directions.

Taken together, these factors draw attention to a unique consideration for First Nation: reserve land tenure is characterized by two levels of governance. The primary level occurs within a First Nation itself, while the secondary level is dominated by the state. Interest holders in First Nation's lands will often have to traverse both levels in order to realize full definition and enforcement of their formal property rights. For example, First Nation's government has decision-making powers in areas of possession and customary property rights, taxation and land allocation. But the structure of the Band council and the scope of its powers in defining and administering a land tenure regime are dictated by the provisions of the federal *Indian Act*.[48] Questions of legitimacy, stability and consistency must therefore be addressed at both First Nation and state levels, and at the intersection between them. At least one commentator has acknowledged that changes in the relationship between Indigenous and state governments can have significant implications for tenure security.[49] This same conclusion likely extends to most other legal aspects of property ownership and allocation on reserves, and will be important below where we discuss the *status quo* in First Nation today.

Institutional Change

Suppose that a FNLTS offers net benefits to First Nation and that the necessary pre-conditions for successful tenure reform currently exist. The final question that needs to be answered is to what degree state and Band government involvement is required for land tenure reform to actually occur. Decentral-

48 *Indian Act*, *supra* note 1, s. 2(1), at ss. 74-86.

49 T. Isaac, "First Nations Land Management Act and Third Party Interests" (2005) 42 Alberta Law Review 1047 [Isaac].

ized social and economic forces may cause greater tenure security to evolve on its own, thus making changes in land tenure systems inherently well-suited to their contexts and rendering a directed process of formalization unnecessary. Harold Demsetz has noted at least three factors that are expected to motivate the evolution of greater tenure security in the form of emerging private property rights: when groups become less close-knit, thus weakening informal institutions; where individual productivity increases, thus making the appropriation of gains from use relatively more valuable; and when the complexity of resource allocation increases, thereby making social coordination more difficult.[50] This view is challenged and ultimately supplemented by Daniel Fitzpatrick, who argues that land tenure "evolution" is not necessarily a one-way street and documents multiple cases of decentralized regime change from private to communal systems.[51] But in either case, the process of reform may be impeded by barriers that require direct action by First Nation's government, by the state or by some combination of the two. The nature of these barriers will influence whether it is necessary to proceed with legislative changes and the form that legislative intervention should take.

Constraints on evolutionary change in land tenure systems are collectively referred to in the institutionalist literature as "path dependence."[52] A core insight revealed by modern path dependence theory is that because individuals invest resources and expectations into economic activities under the existing institutional system, increasing returns from participating in these activities under the *status quo* make alternative systems comparatively more costly.[53] The incentives for continuing to invest within the *status quo* therefore become self-reinforcing over time. Overwhelmingly in First Nations contexts, land tenure has been tightly controlled by the federal government through the reserve system itself. As a result, existing state-level legislation may actually be the most significant barrier to change. Reserve communities in Canada have been made economically dependent on the federal government through a system of transfer payments, and institutionally de-

50 H. Demsetz, "Toward a Theory of Property Rights II: The Competition between Private and Collective Ownership" (2002) 31 The Journal of Legal Studies 653.

51 D. Fitzpatrick, "Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access" (2006) 115 Yale Law J. 996 [Fitzpatrick, "Chaos"] at 452. Fitzpatrick's research indicates that high costs and uncertainty associated with private rights and individualization can do more than cause groups to retain collective tenure systems in the face of pressures to individualize rights: these factors may actually induce collectivization of private systems. He also notes that "while customary tenure arrangements may sometimes be less than ideal in social, economic and/or environmental terms, the fact that they are fundamentally embedded in complex social processes means that any attempt to change or replace them may itself involve prohibitive costs and risks" (at 453).

52 North, "Economic Change", *supra* note 37 at 52.

53 P. Pierson, "Increasing Returns, Path Dependence, and the Study of Politics" (2000) 94 American Political Science Review 251; W.B. Arthur, *Increasing Returns and Path Dependence in the Economy* (Ann Arbor: University of Michigan Press, 1994).

pendent in the forms of governance imposed by the *Indian Act*.[54] *Indian Act* land tenure arrangements govern the types of state-protected interests available to rights holders on reserves and control the returns associated with non-formal arrangements. If existing state-controlled arrangements are sub-optimal for meeting economic development goals and impede further institutional changes, it is likely that additional legislation will be required to modify these constraints. Alternatively, decentralized regimes such as traditional tenure systems can entrench less-than-efficient regimes because of powerful vested interests that have a stake in perpetuating the *status quo*.

If we assume for the moment that a FNLTS as proposed is optional for First Nation, the factors that contribute to path dependence will be important considerations. While opt-in programs tend to promote community autonomy and avoid the costs of forming a broad consensus across stakeholders, economically beneficial reforms may fail to materialize under an optional scheme when impediments to change exist at the community level. Path dependence also implies that land tenure decisions today may affect the potential scope for reforms in the future, meaning that First Nation should consider the predicted impacts of tenure formalization on future generations.

Unfortunately, path dependence theory does a better job of explaining the past than predicting the future. As a policy tool, the concept of path dependency may be too vague to identify the "right" time to implement tenure reforms and may be overly deterministic, thus rendering impotent its practical forward-looking application in predicting the outcome of reforms.[55] However, path dependence does serve to underscore the complexity of land tenure reforms in First Nation and the interconnectedness of reforms with other institutions. One way for policy-makers to appreciate the implications of path dependence is to recognize that options for formalizing land tenure exist along a continuum. State action can involve a high level of control in

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54 The Harvard Project has consistently demonstrated that there are high costs associated with dependency. One significant cost is that dependency leads to economies that are heavily dependent on employment in First Nations governments. This has led to the case where business enterprises owned and run by the Band are directly impacted by land tenure policy decisions of the Band government, thus creating conflicts of interest. See Cornell, "Lessons from the Harvard Project", *supra* note 19 at 53.

A recent study by the Conference Board of Canada documents that: "Aboriginal leaders also applied Indigenous philosophies to their decision-making processes, including 'deep understandings of the environment—the earth and the "cosmos" and the harmony and balance on which survival depends.' With the institutionalizing of the *Indian Act*, other modes of leadership were imposed on Aboriginal communities, including band, tribal, and hamlet councils centred on elected chief systems. This creates unique challenges for Aboriginal businesses and aspiring Aboriginal entrepreneurs." See A. Sisco and R. Nelson, *From Vision to Venture: An Account of Five Successful Aboriginal Businesses* (Ottawa: The Conference Board of Canada, 2008) [Sisco & Nelson] at 24.

55 M. Prado, M. Trebilcock & J. Wilson, "Path Dependence, Development, and the Dynamics of Institutional Reform" (August 19, 2008) [unpublished working paper].

the definition and enforcement of a land tenure regime. At the other end of the spectrum is a hands-off-framework approach that emphasizes decision-making capacity within the community. The latter may, for example, involve the state-level definition of what Fitzpatrick calls a "tenurial shell."[56] Inside this shell, the community has more-or-less full autonomy in defining property rights and obligations, and to allocate interests, at least initially. Creating or redefining a sphere of protected group-interests may, in some contexts, shift path dependence or otherwise remove impediments to evolutionary change.

An additional impediment may emerge when a formal system requires provision of public goods, such as a title registry. As in classic public goods or collective action problems, individual actors—or in this case individual communities such as First Nation—may fail to create or contribute to a nationally unified registry on their own, even though the system would provide net benefits to all. The proposed FNLTS includes the provision of a national registry in order to overcome this collective action challenge.

Conclusions on Theory

Overall, the three-part model—which considers the optimal regime, preconditions and the process of change—implies that the answer as to whether First Nation should formalize land tenure under a FNLTS is contingent on context. The model also reveals that the decision to formalize is not necessarily a binary one, but can exist along a spectrum of options for reform. To begin applying the model to First Nation's situation we need to understand the contemporary legal context of the community. Part III provides a brief historical overview of land tenure regimes on reserves, highlighting the background economic and political conditions that shaped past experiences with property rights formalization. We then survey the *status quo* land tenure regimes on reserves as they exist in Canada today and characterize each in terms of their effect on tenure security and transfer rights.

III THE STATUS QUO IN FIRST NATIONS

History

Confronted with another proposal to reform land tenure on reserves, First Nations peoples in Canada might come to the conclusion that they have seen this type of scenario before. While the particulars of a FNLTS might differ from past reforms, the concept of formalizing reserve tenure is certainly not

56 Fitzpatrick, "Best Practice", *supra* note 26 at 455 underscores the idea that formal legal orders should not unduly restrict or freeze changes in traditional tenure systems.

new. The reserve system itself is a vestige of past attempts by colonial governments to promote the norms, if not the legal rights, of private ownership in First Nations communities. Our discussion of the *status quo* begins with a brief historical overview of reserve tenures and reform strategies. At various points in that history, "formalization" became synonymous with the destruction of First Nations communities and the assimilation of individuals into the Anglo mainstream. Either by incentives or by force—sometimes both at once—the federal government pursued this objective by tightly controlling land tenure arrangements. Thus, the history of reserve land tenure has been characterized by an inherent tension, with federal governments seeking to homogenize on- and off-reserve systems of ownership by individualizing rights, while maintaining central control of tenure administration within First Nations communities as a system apart. That tension has carried over into the modern legislative environment. While underlying title to reserve lands remains vested in the federal Crown under Canadian law, a menu of possible governance schemes has emerged both inside and outside the *Indian Act*. These options offer varying degrees of autonomy and flexibility for First Nations in the management and transfer of their reserve land title, but the options exist within a broader framework of federal oversight and control.

Origins of the Reserve System

The Royal Proclamation, 1763 purported to establish the legally distinct character of lands held by First Nations peoples as inalienable to private settlers.[57] Under the supposed sovereign authority asserted by the Proclamation, Aboriginal title could only be purchased by the British Crown.[58] While the first "reserve" in Canada, at Sillery, near Quebec City, was created in 1637, "[r]eserves in the modern sense (lands set aside for Amerindians' continued use upon surrender of most of their territory) did not appear until after the Proclamation."[59] As the British began to rely less on the participation or co-operation of First Nations in military activities after the War of 1812,[60] the colonial government exerted a growing control in the day-to-day oversight of First Nations communities. By the 1830s, the core policy of the colonial administration toward First Nations had solidified in the tripar-

57 *Royal Proclamation*, [1763]; for more details about the implications of the Proclamation for Aboriginal rights and title claims in Canada, see Henderson, *supra* note 10 at 147.

58 *St. Catherine's Milling and Lumber v. The Queen*, [1888] 14 App. Cas. 46 (P.C.). For further discussion see J. Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" (1997) in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 155.

59 Dickason, *supra* note 12 at 207.

60 P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty* (Oxford: Oxford University Press, 2004) [McHugh] at 182.

tite goals of civilization, Christianization and assimilation. The idea of creating "model communities" for First Nations began to catch hold among British policy-makers during this period, often with a focus on small-scale agriculture as a means to establish First Nations peoples in a sedentary lifestyle and to encourage the organization of land into private, Western-style land holdings.[61] Control over the design and administration of these settlements was sometimes delegated to missionaries or other religious officials.[62] Some of these early reserve communities encountered economic and political difficulties and were soon abandoned or relocated; others continue to exist today under the modern system of reserves administered by the federal government.

Reserves provided a convenient means for British colonists to enforce assimilative policies on the community as a whole, but were also an attempt to streamline government oversight,[63] thus epitomizing the tensions between these political objectives.[64] The creation of reserve communities was, however, intended only as a stepping-stone toward full assimilation into Anglo white society, and not necessarily as a lasting settlement and governance pattern for First Nations peoples. Instead, colonial policy-makers anticipated that reserve communities would gradually adopt systems of private property holdings—an idea that was advanced in the influential Bagot Commission on Indian Affairs in 1844.[65] This ideological linkage between private property rights and the assimilation of First Nations communities would continue to inform government policy in the lead-up to and following Confederation in 1867.

Experiences with Formalization

Two experiences with past attempts to formalize reserve lands help to situate modern reform proposals in an historical context. The first, 'enfranchisement,' was initially designed to provide First Nations individuals with the legal option to shed their official Indian status and to acquire private interests in small parcels of land hived off from their home reserves. The second related experience began with the location ticket system, which created a state-level framework for creating private allotments on reserves

61 Dickason, *supra* note 12 at 208.

62 *Ibid*. at 207, 208.

63 R.J. Surtees, *Canadian Indian Policy: A Critical Biography* (Bloomington: Indiana University Press, 1982) at 34.

64 Trespass on First Nation lands by settlers may also have motivated this tension to some extent as the British government attempted to "protect" what First Nations lands remained against growing intrusion. Alienation by First Nations peoples themselves also contributed to land loss, especially in the form of leasing to settlers. In 1839, the *Crown Lands Protection Act* was passed, declaring Indian lands to be Crown lands. Reserve lands are still held by the Crown today. See Dickason, *supra* note 12 at 220.

65 McHugh, *supra* note 60 at 182.

without necessarily forcing the First Nations community to relinquish their restricted political or legal decision-making power over reserve lands.

The *Gradual Civilization Act, 1857*[66] was a direct attempt by the government of Upper Canada to dismantle the reserve system by granting private land holdings to First Nations individuals.[67] As part of a broader process of assimilation intended to individualize all Status Indians' civil and political rights, the Act created a voluntary procedure for individuals to enfranchise as Canadian citizens, thereby abandoning their state-recognized Indian status.[68] This policy development "was based on the assumption that the full civilization of tribes could be achieved only when Indians were brought into contact with individualized property."[69] An enfranchisee relinquished a number of rights and benefits including the right to live on a reserve, rights to social assistance and tax exemptions under the *Indian Act* and any hunting and fishing entitlements on Aboriginal lands.[70] In return, male individuals who met the criteria for enfranchisement—being of "good moral character", free from debt and English speaking—were granted an allotment of up to 50 acres of land as a life estate, hived off from the reserve land base and made alienable to off reserve interests. The fee simple in these allotments passed to the enfranchisee's children.

Opposition to enfranchisement within First Nations communities was widespread—only one Status Indian individual was enfranchised between 1857 and the enactment of the *Indian Act* in 1876.[71] A significant factor in First Nations peoples refusing to take part in enfranchisement stemmed from opposition by First Nations political leadership. In 1846, a group of Band

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66 *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians,* S.C. 1857, Chapter 26 [*GCA*].

67 R.J. Brownlie, "'A Better Citizen than Lots of White Men': First Nations Enfranchisement—an Ontario Case Study, 1918–1940" (2006) 87 The Canadian Historical Review [Brownlie] at 32. The Canadian enfranchisement period preceded an analogous experience of assimilation through the private allotment of reserves in the United States, which officially began with the implementation of the *Dawes Act* in 1888, and in New Zealand. A key difference between these programs, however, was that enfranchisement in Canada was officially voluntary for individuals, while the US and New Zealand strategies involved the forced allotment of land and the involuntary dismantling of reserves. See R. Stremlau, "'To Domesticate and Civilize Wild Indians': Allotment and the Campaign to Reform Indian Families, 1875–1887" (2005) 30 Journal of Family History 265; J.A. Shoemaker, "Like Snow in the Spring Time: Allotment, Fractionation, and the Indian" (2003) Wis. Law Rev. 729 [Shoemaker]; L.A. Carlson, *Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming* (Westport: Greenwood Press, 1981).

68 McHugh, *supra* note 60 at 246.

69 J.S. Milloy, "The Early Indian Acts: Developmental Strategy and Constitutional Change" in I.A.L. Getty & A.S. Lussier, eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) [Milloy] at 58.

70 Brownlie argues that while losing these rights was a fact in law, their operation prior to the enfranchisement period was for many individual Indians illusory in practice: Brownlie, *supra* note 67 at 33.

71 McHugh, *supra* note 60 at 246.

councils rejected the outright subdivision of reserves into private interests.[72] Gradually, the requirements for enfranchisement were eased and, in 1918, *Indian Act* reforms de-linked enfranchisement from the breakup of reserves. Individuals who were enfranchised after 1918 lost their official status, but did not acquire individual allotments from the reserve land base. In return, enfranchisees gained "additional" rights—that is, rights already enjoyed by non-Indigenous citizens—such as rights to hold a business licence, buy liquor and send their children to public school.[73] After these reforms were in place, enfranchisement continued to gain few adherents. By 1920, only 227 people had been enfranchised, although this was nearly twice the total number of enfranchisees between 1867 and 1918.[74]

Following Confederation in 1867, the federal government began asserting exclusive jurisdiction over "Indians, and lands reserved for Indians" under s. 91(24) of the *British North America* (*BNA*) *Act*.[75] Shortly after, the federal government passed the *Gradual Enfranchisement Act* (*GEA*)*, 1869*.[76] This legislation provided another method for individuals to acquire private interests through location tickets granted by the Governor-in-Council. Location tickets created rights to possession of reserve land, an exemption from taxes and legal seizure, limited transferability of possessory rights to non-Indians, and provisions for passing these rights through inheritance. Individuals who elected for enfranchisement, in addition to acquiring a location ticket, could also apply to the federal government for a fee simple interest in the land. This system for granting location tickets preceded the modern Certificates of Possession, which are discussed in greater detail below. McHugh observes that the *GEA* set the tone for the relationship between the federal government and First Nations by establishing "the central principle of Canadian law ... namely the federal control of on-reservation governance."[77] Provisions for granting location tickets were later consolidated in the first *Indian Act* in 1876[78] and continued until the *Indian Act*'s reconsolidation in 1951 when the location ticket system was replaced by Certificates of Possession.

Historical experiences with formalizing property systems on reserves point to strong opposition within communities where economic reforms are seen as instrumental to broader political objectives, such as the assimilation of First Nations peoples and communities. Any potential economic benefits

72 Milloy, *supra* note 69 at 59.
73 Dickason, *supra* note 12 at 233.
74 Brownlie, *supra* note 67 at 34.
75 *British North America Act, 1867*.
76 *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria,* Chapter 42, S.C. 1869, Chapter 6 [*GEA*].
77 McHugh, *supra* note 60 at 183.
78 *Indian Act, 1876*, ss. 5–10.

from attempts to enforce state-sanctioned tenure security on First Nations lands were also tempered by the reality of government policy failures to prevent intrusion by European settlers. Historian Olive Dickason observes that "Amerindian opposition to individualized landownership [that is, European-style ownership] was not surprising, not only because of their entrenched customs but also because of the considerable land losses that invariably followed its imposition."[79] While loss of reserve lands through the privatization of land title may not have proceeded with the same uniformity in Canada as it did for Indigenous peoples elsewhere, particularly in the United States,[80] concerns about dispossession are likely to remain an important issue for First Nations peoples, particularly when formalization programs create an open conduit for reserve land transfers to non-community members.[81] Conversely, past attempts to centralize control of land tenure on reserves have also left a legacy of rigid legislative controls that afford First Nations little autonomy in designing tenure regimes appropriate to their unique situations.

The history of reserve tenure in Canada sets the stage for examining the modern *status quo*. Returning to our hypothetical First Nation, we now proceed to illustrate a number of common modern development scenarios confronting this community and discuss the impacts of the *status quo* regimes on meeting development objectives.

Potential Economic Actors

Each of the five scenarios introduced in this section provides a unique vantage point on pursuing economic development in First Nation. We use stylized economic actors to illustrate how some common development activities are impacted by the *status quo* property regimes in First Nation today. Some actors are individuals—both Status Indian and non-Indigenous—while others are collective entities such as corporate entities and the community as a whole. One aspect of land tenure reform that these scenarios are meant to underscore is the fact that policy decisions may impact upon business enterprises differently, depending on whether the enterprise is run individually by a citizen of First Nation, by First Nation's government or by outsiders.[82] Our analysis highlights the major development objectives of

79 Dickason, *supra* note 12 at 233.

80 See Part V, below.

81 However, experiences with formalization in what is now the United States may be particularly relevant for some First Nations in Canada since Canadian and American Indians were often of the same family, tribe or association. These groups were indiscriminately separated by the creation of the Canada-US border.

82 Cornell, "Lessons from the Harvard Project", *supra* note 19 ("Production enterprise in First Nations typically comes in three forms, each of which can serve either internal markets, export markets, or both: non-Aboriginal ownership, ... First Nation ownership, ... and citizen

each party and characterizes these in relation to the strength of property rights afforded under *status quo* options.

Entrepreneur

Entrepreneur, a citizen of a First Nation, wants to open a retail goods business on the reserve. She intends to retail goods for sale in her local community initially, but has plans to expand the business in the future to market products outside the reserve. Entrepreneur has two main challenges: (1) to find a suitable retail and production site in the First Nation; and (2) to secure a small business loan to finance her capital investments and other start-up costs.

Like many other members of First Nation, Entrepreneur holds a community-defined right to occupy a tract of land that has been used by her family for, at various times, small-scale agriculture and as residential property. This land might provide a good site on which to locate her business. In practice, the term "customary tenure" is sometimes employed as a convenient residual category by policy-makers and researchers for tenure regimes not administered by or negotiated with the federal government. However, this terminology combines two distinct concepts. "Non-formal tenures" consist of decentralized, socially-determined and often implicit land use rules.[83] By comparison, "Indigenous tenures" may be highly structured with detailed, explicit rules regarding land use, value appropriation, title transfer and inheritance, and the initial allocation of rights by a central authority. These systems have often evolved over extremely long time-spans. As a consequence of unique traditions, practices and histories, the actual content and governance of Indigenous land tenure is likely to vary widely between the communities where they are employed. A comprehensive survey of these regimes is beyond the scope of this paper, and indeed the diversity of Indigenous tenure forms across actual First Nations in Canada defies the reduction of these rich, complex systems to a set of common characteristics. A ground-breaking study, *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims*, by anthropologist Antonia Mills provides one of the most thorough accounts of an Indigenous land tenure system.[84] Mills describes in detail the relationship between the social organization of

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entrepreneurship ... The urgent need for growth, diversification, and resilience in Aboriginal economies suggests that, circumstances permitting, the wise choice is for most First Nations is to explore all three forms of enterprise" at 54).

83 See Part II, above.

84 A. Mills, *Eagle Down is Out Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) [Mills]. Mills spent three years living in the Witsuwit'en Nation as part of a project to prepare expert evidence for *Delgamuukw v. British Columbia,* [1993] 104 D.L.R. (4th) 470 (B.C.C.A.). The *Delgamuukw* case was later heard at the Supreme Court of Canada, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193.

traditional Witsuwit'en societies, the lineage of hereditary titles that determines governance of lands and resources, and the centrality of the feast ceremonies in which those titles are transferred. The historical bases of this land tenure system are related to the unique patterns of resource use and "ownership" on Witsuwit'en lands:

> While gathered at the summer salmon-fishing village, the head chiefs presided over the named cedar-plank houses in which their matrikin and their spouses lived and smoked the salmon. In the winter these people went, under the leadership of the head chiefs, to the house territories. The winter groups, dispersed in these territories were called by their location name, such as *bewani wuten* (people of *bewani*) or *kilwoneetswuten* (people of *kilwoneets*). The names of the summer houses, which were and are used to designate one's house or matrilineal affiliation, were not used in the winter sites of the outlying territory .... The names of the winter groups refer to a people who own or have a certain territory, just as the name for the Witsuwit'en as a whole means people who have or own the "lower drainage."
>
> ….
>
> The feast, in which titles within the houses and the clans are conferred on the chosen representative (who assumes stewardship of the associated territory), is central to Witsuwit'en government.[85]

Indigenous tenure regimes such as the system of titles and feasts used by the Witsuwit'en may operate very differently from systems of private rights familiar to individuals outside the community. In addition to their inherent social and cultural significance, these forms of ownership and allocation offer important economic benefits similar to those predicted to flow from formal regimes.[86] For community members, the system of titles and feasts likely provides a high degree of tenure security derived from the deep connection between these tenure forms and the broader organization of Witsuwit'en society.[87]

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85 Mills, *ibid*. at 41.

86 For example, Ronald Trosper argues that Indigenous institutions in societies of the Northwest coast of North America have led these groups to achieve long-term sustainable resource management by structuring unique incentives based on norms such as reciprocity: R.L. Trosper, "Northwest Coast Indigenous Institutions that Supported Resilience and Sustainability" (2002) *Ecological Economics* 41(2) [329].

87 Flanagan and Alcantara have attempted to characterize the formality of Indigenous tenure—which they call "customary tenure"—according to five factors that match private property regimes off reserve: individual rights recognized by the community; use of the Band council resolution (BCR) process; provision of official surveys; use of a land registry administered by the Band; and the availability of a dispute resolution mechanism. The authors describe three First Nations employing systems of Indigenous tenure that meet all five of these formalization criteria. T.E. Flanagan & C. Alcantara, "Customary Land Rights on Canadian Indian Reserves" in T.L. Anderson, B. Benson & T.E. Flanagan, eds., *Self-Determination: The Other Path for Native Americans* (Stanford: Stanford University Press, 2006) [Flanagan and Alcantara, "Customary rights"] at 140. In fact, this characterization mirrors the requirements for reserve land tenure administered under ss. 20 to 29 of the *Indian Act*, *supra* note 48. See below for a full discussion of *Indian Act* reserve tenure. We decline to use Flanagan and Alcan-

In our hypothetical First Nation, Indigenous tenure is widely recognized by community members and vests claimants like Entrepreneur with use and appropriation rights on specially designated areas according to family lineage and other aspects of social organization. But Entrepreneur faces two concerns about the tenure security of her community-based rights: resolution of competing claims with other community members and the possibility of expropriation of her interest by the Band council. Both of these concerns about Indigenous tenure insecurity are caused in part by the overlapping system of land tenure imposed on First Nation under the *Indian Act*. According to s. 20(1) of the Act, "[n]o Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band."[88] In other words, even though Indigenous tenure might, in practice, be recognized and respected by the community, Entrepreneur could find her tenure security undermined by conflicting claims made in non-Indigenous courts. In general, courts have maintained that reserve communities hold a communal interest in reserve land and that no legally recognizable title can vest in individual members of the community on the basis of community-recognized interests alone. An exception to that rule is that courts have enforced interests vested under Indigenous tenure systems when they are approved by both the Band council and the Minister of Indian Affairs, although these cases appear to be rare. As a result, Entrepreneur's rights under an Indigenous tenure regime are vulnerable to invasion or expropriation through formal, state-sanctioned channels—especially when those rights diverge from possessory interests granted under the *Indian Act*.[89]

A further consideration for Entrepreneur is that the Band council plays a key role in determining Indigenous tenure security under the overlapping jurisdiction of the *Indian Act*. If Indigenous tenure is recognized by the Band council, Entrepreneur may have a better chance of having her claims

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tara's description of formalized Indigenous tenure because it tends to obscure the relationship between these systems and tenure security and transfer rights, by overemphasizing the individual rights that are sometimes part of Indigenous tenures to the exclusion of other forms of property 'ownership,' including the significance of communal rights and hereditary title.

88 *Indian Act*, *supra* note 1 at s. 20(1). See also *Joe v. Findlay,* [1981] 3 W.W.R. 60, 26 B.C.L.R. 376, 122 D.L.R. (3d) 377 (C.A): "... there is no statutory provision enabling the individual Band members alone to exercise through possession the right of use and benefit which is held in common for all Band members." [D.L.R. at 380].

In *Lower Nicola Indian Band v. Trans-Canada Displays Ltd.* [200] 4 C.N.L.R. 185, 2000 BCSC 1209, "Smith J. held that traditional and customary use did not create a legal interest in the land that would conflict with the provisions of the *Indian Act*": S. Imai, ed., *The 2008 Annotated Indian Act and Aboriginal Constitutional Provisions.* (Scarborough: Carswell, 2007) [Imai, "Annotated *Indian Act*"] at 91.

89 Even if Indigenous tenure systems were recognized by Canadian courts, non-Indigenous legal institutions may not to have the capacity to adjudicate claims made under widely differing regimes in First Nations communities.

enforced, even in non-Indigenous courts. But because Indigenous tenures can be closely connected to particular forms of social organization and authority unaccounted for by the political systems imposed on reserve communities under the *Indian Act*, the structure of the Band council itself may undermine traditional tenures and lead to greater insecurity. For example, the rules governing organization and succession of hereditary chiefs in the Witsuwit'en system diverge markedly from the *Indian Act* requirements for electing and operating a Band council which is responsible for the administration of land tenure under the Act. Where conflicts or incongruities exist between these regimes, greater uncertainty for both community members and outsiders is a likely result.

Entrepreneur might want to transfer her traditional rights in order to collect rental income for her business, to acquire profit from the sale of her business, to use as collateral for a business loan and/or to bequeath her business to her heirs. She might transfer her rights to other members of the community if permitted under a given regime. A form of land market may therefore exist within First Nation between community members. For larger and more economically developed reserve communities these markets may be significant in scale. But Entrepreneur's ability to transfer her community-based rights within the community will ultimately be bounded by factors such as the population of First Nation, the availability of land on the reserve, and the available investment capital in the community. Entrepreneur's opportunity to involve outsiders in land transactions will be dependent on the relevant rules of the First Nation's Indigenous tenure regime. It is clear, however, that these rules will rarely be enforced by non-Indigenous courts.

A second option is for Entrepreneur to transform her community-based claim into a Certificate of Possession (CP) issued under s. 20(2) of the *Indian Act*. CPs are the closest analogue to private property rights held off reserve in Canada. Once her application is approved by both the Band council and the Minister of Indian Affairs, a CP would grant private rights of possession and use for an indefinite term, including the ability to exclude other members of the Band.[90] Under Canadian law, underlying title to CP land remains vested in the Crown.

CPs replaced the original location ticket system after *Indian Act* reforms in 1951. Since then, CPs have been widely used. By the early part of the 21st century, 10,059 location tickets and 145,000 CPs had been issued to

90 The transactions cost of obtaining a CP can be high. The process of applying for a CP and obtaining the requisite documents and surveys can involve a number of administrative steps and has been documented as taking anywhere from six months to 11 years: C. Alcantara, "Certificates of Possession and First Nation Housing: A Case Study of the Six Nations Housing Program" (2005) 20 Canadian Journal of Law and Society 183 [Alcantara, "Certificates of Possession"] at 189.

individuals on 301 reserves.[91] Some communities have embraced the CP system by allotting the majority of their reserve land to individual certificate holders, while others have implemented CP allotments only to a limited extent, if at all. Communities may also utilize a mix of property schemes, with a portion of the reserve being held by individual CP holders and the remaining property governed according to traditional systems.

CPs may provide Entrepreneur with a high degree of tenure security for two reasons. First, her CP rights are predictably defined under the *Indian Act*, eliminating the uncertainty associated with the diversity and variability of Indigenous tenures between reserve communities in transactions with outsiders. Second, CP rights have been widely enforced by non-Indigenous courts. Notwithstanding that CP title is not alienable directly off reserve, courts have acknowledged that CP holders retain the other incidents of private title afforded to owners of land in fee simple.[92] On the other hand, the enforceability of CPs is compromised because many transactions involving CP land are subject to consent or approval from the Band council and the Minister, thus creating uncertainty and raising transactions costs associated with the land.

Shortcomings of the title registry system for CP holders may be another source of tenure insecurity for Entrepreneur under the CP system. Sections 22 and 55 of the *Indian Act* require an Indian Lands Registry (ILR) to record all property interests held on reserve and to track all transactions affecting those interests. The ILR has been criticized as being incapable of meeting the needs of First Nations peoples and third parties to track interests on reserves.[93] In comparison with other modern title registry systems, the ILR has been characterized as inaccurate, unreliable, difficult to access and use, and is not comprehensive in its coverage.[94] The ILR also provides no protection for CP holders against fraudulent transactions.

CP title can be transferred to or inherited by other citizens of First Nation, but is inalienable to outsiders directly by lease, deed, mortgage or will under s. 28 of the *Indian Act*—the result being that Entrepreneur will be forced to relinquish her CP rights if she ceases to be a member of First Nation as defined under the *Indian Act*.[95] However, s. 58(3) of the *Indian*

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91 C. Alcantara, "Individual Property Rights on Canadian Indian Reserves: The Historical Emergence and Jurisprudence of Certificates of Possession" (2003) 23 Canadian Journal of Native Studies 391 at 393.

92 *Westbank Indian Band v. Normand* [1994], 3 C.N.L.R. 197 (B.C.S.C), ruling that when a CP is issued all incidents of ownership vest in the holder of the certificate. See also Imai, "Annotated *Indian Act*", *supra* note 88 at 93.

93 Rakai, *supra* note 36 at 109.

94 D.E. Cragg, "Best Practices in First Nations Land Title Systems" in Anonymous, *Improving First Nation Land Title Certainty and Modernizing the Land Registry System: Consolidation of Research* (Kamloops: Indian Tax Advisory Board, 2007) [Cragg] at 9.

95 *Indian Act*, *supra* note 1 at s. 25(1).

Act permits the federal government to grant long-term leases to First Nation's lands for the benefit of a CP holder without the consent of the Band council.[96] These leases can be granted to off reserve interests up to a maximum term of 99 years. The leasing option relaxes some of the constraints on alienability for Entrepreneur in the event that she wishes to "sell" her business (that is, lease it as a long-term interest) by opening up potential land markets beyond First Nation itself. While the land remains part of the reserve and permanent possessory interests are non-transferable to outsiders under the leasing scheme,[97] lessees can gain use and appropriation rights to First Nation's lands over significant time periods. When the lessee's rights are made transferable to others by third parties—for example, when subleases are granted in residential developments—the benefits from alienability of title may be substantially increased, although these benefits decrease as the renewal date for the lease approaches.[98]

Investor

Investor is a non-community-member financier who has expressed an interest in Entrepreneur's business plan. Viewing First Nation as an undeveloped market for Entrepreneur's goods, Investor is willing to provide substantial start-up capital for the enterprise in the form of buildings and equipment. He has offered to finance this infrastructure himself or through a mortgage in order to lease it to Entrepreneur for her business. The main challenge for Investor is to acquire property interests in the land that are sufficiently secure and transferable to warrant a large investment in the development of the land. He will also be concerned with the complexity of obtaining those interests, as greater complexity will increase his investment costs.

Since outsiders cannot obtain customary or CP rights to land in First Nation, Investor's first choice will probably be to obtain a long-term lease. He has the option to lease CP land—either from Entrepreneur herself or from another citizen of the First Nation via the federal government—or to obtain a lease from the Band for land that has previously been unallotted to individual interests.[99] In order for the Band to grant a long-term lease the reserve land must be designated by way of a surrender to the federal

96 Section 58(1)(b) of the *Indian Act* also allows the Minister to grant a lease of CP land for "agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession."

97 *Derrickson v. Kennedy*, [2006] 55 B.C.L.R. (4th) 123, 379 W.A.C. 96 (C.A.): the British Columbia Court of Appeal ruled that no surrender of reserve land was made or inferred by a lease granted to a non-Band member under s. 58(3) of the *Indian Act*.

98 T. Flanagan & C. Alcantara, "Individual Property Rights on Canadian Indian Reserves: A Review of the Jurisprudence" (2005) 42 Alberta Law Review 1019 [Flanagan & Alcantara, "Private"] at 526.

99 *Indian Act*, *supra* note 1 at s. 28(2).

government under s. 38(2) of the *Indian Act*.[100] The process of designation requires a majority vote among all members in the Band and must be approved by the Governor-in-Council.[101] Prior to an amendment to the *Indian Act* in 1988, there was no provision for "designated lands" and there was some doubt about whether lands surrendered conditionally ceased to be part of the reserve.[102] Under current legislation, designated lands remain part of the reserve. As with CP leases, the maximum term for Band-negotiated leases is 99 years.

A long-term lease negotiated with First Nation or with a CP holder and provided by the federal Crown for the benefit of the band may provide comparatively strong tenure security for Investor. Including the Crown as an intermediary can increase the likelihood that courts will enforce third-party interests since Investor can bring legal claims directly against the federal government. In addition, if Investor is uncertain as to the particular requirements of conducting business in or with First Nation, or is unfamiliar with the practices unique to the community, the participation of the Crown may help Investor to mitigate this uncertainty.

But long-term lease arrangements also generate tenure insecurity in two ways. The complexity of multiple layers of governance that relate to leases might contribute to greater confusion about the rights of the parties and thereby exacerbate uncertainty for both the lessee (for example, Investor) and the lessor (for example, Entrepreneur).[103] In addition, designing and implementing a lease agreement in First Nation requires professionals involved in land transactions to have special expertise and skills, thus increasing the cost for Investor compared to land transactions off reserve.[104] A second source of tenure insecurity in long-term lease arrangements in First Nation is derived from the regulatory gaps that result from the fact that the provinces hold constitutional jurisdiction over regulations governing land

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100 R.S.C. 1985, c. 17 (4th Supp.), s. 2 ("A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted").

Strictly speaking, the *Indian Act* provides additional methods of alienating reserve lands to non-members in some form. These include s. 28 (Permits for Reserve Lands), s. 35 (Lands Taken for Public Purposes), s. 48(3) (Surviving Spouse) and s. 58 (Uncultivated and Unused Lands): Imai, "Annotated *Indian Act*", *supra* note 88 at 114.

101 *Indian Act*, *supra* note 1 at s. 39(1).

102 Imai, "Annotated *Indian Act*", *supra* note 88 at 114.

103 For example, the Crown's "duty to consult" with First Nation can impose uncertainty on outside investors by making their lease agreement with the Crown subject to claims by the community about the process of consultation and negotiation over the lease's terms. See *Geurin*, *supra* note 9.

104 Fiscal Realities Economists, "The Economic and Fiscal Impacts of Market Reforms and Land Titling for First Nations" in Anonymous, *Improving First Nation Land Title Certainty and Modernizing the Land Registry System: Consolidation of Research* (Kamloops: Indian Tax Advisory Board, 2007) [Fiscal Realities, "Economic and Fiscal Impacts"] at 14.

use and commercial transactions.[105] Since jurisdiction over First Nation lands is, by and large, exclusively federal according to the *Constitution Act, 1867*,[106] there is often a high level of uncertainty about whether and what kinds of provincial commercial regulations apply to projects on reserves. The federal government has only recently moved to fill in the resulting gaps.[107] The uncertainty surrounding commercial projects in reserve communities—especially large commercial projects requiring complex regulatory schemes, such as natural resource developments and large-scale housing projects—increases the risk of unexpected costs and renders some projects potentially unfeasible.[108] With the enactment of the *First Nations Commercial and Industrial Development Act* (*FNCIDA*) in 2006, the federal government created a framework that provides for regulations on reserves to be harmonized with existing provincial schemes. This development has the potential to mitigate some of the tenure insecurity associated with long-term leases in First Nation, although the effectiveness of the *FNCIDA* in resolving jurisdictional disputes remains untested.[109]

A more permanent arrangement for Investor would involve First Nation surrendering the land to the Crown under s. 38(1) of the *Indian Act*. A surrender removes land title from the reserve altogether, creating a fee simple interest that could be transferred by the federal government to Investor in the same way as other off reserve lands. This option would require a majority vote by all citizens of the First Nation. While potentially creating the strongest possible property rights for Investor, rulings by Canadian courts continue to create some uncertainty about whether the First Nation would retain underlying Aboriginal title to surrendered lands. The Court in *Osoyoos Indian Band v. Oliver (Town)*[110] held that even when a reserve interest is expropriated by the federal government, the Aboriginal title underlying that interest is not necessarily affected and may remain vested in the Band. While the Court's decision in *Osoyoos* has not been explicitly extended to the surrender provisions of the *Indian Act*, Woodward notes that this ruling opens the door for future courts to draw a close analogy.[111] The

105 See s. 92(13) of the *Constitution Act, 1867*: "Property and Civil Rights in the Province."

106 See s. 91(24) of the *Constitution Act, 1867*: "Indians and lands reserved for Indians."

107 P. Salembier *et al.*, eds., *Modern First Nations Legislation Annotated*, 2007 ed. (Markham, ON: LexisNexis Butterworths, 2006) [Salembier *et al*.] at 7.

108 J.P. Salembier, "Designing Regulatory Systems: A Template for Regulatory Rule-Making–PART I" (2002) 23 Stat. L. Rev. 165 at 167.

109 *First Nations Commercial and Industrial Development Act*, S.C. 2005, c. 53 [*FNCIDA*]. See Salembier *et al*., *supra* note 107 at 7.

110 *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746.

111 J. Woodward, "Converting the Communal Aboriginal Interest into Private Property: Sarnia, Osoyoos, the Nisga'a Treaty and Other Recent Developments" in O. Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: The Fraser Institute, 2000) at 96.

implication may be that an unconditional surrender of reserve lands to the Crown allows First Nation to retain some form of interest in those lands, which may be the basis for future claims against Investor.

In order to remove the Crown as an intermediary between Entrepreneur, First Nation, and Investor, the community has the option of implementing a land code, drafted by the community, to create and administer property rights on the reserve under the *First Nation Land Management Act* (*FNLMA*). Enacted federally in 1999, the *FNLMA* provides an option for First Nation to replace the land management provisions of the *Indian Act* with community-level jurisdiction over allotment of property rights to Band members and leasing agreements with off reserve parties.[112] According to Salembier *et al*., the *FNLMA* "represents a major step away from the paternalistic land management provisions of the *Indian Act*, where virtually every reserve land transaction must be granted, approved or consented to by, or on behalf of, the Minister ... or by the Governor in Council."[113] According to s. 5 of the Act, underlying title to First Nation lands under the *FNLMA* would be unaffected, remaining vested in the Crown for the "use and benefit of the band."[114] Title to reserve land cannot be alienated in fee simple by First Nation to outsiders under the *FNLMA*, except in cases where reserve land is "exchanged" for other lands, which are transferred to the federal government and designated as part of the reserve.[115] These exchanges are subject to approval by the federal government.

Adoption of the *FNLMA* scheme and the development of land codes have not yet become popular tenure reform options for reserve communities in Canada, although it appears that uptake is growing. Currently, 58 communities have signed the Framework Agreement for the *FNLMA*, with over half of those administering fully functional land codes under the Act.[116]

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112 Lands Advisory Board, *Annual Report 2006-2007*, online: Annual Reports <http://www.fafnlm.com/content/documents/AnnualReports/0607AR.pdf> [Lands Advisory Board, "Annual Report"] ("Once a First Nation has ratified the Framework Agreement and enacted its land code, there are 34 land administration sections of the *Indian Act* that no longer apply to the First Nation's reserve lands and resources. The First Nation now is self-governing over its lands and resources" at 17). However, land codes are subject to approval by an external "verifier" jointly appointed by First Nation and the Minister of Indian Affairs. See *First Nations Land Management Act*, R.S.C. 1999, c.24 [*FNLMA*] s. 8(1).

113 Salembier *et al*., *supra* note 107.

114 *FNLMA*, *supra* note 112 at s. 5.

115 *Ibid.* at s. 26(1), s. 27. See also Framework Agreement on First Nation Land Management, (1996) online: <http://www.fafnlm.com/content/documents/Text%20of%20the%20Framework%20Agreement%20on%20First%20Nation%20Land%20Management.pdf> [*Framework Agreement*] ("A First Nation has the right to exchange a parcel of First Nation land for another parcel of land, if that other parcel of land becomes First Nation land. And exchange of First Nation land may provide for additional compensation, including land that may not become First Nation land, and may be subject to any other terms and conditions" at s. 14.1).

116 Lands Advisory Board, *Signatories to the Framework Agreement*, 2007 online: Member Communities <http://www.fafnlm.com/content/en/MembersCommunities.html>.

Tenure security for a lease granted to Investor under the *FNLMA* may be improved because the Act requires that valid land codes include detailed descriptions of reserve land subject to the code and provide rules governing use, occupation and transfer of the land.[117] Significantly, the Act requires that First Nation's land code include rules and procedures for interests "pursuant to the custom of the first nation [that is, rights acquired under Indigenous tenure regimes]."[118] If First Nation opts into the *FNLMA*, the land code must also provide for a dispute resolution mechanism to adjudicate conflicting claims.[119] Guidelines for expropriation of interests by First Nation will also be required.[120] Isaac, however, argues that the *FNLMA* can create greater tenure insecurity for investors because the Crown no longer acts as an intermediary in land transactions.[121] Although existing interests and licences continue in accordance with their terms and conditions, once a community adopts the *FNLMA*[122] Isaac notes that the powers to terminate, amend or materially alter those interests will no longer be informed by the broader "public policy considerations" assumed to be protected by the Crown. Isaac raises similar concerns with respect to new powers of expropriation granted to Band councils under the *FNLMA*.[123] The Act allows the Band council to expropriate interests necessary for community works or other purposes benefiting the community. To the extent that Investor's interests are protected by "public policy considerations" outside the community against the actions of First Nation's government, his tenure security may be adversely affected under the *FNLMA* scheme. Conversely, greater freedom for First Nation's government to pursue the concerns of the community and to protect the interests of community members under the *FNLMA* may actually improve tenure security for individuals like Entrepreneur.

Uncertainties created by the ILR system used to register property interests under the *Indian Act* have been addressed under the *FNLMA* by establishing a new First Nations Land Registry (FNLR). Communities adopting the *FNLMA* are required to provide for the registration of all interests governed under their land code—including prior interests brought under the governance of the Act—with the goal of ensuring that all property interests are easily traceable and accessible.[124] The FNLR was finally made

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The schedule to the *First Nations Lands Management Act* lists 47 Nations: *First Nations Lands Management Act* Schedule, 1999, c. 24, Sch.; SOR/2003-178; SOR/2006-216.

117 Salembier *et al*., *supra* note 107 at 293.

118 *FNLMA*, *supra* note 112 at s. 6(1)(b)(ii).

119 *Ibid*., s. 6(1)(h)-(j).

120 *Ibid*.

121 Isaac, *supra* note 49.

122 *FNLMA*, *supra* note 112 at s. 16(3).

123 *Ibid*., s. 28(1).

124 Lang Michener LLP, "Best Practices in First Nations' Land Administration Systems" in Anonymous, *Improving First Nation Land Title Certainty and Modernizing the Land Registry*

operational in October 2007 when the regulations were brought into force.[125] One significant difference compared to the ILR is that the FNLR allows for the registration of priority interests.[126] Interests that affect the same parcel of land are given priority according to the date of their registration, not the time and date of their execution. This procedure helps to clarify potentially conflicting claims that can result from long chains of title transactions.

Joint Venture

By the mid-1990s, 69 per cent of all First Nations business arrangements in Saskatchewan involved First Nations government participation or were joint ventures between First Nations corporate entities and commercial interests off reserve.[127] Highlighting the Saskatchewan example, Anderson observes that as First Nations communities in Canada continue to strengthen their economies, there is a growing interest from outside corporate enterprises in the potential to engage in co-operative ventures on reserves. The Conference Board of Canada, in a recent study of successful Aboriginal businesses, underscores the potential for developing partnerships between Aboriginal and non-Aboriginal enterprises.[128]

Collective business development strategies have met with some past success in our hypothetical First Nation. To facilitate joint ventures, First Nation's Band council has formed the First Nation Development Corporation (FNDC) to act as an official partner with outside businesses.[129] Entrepreneur has approached the FNDC with an expanded business proposal in

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System: Consolidation of Research (Kamloops: Indian Tax Advisory Board, 2007) [Lang Michener] at 11.

125 *First Nations Land Registry Regulations,* SOR/2007-231 [*FNLR Regulations*]. According to the Lands Advisory Board (LAB) (an elected body of chiefs that manages implementation of the *FNLMA*):

> The preference of the LAB is to establish a Torrens system, but that is not currently possible for a variety of reasons. It difficult to establish this system across Canada for Indian reserve land. It takes more than political will—it would take millions of dollars in survey costs alone. In order to secure tenure the LAB has had direct talks with the major banks, trust companies and title insurance companies. These institutions have looked at the regulations and been involved in the drafting process. The banks are very supportive that there will be a legal basis for the land tenure system under First Nation land codes. Several of the land title insurance companies are also interested in doing business on reserve once the regulations come into effect. (Lands Advisory Board, "Annual Report", *supra* note 112 at 41)

126 *FNLR Regulations*, *ibid*. s. 28(1).

127 R.B. Anderson, "Corporate/Indigenous Partnerships in Economic Development: The First Nations in Canada" (1997) 25 World Dev. 1483 at 1488. Of those businesses earning revenues in excess of $400,000 per year, 96% were government-owned or joint ventures.

128 Sisco & Nelson, *supra* note 54.

129 One of the main findings of the Harvard Project on American Indian Economic Development is that successful enterprises require appropriate insulation from tribal politics. See Cornell, "Lessons from the Harvard Project", *supra* note 19 ("Some enterprises owned and operated by Native nations do well, and others don't" at 52).

which she explores the possibility of attracting a large, outsider, retail management company as a partner. Her proposal calls for First Nation to provide the land and building infrastructure, while the retail company would supply operations expertise as a managing partner. The FNDC would retain a 51 per cent ownership interest in the joint enterprise, with the option to take over management of the company from the outside retailer after a 10-year period.[130] Entrepreneur's role would be as a salaried project manager working for the FNDC.

The direct involvement of First Nation's government in the joint venture proposal avoids many of the property rights-related challenges encountered by private business operators on the reserve under the *status quo*. Because title to the land and the business infrastructure can remain vested in the Band, no transfer or lease agreements involving the federal government are required. In contrast to Investor's concerns about tenure security under the *FNLMA* scheme, First Nation as a whole will have a collective stake in the operation and success of the business, thus diminishing the likelihood of conflicting interests between the community and outside parties. Using the FNDC as a vehicle for business development largely leaves implications for alienability under customary rights or *FNLMA* regimes unchanged. If First Nation has sufficient financial resources to provide funding for the joint venture project, use of the FNDC may eliminate the need for land to be alienable in order to gain access to credit.

Homebuilder

Homebuilder is a citizen of First Nation and wants to construct a single-family residence on the reserve.[131] Like Entrepreneur, Homebuilder's two-fold challenge is to find a suitable area of land for her home and to secure mortgage financing at an interest rate that she can afford. Homebuilder also claims a Indigenous tenure interest in some of First Nation's lands and is likely to select this as her first choice of building sites.

Homebuilder shares Entrepreneur's concerns about tenure security under the Indigenous tenure and CP options. But she is particularly concerned by her inability to obtain a mortgage because her interests are

130 The details of this scenario are taken from a real-world joint-venture winery on the Osoyoos First Nation in British Columbia, discussed in Anderson, "Indigenous Land Rights", *supra* note 17 at 51.

131 Canadian Mortgage Housing Corporation, "Research Highlight: The Economic Impact of Residential Construction On Reserves" (April 2006) Socio-economic Series 06-009 ("Past studies have shown that the link between residential construction and economic development on reserves is reciprocal. On the one hand, residential construction is not a leading sector, but a sector that responds, a sector whose activity is affected by economic growth, or the lack thereof. On the other hand, the availability of sufficient dwellings of some quality may also help to attract people to a location, thus affecting its economic development" at 1).

non-transferable to off reserve financial institutions. As a result, banks and other lenders are ineligible to acquire land title on the reserve if Homebuilder defaults on her loan. An additional barrier is that s. 89(1) of the *Indian Act* specifically prohibits mortgaging reserve lands.[132] Most financial institutions are unwilling to provide loans without some form of collateral, meaning that Homebuilder and Entrepreneur are effectively cut off from conventional credit options widely accessible off reserve.

Homebuilder has two additional concerns. First, when viewed from an inter-generational standpoint, security of tenure will be impacted by the way property interests are inherited. Stronger tenure security implies that Homebuilder can determine with precision how her real property assets will be divided among her heirs. CP interests are inheritable according to succession provisions in the *Indian Act*, and traditional rights may be inheritable according to Indigenous tenures. The *FNLMA* framework also requires that First Nation define clear rules for inheritance when drafting a new land code.

Second, strong tenure security will allow for a predictable division of matrimonial real property in the event of a divorce. Without this predictability, Homebuilder may be less willing to invest in a housing project, particularly if the home is to be jointly owned with her spouse. Rules governing the division of matrimonial real property are not considered in the *Indian Act*, resulting in a serious legal gap that has adverse consequences that are borne disproportionately by First Nations women.[133] In a review of the Canadian jurisprudence, Alcantara demonstrates that the courts have consistently issued rulings that lead to a bias against women when matrimonial property is divided, thus inflicting severe economic hardships and often forcing women to move outside their communities following a divorce, because of housing shortages.[134] The *FNLMA* offers significant advantages in this respect. Section 17 of the Act requires that, in drafting a land code, First Nation must include an explicit mechanism for the division of matrimonial real property.

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132 *Indian Act*, *supra* note 1 ("Subject to this *Act*, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or band" at s. 89(1)).

133 Native Women's Association of Canada, "Aboriginal Women and Housing" (November 2004) *Background Document for the Canada-Aboriginal Peoples Roundtable Sectoral Follow-up Session on Housing*, online: Native Women's Association of Canada: <http://www.nwac-hq.org/en/documents/NWAC_BgPaper_e.pdf>.

134 C. Alcantara, "Indian Women and the Division of Matrimonial Real Property on Canadian Indian Reserves" (2006) 18 Canadian Journal of Women and the Law 513 at 528.

Vendor

Vendor, a citizen of First Nation, holds both traditional and CP claims to multiple tracts of land in First Nation, which he has acquired both through family inheritance and through transactions with other community members. His primary objective is to rent or sell his property interests—preferably under market conditions comparable to those outside the community, where land rents and sale values tend to be higher.

As an extreme example, Vendor is the government of First Nation and seeking to sell the entire land base of the reserve to a major forestry company. Because, in this scenario, First Nation's reserve lands are assumed to contain significant timber and mineral resources, and because the population of First Nation is assumed to be small, a land sale will provide a one-time windfall to each current member of the community. The profits will be divided equally within the community. Many have suggested that they will use their share of the money to move to larger urban centres in other parts of the country. As a result, the probable outcome of the land sale is that the community will cease to exist, at least as a cohesive social and geographical unit.

Vendor's challenge under the *status quo* is to find a property rights arrangement that comes closest to a grant of fee simple title off reserve, thereby raising the sale price of the land to its highest value for off reserve interests. None of the options discussed above allow a transfer of indefeasible title to outsiders—either to individual tracts or to the reserve land as a whole. A possible exception is for the First Nation's government to surrender reserve lands under s. 38(1) of the *Indian Act.* But since a wholesale transfer would need to be approved by Minister of Indian Affairs, it may be *de facto* politically infeasible, if not impossible. Since the *status quo* regimes place strong restrictions on the outright sale of reserve lands, Vendor is probably confined either to leasing arrangements with off reserve parties or to land transactions within the community.

Conclusions About the Status Quo

The *status quo* presents a complex array of land tenure arrangements on reserves—not to mention the diversity of Indigenous tenures and non-formal property systems that have barely been touched on here. What is clear is that the implications of the *status quo* on tenure security and alienability will differ depending on the development objectives being pursued and on the membership and registered Indian status of the interest holders. Whether or not the *status quo* regimes create barriers in relation to meeting development objectives, and whether these challenges might be remedied under a more formal arrangement, is the subject of Part IV.

IV COMPARISON TO A FIRST NATIONS LAND TITLE SYSTEM

The First Nations Tax Commission (FNTC) is currently developing a proposal for federal legislation that would establish a national FNLTS as an additional tenure reform option for First Nations. The FNTC is a statute-based service agency established under the federal *First Nations Fiscal and Statistical Management Act* (*FNFSMA*)[135] in 2005. While the primary aim of the FNTC is to support First Nations in the administration of new tax powers granted under the *FNFSMA*, the organization is involved in a wide range of economic development projects and research initiatives. The proposed FNLTS envisages a Torrens-style title system to register property interests on reserves as a way to establish greater certainty and clarity about these rights, to provide for greater flexibility in the transfer of these interests, and to harmonize land tenure with property title systems off reserve. The proposed FNLTS has four main characteristics relevant to our hypothetical First Nation:

(1) The underlying allodial title in the reserve land passes from the Crown to a First Nation as a communal interest. The government of a First Nation has full jurisdiction under Canadian law to allocate property interests on the community's land to both community members and non-members if it chooses—including granting new interests and registering existing forms of private title such as CPs or allocations made under customary regimes.

(2) This FNLTS will make it possible for a First Nation to grant private, indefeasible title to reserve lands, transferable to parties off reserve. But a First Nation retains an underlying communal title interest to all land, even when individually titled tracts are transferred to outsiders. This implies that a First Nation always retains ultimate jurisdiction over titled lands, similar to the role of the Crown in lands off reserve. A First Nation retains an underlying communal interest to all land and this interest is non-transferable.

(3) The title registry will be implemented nationally, rather than as a collection of separate provincial systems or individual registries at community level.

(4) Adopting the FNLTS land governance scheme is optional for a First Nation and is intended to exist simultaneously with other options for tenure reform on reserves as part of a menu for each community. But once the FNLTS is adopted, the First Nation is permanently released from the jurisdiction of the land governance provisions of the *Indian Act*.

Below, we evaluate the case for a FNLTS through a discussion of how the proposal seeks to overcome shortcomings in the *status quo* regimes. Emphasizing that institutional analysis should be contingent on economic

135 *FNFSMA*, *supra* note 6.

development objectives, we assess these regimes in light of their contribution to efficient land use, increasing access to credit, supporting incentives to invest and reducing socially wasteful disputes. Because property rights arrangements in First Nations reserve communities have been understudied in the Canadian context, two caveats are in order. First, descriptions of the relationship between Indigenous tenures and economic development are largely speculative, given the vast diversity of these regimes in First Nations communities and the incomplete characterizations of these regimes that are available in the literature. Second, our assessment of *status quo* regimes rests largely on selective case studies since very little cross-community empirical work that quantifies or characterizes the economic development impacts of the *status quo* in a detailed way has been undertaken in Canada. These case studies are employed as illustrative, rather than as representative, of overarching trends.

Efficient Land Use

The efficiency of land use under *status quo* tenure regimes is perhaps the most difficult outcome to evaluate due to lack of empirical evidence—a problem shared in this research area internationally.[136] Given that we lack this empirical data, the decision of the Supreme of Canada in *Musqueam Indian Band v. Glass*[137] both illustrates and has implications for the potential efficiency-reducing effects of existing tenure regimes. In 1960, the Musqueam First Nation in British Columbia surrendered a tract of reserve land to be leased by the federal government to a development company. This head lease was then further subdivided into individual housing plots and leased for 99-year terms to individual lessees. After 30 years, the annual rent was to be reassessed at 6 per cent of the current land value. The Court in *Musqueam* determined that for the purpose of assessing lease rental rates, land values on reserves should be assessed at a rate 50 per cent less than the market value of comparable freehold land off reserve. In support of the 50 per cent figure, the Court cited restrictions on alienation and the power of the Band council to levy property taxes and to pass by-laws as being the primary factors that reduced the value of reserve lands. Not only does the *Musqueam* decision speak to some of the barriers to efficient land use created by the *status quo* regimes, it also has direct practical implications for future lease arrangements. Investor may, for example, be able to negotiate a leave to First Nation's lands at a much lower rental rate by relying on the Court's ruling.

An empirical study, by Terry Anderson and Dominic Parker, of economic performance on American Indian reservations may also have some

136 Trebilcock & Veel, *supra* note 18.
137 [2000] 2 S.C.R. 633 [*Musqueam*].

relevance to First Nations communities in Canada.[138] Using data from a cross-section of reservation communities in the United States on the amount of land held in tribal, trust and individual ownership, Anderson and Parker estimate that holding land in private ownership has a positive impact on the per capita income of individual American Indians. While this study is unique in its attempt to quantify the connection between property rights and economic development in Indigenous communities, we are cautious about the applicability of the results to First Nations in Canada. Indigenous populations in Canada and the United States have shared some important commonalities in their respective histories of colonization and in the administration of land tenure regimes on federally defined reserves. However, the property regimes used in Anderson and Parker's study do not necessarily capture the unique characteristics of the *status quo* options in First Nations communities in Canada today. For example, compared to First Nations in Canada, reservation communities in the United States tend to have greater flexibility in terms of the legal options available to create their own institutions including policing, taxation powers, education systems and traditional governance structures.

Access to Credit

Entrepreneur and Homebuilder want to use their property interests as collateral for business or housing loans. Since Homebuilder has a strong credit rating and steady employment income she would likely be approved for a housing mortgage by major financial institutions in Canada off reserve. But as noted in Part III, neither her traditional interest nor her CP rights are alienable outside First Nation under the *Indian Act*, meaning that banks and other lenders are ineligible to acquire land title on the reserve if Homebuilder defaults on her loan.

Some communities have circumvented collateralization barriers by setting up creative lending schemes facilitated by the local Band council. First Nation, like some real-world communities, may circumvent collateralization barriers by setting up creative lending schemes facilitated by the Band council. For example, First Nation may secure a loan for Homebuilder directly from the Canada Mortgage and Housing Corporation (CMHC), using public funds in return for an interim transfer of her traditional interest to the Band. In communities where this scheme has been implemented, the Band council retains the traditional interest until the loan is repaid, at which

138 T.L. Anderson & D.P. Parker, "The Wealth of Indian Nations: Economic Performance and Institutions on Reservations" in T.L. Anderson, B. Benson & T.E. Flanagan, eds., *Self-Determination: The Other Path for Native Americans* (Stanford: Stanford University Press, 2006) at 159.

point the interest returns to the homeowner.[139] However, these lending schemes have experienced high rates of loan default and have struggled with enforcement against claimants when a system of Indigenous tenure is in place. Similar programs that exist in some communities for CP holders have met with higher rates of success.[140] Since CP interests are enforceable in non-Indigenous courts, this form of tenure security may result in a greater likelihood that the Band council will repossess the land in the case of a loan default. Unfortunately, if Homebuilder needs to apply for a CP before she can participate in a lending scheme, this sometimes lengthy process can entail significant additional transactions costs.

Likewise, Entrepreneur will be restricted in her options to finance her start-up and early overhead costs. Based on a survey of 20 Aboriginal entrepreneurs in Northern Ontario, Cachon reports that several on reserve businesses were forced to use personal financing in place of bank loans due to lack of collateral, thus hindering business growth.[141] The same study reported that many businesses on reserves have experienced difficulties attracting investor financing.

Our hypothetical First Nation might develop its own lending institution to assist those like Entrepreneur by following the example of the Kahnawake First Nation in Quebec. In 1987, Kahnawake established a Caisse Populaire in consultation with Department of Indian Affairs and Northern Development (DIAND) and Caisses Populaires Desjardins Federation. In order to secure a loan from the *caisse* under this scheme, three community members must agree to act as trustees who will oversee the loan repayment and, in case of a default, the sale of the property within the community and the reimbursement of the fund.[142] One notable benefit of the Kahnawake *caisse* model is that the organization is community-oriented and can take into account the unique labour patterns and financial situations of the local population when evaluating loan applications.[143] First Nation may also access credit markets that have been specifically designed for reserve communities,

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139 Flanagan & Alcantara, "Private", *supra* note 98 at 499.

140 *Ibid*. at 511.

141 J.C. Cachon, "Aboriginal Entrepreneurship on Reserves: Some Empirical Data from Northern Ontario and Considerations Following the Supreme Court of Canada Decision on the *Delgamuukw v. British Columbia* Appeal" (2000) 15 Journal of Small Business and Entrepreneurship 2 at 7. See also M.L. Rice, "Native Economic Development in Kahnawake: Banking and Collateral" in Royal Commission on Aboriginal Peoples, *Sharing the Harvest: the Road to Self-Reliance* (Ottawa: Canadian Government Publishing, 1993) at 262-263.

142 Sisco & Nelson, *supra* note 54 at 20. The Conference Board's report does not discuss any potential challenges posed by limited land markets on the Kahnawake reserve, but the successful operation of this scheme appears to be premised on the ability to sell the repossessed real estate at a price sufficient to recoup the loan amount.

143 *Ibid*. For example, half the male population in Kahnawake works seasonally in the construction industry—an employment pattern that may preclude individuals from acquiring a loan from financial institutions off reserve.

such as the First Nations Finance Authority (FNFA) which provides an investment pool available to communities who hold property tax powers under the *FNFSMA*.

A FNLTS would purportedly solve the collateralization challenges for Homebuilder and Entrepreneur by allowing off reserve lending institutions to acquire title to reserve lands in the case of a loan default.[144] The lender would then be free to sell or otherwise transfer that interest to a third party. Given the opportunity for marketable security on mortgages and business loans, research by the FNTC predicts that lending institutions will move quickly into First Nation's credit market and to replace existing schemes administered by the Band government.

Investment Incentives

If Investor can acquire a private interest in First Nation's lands, this would probably be his first choice of method to invest in a commercial development. But since the *status quo* currently bars him from this option—CPs and *FNLMA* interests can only vest directly in members of the community—he may be able to acquire a lease from either a CP holder in First Nation or directly from the Band council instead. The length and security of the lease arrangement will probably be a major determinant of Investor's willingness to invest in the development of the land. A study commissioned for the FNTC estimates that a typical reserve community has only developed about 10 per cent of its existing land base, which suggests that attracting investment will be a significant challenge for some communities.[145] This is likely to be true for some communities, but for others a lack of access to additional lands for development may be a major impediment to increasing investment.[146] Another impediment to investment may be regulatory gaps on reserves, as noted above; the new *FNCIDA* may go some way towards promoting increased investment by lowering the risk associated with large development projects.[147]

At least in some cases, leases have provided a solid property rights foundation for even large-scale investment projects. The Sun Rivers residential development and golf course on the Kamloops Indian Reserve is a prominent example. In a joint venture between the Kamloops Indian Band (KIB) and the Sun Rivers Development Corporation, 99-year pre-paid leases created individual parcels on 400 acres of KIB land. Started in 1998, the

144 Fiscal Realities, "Economic and fiscal impacts", *supra* note 104 at 39.

145 *Ibid*. ("Unless it is known from experience that a First Nation has considerable more land already developed, it is assumed that the developed potion of land is 10% of their existing lands" at 28).

146 Dorey, *infra* note 172.

147 *FNCIDA*, *supra* note 109.

development is in its third phase and continues to realize real estate values comparable to similar projects off reserve.[148]

Under a FNLTS scheme, Investor will be able to acquire indefeasible title to the development land. This title will vest him with an open-ended set of use and appropriation rights, subject to any regulations and restrictions imposed by the government of First Nation. Investor's title will also be transferable to a third party, regardless of that party's Indian status or community membership. Since Investor's title would only revert back to First Nation in a limited set of circumstances—for example, if Investor dies without heirs or the Band council can justify expropriation under guidelines that would be set out in the FNLTS legislation—his security of tenure would be comparable to fee simple interests off reserve.

Both Investor and Homebuilder would also be able to sell or otherwise freely transfer their interest to a third party, allowing them to reap the benefits of property investments at the time of sale. The increased alienability of property rights under a FNLTS would increase their incentives to make new investments and to undertake land improvements that increase the potential sale price of the land. This aspect of the FNLTS proposal is highly attractive to Vendor, opening up new land markets outside the community and potentially raising the value of saleable lands to outsider buyers.

First Nation as a whole will also benefit from greater property tax revenues when outside investment in development projects is increased. The public revenue benefits of FNLTS has been a major focus of the FNTC in the development of their proposal and "is one of the reasons why the First Nation Tax Commission is so keenly interested in this research project."[149] The public revenue benefit of a FNLTS has been a major focus of the FNTC in the development of their proposal and "is one of the reasons why the First Nation Tax Commission is so keenly interested in this research project." The *First Nations Fiscal and Statistical Management Act* confers property taxation powers on First Nations who opt into scheme set out in this legislation.[150] The FNTC estimates that annual property tax revenues will rise by an average of $20 million over 15 years for a First Nation under a FNLTS.[151] These tax revenues can then be used to, among other things, finance additional infrastructure, providing further opportunities for economic growth.

Avoiding Socially Wasteful Disputes

A FNLTS presents opportunities to avoid costly disputes between First Nation and the federal government by granting First Nation exclusive

148 Fiscal Realities, "Economic and fiscal impacts", *supra* note 104 at 16.
149 *Ibid*. at 40.
150 *FNFSMA*, *supra* note 6.
151 Fiscal Realities, "Economic and fiscal impacts", *supra* note 104 at 40.

jurisdiction to make title allotments and to negotiate leasing arrangements with outsiders. The process of surrendering reserve lands to the federal government, which in turn leases these lands to off reserve interests for the benefit of the community, has in the past caused legal disputes when the Crown has been regarded as prioritizing the needs of outsiders over those of the community. A prominent example is *Guerin v. The Queen*,[152] where the Musqueam band in British Columbia surrendered lands to the federal government for a long-term lease to a golf course developer according to an initial agreement between the developer and the Band about the rental rate of the land. When granting the lease to the developer, the federal Crown subsequently changed the terms of the lease agreement, significantly reducing the rental rate. The Crown's actions were contested in the Canadian courts, with the Supreme Court ultimately ruling that the federal government has a duty to consult with communities when designing and implementing leasing agreements on reserves. However, this decision leaves open the possibility that the Crown can choose to overrule First Nation's explicit demands or conditions on leasing arrangements on surrendered lands. Insofar as the Crown's duty to consult leads to litigation or other disputes that sap First Nation's resources without contributing to economic development, a FNLTS may provide a way to circumvent involvement by the federal government in lease agreements and avoid potentially costly conflicts.

Conclusion

If there are net benefits to be had under a FNLTS, community members like Entrepreneur, Homebuilder and Vendor stand to benefit differently from non-Band members like Investor. Community members may find that greater tenure security from granting and enforcing private rights makes some kinds of land use more productive. More obviously, our hypothetical First Nation might reduce the incidence of potentially socially wasteful legal disputes with the federal government by removing the Crown as an intermediary in lease agreements. Finally, by allowing financial institutions outside First Nation the option of foreclosing on a loan default, the increased alienability of title under a FNLTS will arguably lead to significant increases in the availability of credit to both residential and commercial borrowers.

Proposed benefits to non-community members—and arguably to First Nation itself by improving its ability to attracting outside investment—will flow mostly from the greater tenure security of being able to own reserve lands in a form of fee simple, and from greater familiarity with off reserve property systems. It is, however, unclear that title held under a FNLTS offers outside investors significantly greater tenure security in comparison to the

152 *Guerin*, *supra* note 9.

kinds of long-term leases that currently exist under the *status quo.* The net benefits from this aspect of reform may depend largely on the federal government's role in contributing to or undermining tenure security for non-community members.

V INTERNATIONAL INDIGENOUS EXPERIENCES

We now turn to international Indigenous experiences with land tenure reform to discuss some of the conditions that might inform First Nation's decisions about (1) whether to opt into a FNLTS and (2) the content and management structure of a land tenure system under a FNLTS best suited to its needs, if the community decides to pursue this course. In searching for relevant experiences, there is a temptation to look to those British colonial countries between which Indigenous populations are commonly compared to each other—namely the United States, Australia, and New Zealand. On the face of it, Indigenous populations in these countries share common histories of colonization and confront many of the same economic, social, legal and political challenges today. But in order to be specific about why the comparative cases are relevant, we focus on the fact that Indigenous populations share histories of "reserve land tenure." Land tenure in these communities has in general been characterized by confinement within discrete boundaries and active past and present control by the state government in shaping tenure regimes. This has, in general, been the experience of First Nations communities in Canada, as discussed above. A focus on reserve land tenure somewhat broadens the category of relevant cases, allowing us to examine experiences from contexts such as South Africa.

Following the three-part model from Part II—considering the optimal land tenure regime, the necessary pre-conditions, and the process of regime change—in this section we underscore the differences between reserve communities in Canada by identifying specific conditions or situations that will likely influence First Nation's land tenure decisions with respect to economic development. In general, international Indigenous experiences suggest that formalization reforms can lead to greater tenure insecurity if they undermine Indigenous tenure systems or exacerbate conflicting claims, and can lead to large losses of land when the ability of private interest holders or of the group itself to alienate title to outsiders is unrestricted. In addition, where supportive institutions—including Indigenous institutions and practices—community governance, and markets do not exist or have been limited, the potential gains from formalization in Indigenous communities have been or are predicted to be minimal. Finally, past tenure systems and control over Indigenous communities by the state may have entrenched (potentially inefficient) property interests in Indigenous communities, creating path dependency and increasing the costs of reform.

Costs of Formalization

There are several scenarios that demonstrate countervailing costs to tenure reform, leading to greater tenure insecurity under a FNLTS and/or negating the economic benefits of customary regimes. One conclusion from Indigenous experiences is that First Nation may benefit from adopting a FNLTS when Indigenous land tenure rights operate in parallel with private interests, but must avoid the risk of undermining traditional obligations and community cohesion. Whether or not a FNLTS is adequately flexible to integrate Indigenous tenure regimes may determine, in large part, the relative costs of reform. Questions arise in this context about the types of interests that First Nation can potentially register in a Torrens title system. First Nation will need to address how this uncertainty will affect the community's ability to recognize traditional rights under the new system. A second conclusion is that there may be high relative costs in transitioning from the *status quo* to a FNLTS, depending on property rights that exist in the community. A major determinant of these transition costs are the *Indian Act* tenure regimes, which create the potential for conflicting title claims in some cases. A third conclusion is that First Nation may have options available to restrict the alienability of title interests, but where restrictions are infeasible and/or the risk of land loss and dispossession is high—particularly when considering the impact on future generations—the irreversibility of land sales suggests that First Nation may want to explore alternatives to a FNLTS.

Titling Indigenous Tenures

Formally recognizing an Indigenous tenure regime in First Nation may be a priority for both economic and non-economic reasons. One vision of land tenure in reserve communities that has gained some attention recently, both in Canada and elsewhere, is the possibility of maintaining or recognizing Indigenous regimes—usually involving some form of communal or collective interests vested in the community as a whole—alongside forms of private, individual interests in order to promote development initiatives such as large scale housing projects.[153] The following section considers prospects for First Nation to administer Indigenous tenures under a *FNLTS* in some form.

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153 J. Borrows & S. Morales, "Challenge, Change and Development in Aboriginal Economies" in D.A. Dorey & J.E. Magnet, eds., *Legal Aspects of Aboriginal Business Development* (Markham ON: LexisNexis Canada Inc., 2005) [Borrows and Morales]. See also L. Shillito, "Strata Title Aboriginal Towns? An Alternative to the Town-Leasing Proposal" (2007) 14 Australian Property Law Journal 201 [Shillito] for a discussion of similar proposals for the Australian case; RCAP, "Economic Development", *supra* note 4 (presenting the view from Aboriginal peoples who want economies "capable of supporting those who wish to continue traditional pursuits (hunting, fishing, trapping) while enabling those who wish to participate in a wage and market economy to do so").

Absenteeism and Title Fragmentation

One of the main reasons why Indigenous tenures might support efficient land use in First Nation is because the community is sufficiently close-knit to enforce social controls that prevent inefficient overuse of resources and reduce potential conflicts over claims to resource rents. First Nation needs to address two potential effects of reform that can threaten to undermine the social foundations of Indigenous tenures. The problem of *absenteeism* results when tenure formalization causes increased out-migration of traditional interest holders. Greater tenure security may imply that physical connection to or possession of the land ceases to be a significant dimension of land tenure, since claims will be enforceable without rights-holders needing to be physically present on the land. While greater geographical flexibility for interest holders can have positive economic effects—*e.g.*, increasing income potential by leasing the land—Indigenous experiences show that absenteeism may cause land to be underutilized. In addition, when non-economic out-migration pressures already exist, absenteeism may contribute to rapid declines in community cohesion and the erosion of social networks. Title fragmentation is a related problem that can occur when formalization reforms divide title into multiple co-ownership shares, when the titling system is implemented or when the initial allocation of rights is inherited. Fragmentation can lock interest holders into complex co-ownership arrangements that impose high transactions costs and impede collective action, and can compound the potential for absenteeism.

It is significant that absenteeism and fragmentation problems have been widespread in Indigenous communities where formalization programs have attempted to maintain some form of collective title by seeking to recognize or even accommodate the communal nature of some Indigenous tenures, rather than directly imposing individual rights. Experiences of the Maori in New Zealand sound a caution to First Nation about the complexity of formalizing traditional rights under a FNLTS. Traditional land use and possessory rights in Maori communities are held by nested, collective units. In general terms, *iwi* (overarching tribes) normally consist of several *hapu* (sub-tribes), which are in turn composed of a number of *whanau* (extended families).[154] While Indigenous tenures are organized according to these social units, individuals are often allocated non-exclusive access, occupation, and use rights over lands.[155] Maori Indigenous tenures proved resilient in the face of early

154 I.H. Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (New York: Clarendon Press, 1977) [Kawharu] at 38. The smaller units, the *hapu* and *whanau*, were historically the functional units of Maori society, while the *iwi* was more or less a means of territorial organization. Kawharu also suggest that *iwi* served as the larger basis of "group ideology."

155 T. Kingi, "Individualisation of Maori Customary Tenure and Maori Agricultural Development" (Paper presented to the FAO/USP/RICS Foundation South Pacific Land Tenure Conflict

settler pressures to individualize rights, and flexible in adapting to the wave of Western-style agricultural that brought larger-scale production methods and a rapid growth in agricultural trade. Kingi argues that, prior to signing of the Treaty of Waitangi in 1840, "[w]hile the cumulative acquisition of new technologies and cultural accessories produced changes in the structure of Maori society, the organization of economic activity was still based on traditional tribal structures."[156] This adaptability proved beneficial for Maori farmers, who demonstrated skill in modern agricultural methods, using traditional practices as a foundation, and supplied large quantities of food both for their own communities and non-Maori (*pakeha*) settler colonies. The ability of the Maori to adapt their Indigenous tenure systems to changing circumstances derived in part from the fluidity of social and political arrangements, demonstrating that traditional land rights were by no means static:

> Before the arrival of Pakeha these competing claims of right [between Maori groups] were resolved through a variety of customary practices including the use of military force, and public pact. But there were no clear-cut rules, and all rights and relationships changed over time. The dominant political force could eventually wane and merge with another more powerful group, or break up through internal conflict and re-allocate the land amongst newly formed groups.[157]

But when growing colonial pressure to formalize tenure arrangements on Maori lands culminated in the *Native Land Acts* of 1862 and 1865, the social foundation of customary tenures began to erode. While the 1865 Act's purpose *de jure* was "to encourage the extinction of (Maori) proprietary customs,"[158] the Native Land Court[159] created to implement formal titles to Maori lands stopped short of granting individuals rights. Instead, Certificates of Title were vested in groups of no more than 10 individuals, who became tenants in common under English colonial law and took the land as a Maori freehold interest that was alienable to outsiders upon the consent of the co-owners, or by individuals after title was partitioned into individual interests.[160] Each member of the group was required to demonstrate a "custom-

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Symposium , delivered at the University of the South Pacific, Suva, Fiji, 10–12 April 2002) [unpublished] at 6 [T. Kingi, "Individualisation"].

156 *Ibid*. at 5.

157 R. Boast & A. Ereuti, "Maori Customary Law and Land Tenure" in R. Boast *et al*., eds., *Maori Land Law* (Wellington: Butterworths, 1999) [Boast & Ereuti] at 44.

158 Kingi, "Individualisation", *supra* note 155 at 7, quoting from the preamble of the 1865 Act.

159 Later called the "Maori Land Court."

160 The reason for not granting individual titles outright is unclear, especially in light of widespread criticism of the 1865 *Native Title Act* as "an engine of destruction for any tribe's tenure of land, anywhere." See Kawharu, *supra* note 154 at 15. See also A. Ward, *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (Toronto: University of Toronto Press, 1974) at 180.

ary" basis for their property claim to qualify for co-ownership.[161] Under the 1865 *Native Land Act*, the Land Court also had the power to vest land as a communal title in "tribes" in tracts larger than 5,000 acres,[162] but actual incidents of these larger communal grants were rare.[163]

The arbitrary imposition of co-ownership titles on Maori land derived from a failure to recognize the true structure of existing Indigenous tenure arrangements rooted in broader forms of social organization, and ultimately led to fragmentation of title, interest-holder absenteeism, and, as discussed below, widespread land loss to European interests and to the Crown. Fragmentation of title by inheritance—perhaps the biggest impact of reforms—still hinders economic activity on Maori lands today. Since traditional interest-holders were granted property rights as tenants in common, the partial interests of co-tenants became further divided among heirs after the death of the principal.[164] Generations of intestate inheritance attached growing numbers of co-owners to tracts of land, each with ever smaller shares. While there is little empirical evidence that demonstrates a direct connection between fragmentation and land underutilization on Maori lands, the transaction costs of coordinating land use—*e.g.*, for agriculture—and for leasing arrangements very likely increased considerably with the number of co-owners.[165] More broadly, Kingi notes that Maori Indigenous land tenure included a system of reciprocal obligations on rights holders that were undermined by the imposition of Maori freehold title, as fragmentation made

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161 The traditional basis of title was determined by the Land Court, and reflected a thin understanding of the complex bases of Maori claims to areas of land that included inheritance from ancestors (*take tupuna*), conquest (*take rapatu*), gifting (*take tuku*), discovery and exploration (*take taunaha*), and "keeping the home-fires burning" (*take ahikaa*): Boast & Ereuti, *supra* note 157 at 42. Part of the reason for the Land Court's interpretations of the customary basis of title may be derived from a recognition of a fundamental incongruence with Maori customary law which did not recognize individual ownership of land: R. Boast, "Evolution of Maori Land Law 1862–1993" in R. Boast *et al*., eds., *Maori Land Law* (Wellington: Butterworths, 1999) [Boast, "Evolution of Maori Land Law"] at 53.

162 *Native Land Act 1865*.

163 Boast, "Evolution of Maori Land Law", *supra* note 161 at 60.

164 P. Craig-Taylor, "Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting" (2000) 78 Washington University Law Quarterly 737 (in contrast to land held in joint tenancy, where, under English common law, the partial interests of co-owners revert to the other joint tenants at the time of death).

165 See M. Lyne, "Ownership and Control of Maori Land: Some Lessons for South Africa" (January 1994) Lincoln University Agribusiness & Economics Research Unit Discussion Paper 138, Canterbury, at 4-5 [unpublished discussion paper], online: Lincoln University, New Zealand <http://hdl.handle.net/10182/223>. See also J.K. Hunn, "Report on the Department of Maori Affairs" (Wellington: Government Printer, 1961), cited in Boast, "Evolution of Maori Land Law", *supra* note 161 at 98. For a discussion of the theoretical problems associated with title fragmentation, see B.J. Deaton, "Intestate Succession and Heir Property: Implications for Future Research on the Persistence of Poverty in Central Appalachia" (2007) 41 Journal of Economic Issues 927.

it impossible to maintain the local character of Indigenous tenure and as absenteeism spread.[166]

The Maori experience also underscores the difficulties in creating a "hybridized" tenure system where a First Nation administers some lands under an Indigenous regime, while title to other lands is granted as private interests and, potentially, made freely alienable. Boast notes that "[t]he process [of converting Maori customary title to Maori freehold title] was voluntary; Maori were quite free to leave their lands in customary title if they so wished. In fact, a number of factors combined to ensure that virtually all Maori land was eventually brought before the Court [to be converted to freehold title]. Today ... there seems to be little or no land remaining in customary title."[167] Given the potential for individuals within First Nation to realize large one-time gains from private title grants, social and political pressures may tend to polarize land titling decisions toward either an Indigenous tenure-only system or one that consists of all—or mostly—private, alienable rights. From the perspective of institutional change, pressure to privatize rights at the expense of Indigenous tenures may derive from economic incentives. But Indigenous communities, like the Maori, have historically been subjected to strong coercive pressures from outsiders to privatize. It will be incumbent on decision-makers in First Nation to be cognizant of these pressures if an adequately context-contingent tenure system is to operate successfully.

Finally, these experiences demonstrate that if economic benefits flowing from Indigenous tenure are to be preserved and encouraged under a FNLTS, tenure security and social cohesion must be mutually reinforcing. In the absence of either—because they do not exist under the *status quo* or because reforms limit their expression—a formal tenure scheme that seeks to recognize and enforce Indigenous systems is unlikely to be able to maintain the social underpinnings required for norms and traditions to operate. Without a strong community base, First Nation is also unlikely to be able to balance plural tenures when market forces drive strong individual incentives toward a one-way harmonization with outsider property systems. One notable point of difference from the Maori experience is that under a FNLTS the federal government will be required to recognize First Nation's jurisdiction to determine the content of Indigenous tenure interests, instead of having that content imposed by outsider institutions similar to the Native Land Court in New Zealand. This high degree of community specificity may hold the potential for First Nation to navigate some of the challenges associated with formalizing Indigenous interests.

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166 Kingi, "Individualisation", *supra* note 155 at12.

167 Boast, "Evolution of Maori Land Law", *supra* note 161 at 53.

Costs of Transition to a FNLTS

A FNLTS appears to offer the flexibility to grant private-type interests similar in content to CP and *FNLMA* regimes, and holds some limited potential for incorporating Indigenous systems. But there will also be costs in transitioning from one system to another. The process of formalization may exacerbate underlying conflicts that adversely impact the community, especially in contexts where undefined *status quo* rights leave claimants' interests relatively insecure.

Transition from Indigenous Tenure

Suppose that a First Nation has declined to allocate individual interests under the CP or *FNLMA* regimes and currently has no leases with outsiders. Formalizing land tenure on this First Nation can raise the stakes for title claimants to have their Indigenous tenure claims recognized under the regime, thus escalating underlying disputes to land when a FNLTS is seen as a permanent arrangement that entrenches property rights for the indefinite future.

At the individual level, conflicts may occur in a First Nation if there are overlapping rights to the same physical piece of land. If Indigenous tenure in a First Nation involves multiple layers of functional rights in land corresponding to different uses, how can these rights be recognized under a FNLTS? If some functional rights are prioritized over others in the formalization process, the potential for conflict is high. In recent attempts to recognize communal land rights to specially designed Indigenous lands in South Africa, conflicts surrounding overlapping individual or family rights have come to the fore. The *Communal Land Rights Act* (*CLRA*) was passed in South Africa in 2004 with the broad purpose of transferring communal title in former reserve areas from the state to local communities. Individual "Deeds of Communal Land Right" can then be granted to individuals, overlaying the communal interest and therefore subject to the jurisdiction of the local council or chieftaincy. A central government Minister is responsible for granting "new order rights" to individuals under the *CLRA*, which are recognized on the basis of traditional or historical claims to "older order rights." While the *CLRA* has not yet been implemented, test cases "showed that the prospect of the transfer of private ownership raised the stakes in tenure disputes and triggered major tensions and conflict between competing interest groups."[168] The problem of competing and overlapping rights to the same physical piece of land in these communities is derived from a history

168 Cousins, *supra* note 20 at 285, 290-291.

involving waves of settlement by refugees from the apartheid system who had themselves been forcibly removed from their land elsewhere.[169]

The concept of 'unpacking' overlapping property rights has received particular attention in South Africa as a way to address disputes arising from conflicting claims. The *CLRA* requires that a land rights enquiry must take place, in an open adjudicative process, to determine the character and content of older order rights.[170] Older order rights are unpacked by granting an award of title to land or control (*e.g.*, use and appropriation rights) over resources corresponding to the originating interests. Aside from the fact that this adjudicative process itself is likely to be expensive, one lesson from the South African experience is that where "overlapping and conflicting rights cannot be reconciled within one area, additional land will be required to relieve land shortages, to ensure that strengthening of the rights of some does not lead to the eviction of others."[171] The impact of land shortages in reserve communities in Canada has been recognized as an impediment in the context of First Nations business development in Canada.[172] In cases where First Nation has opportunities to expand its existing land base by making additions to the existing reserve area—perhaps though the return of lands through a land claims process—the resolution of disputes arising from conflicting or overlapping claims may be less costly and more feasible for the community.[173]

Strong community leadership is likely to be another element in successful prevention of and/or resolution of competing or overlapping claims to land in First Nation. If strong leadership and the capacity for dispute resolution are non-existent, these conflicts will likely impose high costs. To a large extent, existing *Indian Act* tenure regimes have already eroded leadership capacity in some reserve communities. The Six Nations community in

169 *Ibid*. at 262-263.

170 *Ibid*. at 287.

171 *Ibid*. at 264

172 RCAP, "Economic Development", *supra* note 4 at 4. See also D. Dorey, "Development Unreserved: Aboriginal Economic Development for the 21st Century" in D.A. Dorey & J.E. Magnet, eds., *Legal Aspects of Aboriginal Business Development* (Markham: Butterworths, 2005) [Dorey].

173 However, we hesitate to overemphasize the return or acquisition of lands as a panacea for economic development challenges for First Nations communities in Canada, at least on the grounds considered in this article. In Australia, for example, vast amounts of land have been returned to a form of Aboriginal control, following the *Aboriginal Land Rights (Northern Territories) Act, 1976*. See D.P. Pollock, "Indigenous Land in Australia: A Quantitative Assessment of Indigenous Land Holdings in 2000" (2001) Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, Discussion Paper No. 221. But this fact alone has failed to produce much in the way of economic benefits for Indigenous peoples in Australia. See J.C. Altman, C. Linkhorn & J. Clark, "Land Rights and Development Reform in Remote Australia" (2005) Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, Discussion Paper No. 276. [Altman *et al*., "Land Rights"] at 3. The location of lands and the natural resources available will no doubt go a long way toward determining the economic outcomes of an increased land base.

Ontario is apposite—the legitimacy of different systems of tenure and governance may be interpreted differently between community members.[174] Attempts to formalize Maori land tenure have concretely demonstrated the endogenous effects of some reforms on community capacity for dispute resolution: "Land was awarded to individuals and those individuals could sell their individual shares without reference to the tribe ... The consequences were far reaching. Individual claims and individual ownership exacerbated family disputes, always present but formerly controlled through the influence of chiefs and elders. The individual assumed an unaccustomed authority and traditional leadership waned."[175] In this respect, the significance of the unique relationships between individuals, Indigenous structures of governance, and the community as a whole in First Nation cannot be underestimated when considering reforms.

Transition from the Indian Act *and* FNLMA *Regimes*

Suppose that First Nation has allotted over 95 per cent of its total land area to individual CP holders. Many of these individual allotments have houses, or are used privately for commercial or recreational purposes. The remainder of the land is either leased directly by the Band to outsiders or is used for public works, administrative buildings, and public recreational areas. Registering individual interests in land previously held as CPs or individually under the *FNLMA* will apparently be a straightforward process of mapping new order rights in the land registry directly onto *status quo* interests.[176] But two challenges arise for First Nation. First, the title fragmentation problem discussed above in relation to the New Zealand and United States experiences may already exist to some extent in reserve communities in Canada as a result of the way that CP interests are inherited. When existing CP estates are highly fractionated, the process of registering those fractioned interests under a FNLTS is likely to be complex, especially where record-

174 *Logan v. Styres,* [1959] 20 D.L.R. (2d) 416, 5 C.N.L.C. (Ont. H.C.) (this case involved a claim brought by the hereditary chiefs of the Six Nations against the elected Chief and Council to stop the surrender of a portion of the reserve). See Imai, "Annotated *Indian Act*", *supra* note 88 at 125. See also D.M. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 U.T. Fac. L. Rev. 1

175 S.C. Bourassa & A.L. Strong, "Restitution of Land to New Zealand Maori: The Role of Social Structure" (2002) 75 Pacific Affairs 227 [Bourassa & Strong] at 234, quoting *Waitangi Tribunal*, Orakei Report, Wai 9 (Wellington: GP Publications, 1987) at 30-31.

176 First Nation might have the option to operate land administration simultaneously under the *FNLMA* and a FNLTS. For example, interests created under the *FNLMA* could simply be registered in the new title system. The Framework Agreement for the *FNLMA* certainly appears to allow for this option ("Nothing in this Agreement prevents a First Nation, at any time, from opting into any other regime providing for community decision-making and community control, if the First Nation is eligible for the other regime and opts into it in accordance with procedures developed for that other regime").

keeping has been inaccurate, thus making it difficult to determine the actual group of heirs. Second, if First Nation intends to reclaim previously allotted lands for community purposes or to except certain uses from private title granted under a FNLTS,[177] a high proportion of existing CP allotments may impose high costs. CP or *FNLMA* private interest holders may, in this case, face a type of expropriation or forced rearrangement of their rights, which may possibly provoke costly disputes.

Inheritance of CP interests on reserves may lead to a growing fragmentation of title into co-tenant interests, similar to the mechanism of title fragmentation extant on Indian reserves in the United States that resulted from the attempts to allot American Indian reservation lands beginning in the 1880s.[178] Section 42 of the *Indian Act* in Canada makes it possible for CP interest holders to bequeath their title interest through a will and determines how the title is divided or fragmented if the CP holder dies intestate. When groups of heirs are large and record-keeping has been poor, First Nation may find it difficult or impossible to register these interests accurately under a new tenure system, creating the risk of discontinuities and outright loss of fragmented interests. A loose collection of strategies to solve title fragmentation problems in American Indian communities was enacted through the *Indian Land Consolidation Act* (*ILCA*) in 1983, with reforms in 1984 and 2000.[179] The *ILCA* created a mechanism for tribal land exchanges that allows an individual with several fractional interests to exchange those interests, through the tribal council, for a single piece of land, subject to federal approval and appraisal processes.[180] However, the system of tribal land exchanges has proved to be time consuming and labour intensive in many cases.[181] In addition, the *ILCA* contained provisions that forced escheatment of small interests with low income-earning potential back to the tribe on the death of the holder of the fragmented interest.[182] These escheat-

177 The title system proposal indicates that First Nation will be able to create exceptions and reservations to allotted title interests under a FNLTS—for example, in order to reserve timber, mineral, oil, gas, and water resource interests from a grant of individual title to Investor. See Lang Michener, *supra* note 124 at 18.

178 No systematic evidence exists as to the extent or specific causes of CP title fragmentation in First Nations reserve communities. A survey of a custom data set identifying all undivided (fragmented) interests in Ontario reserve communities, generated from the *Indian Lands Registry* by the Department of Indian Affairs and Northern Development (DIAND) in 2006, revealed a total of 558 separate undivided interests. The problem of title fragmentation, as a result of intestate inheritance of CP interests, was also identified anecdotally through discussions with officials in the estates section at DIAND.

179 *Indian Land Consolidation Act 1983*, Pub. L. No. 97-459, 96 Stat. 2515, 2517-19 (1982), cited in Shoemaker, *supra* note 67 at 764.

180 Shoemaker, *ibid*. at 765-66.

181 *Ibid*. at 767.

182 *Ibid*. ("The original version [of the *ILCA*] prohibited descent or devise of interests that amounted to less than 2% of the total tract and that produced less than $100 in the year preceding the descendant's death. In 1984, Congress amended the statute to prohibit descent

ment provisions were struck down as unconstitutional takings without just compensation by the United States Supreme Court.[183] What is more, as Jessica Shoemaker notes, the escheatment provisions did not work in practice. During the seven-year period when the escheatment provisions of the *ILCA* were in operation, the number of fragmented interests in a twelve-reservation sample more than doubled.[184] Finally, after the amendments to the *ILCA* in 2000, the Secretary of the Interior was given the power to purchase fragmented interests at fair market value with the consent of the majority of the interest holders. These lands are then held in trust for the tribe. While this strategy has been welcomed by some, concerns remain about loss of individuals' connections to particular lands and about the risk that this program will lead to an erosion of tribal jurisdiction as the federal government acquires greater control through the trustee relationship.[185]

Another strategy with some potential to address fragmentation problems —if a FNLTS is implemented—may be to form incorporations that manage fractioned title lands for the benefit of the group. After overcrowded titles on Maori lands started to receive attention as being detrimental to economic development, the 1909 *Native Land Act* included provisions for the Native Land Court to grant an incorporation of Maori land by vesting title as a fee simple estate in newly created corporations. Co-owners of the previously fragmented title became shareholders and were required to elect a committee of management with the powers of alienation.[186] One significant benefit of this scheme is that it allows the corporation to borrow money using land as collateral. However, incorporation does not necessarily solve problems with absenteeism, and may impose land management structures that are ill-suited to the needs and traditions of the community, thus making corporations difficult to administer.

The further formalization of private-type interests under a FNLTS may also have differential impacts on the tenure security of community members versus outsiders. For individuals like Homebuilder and Entrepreneur, the registration of interests may improve tenure security by removing the federal government as an intermediary and vesting control in local Band authorities, which are likely more accessible and familiar to community members. In contrast, outside lessees like Investor may perceive their interests as less

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and devise only if the interest had not produced $100 in any of the five years preceding death" at 767). This type of scheme was also tried in New Zealand, under the *Maori Affairs Act*, *1953*. Section 137 of the *Act* required that "uneconomic interests" (not exceeding £25) be compulsorily acquired, at market value, by a Maori trustee, who could then sell the interests to a restricted class of persons. This "conversion" process was abandoned in the *Maori Affairs Amendment Act*, *1974*. See Boast, "Evolution of Maori Land Law, *supra* note 161 at 97-98.

183 *Hodel v. Irving*, [1987] 481 U.S. 704.

184 Shoemaker, *supra* note 67 at 768.

185 *Ibid*. at 769.

186 Boast, "Evolution of Maori Land Law", *supra* note 161 at 95.

secure in the absence of federal government oversight. For both community members and outsiders the power of First Nation's government to expropriate interests—both in the initial conversion of existing interests and after registered interests have been granted under a FNLTS—may impact heavily on tenure security in the transition to a new tenure regime.

Costs of Alienability and Dispossession

New possibilities for non-community members to acquire freely transferable, indefeasible interests in First Nation's land are probably the most controversial aspects of the FNLTS proposal. On the one hand, many of the purported economic benefits of reform derive directly from the ability to alienate land off reserve. When there are significant opportunities for land to be transferred to more efficient users; to collateralize land for credit; to increase investment incentives by allowing investors to realize the gains from sales; and to generate additional property tax revenue from increased land use activity First Nation may derive net economic benefits from alienating some lands to outsiders. On the other hand, when Indigenous tenures premised on collective action lead to relatively efficient land uses (perhaps because of scale economies), when the potential windfall gains from one-off land sales lead to conflicts over land title, and when land loss threatens to adversely affect economic development and social cohesion for future generations, First Nation may find that making land alienable poses high relative costs and represents an inappropriate permanent policy option.

Historically, state-sanctioned formalization schemes legalizing title transfer to non-Indigenous settlers caused Indigenous peoples in both New Zealand and the United States to lose most of their traditional lands through exploitation, colonial government mismanagement and bad faith, and newfound incentives for Indigenous individuals to sell their lands under promises of windfall gains. There were important differences between the mechanisms of land loss and the restrictions on transfers in these jurisdictions. In the United States, trustee restrictions against individual land transfers were imposed on American Indian allotees, and sales of "surplus" lands by the federal government to non-Indian settlers were the main cause of land loss. Between 1887 and 1900, the federal government allotted 32,800 parcels of Indian lands totalling 3,285,000 acres, and sold or forced tribes to cede 28,5000,000 acres of surplus land.[187] By 1934, when allotment ended, 90 million acres of Indian lands were transferred outside Indian control, representing two-thirds of their original land base before 1887.[188] In New Zea-

187 J.A. McDonnell, *The Dispossession of the American Indian 1887–1934* (Bloomington: Indiana University Press, 1991).

188 K.H. Bobroff, "Retelling Allotment: Indian Property Rights and the Myth of Common" (2001) 54 Vanderbilt Law Review 1558.

land, Maori customary land was converted to Maori freehold land through the Land Court and granted without transfer restrictions to groups of co-tenants. For the Maori, land loss occurred mostly through private land sales to outsiders, including cases where co-tenant land was partitioned and sub-parcels were put up for sale.

One marked difference from the international experiences is that under a FNLTS, First Nation will retain underlying allodial title to community lands, even where indefeasible private interests are granted to individuals. By contrast, for the Maori (as well as American Indians), "[t]he core process was one of tenurial substitution, involving the cancellation of the Maori customary allodial tenure and its replacement by classical English feudal tenure."[189] This aspect of the proposed tenure framework provides for First Nation to retain rights of expropriation—*e.g.*, for public purposes—and rights of reversion—*e.g.*, when a private title owner dies without any heirs. More significantly, the jurisdiction derived from the underlying communal title of FNLTS land will afford First Nation the authority to place restrictions on the alienability of registered title interests off reserve.

One possible strategy for First Nation is to impose temporary restrictions on individuals against selling lands to outsiders, although this strategy carries some risks.[190] Temporary restrictions could take the form of a complete ban on transferring title to non-community members for an initial period, say five years, to give First Nation the opportunity to evaluate the impacts of tenure reform without the possibility of irreversible land loss. Under the *General Allotment Act* of 1887 in the United States, grants of former reserve lands as trust patents were made to individual Indians; the remaining unallotted lands were made available for sale to non-Indians on "behalf of the community." As trustees of allotted lands, the federal government retained legal ownership for a period of 25 years. Individual allotees were afforded use rights during this period, but were restricted from selling the land or encumbering it in any way. In view of the overwhelming loss of control over traditional lands, the trust restrictions placed on individuals appear somewhat contradictory to the policy of selling surplus lands, but legislators nonetheless justified these measures as protection against exploitation by non-Indians.[191] While the trust arrangements created subsequent economic challenges for allotees and their heirs, trusts did in fact provide some degree of protection against the outright loss of what remained in Indian—at least individual Indian—control.

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189 Boast, "Evolution of Maori Land Law", *supra* note 161 at 53.

190 Research for the FNLTS proposal indicates that First Nations will have the option to designate "protected lands" that would be inalienable to off reserve parties. See Fiscal Realities, "Economic and Fiscal Impacts", *supra* note 104 at 20.

191 F.W. Semour, "Our Indian Land Policy" (1926) 2 Journal of Land & Public Utility Economics 93 at 100.

Title fragmentation on allotted lands however, as discussed above, probably also defeated any efficiency aspects of privatizing land tenure, and in fact created greater opportunity for conflicts between expanding groups of co-owners. Since the inalienability of trust land precluded any collateralization or investment incentives, this strategy proved to be an all-around loss for most Indians in the United States, beyond the fact that it prevented them from losing the remaining land title. The lesson for First Nation is that any transfer restrictions on private titles granted under a FNLTS must account for the processes of intergenerational transfer to avoid similar fractionation problems.[192]

Another strategy to confront the risk of land loss may be for First Nation to create specially designated land areas that are available for sale to outsiders, restricting the transferability of interests on the remainder.[193] This strategy could provide tenure security for outsiders like Investor to invest in commercial developments, while restricting speculators like Vendor from promoting rapid land loss not necessarily connected to community's economic development goals. If First Nation already has lands either surrendered or designated under long-term leases, there may be very limited costs involved to convert leasehold interests into indefeasible private title arrangements. But this strategy might be unworkable if most of the reserve land has already been allotted as CPs or under the *FNLMA,* since community-controlled land will be in short supply. Further, the possibility of windfall profits from selling designated lands may increase incentives for First Nation's government to expropriate previously allotted interests in order to make them alienable to outsiders, effectively decreasing tenure security for rights holders and increasing the potential for costly conflicts. One solution to this problem has met with some success for the Maori in New Zealand. In order to coordinate economic activities undertaken by Maori trusts, these trust entities frequently acquire additional lands, through purchase from the Crown, and which are designated as "General Land owned by Maori." This category of freely alienable title can be collateralized in order to gain access to credit, but is still subject to the jurisdiction of the Land Court to a limited extent.[194] As with remedies to resolve competing claims, the expansion of existing First Nation's community land base may be a key consideration.

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192 It is unclear from research for the FNLTS proposal whether the Band government will be able to define inheritance rights for title holders. Notably, First Nation will retain escheatment rights under the proposed FNLTS: Lang Michener, *supra* note 124 at 19.

193 Noted briefly by M.A. Stephenson, "Individual Title Versus Collective Title in Australia: Reflections on the North American and New Zealand Experiences of Indigenous Title to Land" in E. Cooke, ed., *Modern Studies in Property Law*, vol. 4 (Portland, Oregon: Hart Publishing, 2007) 294 [Stephenson] at 311. See also Borrows & Morales, *supra* note 153.

194 N.F. Smith, "Title Record" in R. Boast *et al*., eds., *Maori Land Law* (Wellington: Butterworths, 1999) 137 at 141.

One further question arising in the business and housing contexts is whether First Nation will be able to claim a right of first refusal—at market value—to the interest granted to Entrepreneur and to Homebuilder under a FNLTS so that the community has to option to reclaim the title to the land if an off reserve lending institution repossesses on a loan default. This option might be important for First Nation as a way to maintain a level of control over title interests and to prevent a permanent outflow of interests to non-community members.

First Nation should be aware that increased diversity in the types of title interests in the community and in the mix of Status and non-Status interest holders can lead to additional social costs, in addition to the increased complexity of administering the land tenure system itself. This has been the experience, to some extent, of Indians in the United States as a result of the heterogeneous pattern of land ownership that resulted from allotment. After the American Allotment Period ended in 1934 with the *Indian Reorganization Act*, previously allotted lands in some communities were placed back under the control of Indian tribes. Lands that were ceded or sold, however, were not returned to tribes and remained as fee simple lands outside their control, creating what is commonly referred to as "checkerboard reserves." The resulting spatial pattern of lands under tribal control interspersed with non-reserve lands, often owned by non-Indians, has in some cases created major administrative costs for these communities since Indians and non-Indians are subject to different legal jurisdictions. Police services, for example, are extremely difficult to administer on this checkerboard pattern, with Indian individuals on reserve lands subject to tribal policing powers, while non-Indian individuals are subject to a mix of state, county, and municipal police jurisdictions.[195]

A final, overarching strategy for First Nation—one that supplements either or both of the previous two suggestions—is to ensure strong community cohesion and leadership so that Indigenous tenures are not undermined and to prevent the discounting of the future value of community lands that may result if First Nation is plagued by health, social, economic and political problems generally. Altman *et al*. observe: "[m]any commentators consider that enabling Maori to deal in individual interests in land without reference to the community of owners undermined the customary bases for Maori land tenure—which included group rights and group decision-making—and that this contributed to excessive sales of Maori land to outsiders in a way that was injurious to the long-term interests of those communities."[196] If the community government or the community itself does not or cannot provide

195 S. Wakeling *et al*., "Policing on American Indian Reservations" (July 2001) National Institute of Justice, online: <www.ncjrs.gov/pdffiles1/nij/188095.pdf> at 33-34.

196 Altman *et al*., "Land Rights", *supra* note 173 at 23.

social stability, Vendor may become an increasingly prominent figure, threatening the long-term social and economic survival of the group.

Social Inequalities: Gender, Wealth, and Political Power

We have been attentive to the differential impacts of a FNLTS on community members and outsiders, highlighting points where the interests of these two groups might be in tension. But formalization might also impact individuals or subgroups differently within First Nation, depending on pre-existing distributions of wealth and political power, and on existing biases or discriminatory practices.

For example, the *Report of the Royal Commission on Aboriginal Peoples in Canada* emphasizes that colonial and post-Confederation legislation targeting status Indians has served to continually and increasingly marginalize First Nations women in Canada:

> [A]fter 1876 and the passage of the *Indian Act*, Indian women were denied the right to vote in band elections or to participate in reserve land-surrender decisions, and, where their husbands died without leaving a will, they were required to be "of good moral character" in order to receive any of their husband's property.[197]

As discussed above, the current *Indian Act* also provides no protection for the division of matrimonial real property on reserves following the dissolution of marriage, which has led to calls for reform from Aboriginal women's organizations. Confronted with this legacy, First Nation will need to consider carefully the link between land tenure and gender inequality within the community, including opportunities for the process of tenure design to address some of these issues. One small step may be to ensure that there are provisions for recognizing women's interests in land where they had previously been denied. Under South Africa's *CLRA* legislation, for example, "new order rights" are to be vested in women, on determination by the Minister, even where the corresponding "old order rights" were vested only in men. These "new order rights" are also required to be vested jointly in all spouses in a marriage whereas former regimes previously excluded female partners as interest holders—although some gaps still exist with respect to adult female members of a household who use the land but are not spouses.[198] While some of these strategies provide a place to start, it will admittedly not be an easy task for First Nation to address long histories of inequality in a way that is viewed as fair by all parties. However, as with issues related to alienability and dispossession, the possibility of increasing formalization of land tenure under a FNLTS places strong pressures on First Na-

197 *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services, 1996), vol. 4, ch. 2, section 3.

198 Cousins, *supra* note 20 at 288.

tion to confront inequalities before arrangements of rights—and the outcomes that flow from those arrangements—are further entrenched and secured.

This observation applies equally to distributions of wealth and political power derived from control over land and resources in First Nation. If, for example, most CP interests are held by a small proportion of individuals or families under the *status quo*, a move to provide greater tenure security will make it more difficult for First Nation to reallocate those interests—if it chooses to—in a way that meets the needs of the entire community. If those interest holders also wield considerable political influence, reallocation prior to implementing a FNLTS may be practically unfeasible.

Existence of Other Social, Political and Economic Institutions

The purported benefits of a FNLTS presuppose a number of social, political, and economic institutions existing in or accessible by First Nation. These represent necessary conditions, in the absence of which the economic benefits of improved tenure security and increased transferability of land tenure under the new system will be substantially diminished. Markets for credit, investment, and the sale of land are the mechanisms through which First Nation will realize these potential gains. Where markets are highly imperfect or non-existent, many of the arguments for formalized land tenure drop away. If a FNLTS is adopted in these circumstances, First Nation should not be too quick to abandon public initiatives that previously filled market gaps under the *status quo*, in anticipation of immediate market changes. Community governance and strong political leadership will also be a significant pre-condition, especially where First Nation plans to enforce Indigenous tenure arrangements and manage the pressures that will attend new jurisdiction to alienate land to outsiders.

Markets

By making tenure more secure and more easily transferable, a FNLTS may enable Homebuilder and Entrepreneur to collateralize their title in exchange for a mortgage or some other form of credit, increase the attractiveness of commercial opportunities for Investor, and bolster Vendor's potential gains from land sales. But even with tenure reforms in place, credit, investment, and land markets themselves may fail to materialize at all, or may evolve slowly, thus creating market "gaps" after reforms are implemented. Three reasons for these gaps may be low land values, inadequate access to existing markets, and the low income of potential borrowers.

Land Values

Many Indian reserves in Canada are remote Northern communities where land has a relatively low market value. Even where property rights in First Nation's lands are freely transferable to outsiders, its physical remoteness may imply that the potential market for land sales is, in practice, limited to the immediate community. This reality is particularly striking for Indigenous peoples in Australia's Northern Territory, where the predicted benefits of creating private rights to Indigenous lands in remote communities to encourage housing and investment are small. In an attempt to return traditional lands to Indigenous communities under a limited form of control, large amounts of remote land in Australia have been purchased by federal government land trusts following implementation of the *Aboriginal Land Rights (Northern Territories) Act* (*ALRA*) in 1976, While these communities have only recently been recognized under Australian law as having the legal capacity to grant leasehold interests, recent research has explored the potential challenges of reforms similar to a FNLTS.

The Australian experience demonstrates how low land values in remote communities may impact on Homebuilder's and Investor's options. Land acquired by the Indigenous Land Corporation in the Northern Territory of Australia has been valued at, on average, A$13 per acre.[199] Altman *et al*. observe that the construction costs of housing development in these remote areas—because of high transportation costs and the limited availability of construction materials and expertise—are disproportionately high compared to the mortgage value of the land.[200] In a survey of financial sector experts in Australia, researchers found that Indigenous lands were generally perceived as being not commercially valuable, and therefore unlikely to be attractive to potential lenders or investors.[201]

The converse will be true, of course, if First Nation has valuable natural resource endowments or is close to commercial centres. But it is worth noting that commentators across a number of Indigenous communities have observed that the history of colonization often left Indigenous peoples with low-value lands as more valuable areas were appropriated or purchased through various private and public channels. At the time of the New Zealand *Treaty of Waitangi Act* in 1975, the Maori people held 3.1 million acres of land—only 5 per cent of the total land in the country—and that was of poor quality and generally non-arable.[202] The highest-value lands, which were

199 Altman *et al*., "Land Rights", *supra* note 173 at 13.
200 *Ibid*. at 14
201 Cited in Altman *et al*., "Land Rights", *supra* note 173 at 12-13.
202 Bourassa & Strong, *supra* note 175 at 236.

primarily suitable for agriculture, were sold off to European settlers.[203] Indigenous Australians, too, "have long been displaced (and their native title rights extinguished) from parts of Australia that are attractive for economic development, so that almost by definition, most land ... is unattractive for development."[204] If this pattern of land distribution resonates strongly with First Nation,[205] the community must be careful to take stock of its available resources, and future resources needs and entitlements, before pursuing the promised benefits of reforms.

Access to Credit and Investment Markets

Even if land markets exist and land has a sufficiently high market value to support housing loans and attract business investment, credit and investment markets may themselves be underdeveloped because of challenges facing investors and creditors, or as a result of a general unwillingness to participate economically in First Nation because of high perceived risks. In general, an increase in tenure security and alienability is likely to affect business enterprises differently, depending on the scale and complexity of the undertaking.

While land tenure may become more closely harmonized with tenure off reserve under a FNLTS, the structure of business enterprises and investment opportunities in First Nation may be very different from those off reserve. For individuals like Investor engaging in "passive" investments that support Entrepreneur on reserve by leasing lands or supplying start-up capital, land tenure reforms may have the biggest impact on attracting investment. But for more active investors who want to take part in the operation of enterprises on reserve—such as outside corporations in a joint venture—the complexity and unfamiliarity of legal and governance institutions in First Nation may be the main determinants of investors' willingness to invest, thus making land tenure reform relatively insignificant. For example, there may be legal and regulatory gaps that First Nation will need to address before complex business and investment schemes can be successful. As we discussed above, the new *FNCIDA* legislation will have a prominent role to play in attracting Investor to First Nation and in supporting joint ventures by filling some of the regulatory gaps that exist as a result of separate First Nation and provin-

203 T. Kingi, "Communal Land Tenure and Indigenous Economic Development: Getting the Institutions 'Right'" (Paper presented to the Aboriginal Land Development Conference, University of Saskatchewan, Saskatoon, 22–25 June 2004) [unpublished] [Kingi, "Communal land tenure"].

204 T.J. Venn, "Economic Implications of Inalienable and Communal Native Title: The Case of Wik Forestry in Australia" (2007) 64 Ecol. Econ. 131 at 137.

205 For example, this may have been the case for First Nations in New Brunswick, see Dickason, *supra* note 12 ("As historian Leslie Upton ... pointed out, the only thing that saved Amerindians from total dispossession was the fact that much of New Brunswick was not suitable for agriculture, and most Amerindian lands were at best marginal" at 205).

cial jurisdictions.[206] Under the *FNCIDA*, outside investors will acquire greater business certainty by knowing the range of applicable regulations to commercial development projects before those projects begin. For these reasons, if *FNCIDA* and related legislative measures fail to provide the needed business certainty or are slow to operate, larger and more complex investment initiatives may not materialize after tenure reforms are implemented, although smaller investments may be feasible.

On the other hand, the business risks perceived by investors in First Nation may already cause them to favour larger-scale business opportunities—even more so once regulatory gaps are filled, which means that investment markets for smaller enterprises may be more limited. Altman and Dillon observe that investments on Indigenous lands in remote Australia tend to be large scale and low risk, noting the prevalence of large mining projects on ALRA lands.[207] Part of the reason for this may be that outside investors avoid higher-risk investments because they consider the commercial environment to be more uncertain, because tenure security is perceived to be weak, or because of concerns about political or social instability. This experience implies that land tenure reforms may benefit large enterprises like joint ventures—given that regulatory gaps are filled—more than small business ventures like that proposed by Entrepreneur and Investor.

Low Incomes of Potential Borrowers

A final reason why credit market opportunities might be limited for First Nation is because of persistently low individual incomes in comparison to comparable potential borrowers off reserve. Regardless of whether Homebuilder can collateralize her land as a result of it being alienable under a FNLTS, her income may still be too low to qualify for a mortgage from an off reserve bank. Speaking again to the case of remote Indigenous communities in Australia, Altman, Linkhorne and Clark predict that "[g]iven very low mainstream employment rates, low incomes and lack of savings among remote and very remote Indigenous people, commercial lenders would be unwilling to lend, or would lend only relatively small amounts, for housing finance irrespective of the nature of the land title."[208] The barrier presented by lower-than-average incomes in First Nation, compared to off reserve, illustrates the implications of interactions between land tenure reforms and other development initiatives, such as increasing employment opportunities in the community.

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206 *FNCIDA*, *supra* note 109.

207 J.C. Altman & M.C. Dillon, "Commercial Development and Natural Resource Management on the Indigenous Estate: A Profit-Related Investment Proposal" (2005) 24 Economic Papers 249. See also Altman *et al*., "Land Rights", *supra* note 173 at 20.

208 Altman *et al*., "Land Rights", *ibid.* at 12.

Conclusions About Markets

Two general conclusions flow from considering land, investment, and credit markets. First, recognizing that market imperfections affect credit and investment access under the *status quo* regimes, it is apparent that community governments and state-supported initiatives have already moved to fill in some of the resulting gaps, such as providing mortgages to traditional rights and CP holders with the Band council providing security on a loan. While these initiatives may not be optimal from an efficiency standpoint compared to participation in well-functioning markets, they clearly serve important social and economic functions. Even when other factors, such as efficiency gains, weigh in favour of First Nation adopting a FNLTS, community and state governments should be cautious about abandoning or modifying these supportive institutional arrangements in expectation of immediate changes in credit and investment flows, despite predictions by the FNTC that these changes will occur rapidly, at least in some cases.

Second, while a FNLTS gives First Nation greater autonomy in determining the structure of land tenure regimes and removes layers of federal oversight, the federal government will probably still have a key role to play in First Nation in the operation of credit and investment programs that meet the specific needs of First Nations communities. State-supported investment funds, for example, may be crucial elements in an overall plan for increasing investment through land tenure reform. First Nation should be wary that increasing market-based opportunities for enterprise investment and development could signal a rush by the federal government to reduce or dismantle state-supported initiatives tailored to the needs of reserves, leaving First Nation in a vacuum before markets have had the opportunity to develop in a sustainable way.

Governance Capacity

If a FNLTS can be said to grant First Nation a high level of autonomy in determining the content of property rights and the allocation of those rights to interest holders, there is no doubt that this places particular weight on the community government's capacity to ensure the legitimacy of those interests and to resolve disputes between conflicting claimants. Nearly two decades of research from the Harvard Project on American Indian Economic Development on the connection between governance institutions and economic development on American Indian reserves emphasizes that governance will be crucial for land tenure reforms to be successful in First Nation. While many of the project's findings speak specifically to the importance of good governance in determining enterprise success directly—for example, in operating tribally owned enterprises—some of these conclusions are generalizable to explain why governance capacity in First Nation can be viewed

as a pre-condition for land tenure reforms to lead to successful economic development outcomes. As with most of the *status quo* tenure regimes, the ability of rights holders to enforce property claims will be determined by reference to two levels of oversight: First Nation's internal rules for governing disputes and the rules in non-Indigenous courts.

If First Nation does not have an effective dispute resolution mechanism to address competing claims, then almost by definition tenure security will be eroded for both community members and for outside investors. Dispute resolution will need to fairly adjudicate two kinds of conflicts: between individual rights holders—for example, between two community members with conflicting claims—and individual rights holders claiming infringement by the community government itself. The latter will impact on Investor's incentives in particular, especially when he is wary about the fact that his title interests will in some cases be vulnerable to expropriation by the Band. Jorgensen emphasizes that "[f]air dispute resolution is essential to the accumulation of human, financial, and infrastructural capital because it sends a signal to investors of all kinds that their contributions will not be expropriated unfairly."[209] If interest holders feel that their legal interests have been infringed by the community government or that the community's dispute resolution mechanism is inadequately developed to adjudicate individual conflicts, they may turn to non-Indigenous courts to resolve competing claims. The greater the capacity of First Nation's government to resolve these disputes on its own, in a manner that is regarded as consistent and fair by all parties, the lower the cost of resolution and the greater the relative benefits that will flow from adopting a FNLTS.

Good governance will be doubly important for First Nation where land tenure reforms promise to improve the opportunities for successful enterprises where the community as a whole has a direct stake or ownership interest. Since management of the "politics-business connection" by insulating community-owned businesses and joint ventures from local politics is already a key consideration emerging from the Harvard Project,[210] another layer of control vested in First Nation's government in the management of land tenure regimes poses additional challenges to avoid conflicts of interest that impair the viability of these enterprises.

In addition to dispute resolution, First Nation's governance capacity also includes its administrative capacity to operate a FNLTS on an ongoing basis, including the maintenance of a land registry office and training the required personnel. While the central registry itself will presumably be located in

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209 M. Jorgensen & J.B. Taylor, "What Determines Indian Economic Success? Evidence from Tribal and Individual Indian Enterprises" (2000), Harvard Project on American Indian Economic Development, online: <www.hks.harvard.edu/hpaied/pubs/documents/WhatDeterminesIndianEconomicSuccess.pdf> at 6.

210 Cornell, "Lessons from the Harvard Project", *supra* note 19 at 60.

Ottawa, it is likely that local land offices will need to administer the system and provide guidance and advice to community members. For very small communities with limited public funds and access to expertise, even these minimal demands may strain the community's existing resources.

The Torrens Title System

A central assumption of the FNLTS proposal is that a Torrens-type title registry can adequately incorporate the potential diversity of interests, including Indigenous and non-Indigenous tenures, and private and communal interests. When considering the title interests suitable to the needs and objectives of the community, First Nation will need to test these assumptions against the actual capacities of the registration system. Since the FNLTS proposal calls for a national title registry, at some level the elements of the title regime will need to be standardized across First Nations communities. In the context of registering Indigenous title in Australia, Godden and Tehan observe that "[r]egistration systems have proven most adaptable in accommodating various forms of proprietary interest from share registers to water rights registers. However, the scale and complexity of ... adapting the current systems for recording native title interests to land registration systems, such as the Torrens title system—should not be underestimated."[211] A Torrens cadastral system is already the dominant title registry for non-Indigenous lands in Australia where attempts are now being made to design a unified title registry that is capable of integrating Indigenous land tenure. Brazenor *et al*. provide some examples of how the existing tenure system in Australia will be strained as it attempts to address the unique features of Indigenous title, for which recognition has grown since the *Native Title Act* 1993.[212] Central challenges are the accurate and appropriate spatial characterization of lands when boundary definitions may operate differently (*e.g.*, according to topographic features rather than mathematically defined parcels), and the integration of overlapping rights, restrictions and responsibilities on Indigenous lands.[213] The existence of functional as well as spatial rights in land—*e.g.*, different rights of use held by different "owners" to the same physical area—may also present challenges.

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211 L. Godden & M. Tehan, "Translating Native Title to Individual 'Title' in Australia: Are Real Property Forms and Indigenous Interests Reconcilable?" in E. Cooke, ed., *Modern Studies in Property Law*, vol. 4 (Portland, Oregon: Hart Publishing, 2007) 263 at 293.

212 C. Brazenor, C. Ogleby & I. Williamson, "The Spatial Dimension of Aboriginal Land Tenure" (Paper presented to the 6th South East Asian Surveyors Congress, November 1999 Freemantle, Australia) [unpublished].

213 *Ibid*. See also Rakai, *supra* note 36.

VI CONCLUSIONS AND SUGGESTIONS FOR FUTURE RESEARCH

The international experiences set out in Part IV suggest that First Nation will be confronted with a formidable set of considerations in gauging whether, or how, to opt into a FNLTS. To complicate matters further, no two real-world First Nations will face the same set of considerations—a point which is too easily overlooked when considering proposals for legal reforms, particularly at the national level. In order to deal with this complexity, we suggest, first and foremost, that land tenure reform cannot be considered in isolation from the context of a given community's social, economic and political institutions, geography and history. Broad-brush prescriptions about, for example, the economic value of private property rights for reserves are not only unhelpful as a policy-making model, but serve to polarize perspectives on reform and continue to marginalize actual First Nations communities by oversimplifying their situations, their present challenges and their traditions. Our central aim in this study has been to draw connections between land tenure reform and development goals of more efficient resource use and community economic growth in a way that forces decision-makers to confront the diversity of First Nations head-on as they weigh the full benefits and costs of reform.

How to characterize that diversity when it comes to assessing whether a national titling system is a viable policy initiative overall will be an important next step in this vein of research. The FNTC estimates that the fiscal benefits of a FNLTS will heavily outweigh the fiscal costs of implementing and administering the system, especially when combined with taxing powers under the *First Nations Fiscal and Statistical Management Act*.[214] Given the diverse circumstances of First Nations reserve communities, a main conclusion from our survey of international experiences is that a FNLTS is unlikely to be appropriate for all First Nations. Future research will therefore need to address how the present and future needs of individual communities, should inform the decision to enact legislation providing the legal basis for First Nations to participate in a land title system. One suggestion is that the ongoing experience of reserve communities in adopting and operating land tenure systems under the relatively new *First Nations Land Management Act* (*FNLMA*) might be instructive in identifying how communities may respond to, and whether they will benefit from, a FNLTS. We highlight three issues that may prove significant:

(1) *Regionalism*. In our discussion above, we highlighted some important regional differences that could impact on the success of a FNLTS, such as the remoteness of Northern communities compared to those near urban centres, and potential differences in the frequency of allotted CP

214 Fiscal Realities, "Economic and Fiscal Impacts", *supra* note 104.

land across reserves in different regions. Conversely, attention to regional similarities may provide a viewpoint from which to consider alternatives to a nationally-based system. For example, whereas Northern reserve communities in Canada tend to be dependent on non-renewable resource economies, such as mining and oil and gas development, economies in southern Canada are generally more diversified.[215] Provincial similarities might also be significant. A full one-half of the signatories to the *Framework Agreement* for the *FNLMA* are First Nations in British Columbia.[216] There is only one First Nation in Quebec that is actively developing a land code under the *Act*, and none in the Maritime provinces.[217] The underlying reasons for these provincial and regional differences are as yet unclear. One implication for a FNLTS is that separate title systems for reserves administered at the provincial—instead of national—level might be a strategy to address the diversity of First Nations' situations and their objectives for land tenure reform.[218]

(2) *Different economic outcomes for community members and outsiders*. Given that—according to their membership status in the community—individuals and groups can experience tenure security and transfer rights differently under a given tenure regime, First Nations may need to balance community demands with the potential to increase the flow of material wealth and resources from outside. Recognizing that First Nations peoples have historically had their tenure claims and development objectives subordinated to outside interests, we suggest that the goal is to find a land tenure arrangement that does not force First Nations into a zero-sum game with outsiders. As a prerequisite, that arrangement will need to protect and prioritize community cohesion and community interests. The process of designing custom land codes under

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215 Indian and Northern Affairs Canada, *The North*, INAC online: <http://www.ainc-inac.gc.ca/pr/info/info102_e.html>.

216 "Signatories to the Framework Agreement" (2007) First Nations Land Management Resource Centre online: <http://www.fafnlm.com/content/en/MembersCommunities.html>. Signatories to the agreement fall into three categories: (1) Operational Nations have functional land codes that have been approved by the federal government; (2) Active Developmental Nations are in the process of actively developing land codes for approval; (3) Inactive Developmental Nations have expressed their intention to enact a functional land code under the *Act* by singing the Framework Agreement, but are not currently active in developing the land code. Another pattern worth noting is that of the 120 communities who have adopted taxing powers over commercial properties under the *First Nations Fiscal and Statistical Management Act*, over 100 of these are in British Columbia.

217 *Ibid*. There are two "Inactive Developmental" Nations in New Brunswick: Kingsclear and Saint Mary's First Nations.

218 This is an option that has been considered by the FNTC when developing the FNLTS proposal. An additional consideration is the fact that many provinces currently employ a Torrens system to administer land title off reserve (*e.g.*, British Columbia), while some use a mix of Torrens and deed systems (*e.g.*, Ontario).

the *FNLMA* may provide some useful insights into how First Nations are currently attempting to balance, or to align, competing objectives.

(3) *The federal government's role*. To accurately assess whether a FNLTS has the flexibility to accommodate First Nations' diversity, further research will also need to grapple with questions about the appropriate scope of the federal government's involvement in structuring incentives to opt into the system. Path dependence implies that even when a FNLTS is conducive to communities' economic development goals, communities will experience impediments to institutional change differently. The federal government might therefore have a role to play in helping these First Nations to overcome barriers to change, such as by providing incentive programs that reduce the relative costs of transition. In the context of housing, for example, these types of arrangements may help to promote tenure reform when the most significant barrier to change is that existing loan programs—for example, Band-council-administered housing mortgages for CP holders—create increasing returns to doing business under the *status quo*. However, federal government incentive programs will need to be approached cautiously and carefully considered in consultation with communities, in order to avoid the risk of further intruding on First Nations' autonomy by constraining their decisions or otherwise limiting their ability to chart their own community-led development paths.

Finally, it is clear that the diversity of First Nations in Canada and the differences between Indigenous and non-Indigenous relationships to property concepts defy conventional classifications—that are often from a Western view—of land tenure as private and communal, traditional and modern systems—even though we sometimes employ these concepts for lack of a more accurate typology. First Nations are left with the task of thinking creatively about the most appropriate combination of tenure forms and allocation of property rights for its own needs. Here, First Nations might gain further insight from international experiences as communities around the world continue to experiment with tenure regimes that capture the benefits of formalization without undermining community-based systems that are well suited to current economic and non-economic objectives and adaptable to changing circumstances.[219] First Nations' strategies to strike these

219 Some communities, particularly in sub-Saharan Africa, have begun to experiment with "hybrid" systems that combine the features of different land tenure regimes. John Borrows and Sarah Morales have recently discussed the potential for Aboriginal communities in Canada to draw on lessons from a system of "starter-title" in Namibia: Borrows & Morales, *supra* note 153. Under this regime, starter-title is held by an individual who acts as a custodian for a family or household, but title remains group-based because each household is subject to land-

balances will test the flexibility of a national land title system in Canada. Demand for creative, flexible land tenure arrangements may therefore have a major role to play in determining whether a FNLTS will eventually become a viable legal option for First Nations communities.

use rules created by a community association. This type of title can then be "upgraded" to other forms of title under criteria designed by the community. See S.F. Chistensen, "The Flexible Land Tenure System–The Namibian Solution Bringing the Informal Settlers Under the Register" in *Expert Group Meeting on Secure Land Tenure: "New Legal Framework and Tools"* (UN-Gigiri in Nairobi, Kenya, 10–12 November 2004) at 7, cited in Borrows & Morales, *ibid*.