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Individual Property Rights on Canadian Indian Reserves

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Introduction

One of the most widely discussed books of the year 2000 was *The Mystery of Capital,* by the Peruvian author Hernando de Soto. His book showed how millions of poor squatters in sprawling Third World cities such as Manila, Cairo, and Port-au-Prince are handicapped by an inability to obtain documented ownership to the little plots of land on which they have built their homes. Without legally recognized title, they find it difficult or impossible to get electricity and water from utility companies, to borrow against their assets, or to open a legitimate business on their premises (de Soto, 2000, pp. 39-40). When poor squatters try to obtain legal title to property, they encounter a tangle of bureaucratic red tape and are forced to wait many years for government approval. It can take 13 to 25 years in the Philippines, 6 to 14 years in Egypt, and up to 19 years in Haiti to finish the necessary paper work to obtain lawful and legal ownership to a piece of property (de Soto, 2000, pp. 22-25, 83). Even then, there is no guarantee that their title will be secure, because many Third World countries lack a formal and reliable system of enforcing property rights. Deprived of normal police and legal protection of their land and house, they often have to pay gangs or criminal racketeers for such "protection" as those groups provide (de Soto, 2000, pp. 59, 61-62).

Shortly after the book appeared, several Canadian reviewers drew parallels between the Third World conditions described by de Soto and the situation of First Nations. They argued that the Indian Act deprived residents of Indian reserves of the individual property rights that other Canadians take for granted. In an article entitled "Open Up the Treaty Talks," Casey Timmermans wrote that Canada's aboriginals are "denied access to our formal Canadian property system within their settlement lands" (Timmermans, 2001). John Koopman stated that Canada's "Aboriginal reserves ... lack a formal real property system that is rooted in individual ownership of land," resulting in Third World conditions on reserves where "poor aboriginals live in houses constructed on lands they do not own and cannot sell or encumber outside their community" (Koopman, 2001). Peter Holle argued that this lack of aboriginal property rights creates "a real reluctance to put a business on a reserve," ensuring that reserves continue to lag in economic development and standard of living (Holle, 2001; Owens, 2000).

Certainly these commentators had a point. Indian land ownership is indeed highly constrained by the effects of more than 200 years of British and Canadian colonial policy. The Royal Proclamation of 1763 forbade private individuals to purchase Indian lands and required any such sales to be made only to authorized representatives of the Crown. In subsequent years, the Crown retained ownership of reserves set aside for the use and benefit of Indians under treaty. Long-established policy, therefore, has tended to channel Indian property rights in a collective, government-dominated direction.

The critics, however, overstated their case by writing as if reserve residents had no individual property rights whatsoever, as if reserves functioned entirely as regimes of collective property. In reality, the situation is much more complex. Band councils control much reserve land as collective property, but there is also a good deal of individual property, though not in the form of fee-simple ownership familiar to most Canadians. We will focus here on the four main regimes of private-property rights in existence on Canadian Indian reserves: customary rights, certificates of possession under the Indian Act, the variety of land codes now emerging under the recently passed First Nations Land Management

Act, and leases. We will not, however, attempt to deal with several unique cases that exist through treaty (Nisga'a), legislation (Sechelt), or ancient historical circumstances (Oka).

Aboriginal peoples are often depicted, in the scholarly literature as well as in the popular media, as if their cultures had no room for institutions of private property (Flanagan, 2000, p. 113). There has been some specialized work by anthropologists and other scholars on forms of individual and family property in the pre-contact period, but such research is not widely known (Benson, 1992; Hickerson, 1967; Trigger, 1990; Donald, 1997; Miller, 2001). Similarly, we have found in the scholarly literature a few scattered references to, but no sustained discussion of, institutions of private property on contemporary Indian reserves. The individual property rights of aboriginal people may not be a mystery, but neither are they widely recognized. Our research is a step toward producing a more nuanced and realistic portrait of one aspect of the life of Canada's aboriginal peoples.

Our research also has practical implications for economic growth and development. It is generally acknowledged that, with some exceptions, the material standard of living on Indian reserves is much lower than the Canadian average and should be a cause for national concern. Most aboriginal leaders stress their commitment to economic development on reserves, which was also a major theme of the *Report of the Royal Commission on Aboriginal Peoples* (Canada, 1996).

Twentieth-century history has reinforced our understanding of the role of private property rights in creating an efficient economy. Communist polities either collapsed (the USSR) or reformed themselves by introducing major elements of private property (China). Towards the end of the century, the mixed economies of the Western world experienced a major wave of privatization and deregulation as state corporations were sold to investors and released from political control. Surveying these trends, the historian Richard Pipes concluded:

> As the twentieth century draws to a close, the benefits of private ownership for both liberty and prosperity are acknowledged as they had not been in nearly two hundred years. Except for a few isolated oases of self-perpetuating poverty, such as North Korea and Cuba, where Communists manage to hang on to power, and except for the minds of a still sizable but dwindling number of academics, the ideal of common ownership is everywhere in retreat. Since the 1980s, "privatization" has been sweeping the world at an ever-accelerating pace. Thus Aristotle has triumphed over Plato (Pipes, 1999, p. 63).

Against this backdrop, it seems evident that developing workable systems of private property rights to facilitate market transactions will be a necessary, if not sufficient, precondition to attaining widespread prosperity on Indian reserves. Terry Anderson has demonstrated that individually allotted Indian lands in the American West are more productive than tribally or federally controlled Indian lands (Anderson, 1995). But there is not likely to be any widespread equivalent allotment in Canada in the foreseeable future. The Nisga'a treaty allows, though it does not require, fee simple ownership for band members, but there has been no rush to follow the Nisga'a example. It is, therefore, all the more important to study the embryonic systems of private property now existing on reserves to see how they can be expanded and perfected for the long-term benefit of reserve residents.

What follows is a conceptual survey of individual property rights on Canadian Indian reserves. It draws on legislation, case law, and some fieldwork in order to define the varieties of rights in existence and illustrate their practical operation.

The authors hope to carry out future research that will give a better sense of how these rights operate at a practical level and how they might be refined to make them more effective.[1]

Customary Rights

Many Indian reserves in Canada, particularly but not only in the three prairie provinces, have no formalized individual property rights. In practice, however, these reserves often permit families to hold some (sometimes almost all) of the land as a form of customary private property. Individuals or families acquire tracts of reserve land directly by an allotment by the band council based on the fact that they had lived on the land for a long period of time, or indirectly through inheritance from their ancestors. For example, on the Morley reserve of the Stoney Nation in Alberta—a case that has been at least minimally studied—some of the band members have fenced off reserve land for pasture, based on their customary property rights (Notzke, 1985, p. 53). Such holdings cannot be sold, at least in a formal, documented way, but they can usually be left as an inheritance and subdivided among family members. Lands acquired in this way, however, lack legal protection. An allotment based on customary rights does not involve legal recognition by the federal government through the Indian Act or any other legislation. Rather, the band council makes or tolerates the allotment without ever seeking the approval of the Minister of Indian Affairs (Notzke, 1985, pp. 48-49). Thus, the band council usually handles disputes arising under competing customary claims, because the courts have been reluctant to rule on such cases.

The recent case of *Nicola Band et al v. Trans-Can Displays et al* (2000 BCSC 1209) illustrates the uncertainties of customary property rights. David Shuter, a member of the Nicola band in British Columbia, claimed 80 acres of land on the Joeyaska reserve as his own property, based on his family's "traditional or customary use and occupation of the land" (para 4). Shuter claimed to have obtained the land in 1968 through an informal agreement with George Spahan, who had inherited the land from his father, Antoine Spahan. Shuter maintained that (1) his customary interest in the land, (2) a 1987 band council resolution (BCR) affirming the allotment of the land to him, and (3) statements by certain Nicola band chiefs referring to the land as being "owned" by Shuter proved his lawful ownership.

The British Columbia Supreme Court disagreed. According to *Joe v. Findlay* (1981, 122 DLR 3d 377), interest in reserve land is held in common by the band as a whole and not by individual members (*Nicola Band et al v. Trans-Can Displays et al* 2000 BCSC 1209, para 127). An individual can gain an interest in the land only under the procedures described in sections 20-29 of the Indian Act. Since Antoine Spahan never registered the land under section 20, he did not have a lawful interest in it and could not have bequeathed it to his son. George Spahan, therefore, had no interest that he could transfer to David Shuter. Also, although the band council recognized that David Shuter did have "some" interest in the land, neither the band council nor the Ministry of Indian Affairs had ever formally granted the land to him. Shuter's claim that the 1987 BCR allotted him the land was false because the BCR did not make the allotment to David Shuter individually, nor did it describe the exact parcel of land being given to him (para 142). Moreover, on October 8, 1987, the Department of Indian Affairs formally rejected the allotment based on the fact that only 22 of 160 councilors had voted on it, and that "the form

1 Chris Alcantara is writing his MA thesis on certificates of possession and the housing program at the Six Nations reserve. Another graduate student at the University of Calgary is studying the application of the First Nations Land Management Act at Georgina Island.

that was used [to file the allotment] was wrong" (para 68).

The court rejected the relevance of statements made by Nicola chiefs indicating that Shuter owned the land. Relying on *Leonard v. Gottfriedson* (1980 21 BCLR 326), *George v. George* (1996, 139 DLR 4th 53), and several provisions in the Indian Act, the court ruled that a band member could only gain lawful interest in land through a proper band council resolution and the approval of the Minister of Indian Affairs (*Nicola Band et al v. Trans-Can Displays et al.* 2000 BCSC 1209, para 135-136). Although a customary claim can be used to justify granting a certificate of possession under the Indian Act, "[t]he recognition of traditional or customary use of land cannot create a legal interest in the land that would defeat or conflict with the provisions of the [Indian] Act" (para 162).

People who live on reserves understand these customary regimes to the extent that they affect their day-to-day lives, but the larger community has little information about them. Except for a few brief comments, scholars have not studied and written about, and Canadian courts have declined to enforce, customary property rights on reserves (Notzke, 1985; *Williams et al v. Briggs* 2001 BCSC 78). Much of what we have learned about them is, thus, based on anecdotal evidence.

Our impression is that, up to a point, customary property rights are effective. Certainly, a large number of reserve residents across the country dwell in houses and operate farms, ranches, and other businesses based on such rights. One example is the Cowichan Tribes reserve near Duncan, B.C., where about 20 percent of the land is held under customary right in seven villages. These seven villages have been unofficially subdivided and allotted as residential land to individual families, based on traditional usage and family lineage. In the eyes of band members and the Cowichan Tribes government, land held in this way is almost as good as legal title (Alphonse, 2002). Because of this, the band has been able to use customary rights to secure mortgages from the Canadian Mortgage and Housing Corporation (CMHC) for its individual members. In order to receive a mortgage from the CMHC, the customary right holder must first informally transfer that right to the band. The band then signs a ministerial agreement with the CMHC guaranteeing the mortgage. The band returns the land to the customary right holder only after the mortgage has been discharged and any other conditions set by the band have been met (George, 2002). The Cowichan Tribes government has successfully used this program to upgrade many of its custom-held housing units in the seven villages.

The Cowichan Tribes government intends eventually to subdivide and allot all of the land in the villages to individual families. However, the allotment process has proceeded slowly because of disagreements over boundaries. When band officials ask residents to tell them where the boundaries of their land begin and end, residents are often unable to identify their boundaries and may end up in acrimonious disputes with their neighbours. The Cowichan Tribes government has been reluctant (except in helping to gather facts and acting as a mediator) to impose its will; rather, it has usually left the disputants to resolve the boundary differences by themselves.

Although customary rights seem to function more or less well on the Cowichan Tribes reserve, several problems do exist. Inability to mortgage and sell this sort of property limits its usefulness to the owner. Also, customary title-holders in Cowichan have sometimes stopped making payments on their mortgages after three or four months. Although the band council has the legal power to evict residents and reclaim customarily held land, it rarely does so because of long-standing respect for customary rights. In a small community, it is difficult to evict families

that default on home mortgages because the housing committee lacks the political support to act (George, 2002).

Although the band council has several instruments at its disposal to compel payment, it rarely employs them. One reason for inaction is a lack of resources. The council simply does not have the manpower or resources to keep track of payments, send out letters, and knock on doors of delinquent members. Thus, many band members do not pay because they know that the band council will not seek repayment. During the 1990s, the CMHC suspended the issue of new mortgages to Cowichan members for a five-year period. The CMHC recently ended this freeze after delinquent members started paying, but Cowichan officials are not optimistic about a "quick resolution" to the problem of non-payment (George, 2002).

Another general problem is insecurity of tenure. Boundaries between holdings are not always clear, and disputes easily arise within families as a result of divorce, remarriage, death, and inheritance (*Williams et al v. Briggs* 2001 BCSC 78). Moreover, there is always the possibility that the band council could seize the house and the land held under customary right at any time, leaving the customary right holder with no legal recourse. Since the courts will usually not deal with such disputes, they may end up before the band council if family members cannot reach their own accommodation; and if the band council has to decide, politics is likely to intrude, given that the band council is a political, not a juridical, institution (Notzke, 1985).

Despite the obvious problems associated with poorly documented, hard-to-enforce, customary rights, they may well continue to exist for a long time on many Indian reserves where the land is not very valuable. Formalized systems of property rights are costly to create and maintain, and the benefit is not always worth the cost (Demsetz, 1968). An example from our research is the remote Sandy Lake reserve in northern Ontario, where there is plenty of land for the residents to live on and no mineral deposits. Under those circumstances, the only factor that confers much value on land is the provision of utilities for housing units (Ray, 2002). Although conflicts sometimes develop over serviced sites, it may never become worthwhile to develop a formalized system of property rights for the entire reserve, unless the land becomes more valuable for other purposes, such as recreation or resource extraction.

Certificates of Possession

A second form of on-reserve property right is the certificate of possession (CP), known as a "location ticket" prior to the Indian Act revisions of 1951. A certificate of possession is proof of lawful possession issued under the authority of the Indian Act by the Minister of Indian Affairs after approval by the band council (Federal Department of Indian Affairs and Northern Development, 1997, pp. 7-8). Over the last 125 years, more than 100,000 of these certificates have been issued to property owners on 288 of Canada's reserves. Some reserves may have only one or two certificates; on others, such as the Six Nations reserve in Ontario, which has about 10,000 certificates, almost all the land has been allotted in this way. It would be interesting to know the total acreage of reserve land granted under CPs, but the Indian land registry in Ottawa cannot produce that information (Guest and Gros-Louis, 2001).

Once granted, the CP is a stronger form of property right than customary ownership. Land held under a CP can be subdivided, left to an heir, and sold to another person having a right to reside on that reserve (Cadieux, 1997, pp. 3-4). The Canadian courts will settle disputes and in other ways enforce the rights generated by certificates of possession. For instance, in the case of *Westbank Indian Band v. Normand* (1994, 3 CNLR 197), the

defendants had allegedly released an excessive amount of water into a creek, causing flood damage to farmland allotted to Gary Swite under a CP. The band, on behalf of Swite, sued the defendants for damages. The Supreme Court of British Columbia held that the band could not sustain an action against the defendants because Swite had a CP to the land, and possession of a valid certificate passes to the holder all the incidents of ownership except legal title, which remains with the Crown (199). Had Swite filed the action himself, he might have won compensation from the defendants, but the band no longer had a justiciable interest.

In *Dale v. Paul* (2000 AJ No. 751 Alta Master), Cecile Dale had a valid CP for a piece of land under dispute on the Enoch Indian Reserve in Alberta. She had allowed her brother, Harry Sharphead, to live on the property. For a brief period, Sharphead's wife, Elisie Paul, the respondent, also lived with him on the property. After Harry Sharphead's death, Dale gave permission to Ruby Sharphead to live on the property, but the respondent Elisie Paul moved onto it first, claiming that Harry had given her permission to live on the property in the event of his death. She argued that oral bequests had to be honoured according to native custom. The court ruled, however, that Paul did not have a right to reside on the property because Cecile Dale had a valid CP to the land. A CP was "the highest form of title an Indian can have to land that is part of an Indian reserve," as it gave the holder "fee simple certificate of title." Thus, the court ordered Paul to vacate the property in accordance with the wishes of the CP holder, Cecile Dale.

In *Watts v. Doolan* (2000 FCJ No. 470 Fed. T.D.), the Kincolith Indian Band Council had, without obtaining permission, built a radio antenna, two satellite dishes, and a wooden frame building on land held under a CP by Marlin Watts. Watts brought an action against the band for trespass and subsequently won. The court ruled that since Watts held a CP to the land, the band had no right to erect communications equipment on his property without his permission, and it awarded Watts $10,300 in lost rent, damages, and interest.

Notwithstanding these decisions, the property rights flowing from a CP are different from ownership in fee simple. The Federal Court of Appeal in *Boyer v. Canada* (1986, 4 CNLR 53) expressed these differences succinctly:

> The member [of the band] is not entitled to dispose of his right to possession or lease his land to a non member (s. 28), nor can he mortgage it, the land being immune from seizure under legal process (s. 29), and he may be forced to dispose of his right, if he ceases to be entitled to reside on the reserve (s. 25) (*Boyer v Canada* 1986, 4 CNLR 60).

The biggest limitation on the usefulness of CPs is that they can only be transferred within the band (Imai, 1998, p. 46). The inability of a CP holder to transfer possession outside of the band makes it harder for businesses and individuals to construct housing and other economic development projects on the reserve. As well, since even the largest Canadian First Nations are relatively small communities, on-reserve real-estate markets tend to suffer from lack of potential buyers.

However, private property rights do not have to be complete and absolute in order to be useful. Notwithstanding the restriction on sales, the Six Nations, as well as several other First Nations in Ontario and Quebec, have made an imaginative use of the CP system to promote private ownership of homes on reserves (Montour, 2001). As discussed briefly above, the Cowichan Tribes Reserve near Duncan, British Columbia, CP holders have been able to secure mortgages to build their own homes by working with the band council to get around the immunity from debt seizure conferred by the Indian Act. To ac-

complish this, a CP holder must formally transfer the CP under section 24 of the Indian Act to the band as collateral. The band then signs a ministerial guarantee with the CMHC in which it agrees to assume the mortgage in the event of a default. The owner gets the CP back only after he has paid off the mortgage; in case of default, the band can take the land because it has the CP (Roberts, 2002). This arrangement has provided a way of enabling many Cowichan residents to build or purchase their own homes and to possess them without being beholden to a body of politicians.

The Westbank First Nation (WFN) near Kelowna, British Columbia, uses a similar means for securing mortgages for its members. At the WFN, most of the members live in band-owned housing, which individuals have the option of purchasing. The individual can sign a mortgage agreement with the WFN stating that the house reverts back to the band in case of default. As opposed to the Cowichan arrangement, however, the band council also grants the individual a CP to the house, because the bank will not issue a mortgage unless the individual has a CP. The band council then signs a "First Nation Guarantee for Indebtedness of an Individual" with the bank. Unlike Cowichan, the WFN does not take the CP unless there is a default; the individual merely promises that in the event of a default, he will surrender the CP to the house to the band (Vanderburg and Watts, 2002).

Since only 10 houses currently operate under this arrangement at the WFN, it is too early to assess whether they will experience the non-payment problems afflicting Cowichan Tribes. Also, the WFN deals with the Bank of Montreal rather than a government agency such as the CMHC. That private financial institutions are less forgiving with respect to defaults than government agencies may help explain why the WFN has not yet had any defaults. WFN does, however, experience non-payment problems with its non-profit band-owned housing; and, as at Cowichan, nepotism and a lack of determination to evict delinquents are said to be the reasons for the high number of band members refusing to pay their rents (Vanderburg and Watts, 2002).

First Nations Land Management Act

The third property-rights regime to be discussed here is the 1999 First Nations Land Management Act (FNLMA), which allows bands to opt out of the land provisions of the Indian Act (Federal Department of Indian Affairs and Northern Development 1999). Once the band drafts a land code and the Minister accepts it, the band can manage its own lands without further need for ministerial or departmental approval. Section 21 of the FNLMA, however, requires the band to gain the approval of both the Minister of Indian Affairs and the Minister of the Environment when passing environmental protection laws. Moreover, such laws must be equivalent to legislation in the province in which the reserve is located.

Once the land code of a First Nation comes into effect, "the rights and obligations of Her Majesty as grantor in respect of the interests and licenses described in the first nation's individual agreement are transferred to the first nation in accordance with that agreement" (Federal Department of Indian Affairs and Northern Development 1999, sec. 16 (3)). In addition, the band under the FNLMA can "exercise the powers, rights and privileges of an owner in relation to that land; grant interests in and licenses in relation to that land; manage the natural resources of that land" (sec. 18). Moreover, allotments made under CPs or through customary property rights become subject to the provisions of the band's land code (sec. 16 (4)).

The present Indian Act does not contain a provision dealing with the division of property after the breakdown of a marriage. Thus, since the In-

dian Act is silent on this issue, Indians have had to rely on the courts for redress, resulting in a body of inconsistent case law (*Derrickson v. Derrickson* 1986, 1 SCR 285; *Paul v. Paul* 1986, 1 SCR 30; *George v. George* 1996, 2 CNLR 62). The FNLMA addresses this oversight by giving bands the power to establish general rules for dealing with cases involving the "breakdown of marriage, ... the use, occupation and possession of first nation land and the division of interests in first nation land" (Federal Department of Indian Affairs and Northern Development 1999, sec. 17 (1)). Aboriginal women's groups, however, have criticized this approach, fearing it may place women at the mercy of band councils.

Notwithstanding these substantial land-management powers granted to bands, the main constraint of the FNLMA is that title to reserve land remains with the Crown, so that any ownership interests the band's code might create would still not amount to ownership in fee simple (Federal Department of Indian Affairs and Northern Development 1996, sec. 4.2). Hence, title-holders would still not be allowed to sell their land to off-reserve purchasers.

The schedule to the Act authorized 14 First Nations to proceed with development of their own land codes. Four of the 14—Georgina Island, Lheidli T'enneh, Scugog Island, and Muskoday Indian Band—have had their codes accepted and are now outside the Indian Act with respect to land management. Most of the remaining listed bands are said to be proceeding with development of their codes, and numerous other bands are making preparatory inquiries about entering the process. It was reported in March 2002 that Indian Affairs Minister Robert Nault was allowing up to 30 First Nations to enter into the FNLMA every two years (Baswick, 2002). In time, therefore, the First Nations Land Management regime may become a major part of the landscape for aboriginal people in Canada.

However, it is not yet clear whether this will lead to a growth in private property rights on reserves. A graduate student at the University of Calgary recently carried out fieldwork at Georgina Island. She found that the code was being applied primarily to the band's collective land, on which there were some cottage leases. The net result was that the band could now manage these leases and collect revenue directly, without having to go through the Department of Indian Affairs (Georgina Island First Nation 1999, sec. 13.4). This may well be an improvement in aboriginal self-government and efficient administration, but it does not increase the scope of individual property rights for residents of the reserve. Many people on this reserve already had CPs, and their status has not been altered by the new regime. Existing CP rights continue to be respected, but no new rights have been created (Federal Department of Indian Affairs and Northern Development 1996, sec. 16.2-16.3).

Moreover, it seems that only the more prosperous First Nations may actually benefit from the FNLMA. Cowichan officials are considering opting into the Act but are hesitating for two major reasons. First, the costs involved in implementing and operating a land code under the FNLMA are substantial. Although Indian Affairs has promised to cover start-up and operational costs, this funding is inadequate. The formula that the department uses to determine funding is skewed towards First Nations with a sizable number of mobile home and trailer parks. Since the FNLMA requires the First Nation to take on responsibility for all land management tasks, the band government must pay for environmental assessments and land surveys, all of which are expensive. Moreover, Cowichan Tribes believes they would have to hire, on a full-time permanent basis, an administrator, secretaries, and several lawyers to help manage their land and fulfill their obligations under the FNLMA. Such services are now paid for by the Department of Indian Affairs.

The other major concern for Cowichan Tribes is liability. Under the FNLMA, the band is responsible for everything. Thus, the band would have to assume all legal and financial responsibility in the event of a major disaster or problem. Cowichan Tribes simply does not have the resources to deal with any major disasters or lawsuits involving land issues (Wilgress, 2002). It appears that the FNLMA may be viable only for First Nations that have the financial resources to deal with the high administrative and liability costs, or that engage in little land management.

Leases

Regimes of property rights on Indian reserves need not be mutually exclusive. As illustrated in the preceding section, CPs can continue to exist after a band has chosen to come under the FNLMA. Such overlap is even truer of the fourth type of private property right to be discussed here—leases. Leases can be granted on the band's collective land as well as on any type of individually controlled reserve land.

The Indian Act provides for three types of leasing arrangements for reserve land—short-term leases called permits, long-term leases referred to as designated lands, and leases granted on behalf of a CP holder. Permits are governed by section 28(2) of the Indian Act, which gives the Minister the power to grant to any person the right to reside on, use, or occupy reserve land for a period of no longer than one year. This provision also states that for permits longer than one year, the Minister must obtain the consent of the band council (Imai, 1998, p. 47). In a number of rulings, the courts have confirmed that bands can engage in short-term leases only through the use of section 28(2) (*Opetchesaht Indian Band v. Canada* 1998, 1 CNLR 134, para 53). In *Hofer v. Canada* (2002 FCT 16), Hofer, a non-native farmer, had signed a conditional agreement with the Blood Tribe Council extending his lease permits to tribal land for another five-year term. The validity of the agreement was conditional on "any final agreement set forth by Chief and Council and Permittees" (para 53). When Hofer was issued 15 permits for three years rather than the previously agreed-upon five years, he took the federal government and the Blood Tribe to court for breach of contract. The Federal Court ruled that there was no evidence that the conditional agreement containing the five-year term had been approved either by the band council or by the Minister, as required under section 28(2) of the Indian Act. Moreover, the conditional agreement itself provided that the chief and council had the right to change the final agreement before issuing the permits. Therefore, the chief and band council were authorized to change the length of the permits from five to three years (para 6-7).

The influence of band councils over short-term leasing arrangements is limited by the need for a permit from the Minister. In *Millbrook Indian Band v. Nova Scotia* (1978, 4 CNLR 60 NSCA), the band, which operated a mobile home park on unsurrendered reserve land, that is, land set aside by the band for leasing purposes, leased a space to Mrs. Rushton, a non-Indian. At issue was whether the band council could lease land to a non-Indian without a permit from the Minister as stipulated under section 28(2). The Nova Scotia Court of Appeal ruled that since the Minister did not issue a permit, the lease she had signed with the band was void. According to this ruling, band councils are unable to lease reserve land to non-Indians for residential purposes without the permission of the Minister, even if the band council believes that such a lease would be beneficial. Thus, short-term leases do not give local aboriginal governments much in the way of land-management authority.

These two cases also illustrate another difficulty with short-term leases. The fact that both the band council and the minister are involved in giving approval can jeopardize the interests of innocent third parties. Mr. Hofer thought he had

negotiated a five-year lease on agricultural land, and Mrs. Rushton thought she had leased a spot for her trailer, but both had their expectations upset in court. The duality of decision-making means that third parties have to invest more heavily in getting legal advice to protect their own interests, leading to inevitable delays and additional expense—in other words, a clash with economic efficiency.

For long-term leases of reserve land, section 38(2) of the Indian Act allows the band to "conditionally surrender" or "designate" land to the federal government for the purpose of leasing. According to Justice Major's ruling in *Opetchesaht Indian Band v. Canada* (1998, 1 CNLR 134), "[i]n the case of ... long-term leases ... surrender is required, involving the vote of all members of the band" (para 53). After the band receives the approval of its members, the federal government can lease the land to an Indian or non-Indian development company, which can subdivide the land and give out leases to individual Indian or non-Indian sublessees. The Cowichan people have successfully used the designation process to create revenue for both the band and its individual members. For instance, the Duncan Mall and the Wal-Mart superstore in downtown Duncan were built on designated land originally held as several CPs. The Cowichan government and the former CP holders were able to work out an agreement in which the latter received 90 percent of the leasing revenue, while the band got the remaining 10 percent (Sullivan, 2002). Land leased in this way remains reserve land, with the Crown retaining legal title and jurisdiction.

A serious problem with long-term leasing is that the terms incorporated in the agreement may make the lease land considerably less valuable than its off-reserve equivalent, as illustrated by the high-profile case of *Musqueam Indian Band v. Glass* (2000 SCC 52). The Musqueam Band in Vancouver surrendered 40 acres of land for leasing in 1960. The Crown in turn leased the land to a development company, which subdivided the land and gave out 99-year leases to individuals who subsequently built houses. Contained in the leases was a rent review clause stating that after the first 30 years and every 20 years thereafter, annual rent would be re-assessed at 6 percent of the current land value. The dispute in the case was over the method of determining the "current land value" of reserve land designated for long-term lease. The trial division of the Federal Court of Canada held that land designated under section 38(2) remained Indian land, and that such land must be valued in terms of a leasehold rather than a freehold interest. The court also considered that the unique nature of Indian land would have an effect on its current value. The trial court judge ruled that, in these particular circumstances, the value of the land in question should be reduced by 50 percent as compared to similar property in the city of Vancouver (*Musqueam Indian Band v. Glass* 2002 SCC 52, para 27-28). However, the Federal Court of Appeal overturned the decision of the trial judge, arguing that the land designated under section 38(2) should be valued in terms of freehold rather than leasehold interest and that the trial judge had erred in reducing the land value by 50 percent (para 31).

The case was subsequently appealed to the Supreme Court of Canada, which held in a 5-4 decision that the trial court had been correct in assessing a 50 percent reduction in value for these particular lands. Writing for the majority, Justice Gonthier argued that since the leased land had not been surrendered for sale, the value of the land should be assessed as freehold title, even though there was no such thing as "freehold title on a reserve" (para 35). Despite the absence of freehold title on reserve land, he believed that one could still assess a hypothetical freehold title value of the land, and that the trial judge had been correct in assessing a 50 percent reduction of the value of the land. The restrictions on sale and use that come with being reserve land, coupled with

the power of the band council to levy property taxes and to pass by-laws such as zoning laws, greatly reduces the current value of designated land (para 45-49; Kesselman, 2000). Therefore, the majority held that the trial judge was correct in assessing a 50 percent reduction in the current land value (*Musqueam Indian Band v. Glass* 2002 SCC 52, para 52-53).

This case raises serious questions about the usefulness of long-term leases for Indian bands. With this ruling, the Supreme Court of Canada has set the precedent that land designated for long-term lease under section 38(2) may be worth much less than its off-reserve equivalent due to "Indian reserve feature[s]" (para 28). Thus, the amount of rent collected for leased reserve land will be lower than what could be earned from the land if it were not on a reserve. This means that bands may obtain less revenue for their land, making long-term leases under the current regime not as useful and effective as leasing arrangements in the wider economy. The Land Manager of the Westbank First Nation said that the Musqueam dispute, with all its attendant publicity, has had a serious effect on the band's ability to designate land for leasing. Although the WFN assures potential buyers and developers that the Musqueam case is a unique situation and is completely different from the way in which the WFN structures its leases, potential customers are still wary about purchasing or developing WFN land (Vanderburg, 2002).

It would be a mistake to think of the *Glass* decision itself as the root of the problem. There are underlying difficulties in this area that have to be faced. A lease, even a long-term lease, is simply not the same property right as outright ownership. A lease can be sold in the market, thus transcending some of the limitations of CPs and customary holdings; but, particularly as one approaches the renewal date, it does not carry the same security of tenure as a freehold. The market will always impose some discount on entailed land as compared to freehold. However, the discount need not be the 50 percent proclaimed by the Supreme Court in *Musqueam Indian Band v. Glass.* One knowledgeable observer recently opined that leased reserve land in the Kelowna area should be worth about 85 percent of comparable freehold land, given properly constructed lease agreements (Raybould, 2001).

This is a matter of great practical importance. There are now tens of thousands of leases on designated reserve land in Canada, creating the basis for shopping centres, industrial parks, vacation communities, and year-round residential housing projects. The commercial, recreational, or residential potential of their land is the greatest economic asset of many First Nations; and the lease of designated land will be the chief instrument for realizing the value of that potential, for marketizing the land while retaining the permanent title in the Crown for the benefit of the band. Further disputes of the Musqueam type may deter potential developers and purchasers of leases, leading to devaluation of reserve land and impoverishment of the residents. It is important for lawyers and land managers to get it right!

At the individual level, the Indian Act also provides for an Indian in lawful possession of reserve land to lease it. However, he must do so through the Department of Indian Affairs; he cannot simply enter into an agreement on his own (Imai, 1998, p. 61, referencing *Surrey v. Peace Arch Ent. Ltd.* 1970). Section 58(1)(b) says that "where the land is in lawful possession of any individual, [the Minister may] grant a lease of such land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession" (Imai, 1998, p. 71). Section 58(3) states that "the Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated" (Imai, 1998, p. 71). These sections of the Indian Act indicate that an Indian in lawful possession of

reserve land can lease it in two different ways. Where the land is unused and the person in lawful possession is indifferent to the use of the land, section 58(1)(b), which requires the consent of both the band council and the Minister, is controlling. Section 58(3) is invoked when an Indian in lawful possession of the land makes a direct request from the Minister for a lease. No band council consent would be necessary in the second case (*Boyer v. Canada* 1986, 4 CNLR 58).

At the Westbank First Nation, CP holders have successfully used section 58(3) to greatly enhance their personal financial situations. Much of the WFN land is held under CP by a small number of individuals and families. Taking advantage of the lack of band council involvement in a section 58(3) lease, these CP holders have leased their land to private development companies to build adult gated communities and residential neighbourhoods, ranging from lower middle class housing to $400,000 homes. These companies then gave out individual 99-year prepaid subleases for these homes. Essentially, individuals purchased the homes upfront, much as one would do for an off-reserve home. However, after 99 years, the house and land revert back to the CP holder. This reversionary feature of the lease is a ticking time bomb whose effects will eventually have to be faced. Also, in this arrangement, all of the profit goes to the individual CP holders, while the band receives no revenue (Vanderburg, 2002).

Provisions of this type were first tested in the case of *Boyer v. Canada* (1986, 4 CNLR 53). John Corbière, a member of the Batchewana Indian Band, obtained lawful possession to a tract of land on his reserve in 1973. In 1980, he asked his band for a band council resolution (BCR) approving his intention to lease the land to a corporation in which he and his wife were sole shareholders. In 1982, he applied to the Minister under section 58(3) to approve the transaction. The band council, however, disputed Corbière's claim to a lease, and wrote the Minister stating that the lease did not address several causes of direct harm to the band. Ignoring the band's protests, the Minister issued a lease to Corbière's development company in 1983. The Federal Court of Appeal held that the 1980 BCR only consented to the principle of leasing the land and did not in fact reflect the council's approval of the particular lease granted in 1983 (*Boyer v. Canada* 1986 4 CNLR 57). Furthermore, the court ruled that the Minister was not required to obtain the consent of the band council when issuing leases under section 58(3) since the band loses its collective right to the land when it is allotted through a CP or a Certificate of Occupation.

The Federal Court of Appeal modified the *Boyer* decision in 1999 with its ruling in *Tsartlip Indian Band v. Canada*. In that case, the respondents had CPs to reserve land where they wanted to build a home park for non-Indians through the Clydesdale Estates Holdings Ltd., of which they were shareholders. The Tsartlip band council, however, had misgivings about the lease and the use of the land, citing concerns such as a shortage of band member housing, the lack of adequate water and sewer capacity, and the longstanding opposition of band members to home parks for non-Indians (*Tsartlip Indian Band v. Canada* 1999, 172 FTR 160, para 6). Despite the concerns of the band council, the Minister granted the lease and the respondents built the home park. The band then challenged the validity of the lease. The Federal Court of Appeal ruled that, although the Minister does not have any fiduciary duty to the band when issuing a lease under section 58(3), the Minister must still take into account the concerns of the band council, especially when a lease may harm the overall interests of the band. Parliament intended the Indian Act to be band- and reserve-oriented, and the band council should continue to have some influence on whether or not to allow non-Indians onto reserve land. "The mere fact that the Band has originally agreed to let a locatee occupy and use a lot on the reserve cannot mean, in my understanding of the whole of the

Act, that the Band has implicitly abandoned the right it has under subsection 28 (2) to control the use of the lot by a non-member of the Band" (*Tsartlip Indian Band v. Canada* 1999 172 FTR 160, para 56). In this case, then, the court ruled that the Minister did not adequately address the concerns of the band council, and therefore the lease made under section 58(3) was null and void. This decision once again highlights the uncertainty stemming from dual control. Under the *Tsartlip* doctrine, apparently a band council can overturn a lease made in good faith by a CP holder and approved by the Minister. The net result would appear to be reduced security of expectations and increased time and expense involved in negotiating business arrangements involving CP land. This particular problem could be overcome by developing a land code under the FNLMA, which would eliminate the need for ministerial approval of leases.

Governing these three leasing arrangements is the case *of Surrey v. Peace Arch Ent. Ltd.* (1970), in which the British Columbia Court of Appeal ruled that Indian land could only be leased through a government official. In other words, the band council or individual Indians wishing to lease reserve land cannot do so themselves. Rather, they must obtain the approval of the federal government.

Conclusions

Aboriginal leaders declare consistently and repeatedly—and it was crystal clear in the *Report of the Royal Commission on Aboriginal Peoples*—that they want to participate in the economy, capitalize on their resources, create jobs for their people—in a word, to make profits. However, agreement on this long-term goal leaves many questions to be answered. What are the most effective means by which aboriginal people can participate in the market economy? Here history and economics coincide to provide guidance. Markets work best when property is privately owned. As Friedrich Hayek taught us, the market is a process for bringing together knowledge dispersed among individual human beings. The process functions most effectively when control over resources is also dispersed. Government ownership is too sluggish, and too influenced by perverse political incentives, for it to be effective in a market economy. Western nations have largely learned this lesson through failed experiments in socialism; hence the great wave of privatization marking the end of the twentieth century.

First Nations in Canada now have collective property rights to a substantial amount of land. Reserves total more than 2.7 million hectares, more than four times the size of Prince Edward Island, in addition to which a large amount of land in the north is subject to a variety of co-management rights (Federal Department of Indian Affairs and Northern Development, 2002). These totals are growing over time as aboriginal and treaty claims are settled. This should be good news for aboriginal people. But in our view, these large amounts of land, with their attendant natural resources, will never yield their maximum benefit to Canada's native people as long as they are held as collective property subject to political management. (Although it would be a topic for another paper, we would also suggest that provincial and federal ownership of Canada's land and natural resources has been a drag on the whole country's economic development.) The small governments of First Nations are just as subject to perverse economic incentives as are the large governments of Canada and the provinces.

We do not have a sweeping proposal for the privatization of the First Nations land base. It is effectively the property of the First Nations, though legally owned by the Crown, and they will have to decide what to do with it. But the conclusion reached by economics and political science, and the evidence of history, indicates that, in the long

run, collective property is the path of poverty, and private property is the path of prosperity. If First Nations want prosperity by participating in a modern economy, they have to give thought to enhancing private property rights in the substantial land base they now control.

As shown above, four different but overlapping regimes of private-property rights—customary rights, certificates of possession, land codes under the First Nations Land Management Act, and leases—already exist on reserves across Canada, as do several unique regimes, such as the Sechelt and Nisga'a cases (Ministry of the Attorney General, 2002). These various regimes are worthy of serious study by economists, lawyers, and political scientists with a view to establishing how well they work and how they might be perfected for the benefit of First Nations people. There is no single model of property rights. The fee simple model that works well for most Canadians will not be appropriate for reserve lands as long as residents wish to ensure that they remain preserved for future generations of their people. On the other hand, even if it is the universal wish of aboriginal people, insistence that reserves must be protected from alienation cannot help but lower their value in the land market because it ensures that many potentially profitable transactions cannot be concluded. But even within that constraint, human ingenuity can discover ways of making these rights more conducive to the security and prosperity of those who live in First Nations communities. Below we offer some observations based on our fieldwork and survey of the legislation and case law:

1. Customary property rights may have been adequate when reserve populations were small and the reserves were largely isolated from the rest of society, but they are a shaky base for participating in a modern economy where boundaries need to be clearly defined, land may need to be transferred from one user to another in order to realize its value, and investors require security. Customary rights will eventually have to be formalized on many reserves, just as American and Canadian governments formalized the land titles of frontier squatters. One particularly pressing need is to create neutral tribunals to take dispute resolution out of the political hands of chief and council.

2. Leases can work effectively to create tradable property rights, but they can also lead to difficulties, as were evident in the Musqueam case. Joint economic and legal research might help to perfect lease instruments and associated policies dealing with taxation and by-laws.

3. In various circumstances, both leases and CPs have suffered from the uncertainty caused by the dual decision-making power of the Department of Indian Affairs and of band councils, often harming third parties who thought they had entered into valid agreements only to find them no longer enforceable. Transfer of decision-making power to band authorities under the FNLMA may eventually resolve such problems, but smaller and poorer reserves may never be able to afford to opt into the FNLMA. In the meantime, amendments to the Indian Act might help to reduce the damage to third parties who now get caught in conflicts between the department and band councils.

4. Private property rights on reserves are a useful instrument but not a magic wand. Even when progress is made, many problems remain because of the small size and relative poverty of most Indian communities. One problems is that when CPs are extensive on a reserve, a small number of owners may become quite wealthy by leasing their land rights, while the majority of band members

may be left living on the minority of reserve land that is still communally owned. Another is that after CPs and customary rights have been leveraged to obtain mortgages for privately owned housing, it may be difficult to get residents to make regular payments. Smaller and poorer reserves may never be able to afford to take advantage of the FNLMA. And so on. Being aware of these and other problems, we do not present private property rights as a panacea for all the economic and social ills of native communities. Nonetheless, their intelligent application will help many reserve residents obtain better housing and business opportunities while remaining connected to their ancestral communities.

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