

CHAPTER 3

Rights to Land



This “Medeek Pole”, carved by Gitksan Carver, Randy Stephens, from Gitanmaax. This piece, tells of one of the retribution trip up the Skeena River, which involved the Eagle People form the Land of Coor. This piece resides in the boardroom of the Skeena Native Development Society.

**CAN FIRST NATIONS BE “MASTERS IN THEIR OWN HOUSE”
UNDER THE INDIAN ACT?**

Introduction

We have earlier argued the need for First Nations to be “masters in their own house” in order to facilitate prosperity and cultural well-being (see Chapter 1). A fundamental aspect of such mastery is for First Nations to be in complete control of the use and development of their own lands. As far as we are concerned, the full achievement of such mastery would require nothing less than legal ownership of the land base (as has already been achieved by the Sechelt Indian Band under its self-government legislation and the Nisga’a Nation by treaty). But we also recognize that becoming “masters in our own house” in this context is most likely to be a journey, a journey of incremental steps. So, in this Chapter, we ask ourselves the question: to what extent can this objective be attained under the *Indian Act* and, short of full transfer of the legal title, what other legislative mechanisms are available?

(i) **Indian Act**

The pertinent provisions of the *Indian Act* are sections 53, 60, 69, 81 and 83. We will examine each in turn.

(a) **Section 53(1)**

This subsection provides as follows:

The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

- (a) manage or sell absolutely surrendered lands; or
- (b) manage, lease or carry out any transaction affecting designated lands.¹

¹ *Indian Act*, R.S.C. 1985, c.I-5, s.53(1).

The first appointment of First Nations representatives "...by the Minister for the purpose"² was in July 1974 when the then Minister of Indian Affairs appointed the Sechelt Band Council to manage all surrendered Sechelt lands. This was at a time when there was no designation process, and the subject lands were those that had been conditionally surrendered for leasing purposes. A few months later, in November, this authorization was significantly expanded when four Sechelt Band members were appointed as Agents of the Crown for the purpose of directly signing leases arising from an 80 lot subdivision on one of their Reserves. The Sechelt Band thereafter pressed the Department of Indian Affairs to expand this subsection 53(1) signing authority to cover all its leases. It eventually prevailed in February 1978 when it was delegated the authority to manage and lease its surrendered lands "with the same authority as the Director General for the B.C. Region of the Department of Indian Affairs and Northern Development may have from time to time with respect to the signing of agricultural, commercial, industrial and residential leases, permits and assignments...".³ What nobody realized at the time was that this represented the zenith of delegations under subsection 53(1); no other First Nation subsequently achieved this level of authority.

Other First Nations sought powers under subsection 53(1) similar to those delegated to Sechelt. It was a losing battle. In November 1983, the Special Steering Committee, comprising representatives from the Kamloops, Kitamaat, Sechelt and Westbank First Nations and the Central Interior Tribal Council, submitted a brief to the Department of Indian Affairs entitled: "A Review of Land Management and Development Policies Affecting Indian Reserve Lands in British Columbia". Whilst noting that the Musqueam and Westbank First Nations had at least succeeded in obtaining subsection 53(1) delegations, the brief bemoaned the fact of these authorities being less than had been asked for. Musqueam and Westbank

² *Ibid.*

³ Honourable Hugh Faulkner, Minister of Indian Affairs and Northern Development. Letter to Sechelt Chief and Council, February 1978, as quoted in the Special Steering Committee, "A Review of Land Management and Development Policies affecting Indian Reserve lands in British Columbia", November 21, 1983: p.4.

had expected that they could receive a level of authority equivalent to Sechelt's. Instead, Departmental officials unilaterally imposed a 21 year limitation on the agreements that could be signed by Band Council appointees. This made nonsense of the delegation because neither Musqueam nor Westbank had lease agreements of such short duration. Attempting to explain his Department's reasons for this, the Minister of Indian Affairs then in office is quoted in the brief as having written:

The decision to place a 21 year limitation on alienations of reserve land under delegated authority was arrived at for policy reasons. I recognize that this limitation was not imposed on the Sechelt Band when it received delegation of land management authority in 1974. The Sechelt Band was the first Band to receive comprehensive authority to manage its own lands, and at that time the Department had not fully thought through the implications of such delegation. In the intervening years it has become clear that, in delegating his land management authorities to Bands, the Minister of Indian Affairs does not divest himself of his statutory responsibilities for the management of reserve lands. The whole concept of a continuing responsibility has been brought into focus in the last six or seven years in a number of court cases which have raised this issue. I hope you can therefore appreciate why the Department considers some safeguards necessary where long-term alienations of reserve lands are contemplated.⁴

Significant restrictions on the delegated authority remain in effect. For example, Directive 11-02 of Chapter 11 of the INAC Land Management Manual requires the following conditions to be incorporated in both section 53 and 60 delegations:

- The form and terms of every lease, permit or other instrument shall be pre-approved by the Department of Indian Affairs and Northern Development
- The exercise of the authority must be in accordance with all

⁴ Honourable John Munro, Minister of Indian Affairs and Northern Development. Letter to the Alliance of the Musqueam, Sechelt, Squamish and Westbank Bands, undated, as quoted in the Special Steering Committee Review, supra at note 3, p.5.

relevant Departmental policies and procedures

- All leases or permits for terms of more than 5 years shall contain a periodic fee or rent review clause.⁵

This is an oppressive list, the last point in particular being one of the principal causes of mortgaging difficulty on reserve. In addition, a First Nation interested in receiving these delegated powers will face a nightmarish funding formula, one favouring volume over complexity. And, if it still can see its way clear to joining the only two successful section 53/60 applicants, it will be saddled with monitoring and reporting requirements that are little short of stifling.

It is thus hardly surprising that such a circumscribed authority has attracted little response among First Nations. Nearly 30 years after the Sechelt delegation there are only three First Nations in British Columbia, Kamloops, Musqueam and Westbank, that have been delegated subsection 53(1) authority. Throughout the whole of Canada, we know of no more than 14 communities, including the British Columbian ones, having this authority. And, just as the policy frustrations attendant upon its land management powers were a major impetus towards Sechelt self-government, so is it illustrative to note that both Musqueam and Westbank were among the original group of First Nations proceeding under the *First Nations Land Management Act*. It is clear that delegated authority under subsection 53(1), given the Department's policy restrictions, is not a viable mechanism for functioning as "Masters in our own house".

(b) Section 60(1)

This subsection provides as follows:

The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by the Band as the Governor in Council

⁵ Department of Indian Affairs and Northern Development, *INAC Land Management Manual*, drafted October 10, 1997.

considers desirable.⁶

The history of this provision is even more convoluted and disappointing than that of subsection 53(1). Again it was the Sechelt Band, in April 1973, that first applied to assume “control and management over lands in the reserve”.⁷ This was taken by Sechelt to mean its Reserve lands that had not been conditionally surrendered, and this interpretation has been solidified in the recent definition of “reserve” in the *Indian Act* that specifically excludes designated lands from the ambit of section 60. The Departments of Indian Affairs and Justice experienced considerable difficulty in responding to this application, and this was reflected in the Submission to the respective Ministers by The Alliance of the Musqueam, Sechelt and Squamish Bands in 1975:

Regrettably, the necessary Order in Council has still not been adopted (nearly two years after the original application) on account of quite extraordinary confusion within the two Departments as to what Section 60(1) involves. At different times, the Band has been advised that Section 60 applied to surrendered lands as well as unsurrendered; that a Band request to the Governor in Council by referendum or any other method would be superfluous; that an Order in Council was not required in order to delegate power of control and management over unsurrendered lands, etc.

We three Bands of The Alliance would all be interested in assuming the control and management of lands occupied by our respective Bands. However, in view of the Sechelt Band’s experience, we feel justified in first urging the two Departments to clearly formulate Federal Government policy relating to the takeover of such powers.⁸

Subsequent pressure, involving personal negotiations with no less than four Ministers of Indian Affairs, finally resulted in Order in

⁵ Department of Indian Affairs and Northern Development, *INAC Land Management Manual*, drafted October 10, 1997.

⁶ *Indian Act*, *supra* at note 1, s.60(1).

⁷ *Ibid.*

⁸ The Alliance “*Submission to the Minister of Justice and Minister of Indian Affairs*”, February 1975: p.24.

Council P.C. 1977 –1391 granting the Sechelt Band specified management powers over its unsurrendered lands. However, when the Musqueam Band held a similar vote to request the Governor in Council to grant subsection 60(1) authority, it was met by Ottawa with a retroactively stipulated quorum requirement that Musqueam had not met. So the Musqueam Band never did attain subsection 60(1) powers. As the Chief of the time was quoted as wryly observing: "...it is easier for a Band to sell off all its lands than to assume control and management powers over them".⁹

Subsection 60(1) has attracted even less results than subsection 53(1), only the Kamloops and Westbank First Nations in British Columbia having succeeded in obtaining Orders in Council. Put another way, to the best of our knowledge not a single First Nation has successfully applied for section 60 authority in the past twenty years.

Hence, even though sections 53 and 60 are often spoken of as a package, they do in fact embrace quite different procedural and decision-making requirements. The additional complexity of attaining the latter has made it even less useful than subsection 53(1) for those First Nations trying to become "Masters in their own house".

(c) Section 69(1)

The right of a First Nation to collect its own revenues has long been debated. Subsection 69(1) provides:

The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.¹⁰

A majority of First Nations in British Columbia enjoy the right to control, manage and expend their own revenue monies pursuant to this provision. But does it give them the right to collect those rev-

⁹ *Special Steering Committee Review*, supra at note 3, p.4.

¹⁰ *Indian Act*, supra at note 1, s.69(1).

issues? As noted by The Alliance:

It appears to us that no single issue within the Department of Indian Affairs has created such a degree of internal dissension and contradictory interpretation as the question of whether the Section 69(1) phrasing “control, manage and expend” includes the right to collect revenue monies.¹¹

Throughout the early 1970s, the Community Affairs Section in Ottawa took the position that the right to collect was necessarily included within the other powers of subsection 69(1) whilst other INAC personnel were stating otherwise. Finally, in a letter to the Sechelt Band in 1974, the then Minister of Indian Affairs appeared to lay the matter to rest:

I am told by my Director of Legal Services that since the Sechelt Band has been authorized by the Governor in Council, pursuant to Section 69 of the *Indian Act*, to control, manage and expend its revenue monies, the Band can therefore collect the monies payable under the leases.¹²

The Alliance thereupon pressed the Minister to send a letter to all DIA offices confirming this interpretation in order to avoid future inconsistencies. It also proposed that procedures be uniformly instituted for those First Nations wishing to commence collection of their own revenues. All of this proceeded quite smoothly for nearly eight years with, by the estimate of the Special Steering Committee writing in November 1983, “more than a dozen Bands in British Columbia”¹³ having been authorized to collect their own revenues. But then Departmental resistance to Band collection re-surfaced. In a memorandum of October 19, 1982, the Director of Membership and Statutory Requirements Directorate in Ottawa indicated that a Band could only collect its own revenues when a lessee was prepared to pay it to them but, otherwise, the possibility of Band collection should be played down pending a new Program Circular on

¹¹ *The Alliance Submission*, *supra* at note 8, p.24.

¹² Honourable Judd Buchanan, Minister of Indian Affairs and Northern Development. *Letter to Sechelt Indian Band, November 29, 1974, as quoted in The Alliance Submission*, *supra* at note 8, p.25.

¹³ *Special Steering Committee Review*, *supra* at note 3, p.4.

the topic. The Special Steering Committee accordingly recommended: “That the Department should provide a clear statement concerning the right of Bands to collect their own revenue monies under section 69”.¹⁴ We can find no reference to this “clear statement” ever having been made, but it can be inferred from our experience that the right to collect under the *Indian Act* no longer exists as far as the Department is concerned.

It is self-evident that an entity that cannot even collect its own money can hardly claim mastery. The pendulum swings on this issue clearly demonstrate the complete control of the Department over the fundamentals of First Nations life. Departmental refusal to allow revenue collection by First Nations under the *Indian Act* is a major blow to any notion of being “Masters in our own house”.

(d) Section 81

This, and section 83, are provisions that have been enhanced in recent years to the benefit of First Nations, thus being in pleasant contradistinction to the sections previously examined. Since the by-law making powers provided for in subsection 81(1) are of immense relevance to the “masters in our own house” objective, they are reproduced in full:

The council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely,

- (a) to provide for the health of residents on the reserve and to prevent the spreading of contagious and infectious diseases;
- (b) the regulation of traffic;
- (c) the observance of law and order;
- (d) the prevention of disorderly conduct and nuisances;
- (e) the protection against and prevention of trespass by cattle and other domestic animals, the establishment of pounds, the appointment of pound-keepers, the

¹⁴ *Ibid.*, p.41.

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- regulation of their duties and the provision for fees and charges for their services;
- (f) the construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works;
 - (g) the dividing of the reserve or a portion thereof into zones and the prohibition of the construction or maintenance of any class of buildings or the carrying on of any class of business, trade or calling in any such zone;
 - (h) the regulation of the construction, repair and use of buildings, whether owned by the band or by individual members of the band;
 - (i) the survey and allotment of reserve lands among the members of the band and the establishment of a register of Certificates of Possession and Certificates of Occupation relating to allotments and the setting apart of reserve lands for common use, if authority therefor has been granted under section 60;
 - (j) the destruction and control of noxious weeds;
 - (k) the regulation of bee-keeping and poultry raising;
 - (l) the construction and regulation of the use of public wells, cisterns, reservoirs and other water supplies;
 - (m) the control and prohibition of public games, sports, races, athletic contests and other amusements;
 - (n) the regulation of the conduct and activities of hawkers, peddlers or others who enter the reserve to buy, sell or otherwise deal in wares or merchandise;
 - (o) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;
 - (p) the removal and punishment of persons trespassing on the reserve or frequenting the reserve for prohibited purposes;
 - (p.1) the residence of band members and other persons on the reserve;
 - (p.2) to provide for the rights of spouses or common-law partners and children who reside with members of the band on the reserve with respect to any matter in relation to which the council may make by-laws in respect of members of the band;
 - (p.3) to authorize the Minister to make payments out of capital or revenue moneys to persons

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- whose names were deleted from the Band List of the band;
- (p.4) to bring subsection 10(3) or 64.1(2) into effect in respect of the band;
 - (q) with respect to any matter arising out of or ancillary to the exercise of powers under this section; and
 - (r) the imposition on summary conviction of a fine not exceeding one thousand dollars or imprisonment for a term not exceeding thirty days, or both, for violation of a by-law made under this section.¹⁵

It will be noticed that several of the more significant by-law making powers refer to jurisdiction “in the reserve”.¹⁶ This was at one time an immense problem, bordering on national scandal.

The Alliance of the Musqueam, Sechelt and Squamish Bands first brought attention to the problem in their Submission of February, 1975. They referred to the decision of Corporation of Surrey et al. v. Peace Arch Enterprises Ltd. et al.¹⁷ in which the B.C. Court of Appeal had found that a conditional surrender did not have the effect of making the land cease to be “land reserved for the Indians” within the meaning of s.91(24) of the Constitution Act 1867. As a result, municipal zoning by-laws and provincial health regulations could not validly apply to such land as that would restrict the use of “land reserved for the Indians”. Since certain Department of Justice lawyers were at the time voicing the opinion that conditionally surrendered lands were not “reserve” within the meaning of the *Indian Act*, The Alliance sought Federal clarification of the ensuing regulatory situation. The response was quite prompt, a June 1975 Justice Department opinion that concluded: “...that bylaws made under Section 81 do not apply to lessees of surrendered lands”.¹⁸

In its 1983 report, the Special Steering Committee had posed the basic question: “Who can control the planning and development of

¹⁵ Indian Act, *supra* at note 1, s.81(1).

¹⁶ *Ibid.*, paragraphs (a), (g), (i), (n), (o), (p), (p.1), and (p.2).

¹⁷ (1970) 74 WWR 380.

¹⁸ Herbert M. Thornton, Department of Justice. Letter to The Alliance, June 1975, as quoted in the Special Steering Committee Review, *supra* at note 3, p.30.

Indian lands in British Columbia?”¹⁹ The answer was a wretched one. Not the Province, not municipalities, not Band Councils and – eventually conceded by the Department of Justice – not even the Federal Government as there was no applicable legislation. The then Minister of Indian Affairs was obliged to acknowledge his concern about “this regulatory vacuum”.²⁰ Yet this vexing situation persisted for more than a decade after it had first been brought to light, causing First Nations to avoid conditional surrenders (and, hence, leasing) because of the regulatory anarchy that would be thereby precipitated.

Although many First Nations, and even the National Indian Brotherhood, lobbied for legislative change, it was the Kamloops Band, led by former Chief Manny Jules, that is principally credited with having solved the problem. Bill C-115, a package of amendments to the *Indian Act* that is often referred to as “The Kamloops Amendment”, was enacted in 1988. The critical amendment for the efficacy of section 81 was the re-defining of “reserve” to include conditionally surrendered or designated land (except for a few excluded sections that did not include 81). Thereafter the Band Council would be unequivocally able to pass any by-law under subsection 81(1) to take effect over all the Band lands, including conditionally surrendered or designated areas. This was a huge advance.

There remain two areas of concern about section 81 in terms of being “masters in our own house”. Firstly, section 82 requires all by-laws to be forwarded to the Minister of Indian Affairs who may disallow them within a 40 day period. Secondly, there are various provisions that need to be expanded for the purposes of effective governance (e.g. subsection 81(1)(h) leaves it unclear as to which governmental authority is to regulate the construction, repair and use of lessees’ buildings).

Despite the preceding cavils, subsection 81(1) is a valuable tool

¹⁹ *Special Steering Committee Review*, supra at note 3, p. 30.

²⁰ Honourable Judd Buchanan, Minister of Indian Affairs and Northern Development. Letter to The Alliance, November 1975, as quoted in the *Special Steering Committee Review*, supra at note 3, p.30.

towards achieving the “masters in our house” objective and, in our respectful view, its powers need to be more widely activated by First Nations. The adoption of rules, supported by legislative authority, will start to create the conditions of security and stability necessary for entrepreneurship to flourish.

(e) Section 83

Before the 1988 “Kamloops Amendment”²¹, a First Nation wishing to tax interests in its land would first have to be declared by the Governor in Council to have reached “an advanced stage of development”.²² Nobody knew what this requirement meant, and it was mercifully deleted as part of the amending package. Property taxation was the main focus of the “Kamloops Amendment”, and the current form of section 83, cited below, represents a significant overhaul of its predecessor:

83.(1) Money by-laws – Without prejudice to the powers conferred by section 81, the council of a band may, subject to the approval of the Minister, make by-laws for any or all of the following purposes, namely,

- (a) subject to subsections (2) and (3), taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve;
 - (a.1) the licensing of businesses, callings, trades and occupations;
- (b) the appropriation and expenditure of moneys of the band to defray band expenses;
- (c) the appointment of officials to conduct the business of the council, prescribing their duties and providing for their remuneration out of any moneys raised pursuant to paragraph (a);
- (d) the payment of remuneration, in such amount as may be approved by the Minister, to chiefs and councillors, out of any moneys raised pursuant to paragraph (a);

²¹ Indian Act, S.C. 1988, c.23, c.39, c.52, c.57.

²² Indian Act, R.S.C. 1970, c.I-6, s.83(1).

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- (e) the enforcement of payment of amounts that are payable pursuant to this section, including arrears and interest;
 - (e.1) the imposition and recovery of interest on amounts that are payable pursuant to this section, where those amounts are not paid before they are due, and the calculation of that interest;
 - (f) the raising of money from band members to support band projects; and
 - (g) with respect to any matter arising out of or ancillary to the exercise of powers under this section.
- (2) Restrictions on expenditures – An expenditure made out of moneys raised pursuant to subsection (1) must be so made under the authority of a by-law of the council of the band.
- (3) Appeals – A by-law made under paragraph 1(a) must provide an appeal procedure in respect of assessments made for the purposes of taxation under that paragraph.
- (4) Minister’s approval – The Minister may approve the whole or a part only of a by-law made under subsection (1).
- (5) Regulations re by-laws – The Governor in Council may make regulations respecting the exercise of the by-law making powers of bands under this section.
- (6) By-laws must be consistent with regulations – A by-law made under this section remains in force only to the extent that it is consistent with the regulations made under subsection (5).²³

Before 1988, the Department of Justice’s interpretation of “reserve” as not including conditionally surrendered lands effectively meant that leased Band lands could not be taxed by a Band Council; they would not be “in the reserve”. In the meantime, the Province of British Columbia and various municipalities taxed those interests without, in many cases, providing corresponding services. This was a state of affairs that obviously engendered constant aggravation for First Nations. In May 1980, various native leaders

²³ *Indian Act*, *supra* at note 1, s.83(1).

joined with Federal and Provincial representatives to form the Tripartite Local Government Committee, charged with developing proposals to provide for a more effective taxation/servicing regime on British Columbian Reserves that would recognize First Nations' jurisdiction. Among the recommendations in its 1981 Report, the Tripartite Committee called for Federal legislation that would, among other things: "...abolish the distinction between reserve lands and lands released for a term but not permanently and irrevocably alienated and disposed of".²⁴ This recommendation was duly achieved, seven years later, by the previously described amendment of the definition of "reserve" in the *Indian Act*. It was thereafter clear that the amended section 83 provided for the taxation of interests in land that included conditionally surrendered or designated areas.

Property taxation among First Nations is a widely exercised power. We understand that more than 10% of First Nation communities in Canada have adopted taxation bylaws. The percentage is more impressive in British Columbia where 53 First Nations, more than 25% of the total, are functioning under section 83 authority. Without doubt, this ability to raise taxation revenue from their own lands, just like the Province or a municipality, is an important and unusually successful component of First Nations being "masters in our house".

In summary, the effect of "The Kamloops Amendment"²⁵ has been to enhance the jurisdiction of First Nations in the critical governance areas of law-making and property taxation. Should Bill C-7²⁶ become law, First Nations' law-making powers would be further strengthened. But the landlord side of things under the *Indian Act* falls considerably short of being "Masters in our own house", being substantially dominated by Departmental authority and policies. Our overall conclusion is that an *Indian Act* Band, despite recent gains in law-making and property taxation jurisdiction, would remain frustrated and incapable of becoming "master in its own house" under the current legislation.

²⁴ "Report of the Tripartite Local Government Committee respecting Indian Local Government in British Columbia", August 1981: p.26.

²⁵ *Indian Act*, supra at note 21.

²⁶ Bill C-7, "*First Nations Governance Act*", 2nd Session, 37th Parliament, 2002 (First Reading, October 9, 2002).

(ii) First Nations Land Management Act²⁷

This legislation represents a significant step forward for those First Nations intent on achieving considerably more authority over their land management programs than is afforded by the *Indian Act*. We discuss the scheme of this *Act* in Chapter 3. Suffice it to note, by way of conclusion to the preceding discussion, that, once a First Nation's Land Code is in effect, sections 18 – 20, 22 – 28, 30 – 35, 37 – 41, 49, 50(4), 53 – 60, 66, 69, 71 and 93 of the *Indian Act* cease to apply. This means that the various limitations that we have canvassed concerning sections 53, 60 and 69, as well as the oppressiveness of the designation process, have evaporated. A First Nation having an effective Land Code will thenceforth be able to manage all its lands and collect all its revenues without regard to INAC controls and policy, a significant liberation.

Conclusion

Does the availability of the *First Nations Land Management Act* mean that any First Nation having a Land Code thereunder has become, in our view, “master in its own house” when it comes to land rights?” We submit that two further tests remain, one that is fundamental, the other optional.

First, we view the availability of individual property rights as being a fundamental requirement for a market economy. Transcribed to the reserve setting, we would expect to see First Nations having the power to grant individual property rights if they choose to do so. That choice, of course, requires what Professor Stephen Cornell has described as a “cultural match”²⁸ (see Chapter 2). Some First Nations may want to develop their economies through individual development; others might prefer a collective approach. But, to us, the key remains: Can a First Nation grant individual property rights if it chooses to do so? The answer to this question has occupied a great deal of our time, and our resultant analysis is to be found in this Chapter.

²⁷ “*First Nations Land Management Act*”, S.C. 1999, c.24.

²⁸ Stephen Cornell and Joseph P. Kalt, “*Sovereignty and Nation-building: The development challenge in Indian country today*”. Published by the Harvard Project on American Indian Economic Development, undated, p.12.

Second, we have noted already that both the Nisga'a and Sechelt took title to their lands from Her Majesty the Queen. They wanted to end the reserve system so they insisted upon this final step. For us, as stated at the outset, this is what being "masters in our own house" really means. Under the *First Nations Land Management Act*, by way of contrast, Her Majesty will continue to hold title to the subject lands. Is this compatible with being "masters in our own house?" Only in the sense that having your own Land Code represents an important step on the journey. An effective FNLMA Land Code will provide a lot of the tools necessary for mastery, and we see virtue in incremental progress. As noted by Hernando de Soto in The Mystery of Capital:

...that key process was not deliberately set up to create capital but for the more mundane purpose of protecting property ownership. As the property systems of Western nations grew, they developed, imperceptibly, a variety of mechanisms that gradually combined into a process that churned out capital as never before. Although we use these mechanisms all the time, we do not realize that they have capital-generating functions because they do not wear that label. We view them as parts of the system that protects property, not as interlocking mechanisms for fixing the economic potential of an asset in such a way that it can be converted into capital. What creates capital in the West, in other words, is an implicit process buried in the intricacies of its formal property systems.²⁹

Moreover, almost all the benefits of leasing can be achieved under the *First Nations Land Management Act* (perhaps the only deficiency would be the inability to register those transactions provincially). Maintaining the integrity of the land base while deriving economic benefit from letting others use it for agreed periods of time is a well-established practice. It is only the rigidity and timidity of INAC that has prevented reserve leasing from displaying its full merit. Freed from these constraints, the *First Nations Land Management Act* First Nations will be able to offer leases that compete commercially. The "variety of mechanisms"³⁰ referred to by de Soto can indeed emerge from a properly constructed Land Code. Hence, although there is little doubt that taking title from Her Majesty the Queen should be viewed as the overwhelmingly desirable end, there is enough power already legislatively available to let mastery begin.

²⁹ Hernando de Soto, "The Mystery of Capital". (New York: Basic Books, 2000), 46.

³⁰ *Ibid.*

INDIVIDUAL PROPERTY RIGHTS UNDER
THE INDIAN ACT AND OTHER LEGISLATION

In the previous document, we proposed that a test for mastery would be the ability of the First Nations government to grant individual property rights if its community found that to be a “cultural match”.¹ Hence, the choice of collective or individual property rights will always be that of the individual First Nation but, from our point of view, it is essential that the choice be actually and fundamentally available. So, in this Chapter, we are attempting to analyze the extent to which individual property rights either do exist on-reserve or could be made available. We have confined this review to British Columbia, focusing particularly on the *Indian Act*² land regime but also examining individual property rights under other legislation.

Our discussion is divided into three sections. In the first, we summarize individual property rights under the *Indian Act* and discuss: (i) Certificates of Possession; (ii) the impact of the Boyer³ decision on such interests; (iii) post-Boyer analysis; and (iv) the introduction of administrative law considerations by the Tsartlip⁴ decision. In the second section, we summarize individual property rights on Indian lands outside of the *Indian Act* and review: (i) customary holdings on reserve; (ii) the *Sechelt Indian Band Self-Government Act*;⁵ (iii) property rights under the proposed Westbank First Nation Self-Government Agreement⁶; (iv) property rights under the Nisga’a Treaty,⁷ and (v) the impact of the *First Nations Land Management Act*.⁸ In our final section, we undertake a discussion as to the extent to which the property rights presently available will satisfy the stakeholder interests in prosperity and cultural well-being in the First Nations community.

¹ Chapter 2, p. 28 and Chapter 3, p. 61

² *Indian Act*, R.S.C. 1985, c.1-5.

³ *Boyer v. Canada and 488619 Ontario Inc.*, [1986] 4 CNLR 53.

⁴ *Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2000] 3 CNLR 386.

⁵ *Sechelt Indian Band Self-Government Act*, S.C. 1986, c.27.

⁶ *Westbank First Nation Self-Government Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation, Initialled by Negotiators*, July 6, 2000.

⁷ *The Nisga’a Final Agreement as enacted by The Nisga’a Final Agreement Act*, S.C. 2000, c.7, and *The Nisga’a Final Agreement Act*, S.B.C. 1999, c.2.

⁸ *First Nations Land Management Act*, S.C. 1999, c.24.

Individual Property Rights under the Indian Act

(i) Certificates of Possession

The fundamental scheme for affording individual property interests to Band members is provided for in section 20:

- 20(1) No 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.
- (2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein....⁹

A provision of lesser importance is that found in subsection 20(3) deeming the holder of a Location Ticket under the *Indian Act, 1880* to be lawfully in possession of the subject land and to hold a Certificate of Possession with respect to it. (from this earlier system arose the colloquial practice of referring to holders of Certificates of Possession as “locatees”). The Minister may also, pursuant to subsection 20(5), issue a Certificate of Occupation, being a short-term right of occupation whilst the application for a Certificate of Possession is being reviewed. In our experience, Certificates of Occupation are rare.

In addition to the Certificates provided for in the *Indian Act*, we understand that the Department of Indian Affairs maintains what it calls a “cardex holdings” system. This is the Department’s way of recording section 20 allotments until a proper legal description is available. Apparently at such time as a legal survey for registration purposes has been completed, the cardex can be changed to a Certificate of Possession. According to our information, cardex holders are recognized by the Department as having the same possessory rights as Certificate of Possession holders.

Finally, we note section 22 which provides:

Where an Indian who is in possession of lands at the time they are includ-

⁹ *Indian Act, supra at note 2, s.20.*

ed in a reserve made permanent improvements thereon before that time, he shall be deemed to be in lawful possession of those lands at the time they are included.¹⁰

For the purposes of this Chapter, we are not concerning ourselves with questions arising from the validity of issuance of Certificates of Possession. We use as our starting-point the valid holding of such a document by an individual Band member. Our concern is more substantive: what rights does that valid holder get?

The difficulty of the question was strikingly conveyed by Mr. Justice Pratte in the 1984 Federal Court of Appeal decision in Prnovost v. Minister of Indian and Northern Affairs where he said:

The exact legal nature of the most complete right which an Indian may hold over land located on a reserve is extremely difficult, if not impossible, to determine precisely, for the obvious reason that it is a right which has never been defined or described in terms of the usual concepts of the ordinary law, especially not those of the civil law. At most one may speak of an analogy with the traditional institutions of the Quebec Code, and even then one should be extremely careful to avoid any doctrinal construct. The Act speaks of a right of “possession” which may be proven by a Certificate of Possession, taking the place of a real estate title: it speaks of a right which does not derive from that of an owner but which may nonetheless be transferred as such, both inter vivos and mortis causa, although such a transfer can only be fully effective after it has been approved by the Minister; and this hybrid right, which is both patrimonial and personal, is applied formally to the land by the Act without specifying what becomes of buildings or improvements on the land. It has been called a sui generis right: that is undoubtedly true, but what I wish to emphasize here is that this sui generis right defies any rational classification under our traditional property law. Reasoning as if this were not so, by applying general rules framed in terms of institutions developed in a totally different context, is extremely dangerous.¹¹

Nonetheless, despite Mr. Justice Pratte’s cautionary words, the Federal Court of Appeal was obliged, only two years later, to engage in a full-scale analysis of the rights of a Certificate of Possession holder when opposed by his

¹⁰ *Ibid.*, s.22.

¹¹ Prnovost v. Minister of Indian and Northern Affairs, [1984] 1 CNLR 51, 56.

Band. This was in Boyer.¹² Because reserve lands, under section 29 of the *Indian Act*, are not subject to seizure under legal process, a Certificate holder wishing to finance a development will invariably need to lease his/her holding. What happens if the Band Council then says no?

(ii) The Boyer Decision¹³

Boyer was an important decision that dominated until quite recently the thinking and practice concerning the rights of Certificate holders. It is also a particularly interesting decision, reflecting the philosophy and judicial approach of the time.

A member of the Batchewana Band of Ontario had been granted a Certificate of Possession. He applied to the Minister of Indian Affairs for the land to be leased to 488619 Ontario Inc. under the authority of subsection 58(3) which provides:

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.¹⁴

The Minister granted the lease whereupon the Band sought a declaration that it was void as neither the Band nor Band Council had consented to it. At the outset, Mr. Justice Marceau remarked on the deceptive simplicity of the issue before the court:

Its scope and difficulty are not immediately apparent, since it presents no real problem as to the facts and involves the construction of only one short subsection of the Act. It so happens, however, that the provision contained in that subsection is not only fundamental from a practical point of view, but it concerns one of the main features of the legislative scheme adopted in the Act and quite surprisingly it has, apparently, never been scrutinized yet by any judicial authority.¹⁵

Although reported last, we begin with the judgment of Mr. Justice MacGuigan, something of a philosophical dissertation by a former Federal

¹² Boyer, *supra* at note 3.

¹³ *Ibid.*

¹⁴ *Indian Act*, *supra* at note 2, s.58(3).

¹⁵ Boyer, *supra* at note 3, 54.

Minister of Justice and Professor of Law. He described the issue in these words:

This case embodies a new version of the age-old problem of the person and the state, as particularized in the microcosm of an Indian community under the Indian Act...¹⁶

He considered the appellants to be “entirely right” in contending that the words of section 58 could not be interpreted outside of the context of the *Indian Act* as a whole. And, in the submission of the appellants, that statute set forth the fundamental principle that an Indian Reserve must be preserved intact for the whole Band, regardless of the wishes of any individual member concerning the disposition of his allotment. Thus, if the Crown and the locatee were able to bypass the Band Council in all circumstances, the former would not be able to fulfill its fiduciary duty to the whole Band, thereby failing to protect “the Indian collectivity”. Moreover, the appellants took the position that the spirit of native culture is a communal rather than an individualistic one and, in consequence, the *Indian Act* should be interpreted to reflect this as much as possible. In his analysis of these submissions, Mr. Justice MacGuigan said:

The limitations on individual Indians, in favour of the collectivity, are well set out by Judson J., for the majority in R. v. Devereux, [1965] S.C.R. 567, 572, a decision on which the appellants rely:

The scheme of the Indian Act is to maintain intact for bands of Indians, reserves set apart for them regardless of the wishes of any individual Indian to alienate for his own benefit any portion of the reserve of which he may be a locatee. This is provided for by s. 28(1) of the Act. If s. 31 were restricted as to lands of which there is a locatee to actions brought at the instance of the locatee, agreements void under s. 28(1) by a locatee with a non-Indian in the alienation of reserve land would be effective and the whole scheme of the Act would be frustrated.

Reserve lands are set apart for and inalienable by the band and its members apart from express statutory provisions even when allocated to individual Indians. By definition

¹⁶ *Ibid.*, 62.

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(s.2(1)(o)) “reserve” means

a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band.

By s. 2(1)(a), “band” means a body of Indians

(i) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart....

By s. 18, reserves are to be held for the use and benefit of Indians. They are not subject to seizure under legal process (s. 29). By s. 37, they cannot be sold, alienated, leased or otherwise disposed of, except where the Act specifically provides, until they have been surrendered to the Crown by the band for whose use and benefit in common the reserve was set apart. There is no right to possession and occupation acquired by devise or descent in a person who is not entitled to reside on the reserve (s. 50, subs. (1)).

One of the exceptions is that the Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered (s. 58(3))....

(Emphasis added).

However, even in the course of this analysis, which might otherwise support the appellants’ case, Judson J., describes the subsection in question here, 58(3), as an “exception” to the generally communal approach. Admittedly, it was used in the Devereux case to grant a lease for land that had been cultivated and used, so that the conclusion, which I take to be a judgment on fact and law together, is not a binding precedent; but its reasoning is nevertheless not helpful to the appellants in the final analysis, nor is the scheme of the statute itself in any way decisive in the appellants’ favour.¹⁷

¹⁷ *Ibid.*, 63/64.

Having briefly canvassed the relevant statutory provisions and various authorities, Mr. Justice MacGuigan concluded that neither the scheme of the *Indian Act* nor the case law was decisive of the issue. He then embarked on a more broadly based view derived from general principles:

Should analogy then be drawn to the community principle or to the personal principle? In the absence of any clear guide from statute or precedent, a court must I believe look for guidance to the words in the preamble of the Constitution Act, 1867 that Canada is to have “a Constitution similar in principle to that of the United Kingdom”.

Rand J., made bold to say in Saumur v. City of Quebec and Attorney-General for Quebec, [1953] 2 S.C.R. 299, 329, that:

Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery.

Abbott J., went further in obiter dicta in Switzman v. Elbling and Attorney-General of Quebec, [1957] S.C.R. 285, 328:

Although it is not necessary, of course, to determine this question for purposes of the present appeal, the Canadian Constitution being declared to be similar in principle to that of the United Kingdom, I am also of opinion that as our constitutional Act now stands, Parliament itself could not abrogate this right of discussion and debate.

This is similar in approach to the Western tradition succinctly expressed by the French philosopher Jacques Maritain, in Man and the State (Chicago, University of Chicago Press, 1951), at page 13, “... man is by no means for the State. The State is for man”.¹⁸

Mr. Justice MacGuigan concluded that the freedom of the individual in Canada is prior to what he termed “... the exigencies of the community”.

¹⁸ *Ibid.*, 65.

Even where group rights are given priority, the Canadian Constitution has provided for them specifically. His consequent determination was as follows:

In sum, in the absence of legal provisions to the contrary, the interests of individual persons will be deemed to have precedence over collective rights. In the absence of law to the contrary, this must be as true of Indian Canadians as of others.¹⁹

Mr. Justice MacGuigan also rejected the appellants' contention that First Nations culture showed a preference for group rights, observing that there was no such evidence before the court and it was not a matter of which a court could simply take judicial notice. He concluded on a practical note: the Band Council's zoning powers under subsection 81(g), in his view, provided a sufficient protection for the concerns of the community as a whole. If the Batchewana Band Council had failed to exercise these powers, he saw no reason to create a broader alternative right.

In his judgment, Mr. Justice Marceau considered specifically this two-fold argument of the appellants: that Band Council consent would be required for a subsection 58(3) lease either by necessary implication resulting from the context or on account of the Crown's fiduciary duty towards the Band. He summarized the appellants' position:

Under the scheme of the Indian Act, say the appellants, the interest of a locatee ... in his or her parcel of reserve land, is subordinate to the communal interest of the Band itself, and the allocation of possessory rights to Band members does not suppress the recognized interest of the Band in the development of allotted lands; besides, the rule is that non-Indians cannot have possession of reserve lands unless these lands have been surrendered by the Band and except for a few limited purposes set out in the Act, the Minister is unable to authorize non-Indian use or occupation of reserve land without consent of the Band or its Council. If, they say, s. 58(3) was construed literally and made applicable to any land developed or undeveloped, those principles could be disregarded and the scheme of the Act itself would thereby be defeated....²⁰

Then Mr. Justice Marceau presented a comprehensive analysis of the indi-

¹⁹ *Ibid.*, 67.

²⁰ *Ibid.*, 59.

vidual rights of First Nations people in lawful possession:

I am afraid my understanding of the scheme of the Indian Act does not correspond totally with that of the appellants. I have already referred to a few sections of the Act where the words and expressions used in s. 58(3) are defined. It is in fact in these sections and a few others that the basic features of the legislation, with respect to reserve lands, are to be found. I see them as follows. The Band for whose use and benefit a “tract of land” has been set apart by Her Majesty no doubt has an interest in those lands, since it has the right to occupy and possess them. It is an interest which belongs to the Band as a collectivity, and the right to occupy and possess, of which it is comprised, is a collective right. This interest can be extinguished by a voluntary surrender by the Band to the Crown or by expropriation for a public purpose, but it cannot be alienated. The Band, however, acting through its Council, has the power to allot, with the approval of the Minister, parcels of land in its reserve to Band members. The right of a Band member in the piece of land which is allotted to him and of which he has “lawful possession”, although in principle irrevocable, is nevertheless subject to many formal limitations. The member 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). These are all undoubtedly limitations which make the right of the Indian in lawful possession very different from that of a common law owner in fee simple. But it must nevertheless be carefully noted that all of those limitations have the same goal: to prevent the purpose for which the lands have been set apart, i.e., the use of the Band and its members, from being defeated. None of them concerns the use to which the land may be put or the benefit that can be derived from it. The land being in the reserve, its use will, of course, always remain subject to provincial laws of general application and the zoning bylaws enacted by the Band Council, as for any land in any municipality where zoning bylaws are in force, but otherwise I do not see how or why the Indian in lawful possession of land in a reserve could be prevented from developing it as he wishes. There is nothing in the legislation that could be seen as “subjugating” his right to another right of the same type existing simultaneously in the Band Council. To me, the “allotment” of a piece of land in a reserve shifts the right to the use and benefit thereof from being the collective right of the Band to being the individual and personalized right of the locatee. The interest of the Band, in the technical and legal sense, has disappeared or is at least suspended. This being my understanding of the scheme of the Act, not only do I dis-

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agree with the contention that the principles embodied therein require that the words “with the consent of the Band” be read into the provision of s.58(3), I think that those principles would be frustrated by doing so.²¹

(emphasis added)

Having dealt so definitively with the appellants’ first contention, Mr. Justice Marceau gave comparatively short shrift to the second string of their bow, that of the Crown’s fiduciary obligation. In his opinion, the Crown, when acting under subsection 58(3), is under no fiduciary obligation to the Band. He thereupon concluded:

The conclusion to me is clear. Bearing in mind the structure of the Indian Act and the clear wording of s. 58(3) thereof, there is no basis for thinking that the Minister is required to secure the consent of the Band or the Band Council before executing a lease such as the one here in question. It seems that the Act which has been so much criticized for its paternalistic spirit has nevertheless seen fit to give the individual member of a Band a certain autonomy, a relative independence from the dicta of his Band Council, when it comes to the exercise of his entrepreneurship and the development of his land.²²

(iii) Post-Boyer analysis

In his paper Indian Control of Indian Lands,²³ Professor Douglas Sanders presented the view that a Band under the *Indian Act* had a choice as to whether to hold its lands collectively or individually. He first dealt with the former, the more universal perception of this landholding system. He commented:

Reserves are popularly understood to be communal lands, collectively held by the band as a whole. Indian rights are rights of collectivities. Indian rights are group rights, not the individualistic rights of the western legal tradition. In the words of title to Part II of the Constitution Act, 1982, they are the rights of “peoples”.²⁴

²¹ *Ibid.*, 59.

²² *Ibid.*, 61.

²³ Professor Douglas Sanders, Faculty of Law, University of British Columbia, “Indian Control of Indian Lands”, June 27, 1988.

²⁴ *Ibid.*, 11.

Then he remarked on subsection 58(3) as being “... an individualistic alternative to the surrender process”.²⁵ He noted subsection 18(2) which provides:

The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or failing agreement, as may be determined in such manner as the Minister may direct.²⁶

The fact that compensation is payable in these circumstances of expropriation, as also provided for in subsection 65(a), indicated to Professor Sanders a power merely paralleling that of other Canadian governments and not suggestive of any pattern of collective rights. He thus summarized:

Indian lands may be collectively held, but the Indian Act permits a band to decide what patterns of band and individual rights to Indian lands it wishes to allow. Once a decision to permit individual rights occurs, the band is limited in its options of control over those individual rights. It is not particularly helpful to describe Indian lands as communal or collective. They can be managed as a collective asset of the band or they can be wholly or partially assigned to individuals. The drafters of the Indian Act may have assumed that a pattern of individual rights would take over, but the Act does not compel an allotment process (as was compelled at one time in the United States).²⁷

Professor Sanders next reviewed other sections of the *Indian Act*. He noted that a Certificate of Possession can be terminated with the consent of the holder (section 27); that it can be transferred to another Band member with the consent of the holder and the Minister (section 24); and that it can be inherited with the consent of the Minister (section 49). He also referred to subsection 60(1) which provides as follows:

²⁵ *Ibid.*, 11.

²⁶ *Indian Act*, R.S.C. 1970, c. I-6, s.18(2).

²⁷ “*Indian Control of Indian Lands*”, *supra* at note 23, 11.

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The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.²⁸

This meant that such powers as to confirm allotments, approve transfers between Band members and permit devises could be delegated to a Band. In fact, the Sechelt Indian Band was granted all these powers (and others) in a 1977 delegation under subsection 60(1). In the opinion of Professor Sanders, the Federal Government considers itself unable to unreasonably withhold consent under these sections and would expect Bands having delegated powers to function likewise. However, we are unaware of this supposition having been put to the test, although we do know from Campbell v. Elliott²⁹ that Band Councils are under a general duty of fairness when dealing with the legal rights and interests of persons within the reach of their decision-making.

Another ostensibly far-reaching intrusion on individual rights was considered by Professor Sanders. This was subsection 38(1) which at that time provided:

A band may surrender to Her Majesty any right or interest of the Band and its members in a reserve.³⁰

On the face of it, this indicates what Professor Sanders called "... a victory of collective rights over individual rights".³¹ But the practice, as he noted (and we have certainly experienced the same ourselves) is that the holder of a Certificate of Possession which is about to be "surrendered", will be compensated, usually from the resulting revenues. We are unaware of any situation where this section has been used to dispossess a Certificate holder without compensation. Furthermore, although we have no direct experience of the practice, it may be that the rights of the Certificate holder "revive" at the end of a term surrender or designation.

²⁸ Indian Act, *supra* at note 26, s.60(1).

²⁹ Campbell v. Elliott et al. [1988] 4 CNLR 45.

³⁰ Indian Act, *supra* at note 26, s.38(1).

³¹ "Indian Control of Indian Lands", *supra* at note 23, 12.

After referring to the line of authorities dealing with individual holdings, Professor Sanders concluded:

None of the cases represent focused judicial analysis on the allotments or Certificates of Possession, but there is, nevertheless, a pattern of accepting these individual rights and giving force to them. The Boyer case is perhaps the strongest example of this pattern.

This analysis concludes that the Indian Act is not that unclear about the rights involved in a Certificate of Possession. Confusion has arisen because of the common understanding that reserves are systems of collective rights. The Indian Act, in fact, permits collective control and development of lands or individual/private control and development of lands.³²

Unfortunately, just as clarity was beginning to appear, Professor Sanders added another wrinkle in his paper The Present System of Land Ownership, in which he said:

The question of the private property character of an allotment is also raised by the provisions in the Indian Act which say that the allotment cannot be transferred or devised without the consent of the Minister. There are two ways of viewing this provision. The first sees the allotment in individual private property terms. The need for Ministerial consent may have been linked to the need to keep the land within the eligible group of band members (and not otherwise to detract from the private property character of the right). The federal government are of the view that consent to a transfer or devise cannot be unreasonably withheld - meaning that the norm is to treat the interest as transferable and devisable. But the provision can also be seen in collectivist terms. If we proceed from an assumption that reserve lands have a distinctive "collective" character, then the need for consent to transfer and devise can be seen as limiting the private property rights in an allotment to a life estate. In other words the norm is that the land comes back to the collectivity at the end of the life estate, with collective decision making on future rights and use. Consent to transfer and devise now becomes the exception, available for special circumstances.

Let me emphasize my assessment that the currently pervasive view of allotments as normally transferable and devisable is not dictated in any

³² *Ibid.*, 13.

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way by the provisions of the Indian Act. It only seems capable of being explained on the basis of standard notions of property rights in western law. The model is non-Indian individual title, not a notion of Indian land as collectively owned by an Indian band. The “collective” idea makes the life estate view more logical than the view of the allotment as normally transferable.

This analysis suggests that it is open to treat allotments as continuing, transferable titles or as life estates. If bands assume the power to approve transfers and devise (as they can under section 60), then the option to treat allotments as continuing or as life estates is with the band. We know that DIAND believes it does not have an option. And it seems that Bands do not see there being an option. But I repeat my conclusion that this question is left open by the Indian Act.

In any case, the Indian Act establishes a regime of individual private property by way of the allotment system. The Act leaves open the alternative possibilities that the rights are life estates or that the rights are normally transferable and devisable.³³

At one point, the Department of Justice viewed the locatee interest as a life estate. For example, a Department of Indian Affairs 1980 Program Circular provided the following information:

The Department of Justice considers that since a locatee’s interest in the land is a personal one, the term of any lease should not outlive his life interest.³⁴

That was written in support of the then prevailing policy restricting subsection 58(3) leases to 21 year terms. Now the cut-off point is 49 years without Band consent. But the rationale for the restriction appears to have changed. According to the Land Management Manual:

For practical purposes, a locatee lease with a very long term could be considered a way of bypassing the surrender or designation provisions of the Act. This would be especially true if the entire rent is payable in advance.

³³ Professor Douglas Sanders, University of British Columbia, “*The Present System of Land Ownership*”. Presented at the First Nations’ Land Ownership Conference, Justice Institute of British Columbia, September 29, 1988: p. 5-6.

³⁴ Department of Indian and Northern Affairs, *Program Circular H-7-L*, July 1, 1980, as quoted in the Special Steering Committee, “*A Review of Land Management and Development Policies Affecting Indian Reserve lands in British Columbia*”, November 21, 1983: p.12-13.

In recognition of this, **a referendum is required for leases more than 49 years.**³⁵

In fact, although Professor Sanders did raise an interesting issue, it is clear that the Department today does not regard Certificates of Possession as only having created life estates and, to the best of our knowledge, neither do the few First Nations enjoying subsection 60(1) authority. What we have seen though is the vulnerability of individual property rights to the changing approach in Departmental practice.

(iv) The Tsartlip decision³⁶

The Boyer decision was recently considered in 2000 by the Federal Court of Appeal in Tsartlip.

Certificates of Possession had been issued to five members of the Tsartlip Band and, on the authority of subsection 58(3), the Minister had granted a lease to a company wholly owned by those individuals for the purpose of developing one of the lots as a manufactured home park for non-Indians. The Band Council had made clear to the Department of Indian Affairs its opposition to the issuance of this lease. Reflecting Mr. Justice MacGuigan's remark in Boyer that "...it is highly material that the valid concerns of the Indian community against adverse land use are well protected by its powers under s.81(g)," ³⁷ the Band Council had even passed a zoning by-law. This by-law became legally effective on January 31, 1997, and its purpose and effect were described in the judgment:

[25] The by-law essentially designates the reserve as a Special Development Zone, and prohibits the use or development of reserve land for commercial activities that would substantially change or impact on land in the reserve, unless the Band Council approves such use or development as an appropriate use of land, with or without terms and conditions, after receiving an application from the proponent and advice from

³⁵ *Indian and Northern Affairs Canada, Land Management Manual. Directive 07-03 issued January 15, 1997, para. 13.*

³⁶ *Tsartlip, supra at note 4.*

³⁷ *Boyer, supra at note 3, 67.*

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a Zoning Advisory Committee. The by-law provides, *inter alia*, for non-conforming uses: a use of land that was lawful when the by-law came into force could be continued as a non-conforming use....³⁸

The locatees did not apply for approval under the by-law for their development. On March 21, 1997, the Band Council wrote to the Department summarizing the reasons why a lease should not be issued for the development. There were servicing concerns and issues arising from the fact that the whole development was the subject of litigation. But, for the purposes of this Chapter, the following reason was the pertinent one:

“...in considering the requested lease, DIAND should be balancing whatever duty it owes to the [Certificate of Possession] holders with its fiduciary duties to the Band as a whole. This development is contrary to the interests of the Band as a whole:

- (1) The development will cause harm to neighboring parts of the reserve, because of sewage and runoff problems.
- (2) The proponents have known from the beginning that they were going ahead contrary to the wishes of the community and the Chief and Council.
- (3) This development is not consistent with the Band’s most recent proposed community plan. That plan is now being reviewed. This development is large, and will have a big impact on other parts of the reserve. It should not be authorized until it is clear that it is consistent with sound planning and management of the reserve as a whole.
- (4) DIAND has for years been suggesting that the Band should be involved in planning and land management decisions for our reserve, through by-laws. We now have the Tsartlip Zoning By-law in place, which establishes a way to ensure that proposals like this one will be consistent with the interest of the whole Band. The proponents have not made application or received approval as required by that by-law. We want DIAND to respect and support our by-law.

³⁸ *Tsartlip*, *supra* at note 4, 393.

- (5) These last two matters are of special importance because our reserve was set aside *under Treaty*, as the village for the use of our Band's members.³⁹

This put the issue of community interest versus individual interest just about as clearly as could be. The Department responded on April 10, 1997:

I have difficulty accepting your premise that this development would be detrimental to the band as a whole. Section 58(3) of the *Indian Act* clearly allows the holder of a certificate of possession to lease his land, without the consent of the Council of the band. Recent jurisprudence has upheld this right. However, as a matter of policy, DIAND has sought the input of the Chief and Council to the proposed development on reserve.

Although DIAND does not condone the actions of the locatees in constructing a part of the proposed leasehold without the consent of either the council of the day or the department, we are of the view that the alternatives to this project are untenable. Specifically, the removal of the current development or continued existence of this development without a lease in place are not viable options. It is not the policy of the department to dictate the removal of what is considered to be a "buckshee" arrangement, where those individuals present are there with the consent of the locatees.⁴⁰

The lease was accordingly issued on May 1, 1997 but it was made to operate retroactively from April 1, 1996, thereby coming into effect before the zoning by-law.

Mr. Justice Décary, speaking for the Court, first expressed his view that the conclusion in Boyer that Her Majesty had no fiduciary duty to the Band "...has withstood the passage of time".⁴¹ But he then raised the prospect of applying the approach followed in administrative law whenever competing interests were at issue before a decision maker. He pointed out that the sole question before the Court in Boyer was whether or not the validity of the lease depended on the consent of the Band or its Council. That was a narrow issue, and Décary, J.A. commented:

³⁹ *Ibid.*, 394.

⁴⁰ *Tsartlip*, *supra* at note 4, 393.

⁴¹ *Ibid.*, 394.

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The question of allowing non-Indians to reside on the reserve was not raised. No by-law was in issue. The sole question before the Court was a question of principle: whether the consent of the Band was required by the statute or as an effect of a fiduciary obligation. No mention was made of a possible prejudice to the Band and the idea of an administrative law duty on the Minister to weigh the conflicting interests of the Band and the locatee was not mentioned nor explored.⁴²

He determined that the Court in Boyer had merely decided that the Band could not veto a subsection 58(3) lease; it had not ruled out the need for balancing the interests at stake prior to granting a lease. He considered this analysis to be compatible with the Department's policy of referring subsection 58(3) leases to Band Councils but not allowing them a veto. What considerations could emerge from the Band Council referral that would then cause the Minister to deny the lease? Or as Mr. Justice Décy expressed it:

The Minister, in deciding whether to lease or not, has a double duty, one to the individual holding the Certificate of Possession, the other to the band. There is no basis for the suggestion that one duty should necessarily prevail over the other in case of conflict. The question is to determine what considerations in a given case should lead the Minister to exercise his discretion in favour of one rather than in favour of the other.⁴³

(emphasis added)

The Court next reviewed the various provisions of the *Indian Act* that deal with the use of reserve land by non-Indians. It noted that, under subsection 28(1), "...a locatee cannot by lease or otherwise permit a non-band member to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve",⁴⁴ and any such permit would be void. If a non-Band member wished to exercise any such rights then, under subsection 28(2), it would require Ministerial authorization if for a period not exceeding one year and, for any period longer than that, the consent of the Band Council as well. Paragraph 46(1)(d) authorizes the Minister to declare the will of an Indian to be void if the Minister was satisfied that "the will purports to dispose of land in a reserve contrary to the interest of the band...".⁴⁵ Subsection 60(1)

⁴² *Ibid.*, 395.

⁴³ *Ibid.*, 398.

⁴⁴ *Ibid.*, 399.

⁴⁵ *Ibid.*, 402.

empowers the Governor in Council to grant a Band “the right to exercise such control and management over lands in the reserve ...as the Governor in Council considers desirable.”⁴⁶ And, finally, there is paragraph 59(a) which, in Mr. Justice Décarý’s interpretation, “requires the consent of the band council when the amount of the rent set out in a lease is to be reduced or adjusted”.⁴⁷ From this review, he concluded:

[55] The Act is therefore very much band-oriented where use of lands in the reserve is at issue and that is particularly so where lands in the reserve are to be occupied for a period exceeding one year by non-members of the band. The intent of Parliament, clearly, is to require the consent of the band council whenever a non-member of the band, and even more so a non-Indian, is to exercise any right on a reserve for a period longer than one year.

[56] It seems to me that subsection 58(3), which is found in that part of the Act which deals with “management of reserves”, has to be read and understood in such a way as not to conflict with the avowed intent of Parliament expressed in those parts of the Act which deal with the substantial rights of the Indians (as opposed to those parts which deal with the managerial rights of the Minister). 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. To find otherwise could lead, theoretically, to the Minister granting, for example, a 99-year lease under subsection 58(3) to the benefits of non-Indians, thereby displacing the other provisions of the Act.

[57] While Parliament, as found in *Boyer*, stayed shy of giving a veto power to band councils with respect to leases granted under subsection 58(3), the Minister is bound, in my view, to give more weight to the concerns of a band as one gets closer to the type of lease that would be subject to subsection 28(2). The more a lease operates to the substantial detriment of the band as a whole the more the Minister must pay attention to the concerns expressed by the band.⁴⁸

In this case, Band members had expressed opposition to the entry onto

⁴⁶ *Ibid.*, 402.

⁴⁷ *Ibid.*, 402.

⁴⁸ *Ibid.*, 402, 403.

reserve of non-native residents. The Court pointed out that the Minister had an obligation "...to satisfy himself that the concerns of the Band with respect to that long-term development which, they said, threatened their way of life *qua* Indian on their reserve, were unwarranted or were so minimal as compared to the benefits to the locatees as to warrant a conclusion that the lease should go ahead".⁴⁹ The Minister had failed to meet that burden. His Department's letter of April 10, 1997, referred to earlier, had merely stated: "I have difficulty accepting your premise that this development would be detrimental to the band as a whole."⁵⁰ Mr. Justice Décarý commented:

Such a general and condescending statement which ignores the basic fact that the proposed development was not for the benefit of the band, but for the benefit of non-Indians, and had both short-and long-term ramifications for the band as a whole, is evidence that the concerns of the Band were discarded without proper consideration. This is a fatal flaw in the decision of the Minister.⁵¹

The Court also determined that the Minister had dealt unreasonably with the Band's concerns about the development's water, sewer and stormwater systems. Another source of major concern to the Court was the retroactivity of the lease in these particular circumstances. Mr. Justice Décarý stated:

[62] ...The Minister knew, when it executed the lease on May 1, 1997 retroactive to April 1, 1996, that a zoning by-law had been passed by the Band Council on December 23, 1996. The Minister not only knew of the by-law, he also had refrained from disallowing it (see subsection 82(2) of the Act). The Minister knew that under the by-law the proposed development would need to be scrutinized by a zoning advisory committee and then approved by the Band Council, which approval was an unlikely event. He had to have known that in making the lease retroactive to a point in time prior to the coming into force of the by-law, the locatees could avail themselves of the non-conforming use clause of the by-law and proceed without the approval of the Band Council. The Minister had a policy, prior to granting a lease, to ask a band council to confirm that a proposed lease does not contravene zoning by-laws All the steps described in the documentation filed by the Minister with respect to applica-

⁴⁹ *Ibid.*, 403, 404.

⁵⁰ *Ibid.*, 404.

⁵¹ *Ibid.*, 404.

tions for lease point to a prospective approach and counsel for the Minister recognized at the hearing that no reference was made in the documentation to retroactive leases. The lease, furthermore, is written in terms that do not provide for the retroactive compliance by the lessee with its obligations under the lease nor for the retroactive approval by the Minister of any building, structure or other improvement constructed on the premises prior to the execution of the lease on May 1, 1997.

[63] While I need not decide here whether the Minister is legally entitled to grant a retroactive lease, the fact is that in a case such as this one, where the Minister owes a particularly onerous duty to the Band, the very concept of a lease exempted from compliance with a by-law because of its retroactivity simply does not make sense.⁵²

The Court concluded that, in all the circumstances, the Minister had not acted reasonably in granting the lease. He had failed to give proper consideration to “the major concerns voiced by the Band”.⁵³ The lease, as a result, was declared void and of no effect.

Although the Court had gone to some lengths to voice its approval of Boyer, we think that the introduction of administrative law considerations does tend to change the direction. There must surely be a restraining effect on the developmental activities of a Certificate holder when he/she knows: “The more a lease operates to the substantial detriment of the band as a whole the more the Minister must pay attention to the concerns expressed by the band”.⁵⁴ The benefits of certainty are eroded.

Individual Property Rights on Indian Lands Outside the Indian Act

We are aware of the following lands regimes in British Columbia that function outside of the *Indian Act*:

- (i) Customary holdings on reserve;
- (ii) Under the *Sechelt Indian Band Self-Government Act*;⁵⁵
- (iii) Under the proposed Westbank First Nation Self-Government

⁵² *Ibid.*, 404, 405.

⁵³ *Ibid.*, 405

⁵⁴ *Ibid.*, 403.

⁵⁵ *Sechelt Indian Band Self-Government Act*, *supra* at note 5.

- Agreement;⁵⁶
- (iv) Under the Nisga'a Treaty;⁵⁷
- (v) *First Nations Land Management Act*.⁵⁸

(i) Customary Holdings on Reserve

The Department's Land Management Manual states the following:

Certain First Nations do not subscribe to the allotment provisions of the *Indian Act*. Instead, these First Nations recognize traditional or customary holdings by individuals and grant "occupational rights at the pleasure of the First Nation council". The department does not administer these interests, which are not "lawful possession" under the Act.⁵⁹

Although this paragraph refers only to "Certain First Nations" as not subscribing to the allotment system of the *Indian Act*, it is our experience that non-compliance is a widespread and growing phenomenon. As the Department's policies increasingly depart from the realities of contemporary life, First Nations are working out their own practical accommodations. Land held individually under Band custom is well-recognized. What are called "buckshee" or "ad hoc" leases are prevalent (even though clearly void under subsection 28(1)). In a 1988 presentation to the Department of Indian Affairs, Professor Sanders had commented:

"Custom" systems of rights to reserve lands are very common, though they are outside the Indian Act and probably not enforceable in the courts. There are more "property rights" under "custom" systems than under the Indian Act system and more new "rights" are being established under "custom" systems than under the Indian Act system.

The regular courts have not, as yet, commented on "customary" rights. In Joe v. Findlay a judge seemed to accept the Squamish way of handling rights, though it had no basis in the Indian Act. In Campbell v. Cowichan a judge gave procedural rights to the holder of a custom or traditional allotment. So far the courts have not gone further.⁶⁰

⁵⁶ Westbank First Nation Self-Government Agreement, *supra* at note 6.

⁵⁷ The Nisga'a Final Agreement, *supra* at note 7.

⁵⁸ First Nations Land Management Act, *supra* at note 8.

⁵⁹ *Indian and Northern Affairs Canada*, Land Management Manual, Directive 03-02 issued July 9, 1999, para. 10.

⁶⁰ Professor Douglas Sanders, Faculty of Law, University of British Columbia, "Indian Control of Indian Lands". Presented to the Department of Indian Affairs, Ottawa, October 24, 1988: p.2.

Offering something of a closing editorial on the subject, he had further commented in his Indian Control of Indian Lands paper:

The legal hostility to the custom systems is a serious fault in the present legislation, for many of these custom systems are stable and accepted. Custom bands will not agree to any legal reforms which require that these systems be abandoned in favour of a new and improved Indian Act or Indian Lands Act.

Local control by custom systems is fully in accord with the stated policies of Indian leaders and federal politicians. The custom systems are signs of life in a body that many thought had become totally dependent on federal life support systems. The basic approach to the custom systems should be “hands off”. Government should be concerned with innovations which support such local control, not diminish it.⁶¹

In the decision of Lower Nicola Indian Band v. Trans-Canada Displays Ltd.⁶² “(T)he regular courts” finally got to comment on customary rights. Or, more precisely, it was Mr. Justice Smith of the British Columbia Supreme Court doing so.

The plaintiff Band had sought a declaration that the estate of a Band member had no interest in any lands on the Joeyaska Reserve despite the deceased’s claim to two parcels of land on the basis of traditional or customary use by his family. Although the facts were complex, Mr. Justice Smith had no difficulty in reaching the following conclusions:

The provisions of the (Indian) Act are clear and must be strictly applied. All Joeyaska Reserve lands are held in trust for the Band, for its members, subject to those lands which have been allotted by a BCR and Ministerial approval to individual members of the Band.
...Ownership of lands based on traditional or customary use of the land does not exist independent of interests created by the Act. Recognition of an individual’s traditional occupation of reserve lands does not create a legal interest or entitlement to those lands unless and until the requirements of the Act are met.⁶³

⁶¹ “Indian Control of Indian Lands”, *supra* at note 23, 22.

⁶² Lower Nicola Indian Band v. Trans-Canada Displays Ltd., [2002] 4 CNLR 185.

⁶³ *Ibid.*, 216.

He also noted that traditional or customary allocation of reserve lands had historically been for residential or agricultural purposes, not for the commercial purposes that were the subject of this dispute. If a Band Council did choose to acknowledge a traditional or customary allocation of lands to individuals, most probably for these limited purposes, it had “a governance responsibility” to establish a fair process for administering the claim. But this “fair process”, as stated above, would have to culminate in meeting the requirements of the *Indian Act*.

The courts certainly appear to be inclined to invoke the *Indian Act* when endeavouring to regularize these factual situations. For example, in Stoney Band v. Poucette⁶⁴, Mr. Justice Hutchinson of the Alberta Court of Queen’s Bench, whilst commenting, obiter, that an Indian can be in lawful possession without a Certificate of Possession, actually resolved the matter on the basis of section 22 of the *Indian Act* which provides:

Where an Indian who is in possession of lands at the time they are included in a reserve made permanent improvements thereon before that time, he shall be deemed to be in lawful possession of such lands at the time they are included.⁶⁵

And in George v. George,⁶⁶ the British Columbia Court of Appeal accepted the trial judge’s conclusion that the Minister had given approval to the allocation of land on Burrard I.R. No. 3 to the appellant “...although no record of the approval was located and a Certificate of Possession had never been issued”.⁶⁷ The fact that the appellant had signed an undertaking acknowledging that he was “lawfully entitled to possession of the land”⁶⁸ and his transferring this “right, title and interest”⁶⁹ to the Burrard Band for so long as his C.M.H.C. loan remained unpaid had led the trial judge to infer that the Band Council must have approved the allotment. Moreover, the trial judge also inferred that, because of the provisions for security contained in the C.M.H.C. loan documentation and the resultant issuance of funds, the

⁶⁴ Stoney Band v. Poucette, [1999] 3 CNLR 321.

⁶⁵ *Indian Act*, *supra* at note 2, s. 22.

⁶⁶ George v. George, [1997] 2 CNLR 62.

⁶⁷ *Ibid.*, 74.

⁶⁸ *Ibid.*, 65.

⁶⁹ *Ibid.*, 65.

Minister of Indian Affairs must have similarly approved the allotment. The Court of Appeal agreed, noting that the loan security provisions "...would be pointless unless both the Band Council and the Minister had given approval of the allotment of the property to the appellant".⁷⁰ But, with respect, this decision (which seems to rest on fiction) might suggest a different judicial approach. The court is here bending over backwards to effect justice by contriving regularity. It wished to acknowledge the individual's property rights and found a way to do so. Is this a possible direction for the future?

In summary, it is clear from all of the above decisions, including Lower Nicola Indian Band⁷¹, that the courts will be reluctant to support a claim for individual property rights that is outside the *Indian Act* or that cannot be brought within the statutory ambit.

Could a Band member claim possession of reserve land other than under the *Indian Act* (whether in fact or as determined in cases such as George⁷²) or by virtue of a customary holding? Probably the best source for this discussion is the four judgments that resulted from a dispute between Band member Robert Findlay and the Squamish Band Council. The first three of these judgments dealt with an attempt by Mr. Findlay to occupy certain Reserve land without Band Council consent.

In Joe v. Findlay,⁷³ the Squamish Band Council sought an interlocutory injunction restraining the defendant from residing upon one of the Squamish Band Reserves and requiring him to move certain chattels from that Reserve. The defendant argued that possession of reserve lands is in the Crown and, hence, a Band, without possession, could not bring an action for trespass. Mr. Justice Berger had no trouble in disposing of this argument. In his determination, if a Band can allot possession to a Band member, the Band must have possession in the first instance. He stated:

The scheme of the Act for the management of reserve lands by Indian bands would be impeded if such a fundamental legal remedy as ejection were not available to the band suing in its own behalf before the ordinary

⁷⁰ *Ibid.*, 74.

⁷¹ Lower Nicola Indian Band, *supra* at note 62.

⁷² George v. George, *supra* at note 66.

⁷³ Joe v. Findlay, (1978) 87 DLR (3d) 239.

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Courts of the Province.⁷⁴

The Band Council then sought a mandatory injunction to remove the defendant. In the second Joe v. Findlay,⁷⁵ Mr. Justice Wallace held that, since a Band Council has power to allot, it follows that it must have power to eject a person unlawfully attempting to acquire possession of any portion of a Reserve. He further held that the plaintiffs had a sufficient possessory interest in the unallotted lands occupied by the defendant to maintain an action for trespass against him. Although Mr. Findlay was entitled in common with all other Squamish Band members to the use and benefit of their Reserve lands, this did not carry with it the right to possession of any specific portion of the Reserve. That would have required a section 20 allotment and none had been made. Mr. Justice Wallace concluded:

I reject the submission that the respective rights of the parties should be determined in accord with common law principles applicable to tenants in common. It is my opinion that the respective interests of the parties are created by the Indian Act which is designed to further an overall policy, unique to the relationship of Government, Indian bands, members of such bands, and persons who are not Indians. Resort to authorities dealing with quite different relationships, in quite different circumstances, is of little assistance or relevance in construing and interpreting the provisions of the Indian Act.⁷⁶

He therefore granted the mandatory injunction. This decision was appealed to the British Columbia Court of Appeal. Speaking for the court, Mr. Justice Carrothers held that the use and benefit of reserve lands accrued to and came into existence as an enforceable right, subject to Ministerial consent, vested in the entire Band for which such reserve lands had been set apart. He summarized the position in these words:

The subsequent provisions of the statute relating to improvements on reserve lands and transfer of possession of reserve lands are consistent only with this right of use and benefit being exercised by the individual band member through an allotment to that individual band member of reserve land on the part of the band council, with the approval of the

⁷⁴ *Ibid.*, 242.

⁷⁵ Joe v. Findlay, [1981] 2 CNLR 58 (B.C.S.C.).

⁷⁶ *Ibid.*, 74.

Minister. I emphasize that we are considering merely the right to possession or occupation of a particular part of the reserve lands, which right is given by statute to the entire band in common, but which can, with the consent of the Crown, be allotted in part as aforesaid to individual members, thus vesting in the individual member all the incidents of ownership in the allotted part with the exception of legal title to the land itself, which remains with the Crown: Brick Cartage Limited v. The Queen, [1965] Ex.C.R. 102. In the absence of such allotment by the band council, there is no statutory provision enabling the individual band member alone to exercise through possession the right of use and benefit which is held in common for all band members.⁷⁷

(emphasis added)

The fourth and final judgment in this series, Joe v. Findlay and Findlay⁷⁸, dealt with a different set of facts. Here, the Band Council had granted its own “allotment” to Robert Findlay’s father, being a right of occupation for five years with the right to renew for another five years. The whole ten year term had expired, and the Band Council had given notice to quit. However, the defendants claimed a right to continued occupation by virtue of their membership in the Band. Mr. Justice Taylor found that the Band Council was entitled to a declaration that the defendants were not lawfully in possession of the lands in question but were trespassing on it.

From these four judgments, it would appear that, in the absence of an allotment made under the *Indian Act*, the Band Council is very much in control of the right to possession on-reserve.

(ii) Sechelt Indian Band Self-Government Act

Under this statute, proclaimed into effect on October 9, 1986, title to the 33 reserves held by Her Majesty the Queen for the use and benefit of the Sechelt Indian Band was transferred in fee simple to the successor Band. Section 25 provides that the Band “...holds the lands transferred to it for the use and benefit of the Band and its members”.⁷⁹ Given Sechelt’s traditional adher-

⁷⁷ Findlay v. Joe, (1981) 122 DLR (3d) 377, [1981] 3 WWR 60, 21 BCLR 376, [1981] 3 CNLR 58 (C.A.).

⁷⁸ Joe v. Findlay and Findlay 12 BCLR (2d) 166.

⁷⁹ Sechelt Indian Band Self-Government Act, *supra* at note 5, s. 25.

ence to communal ownership, it was not surprising that the *Act* made no provision for the granting of individual property rights other than to make the Band's fee simple title subject to

24...(c) any rights or interests under a mortgage, lease, occupation permit, certificate of possession or other grant or authorization in respect of the lands that exist on the coming into force of this section.⁸⁰

(emphasis added)

As a practical response to this provision, the Band, prior to the date of proclamation, negotiated for the purchase of the certificates of possession on its reserve lands.

Consistent with the preceding, the Sechelt Constitution, enacted under the authority of sections 7 and 10, provided very specifically the following:

The Sechelt Lands shall be held by the Band for the use and benefit of the Band and its members and, subject to section 24(c) of the Act, no further Certificates of Possession shall be issued.⁸¹

So how do Sechelt Band members obtain rights to their own homesites and for business purposes? The former is answered in the immediately succeeding section which provides:

The rights, and the procedures to protect those rights, of the Band Member to use and occupy the lot upon which his or her house is situated shall be provided for by resolution of the Band Council or Band law. The procedure for the issuance of all residential lots available to Sechelt Indians and the settlement of disputes, if any, shall be decided upon by the Band Council and the lots allocated accordingly.⁸²

The latter, rights for business purposes, is not dealt with at all in the Sechelt Constitution but the practice, since 1986, is well-established. A Band Member wishing to acquire property rights within the Sechelt Lands for his/her own business purposes will be able to do so only by the grant of a lease or permit from the Band. Apart from the convention of a nominal rental

⁸⁰ *Ibid.*, s. 24(c).

⁸¹ *Sechelt Band Constitution*, *Canada Gazette, Part I, Volume 121, Number 37, page 3248: Part I, Division (2), s. 1.*

⁸² *Ibid.*, s. 2.

payment during the “start-up” years, the Band Member will be undertaking the same type of legal obligation as would anyone else. In short, the communal principle is so recognized at Sechelt as to render individual property rights for Band Members (apart from their homesites) unavailable.

(iii) Under the Proposed Westbank First Nation Self-Government Agreement

The Westbank First Nation Self-Government Agreement⁸³ was initialled by the negotiators for Westbank and Canada on July 6, 2000. In order to take effect, it will have to be approved in a referendum of the Westbank voters and then be ratified by legislation. Two votes held to date have failed to produce an affirmative vote from the required quorum of Westbank voters.

The Westbank First Nation played a major role in securing the passage of the *First Nations Land Management Act*.⁸⁴ Although this activity has been largely superseded by the momentum towards a significant level of self-government, the rationale for Westbank’s involvement remains. It was succinctly explained by Dr. Tim Raybould, the Westbank Director of Intergovernmental Affairs:

The entire regulatory structure established under the *Indian Act* is premised on the assumption that Indian peoples are not capable of managing their own lands. It establishes a paternalistic system where the federal government assumes not only the legal responsibility for the creation of interests in reserve lands but also the day-to-day administration of what off-reserve would be considered private transactions of individual land holders...the inability for an individual Indian or a Band to enter into a lease in the same way as you can if you have a fee simple interest in land arose because the government assumed the Indian or the Band was not capable of making an informed decision as to the merits of the land transaction. This is the root of the paternalism so often associated with the *Indian Act*.

...the existing regulatory structure does not make sufficient distinction between the function of senior government to create legal interest in land and the local government function of managing land use and development. Rather it creates a confusing and potentially conflict ridden set of

⁸³ Westbank First Nation Self-Government Agreement, *supra* at note 6.

⁸⁴ First Nations Land Management Act, *supra* at note 8.

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administrative practices that needs to be clarified. Furthermore, the system does not allow private individuals to conduct their business in the normally accepted manner without the interference of government and the disclosure of sensitive business information within the political process.⁸⁵

Hence the impetus for Westbank, with approximately 100 businesses located on its lands and over 1340 registered leases, to press for change.

Westbank self-government will maintain Westbank lands as Indian reserve. It will also continue in effect all existing Certificates of Possession except for the modification provided for in the following section:

Interests in Westbank lands held on the Effective Date by Members pursuant to allotments under subsection 20(1) of the Indian Act are subject to the provisions of Westbank Law governing interests in Westbank Lands and sharing in natural resource revenues.⁸⁶

“Westbank Law” is defined as including the Constitution, Codes and laws of the Westbank First Nation. The Constitution and Lands Code (required pursuant to subsection 44(b)) have been drafted and circulated among the membership. These important documents will need to be ratified simultaneously with the Self-Government Agreement itself if a third vote is ever to be held. If the Westbank voters do approve them, it will have created a lands regime that will afford individual property rights to members significantly in excess of those available under the *Indian Act* or achieved to date under the *First Nations Land Management Act*. For example, section 4.1 of Division (4) of Part IV of the proposed Constitution provides for the issuance of Certificates of Title. Section 4.2 thereof provides:

The holder of a Certificate of Title shall have the right to:

- (a) permanent possession of the land held thereunder;
- (b) grant Licences, leases and other interests in that land, and

⁸⁵ Dr. Tim Raybould, Director of Intergovernmental Affairs, Westbank First Nation, “Land Management On-Reserve: Westbank First Nation: A Case Study”. Presented at Insight Information Co. conference entitled “Land Management and Property Development Strategies for Aboriginal Communities”, December 13 – 14, 1999: p.6.

⁸⁶ Westbank First Nation Self-Government Agreement, supra at note 6, s. 90.

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- (c) subject to Westbank Law, exploit, and benefit from, the resources lying in, on and under that land where such resources form part of the land.⁸⁷

The proposed restrictions on a Certificate of Title holder are set forth in section 4.3 as follows:

Notwithstanding subsection 4.2(b) of this Part, a holder of a Certificate of Title may not:

- (a) transfer, devise or otherwise dispose of all or a fraction of his or her interest as a Certificate of Title holder unless such transfer, devise or disposition is to a Member; or
- (a) pledge or mortgage the Certificate of Title unless such pledge or mortgage is to another Member or the Westbank First Nation.⁸⁸

The proposed Lands Code makes it clear that the Westbank Council will not consider applications for a Certificate of Title for any purpose other than single family residential unless first reviewed by the specially constituted Lands Advisory Committee. This new Committee will be empowered to make fairly extensive documentary demands of any applicant and, in the end, it can only recommend an application for Westbank Council acceptance if this would "...best serve the interests of the Westbank First Nation".⁸⁹ There is good reason for these precautions; once a member holds a Certificate of Title, he/she has rights to develop and lease that land subject only to applicable laws. There are none of the community procedures or other limitations found in the Codes so far enacted under the *First Nations Land Management Act* (see section (v) below).

It will be interesting to see if the Westbank First Nation Self-Government Agreement ever does get enacted.

(iv) Under the Nisga'a Treaty

The Nisga'a Treaty was proclaimed into law on April 13, 2000. It establish-

⁸⁷ *Draft Westbank Constitution, February 5, 2001, Division (4) of Part IV, s. 4.2.*

⁸⁸ *Ibid., s. 4.3.*

⁸⁹ *Draft Westbank First Nation Lands Code, November 27, 2000, s. 5.5(c).*

es various categories of land. The first is Nisga'a Lands which comprises Nisga'a Public Lands, Nisga'a Private Lands and Nisga'a Village Lands. Nisga'a Lands are owned by the Nisga'a Nation in fee simple. Pursuant to Treaty Chapter 3, this estate "is not subject to any condition, proviso, restriction, exception, or reservation set out in the *Land Act*, or any comparable limitation under any federal or provincial law".⁹⁰ There are also Nisga'a Fee Simple Lands outside Nisga'a Lands, and these consist of Category A Lands and Category B Lands. Although both categories are held in fee simple, the estate is not quite as extensive as that for Nisga'a Lands because it will be subject to certain rights in the *Land Act*.

On the effective date of the Treaty, May 11, 2000, title to Nisga'a Lands was granted to the Nisga'a Nation free and clear of all interests except those expressly provided for. For our purposes, the provisions of interest are the following:

33. On the effective date, the Nisga'a Nation will issue to each person named in Appendix C-5 a certificate of possession for the parcel of Nisga'a Lands ascribed to that person and described in Appendix C-5.
34. On the effective date, the Nisga'a Nation will issue to each person named in Appendix C-6 a certificate of possession for the parcel of Nisga'a Lands ascribed to that person and described in Appendix C-6.⁹¹

Appendix C-5 sets forth a list of 129 Certificate of Possession instruments issued by Canada on former Nisga'a Indian Reserves, now on Nisga'a Lands. Appendix C-6 lists 523 "Home Locations" for persons authorized by Band Council Resolution on former Nisga'a Indian Reserves, now Nisga'a Lands. We are unaware of any individual holdings affecting Category A or Category B Lands. The Treaty accordingly contemplated that every person identified in paragraphs 33 and 34 would be issued a certificate of possession by the Nisga'a Nation, as a result of which that person:

35. ...will have substantially the same right to possess the described parcel of Nisga'a Lands as the person would have had as the holder of

⁹⁰ *The Nisga'a Final Agreement*, supra at note 7, Chapter 3, s.3.

⁹¹ *Ibid.*, Chapter 3, s. 33, 34.

a certificate of possession under the *Indian Act* immediately before the effective date, modified to reflect Nisga'a Government jurisdiction over, and Nisga'a Nation ownership of, Nisga'a Lands.⁹²

Although it was to us at the time unclear how a certificate of possession could be compatible with the Nisga'a Nation's fee simple title, any consequent difficulty appeared to be resolvable in practice by virtue of paragraph 36:

36. After the effective date, the Nisga'a Nation or a Nisga'a Village may, in accordance with Nisga'a law, replace the certificates of possession issued under paragraphs 33 or 34 with estates or interests in, or licences to use or possess, the described parcels of Nisga'a Lands. If the certificates of possession are replaced with licences, the licences will include rights to use and possess the land comparable to, or greater than, those set out in those certificates of possession.⁹³

(emphasis added)

In fact, with the enactment of the *Nisga'a Land Act*⁹⁴, *Nisga'a Village Entitlement Act*⁹⁵ and *Nisga'a Nation Entitlement Act*⁹⁶, the Nisga'a Nation appears to be moving forward to a somewhat different land regime than that originally contemplated.

The *Nisga'a Village Entitlement Act* provides for the right to possession of a particular parcel of Nisga'a Village Lands. Only an "eligible recipient"⁹⁷ can be granted such a right and, for individuals, this is defined as a Nisga'a citizen who was formerly a member of the Band to which the particular Nisga'a Village is a successor. This holder of the Nisga'a Village entitlement may only transfer his/her interest to another eligible recipient or the particular Nisga'a Village. Any agreement of any kind by which the entitlement holder purports to permit anyone other than an eligible recipient or the particular Nisga'a Village to exercise any rights on the subject parcel is void. Two provisions of particular interest are the following:

⁹² *Ibid.*, Chapter 3, s. 35.

⁹³ *Ibid.*, Chapter 3, s. 36.

⁹⁴ *Nisga'a Land Act*, Nisga'a Lisims Government.

⁹⁵ *Nisga'a Village Entitlement Act*, Nisga'a Lisims Government.

⁹⁶ *Nisga'a Nation Entitlement Act*, Nisga'a Lisims Government.

⁹⁷ *Nisga'a Village Entitlement Act*, *supra* at note 95, s. 2.

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13. If land in which a Nisga'a Village owns the estate in fee simple within its Nisga'a Village Lands is subject to a Nisga'a Village entitlement, the Nisga'a Village may, on application by the registered holder of the Nisga'a Village entitlement, lease the land for the benefit of the registered holder.
14. A Nisga'a Village entitlement 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 eligible recipient or the particular Nisga'a Village.⁹⁸

The *Nisga'a Nation Entitlement Act* is similarly worded except that an eligible recipient only has to be a Nisga'a citizen; there is no requirement with respect to previous Band membership.

The *Nisga'a Land Act* is considerably broader than the *Entitlement Acts*. It deals with the grant of an estate in fee simple to Lisims land, called a "Nisga'a grant".⁹⁹ There appears to be no restriction on who can be a grantee except that the individual must be at least 19. The only constraints on the grant are found in section 6 (1), where it has to be considered by the executive "...to be in the interest of the Nisga'a Nation"¹⁰⁰; and section 7, where the granted parcel cannot have a surface area greater than five hectares except with the prior approval of Wilp Si'ayuukhl Nisga'a (i.e. the Nisga'a legislature). Section 14(1) places restrictions on all dispositions of Lisims land "...other than by a Nisga'a grant".¹⁰¹ The Nisga'a grant therefore appears to be an individual property interest that is as unqualified as one could possibly require although, as cautioned by counsel for the Nisga'a, it is unlikely to be used except in circumstances of pronounced benefit for the Nation as a whole.

(v) First Nations Land Management Act

The *First Nations Land Management Act*¹⁰² received Royal assent on June 17, 1999. It brought into effect the Framework Agreement on First Nation

⁹⁸ *Ibid.*, s. 13, 14.

⁹⁹ *Nisga'a Land Act*, *supra* at note 94, s. 6.

¹⁰⁰ *Ibid.*, s. 6(1).

¹⁰¹ *Ibid.*, s. 14(1).

¹⁰² *First Nations Land Management Act*, *supra* at note 8.

Land Management of February 12, 1996 between the Minister of Indian Affairs and 13 First Nations (the 14th was added as of December 10, 1996). The intent of the Framework Agreement was to provide these 14 signatories with the option of managing their own reserve lands outside the *Indian Act*. There can be little doubt of the importance of this legislation; it represents a significant path forward in the management of reserve land.

Firstly, there is no change in the actual title to the reserve land; it continues to be land set apart for the use and benefit of the particular First Nation and “lands reserved for the Indians” within the meaning of section 91(24) of the *Constitution Act, 1867*. The key event in establishing the new land management regime is the adoption by a signatory First Nation of its own land code. Pursuant to section 6(1), this land code must include the following matters:

- (a) a legal description of the land that will be subject to the land code;
- (b) the general rules and procedures applicable to the use and occupancy of first nation land, including use and occupancy under
 - (vi) licences and leases, and
 - (vii) interests in first nation land held pursuant to allotments under subsection 20(1) of the *Indian Act* or pursuant to the custom of the first nation;
- (c) the procedures that apply to the transfer, by testamentary disposition or succession, of any interest in first nation land;
- (d) the general rules and procedures respecting revenues from natural resources obtained from first nation land;
- (e) the requirements for accountability to first nation members for the management of first nation land and moneys derived from first nation land;
- (f) a community consultation process for the development of general rules and procedures respecting, in cases of breakdown of marriage, the use, occupation and possession of first nation land and the division of interests in first nation land;
- (g) the rules that apply to the enactment and publication of first nation laws;

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- (h) the rules that apply to conflicts of interest in the management of first nation land;
- (i) the establishment or identification of a forum for the resolution of disputes in relation to interests in first nation land;
- (j) the general rules and procedures that apply in respect of the granting or expropriation by the first nation of interests in first nation land;
- (k) the general rules and procedures for the delegation, by the council of the first nation, of its authority to manage first nation land;
- (l) the procedures that apply to an approval of an exchange of first nation land; and
- (m) the procedures for amending the land code.¹⁰³

Given our earlier discussion of customary holdings, it is interesting to note the recognition in subparagraph (b)(ii) of interests held “pursuant to the custom of the first nation;”.

Section 8(1) requires the Minister and First Nation to jointly appoint a “verifier” whose job it will be, inter alia, to determine that the proposed land code accords with the Framework Agreement and the *Act*. There will then be a vote by all First Nation members over the age of 18, regardless of residency, to provide the necessary community approval to proceed. If so approved, the land code will come into force either on the day it is certified by the verifier or on a later date specified in the code itself.

Section 16 provides that, once the land code is in force, no interest in or licence in relation to the subject reserve land can be acquired or granted except in accordance with the code, but that existing interests and licences will continue in accordance with their terms and conditions. Of particular interest is subsection (4):

Interests in first nation land held on the coming into force of a land code by first nation members pursuant to allotments under subsection 20(1) of the *Indian Act* or pursuant to the custom of the first nation are subject to

¹⁰³ *Ibid.*, s. 6(1).

the provisions of the land code governing the transfer and lease of interests in first nation land and sharing in natural resource revenues.¹⁰⁴

This offers each participating First Nation the prospect of an individually tailored land code that could range from a prohibition of individual leases without Chief and Council consent to an enshrined recognition of Boyer.¹⁰⁵ We are moving a long way from the *Indian Act*.

Section 18 sets forth the various powers to be enjoyed once the land code has come into force: the affected First Nation will be able to exercise the powers, rights and privileges of an owner in relation to the subject reserve land; it will be able to grant interests in and licences in relation to that land; it will have the legal capacity necessary to exercise its powers and perform its duties and functions, including the ability to contract, to borrow, to invest and to be a party to legal proceedings; and its powers shall be exercised by the elected Council or a person or body to whom the Council delegates. Under section 20, the Council of the First Nation will have the power, in accordance with its land code, to enact laws respecting such matters as the creation, acquisition and granting of interests in and licences in relation to the subject reserve land, environmental assessment and protection, and the regulation, control or prohibition of land use and development, including zoning and subdivision control.

Once the land code comes into force, the following sections of the *Indian Act*, those concerned with land management, cease to apply: sections 18 to 20, 22 to 28, 30 to 35, 37 to 41 and 49, subsection 50(4), and sections 53 to 60, 66, 69, 71 and 93. This is a formidable list. Her Majesty will thereupon no longer be liable “in respect of anything done or omitted to be done...by the first nation or any person or body authorized by the first nation to act in relation to first nation land”.¹⁰⁶

Of the 14 signatories to the Framework Agreement, five First Nations have to date voted on their own land codes: Georgina Island and Scugog Island in Ontario, Muskoday in Saskatchewan and, as recently as October 25, 2000,

¹⁰⁴ *Ibid.*, s. 16(4).

¹⁰⁵ Boyer, *supra* at note 3.

¹⁰⁶ First Nations Land Management Act, *supra* at note 8, s. 34(3).

Lheidli T'enneh and N'Quatqua in British Columbia (to come into effect once certified by the verifier). Of these, the first four land codes were approved and the N'Quatqua code was not approved. We have reviewed these codes to ascertain the extent to which they provide for individual property rights. Pertinent provisions of each Code are highlighted in Appendix D.

From this highlight of the various provisions affecting individual property rights, it can readily be seen that this *Act* affords participating First Nations a solid opportunity to create their own lands regimes, regimes that will be reflective of their individual values and traditions. We consider the potential to be exciting and encouraging, and we note that section 45 allows the names of other First Nations to be added to the first 14 "...if the Governor in Council is satisfied that the signing of the Framework Agreement on behalf of the band has been duly authorized and that the Framework Agreement has been so signed".¹⁰⁷ It is our understanding that some 30-nearly 80 First Nations have already applied to be added, thereby evidencing a successful arrangement. Of these, we understand that 30 are in the process of being approved or expected to be imminently approved by the Minister of Indian Affairs.

Discussion and Conclusion

The purpose of the Think Tank on First Nations Wealth Creation is to define a path to prosperity¹⁰⁸ for First Nation economies in British Columbia. This will entail a growing reliance on achieving the three cornerstones that we have described in Chapter 1. Concerning cornerstone two, that of land rights, we have explained in Chapter 3 what we mean by "masters in our own house" in that context. In that Chapter, we take the position that the ability to make available legally assured property rights on reserve and other Indian lands is a critical test of the extent to which a First Nation will be "master in its own house".

So let us ask the question: Can First Nations be masters in their own house

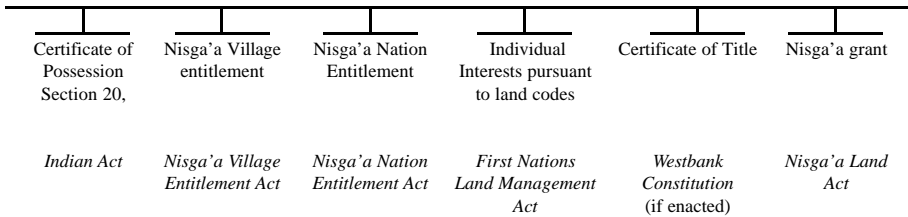
¹⁰⁷ *First Nations Land Management Act*, *supra* at note 8, s. 45.

¹⁰⁸ *Introduction*, p. 1

when it comes to the granting of individual property rights? This is the starting-point.

The following chart depicts the present legal framework, moving along the spectrum from a deficient regime under the *Indian Act* to the security of the Nisga'a grant. We draw these conclusions from our earlier analysis:

**PRESENT
LEGAL FRAMEWORK
(as at November 2002) for Individual
Property Rights on Reserve and
Under Self-government and Treaty Legislation**



- (i) The rules governing Certificates of Possession are not formulated in the *Indian Act*, but left to Ministerial discretion. As a result, this system of individual property rights is governed by the changing policies of the Department of Indian Affairs which, in turn, are affected by changing judicial interpretation. The Tsartlip¹⁰⁹ decision is a textbook example of these deficiencies, its inevitable aftermath being increased uncertainty. In sum, the governing provisions, as they exist, do not appear to establish property rights sufficient to facilitate entrepreneurship.
- (ii) The Nisga'a entitlements are superior rights to possession than Certificates of Possession insofar as this system is established by Wilp Si'ayuukhl Nisga'a law and, presumably, can be amended as circumstances warrant change. Its main present disadvantages are that, as with a Certificate, the holder cannot lease the entitlement land directly and neither can he/she mortgage it to any person other

¹⁰⁹ Tsartlip, *supra* at note 4.

than another Nisga'a Citizen, the Nisga'a Village or Nation. It is our understanding that, where banks have indicated a willingness to provide mortgages to individual Nisga'a Citizens, they are only doing so based on a guarantee from the Lisims Government.

- (iii) It is to the *First Nations Land Management Act*¹¹⁰ that we primarily look for the establishment of a "masters in our own house" regime at the present time. The ability to create its own binding land code would be a powerful instrument for any First Nation. From the five Codes we have examined, it is obvious that clear rules and procedures can be devised, tailored entirely to each community's view of how property rights should be enabled. For us, this statute is the best mechanism generally available at present for those First Nations anxious to become masters in their own house.
- (iv) The proposed Westbank Certificate of Title will be a stronger property right than any enacted to date under the *First Nations Land Management Act*. In particular, it will allow for direct leasing by the Certificate holder with no limit on the term of the lease. The main restrictions would be the inability to transfer title to a non-Band member or to mortgage the Certificate itself to anyone except another Band member or the Westbank First Nation (but, of course, a leasehold interest could still be mortgaged).
- (v) Although not reflected on the chart, the *Sechelt Indian Band Self-Government Act*¹¹¹ is very much an example of a First Nation achieving mastery of its own house. That the Sechelt people have opted for a collective approach to management and development is by the way. The pertinent fact is that, uniquely among the First Nations of Canada, it could, if it wished, subdivide all 33 of its Band Lands into 1000+ parcels and give each Band member a fee simple title.
- (vi) Finally, we come to the most autonomous individual property right yet seen on Indian land: the Nisga'a grant. In our analysis, there appear to be no restrictions on the grantee's ability to transact his/her land. Although it may in practice occur rarely, the mere availability

¹¹⁰ *First Nation Land Management Act*, *supra* at note 8.

¹¹¹ *Sechelt Indian Band Self-Government Act*, *supra* at note 5.

of an individual property right as powerful as the Nisga'a grant is further acknowledgment of an idea whose time has come.

As we said at the outset, we are trying to ascertain the extent to which these individual property rights are "...akin to those available to other transacting parties within the global economy..." available as a manifestation of being "masters in our own house". This requires, in our view, that these rights be in effect a promise or commitment to, firstly, be capable of being recorded and communicated; secondly, to require accountability from both the First Nations government and the individual concerned; and, thirdly, and most importantly, to be useable as capital. In reviewing the above examples, we hence conclude that the objective of "masters in our own house" is attainable under present legislation (notably via the *First Nations Land Management Act*) insofar as this presupposes the ability to provide for individual property rights. And this fits in with what we are trying to do: we are not presuming to tell First Nations what to do; we are saying, if you want to do it, this is what is available.

Interestingly, in each of the preceding examples of individual property rights there exists recognition of the community interest, perhaps appropriately characterized as "Native culture/tradition". We note:

- the judicial requirement for the Minister to take into account the concerns of the Band when faced with a decision such as that reflected in Tsartlip¹¹²
- the inability of a Nisga'a entitlement holder to transfer that interest to a non-Nisga'a, thereby maintaining the integrity of the land base
- the requirement to involve the community in prescribed decision-making in each one of the four five Land Codes we have reviewed
- the proposed Westbank Lands Code requirement that the issuance of a Certificate of Title for any purpose other than single family residential would have to "...best serve the interests of the Westbank First Nation"¹¹³

¹¹² *Tsartlip*, *supra* at note 4.

¹¹³ *Draft Westbank First Nation Lands Code*, *supra* at note 89.

- the decision of the Sechelt Band to manage and develop its Band Lands communally, in accordance with its collective tradition (even though it has legal power to do otherwise)
- the constraint on a Nisga'a grant that it has to be considered by the executive "...to be in the interest of the Nisga'a Nation."¹¹⁴

All of which leads us to the second consideration: what are the stakeholder interests that need to be accommodated and to that what extent can they be?

We have arrived at an extensive list of stakeholders (and we recognize that others may have been missed), listed alphabetically as follows:

- Band Councils
- Canadian people
- Department of Indian Affairs (INAC)
- Disadvantaged groups (e.g. single mothers)
- Elders
- Environmental interests
- Financial institutions
- Future generations
- Government of Canada (CMHC etc.)
- Hereditary system
- First Nations entrepreneurs (on-reserve)
- First Nations fee simple claimants
- First Nations persons (on-reserve)
- Non-First Nations entrepreneurs
- Non-First Nations persons
- First Nations culture/tradition
- Provincial government
- Municipalities and Regional districts.

Each individual property right could accordingly be analyzed to ascertain the extent to which it accommodates the listed interests (see "Assessing Stakeholder Interest" Appendix A). For the purposes of this chapter, however, we will confine ourselves to the more significant observations.

Firstly, there is only one stakeholder interest that emerges as definitive in our analysis of their respective power, urgency and legitimacy. This is the inter-

¹¹⁴ *Nisga'a Land Act*, *supra* at note 94, s. 6(1).

est that we have called “Native culture/tradition”. Moreover, this determination coincides with the preceding analysis in which it was clear that every advance to date from the *Indian Act* system has acknowledged the First Nations cultural context.

Secondly, the cultural adherence to maintaining the integrity of the land base results in a generalized unwillingness to mortgage the title itself. Hence, capital will usually be raised through mortgaging a leasehold interest and, even with this, there are common provisions allowing the First Nation to step in upon default. Is this workable? We know from Hernando De Soto that “The single most important source of funds for new businesses in the United States is a mortgage on the entrepreneur’s house”.¹¹⁵ Without this fundamental capability, will the financial institutions continue to avoid providing mortgage funds to First Nation entrepreneurs? In many ways, the ability to mortgage is the litmus test of property rights. To quote De Soto again (page 64):

To create credit and generate investment what people encumber are not the physical assets themselves, but their property representations – the recorded titles or shares – governed by rules that can be enforced nationwide. Money does not earn money. You need a property right before you can make money.¹¹⁶

One possible response is to argue for the continued integrity of the First Nations land base, maintainable by only mortgaging leasehold interests. This is certainly one option, but it does depend on the willingness of financial institutions to accept such security (and there is widespread difficulty with the Department’s policy of five year rent reviews). What is needed is a range of options, and this requires not just a land management system but the actual government institutions capable of facilitating the mechanisms. It comes down not only to having the political will to build the necessary property system, but also to having the governance powers and jurisdiction required for the task. Hence, the absolute importance of the governance cornerstone which we have examined in Chapter 2.

¹¹⁵ *Hernando de Soto, "The Mystery of Capital". (New York: Basic Books, 2000), p. 6.*

¹¹⁶ *Ibid., p. 64.*

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In summary, we do not see the situation as “grim”. We consider that the mechanisms for a system of individual property rights clearly exist, but they do require strengthening, particularly with respect to the granting of security interests. This, as we see it, is a crucial challenge for First Nations governance.