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INDIVIDUAL PROPERTY RIGHTS ON CANADIAN INDIAN RESERVES: THE HISTORICAL EMERGENCE AND JURISPRUDENCE OF CERTIFICATES OF POSSESSION

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Abstract / Résumé

One common misconception is that Indian reserves in Canada do not have individual private property. This is simply not the case, as several different individual private property regimes exist on First Nation territories. The most common type is the Certificate of Possession system, which allows individual Indians to obtain ownership of a tract of reserve land for the purpose of building a house, constructing a business, or exploiting its resources. This paper traces the history of individual private property rights on reserves in Canada and surveys the relevant legislation and caselaw in order to shed some light on the nature of Certificates of Possession.

Une idée fausse assez répandue veut que les résidents d'une réserve indienne ne jouissent pas de droits de propriété individuels au Canada. Ce n'est tout simplement pas le cas, étant donné que les territoires des Premières Nations possèdent divers régimes de propriété privée. Le régime le plus courant est celui des certificats de possession qui permet aux particuliers d'obtenir la propriété d'un lopin de terre sur la réserve afin de bâtir une résidence ou d'exploiter une entreprise ou des ressources. La présente communication présente l'histoire des droits de propriété privée individuels dans les réserves canadiennes, ainsi que les mesures législatives et la jurisprudence pertinentes, afin de jeter de la lumière sur la nature des certificats de possession.

Recently there have been several books published on how private property rights have been used to improve the standard of living in impoverished regions throughout the world. In *Property and Freedom*, Richard Pipes observed that

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

Peruvian Hernando de Soto concurs, arguing in his book, *The Mystery of Capital*, that Latin American countries are poor not because they lack capital or resources, but because they lack a formal system of private property law. Functional and stable systems of private property allow people to use their assets such as houses and businesses to generate capital for investment and expansion (De Soto 2000, 6). Political Scientist Terry Anderson has looked at how private property institutions have helped to alleviate some of the social and economic problems of Indian communities in the United States. In his book *Sovereign Nations or Reservations*, he compares Indian fee simple ownership to communal ownership regimes and finds that private ownership of land has been far more effective in terms of agricultural productivity and profitability (Anderson 1995, 121, 133-134). Communal institutions restrain Aboriginal Peoples from developing self-sustainable economies (Anderson 1995, xi-xii, xvi, 19-20). Canadian Political Scientist Tom Flanagan believes that the free market system is the best way for raising the standard of living on reserves, and "inducing self-interested individuals to serve the needs of others" (Flanagan 2000, 9). Moreover, the improvement of existing Indian property rights would help solve many of the social and economic problems that exist on reserves throughout Canada (Flanagan 2000, 131).

Interestingly, Indigenous scholars have on the most part been silent about private property rights. Rather, they have focused their efforts on Aboriginal title, treaty rights, the right to self-government, the right to self-determination, Aboriginal sovereignty, and cultural survival rather than on private property rights. Thus, non-Indigenous scholars have dominated private property scholarship. Even then, the number of schol-

ars dealing with this issue is comparatively quite low (see Flanagan 2000, Flanagan and Alcantara 2004, Anderson 1995, Anderson 1992, Notzke 1985, Hickerson 1967).

In Canada, there are four types of property rights regimes in operation on reserves – customary rights, the independent land codes developed under the recently passed First Nations Land Management Act, leases, and Certificates of Possession (CPs) (see Flanagan and Alcantara 2002). The most prevalent regime is the certificate of possession system, which replaced its predecessor, the location ticket system, in 1951. According to the Department of Indian Affairs, approximately 10,059 Location Tickets (the predecessor of the CP) and 145,000 CPs have been issued to individuals on 301 reserves since 1888 (Guest and Gros-Louis 2001, Payne 2002). A CP is the evidence of an individual band member's lawful possession of an individual tract of reserve land. In order for an individual Indian to acquire a CP, the band council must allot the land to the applicant and the Minister of Indian Affairs must approve the allotment. Only band members can hold a CP. Although the CP holder gains similar property rights to an off-reserve resident, there are several important differences. The ability to transfer possession, the legality of wills, the right to an equitable division of property after divorce, the power to lease, and the ability to use property as equity are different from off-reserve practices. As well, Indian private property rights are subject to the exclusive power of Parliament, and to the discretionary will of the Minister of Indian Affairs.

This research is important for several reasons. Individual title to land is important to the economic well being of a person. Security of title gives an individual the ability to build a home or use land for a business. At present, there is very little literature on the Indian individual property rights. Academics, public policy makers, and the wider public are unaware of the different private property regimes that do exist on reserves. The common assumption is that all Indian land is communal land. This is not the case. Indian reserves have a sophisticated land tenure system that has both positive and negative consequences for both the band and their individual members. Understanding how these regimes work is important in helping to come to a solution to the many problems afflicting Indian communities. Interestingly enough, there has been very little communication regarding private property regimes amongst bands themselves. Only in the last 5 years have associations such as the Ontario Aboriginal Lands Association, the British Columbia Aboriginal Land Managers Association, and the National Aboriginal Land Managers Association, been formed to facilitate an exchanging of ideas among land managers regionally and nationally. Amazingly, several bands in Manitoba

have not even heard of CPs (Martin and Martin 2002, Wilgress 2002). Thus this research will help provide the important information for policy makers and practitioners to use to improve the system. Moreover, in light of Minister of Indian Affairs Robert Nault's recent attempt to amend the government provisions of the Indian Act, such research is important in helping bureaucrats evaluate and possibly reform the relevant sections of the Indian Act pertaining to private property. As stated before, the CP system is the prevalent property right system in operation on reserves in Canada. Bands across Canada are in the process of, or have already subdivided their territories to individual band members using CPs. For instance, the government at Cowichan Tribes, B.C. is in the process of subdividing much of its customary held land by CP to its members (Sullivan 2002). In contrast, both Westbank First Nation near Kelowna, B.C., and Six Nations in Ontario, have already allotted almost all of their territories to individual members using CPs (Vanderburg 2002, Martin and Martin 2002). This research will help inform the public, academics and bureaucrats in Canada about land tenure on reserves, will aid policy makers in their decisions to improve or delete the current CP system, and may help spur further research on this important topic.

Since there is very little literature on this subject, one way to understand how CPs work is to look at the legislation and the case law. Therefore, this paper describes the history of Indian private property and CPs in Canada, examines what the Indian Act says about CPs, and finally, looks at how the courts have decided cases involving CPs. Through this method of analysis, one can get a sense of how CPs operate on Canadian Indian reserves. However, further work on how CPs and other property right regimes operate on reserves is needed.¹ The author hopes that this piece will help spur other scholars to study the usefulness of private property regimes in helping improve the standard of living for Indigenous Peoples throughout the world.

A History of British and Canadian Indian Policy in North America

Pre-Confederation: Protectionism

Formal Indian administration in North America originated in the late 17th century when the Thirteen Colonies appointed Indian commissioners to regulate the fur trade and suppress liquor traffic among Indian peoples (Tutley 1986, 1). Both British and French Indian policies were based on two interdependent precepts: fostering good relations with Indigenous nations, and protecting Indian peoples and their land from European encroachment. For the British, the Iroquois and the other Indian nations were key allies against the French. The British feared that if

they did not maintain a friendly relationship with Indian peoples, that they would ally with their enemy, the French. As such, the British colonial office conducted relations with Indian nations on a nation-to-nation basis, regularly giving them gifts, entering into formal alliances with them, and preventing European settlers from encroaching upon their land (Tobias 1983, 40). French Indian policy in Lower Canada was based on three objectives: christianizing Indian peoples using missionaries, the pursuit of military alliances, and the fostering of trade (Henderson 1980, 2). In 1759, the British captured Montreal, thus ending French control in Lower Canada. The fall of Montreal was the end of the direct influence of France in North America and marked the ascendancy of British dominance in European relations with Indian nations in the new world.

British policy, even after the defeat of the French, revolved around maintaining good relations and military alliances with the Indian nations, as well as protecting them and their land from European encroachment. In the 1760 Articles of Capitulation signed by both the British and French after the fall of Montreal, article XL stated "[t]he Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they choose to remain there" (Henderson 1980, 2-3). The Royal Proclamation of 1763 was a major relations building policy aimed specifically at ensuring that the Indian nations remained loyal allies to the Crown. It had two main points relevant to Indian nations. First, all the land not held or settled by the European colonies, as well as the land within the territory of the Hudson's Bay Company, were reserved for Indian peoples as their hunting grounds. Second, such lands could not be purchased, settled on, nor trespassed on without special permission from the Crown. A colonial citizen could only acquire Indian land if the Crown purchased it from an Indian first (Owens 2000, 5, Tutley 1986, 2, Henderson 1980, 6). One major problem with the Royal Proclamation was that possession actually meant "occupation" rather than "ownership." Furthermore, the designation of lands as Indian "hunting grounds" was a tenuous legal designation. The concept of fee simple ownership (complete ownership of the land forever) in British common law was tied to European concepts of land usage such as farming (Carter 1990, 18-29). In the eyes of Europeans, Indian peoples did not hold their lands under fee simple ownership, since hunting was not a legitimate use of the land. Thus, the Royal Proclamation was merely an excuse for the British government and colonials to acquire Indian land under the auspice of fair market transactions sanctioned under the legal authority of the Crown. Nonetheless, the Royal Proclamation was an attempt by the British Crown to fulfill its interrelated dual policy of maintaining good relations with Indian nations, and protecting them and their land from

European encroachment. The war of 1812, however, would be a major turning point, both in fact and in practice, in the relationship between British and Indian nations.

After the British victory over the new American state in the war of 1812, the British Crown began to question the need for its military alliances with the Indian nations (see Benn 1998). The British had defeated both the French in Lower Canada and the Americans to the south, and it seemed that the threat of military invasion was now non-existent. Thus, the British government allowed military alliances to elapse, and discontinued their policy of annual gift giving to Indian nations. After 1812, British Indian policy gradually moved from protectionism and nation-to-nation relations to a policy of protectionism and civilization (Tobias 1983, 40, Tutley 1986, 2-3).

A Shift in Policy: Protectionism, Civilization and the Emergence of the Idea of Indian Private Property

John Locke's *Second Treatise of Government* was the philosophical origin of western notions of private property and the benefits that derived from such rights. John Locke's conception of private property was very influential both in Europe and in the New World among colonials and government officials. For Locke, "every man has a property in his person" and thus everyone has a property in their labour (Locke 1989, para 27). Therefore, everyone had a right to property in what they mix their labour with (Locke 1989, para 27). Locke eventually used these three premises to justify a capitalist market economy of unequal possession of the earth (Locke 1989, para 50). Scholars such as Alice Kehoe believe that Locke's ideas laid the foundation for notions of western superiority and private property rights for Indians in Canada (Kehoe 2001).

Building upon the ideas of Locke, the general belief among colonials living in the Canadas was that individual ownership of land was the key to civilizing Indigenous peoples. Private property would help Indigenous peoples focus "their hopes, interests and ambitions. Lacking a fixed abode, they could have no notion of a proper family life" (Carter 1990, 17). One of the first sources of this civilization policy was from the work of the new world missionaries (Dickason 1997, 199). Missionaries believed that the Indians needed God and a western education to help them grow as a people. They taught the Indians agriculture, religion, the ability to read/write/speak French and English (Tobias 1983, 40, Carter 1990, 17). One missionary believed that private property would help quell the violent tendencies of Indian peoples (Carter 1990, 17). This was a belief shared by a lot of the colonials. According to Sarah Carter,

Most Canadians believed that private ownership of prop-

erty and possession would put an end to Indian warfare, which was viewed as an irrational, bloodthirsty sport, perpetuated endlessly because the Indians had little property to lose. (Carter 1990, 17)

Government officials saw agriculture and private property as necessary elements for Indian peoples to climb the steps out of savagery towards civilization. It is out of this context, rooted in Locke and an ignorance of Indian conceptions of private property, that the notion of individual ownership of land began to enter into colonial government policy towards Indian peoples in North America.

Indian peoples in North America did not have exactly the same understanding of property ownership that Europeans had. According to Julian Stewart,

All natural resources, with the sole exception of privately owned eagle nests, were free to any one. This was not communal ownership; it was not ownership at all, because no groups whatever [sic] claimed natural resources. Water, seed, and hunting areas, mineral and salt deposits, etc., were freely utilized by anyone. (Anderson 1995, 32)

Notwithstanding Stewart's argument, Indian peoples did exercise joint rights and jurisdiction over their land. Jurisdiction included the right to exclude people from entering one's land and the right to recognize family or clan hereditary rights to land (Bell and Asch 1998, 68-69). These rights were respected and recognized by other Indigenous nations. Moreover, according to Michael Asch and Norman Zlotkin, Indian peoples believed one could not sell or give away land. Rather, land was shared with others (Asch and Zlotkin 1998, 216-217). Nonetheless, Indian peoples in North America did have notions of private property. According to James Huffman, Indian peoples understood and employed the concept of tenancy in common (Anderson 1995, 31). The Mahican Indians in the North east recognized the hereditary rights of families to tracts of land along rivers. The Havasupai and the Hopi recognized private ownership of farmland based on land usage. The Montagnais-Naskapi of Quebec recognized family and clan areas (Owens 2000, 15-16). Indian peoples also recognized private property in the form of possessions. When an individual created tools such as arrows, bows, and baskets, the labourer usually gained possession over the items (Anderson 1995, 40). Europeans did not understand that Indian peoples held their land in common and that such land could not be sold; the land was merely shared with Europeans. There could be no transfer of ownership of the land. Second, Europeans did not realize that Indians did in fact have private property. Indian notions of property ownership were not inferior to Euro-

pean ones, just different. Thus, guided by these two misconceptions regarding Indian understandings of property ownership, colonials developed harmful and misguided attitudes about the inferiority of Indian peoples and superiority of European property rights.

After 1812, Indian nations became an obstacle to British colonial expansion in the new world. Now that they were no longer useful as British allies, government officials had to wrestle with what to do with the newly adopted Indian British subjects who happened to own most of the land in Canada. The British colonial office believed that civilizing the Indians in the ways of European life, culture, and religion would solve the Indian problem. During the 1830s, the modern reserve system was born. Part of the civilization process was to move Indian groups off of their resource rich lands, and onto isolated reserves far away from British colonies where missionaries and government officials could teach them the European way of life (Tobias 1983, 41). British Indian policy, based on notions of greed for Indian land and a misguided notion of good will, moved from protectionism to a mixed policy of protectionism and civilization. The emergence of this new policy brought the notion of Indian private property rights into the government decision making.

One of the most important pre-Confederation government reports on Indians and property rights was the Bagot Commission (1842-1844) (Dickason 1997, 222). The Bagot Commission reaffirmed the Royal Proclamation's protection of Indian possession of land, called for the centralization of Indian administration, and recommended their education and conversation to Christianity. More importantly, the Commission "recommended that Indians be encouraged to adopt individual ownership of plots of land under a special Indian land registry system" (Canada 1996, 268). The commissioners believed that the government should encourage Indians to buy and sell land amongst themselves. The hope was that this type of market interaction using private property would promote the spirit of free enterprise and help them learn about the European land tenure system. The Commission also recommended Indian adoption of individual title to discourage White squatters (Canada 1996, 268, Henderson 1980, 12). Indians were described as "an untaught, unwary race among a population ready and able to take every advantage of them" (Dickason 1997, 222). In essence, the Bagot Commission set out some of the basic principles of the present Certificate of Possession system. It recommended that the government grant private property ownership of land to individual Indians, introduce a land registry system, and restrict the ability of Indians to transfer their land only to other Indians (Canada 1996, 268). Although the Bagot Commission's recommendations regarding individual property rights were not adopted until

several decades later, bands on reserves did have the power to parcel out land to individuals. Allotment of such land, however, had no legal recognition in the eyes of the Crown.

As mentioned earlier, the British in the 1830s had experimented with a reserve system for the express purpose of "civilizing" Indian peoples. As the British government and colonial subjects through the Crown purchased land from Indians, they were moved onto isolated reserves far away from White settlements. They were given a right of occupation to the land with legal title still in the hands of the Crown. These reserves however "failed to civilize" their inhabitants effectively and quickly enough. They did not adapt well to farming nor were the colonial government officials satisfied with the speed at which Indian peoples were picking up the English language. Moreover, most of the Indian peoples did not convert to Christianity nor did they abandon their traditions in favour of European ones. Thus, in 1850, the British government decided to move reserves closer to White settlements, based on past experiences in which Indian groups which had lived close to colonial villages had achieved civilization in a reasonable amount of time (Tobias 1983, 41-42). One result of this move however, was the increase in White settler encroachment and squatters on Indian reserves. In response to this problem, both Upper and Lower Canadas both passed Indian land legislation in 1850. There were four main provisions in the legislation. First, the legislation made it an offense for non-Indians to enter into transactions with Indians for Indian land. Second, trespassing on Indian land was illegal. Third, Indian land was exempt from both taxation and legal seizure for debts. Lastly, the notion of race became a determining factor in the classification of an individual as an "Indian" (Canada 1996, 269). The 1850 Acts were important in two ways. First, colonials were not obeying the Royal Proclamation; thus the colonial governments felt it was necessary to reaffirm the status of Indian peoples as subjects of the state with the right of protection from the Crown. Second, the exemption from taxation and legal seizure for debts, which were meant to protect Indian peoples from potential abuse by White colonials, became a consistent policy in subsequent Indian legislation.

Another Shift in Policy: Protectionism, Civilization, and Assimilation

In 1857, the Gradual Civilization Act made the colonial government's practice of moving reserves closer to White settlements official government policy and created a process for enfranchisement (losing Indian status) tied to the acquisition of private property. In the past, Indian settlements close to colonial settlements adapted the European lifestyle faster and easier than isolated Indian settlements (Milloy 1983, 58). In terms of

enfranchisement, any Indian who was judged to be of good moral character, free of debt, and could read and write English would be granted enfranchisement (Place 1981, 3). Enfranchised Indians, having passed a three year probationary period, would receive a life estate allotment of up to 50 acres of tribal land in which after the individual's death, the land would pass to his/her heirs in fee simple ownership. Enfranchised Indians would lose any title to the tribe's communal property and the enfranchised individual's land would now be subject to taxation and legal seizure. An enfranchised Indian however, could sell his land to anyone, including non-Indians (Hall et al. 1988, 451, Tobias 1983, 42). In other words, Crown-recognized individual property rights was supposed to be an important vehicle in the enfranchisement of individual Indians. It was first an incentive for individual Indians to enfranchise, and second an important step towards integrating Indians into the growing colonial community.

The Indian response in the 1860s however, was a rejection of the enfranchisement process. Indian leaders were successful in convincing their peoples not to enfranchise. What irked them the most was the fact that enfranchised Indians were given *tribal* land. Indigenous peoples were not opposed to civilization *per se*, which they defined as a revitalization of their traditional culture within an agricultural context, but they were opposed to losing their land and any measures that attacked their notions of communal property and culture (Hall et al. 1988, 452). From 1857 to the 1876 Indian Act, only one Indian, Elias Hill, applied for and was granted enfranchisement. Due to Indian opposition to Hill's enfranchisement however, he was not granted any land; rather, he was given a cash settlement six times less than the actual value of the land (Canada 1996, 46-48, Hall et al. 1988, 452).

The primary objective of the British government for most of this pre-Confederation period was to maintain good relations with Indian nations while at the same time protecting them from White settler encroachment and abuse. After the war of 1812, British policy shifted to a mixture of protectionism and civilization. Individual property rights, which had been advocated by missionaries and other colonials as a possible solution to the Indian problem, started to gain official government attention with the publication of the Bagot Commission's recommendations in 1844. The Gradual Civilization Act of 1857 marked the beginning of a new policy of assimilation. Overall, four important developments in Indian property occurred during British dominance in Canada. First, Indian lands were recognized as being held in common by Indigenous peoples. Second, Individual Indians could gain individual allotments for themselves or Indigenous chiefs could grant them individual allotments. Such

allotments, however, were not legally recognized by the Crown. Third, Indian lands were exempt from taxation and legal seizure for debts, and Indians were not allowed to sell their land to non-Indians. Lastly, the reserve system was a social policy; the intent was for Indians to eventually develop individual common law estates in reserve land and eventually assimilate into mainstream society (Henderson 1980, 15-16). The ground work for instituting private property rights for Indian peoples in Canada was laid out by the British government prior to Confederation. After Confederation, the new Canadian state instituted a system of private property for Indians founded on these past policies.

Canadian Indian Policy: The Origins of Certificates of Possession

In 1867, the British Parliament passed the British North America Act (BNA Act), uniting Lower Canada, Upper Canada and the Maritime provinces into the Dominion of Canada. The BNA act was Canada's Constitution, setting out the division of powers between the federal government and the provinces, as well as setting up the institutions of governance for Canada. With respect to Indian peoples, section 91 (24) granted the legislative Parliament of Canada authority over "Indians, and Lands reserved for Indians" (Imai 1997, 189). The federal government through section 91 (24) had exclusive and extensive control over Aboriginal rights and, up until the *Delgamuukw* Supreme Court ruling in 1997, also had the unilateral power to extinguish those rights (Imai 1997, 189).

In 1869, Parliament made its first foray into Indian policy with the passage of the Gradual Enfranchisement Act (GEA). Under the GEA, the amount of land that an enfranchised Indian received was undefined rather than the maximum 50 acres under the British government. Also, lawful possession of individual tracts of land was only recognized if the Governor-in-Council granted a location ticket. Land held under a location ticket gave the individual Indian lawful possession of the land, an exemption from taxes/legal seizure, limited the transferability to non-Indians, and allowed for the ticket to pass to a heir(s) upon death (Hall et al. 1988, 481). The Honourable Mr. Langevin called upon Parliament to pass the GEA because Indians could now be entrusted with "White man's privileges" (Canadian Parliament 1869, 83). The GEA would further the goal of educating Indians in good conduct and in the White man's ways with the eventual goal of the enfranchisement of all Indigenous peoples with fee simple property rights (Canadian Parliament 1869, 83). The Act was important because the location ticket scheme was the predecessor of the Certificate of Possession system found in the 1951 Indian Act.

The most important piece of Indian legislation in Canada is the 1876

Indian Act. The Indian Act was a consolidation of previous colonial Indian legislation into one Act, with power over Indians centred in the Superintendent General of Indian Affairs. During the House of Commons debates over the Indian Act, Members of Parliament believed that the purpose of the Indian Act was to raise the Indians "to the place of manhood" (Canadian Parliament 1876, 751) and to "lift the red man...out of his condition of tutelage and dependency" (Canadian Parliament 1876, 1038). According to another Member of Parliament, the government should move the Indians onto resource depleted reserves, give them a sense of ownership of the reserve land, but keep them under the plenary power of Parliament. "As soon as they [Indians] knew exactly what they possessed, they would look for enfranchisement" (Canadian Parliament 1876, 1038). In 1873, Minister of Interior Laird stated that "the great aim of the Government should be to give each Indian his individual property as soon as possible" (Canadian Parliament 1873, A1879). Laird also saw private property as a means of ending Indian dependence on hand outs, which he believed was rooted in their communal life style.

The Indian who makes a laudable effort to provide for the support of his family, seeing that his stores often have to go to feed his starving brethren, then loses heart himself, and drops down to the level of the precarious hand-to-mouth system of the Band generally. (Christensen 2000, 349)

Thus, with these purposes in mind, Laird introduced the location ticket system for Indians living on reserves.

The location ticket system can be found in sections 5-10 of the 1876 Indian Act. It was a loose system of property rights for Indigenous peoples on reserves. Section 5 allowed the Superintendent General to subdivide reserve land into individual lots. Section 6 stated that an individual Indian could only gain lawful possession of land if both the band and the Superintendent General consented. Section 7 stated that after an allotment is approved, the applicant should be issued a location ticket granting title of the land to the individual. Section 8 protected lands held under a location ticket from legal seizure, and restricted the ability to transfer title to land to another Indian of the same band, subject to band approval. Section 9 allowed for land to be transferred to a widow and children. If no heirs nearer than a cousin were eligible, than the land became Crown land to be managed for the benefit of the band. Section 10 provided for any non-treaty Indian in the west and north who made improvements on their lands prior to the lands becoming reserve lands, to enjoy location ticket rights and privileges (Department of Indian Affairs and Northern Development 1981, 16). Moreover, Indians could gain fee simple interest in the land by enfranchising. Under section 86, an

Indian could apply for enfranchisement by demonstrating to the Superintendent General that he had "attained a character for integrity, morality, and sobriety" (Department of Indian Affairs and Northern Development 1981, 27). After a 3 year probationary period in which applicant demonstrated that he would use the land as a European would, the applicant would be enfranchised and gain fee simple interest in the allotted land. In essence, the 1876 Indian Act created two systems of land holding. Under the first, non-enfranchised Indians could hold lawful possession (life estate) of reserve land allotted to him by the band council with a location ticket issued by the Superintendent General. Under the second system, enfranchised Indians under sections 86 and 88, could gain a fee simple interest to reserve land; upon death, the land went to his children in fee simple (Department of Indian Affairs and Northern Development 1981, Place 1981, 6).

Between 1876 and 1951, very little changed in terms of individual property rights in Canadian legislation. In 1890, the Canadian government introduced Certificates of Occupation (COs) for the western Indian tribes. COs were introduced as a system of private property for the less advanced western Indian tribes in Manitoba, Keewatin, and western territories. Under a CO, lawful possession of up to 160 acres could be granted to each family head. The CO however, could be cancelled any time by the Superintendent General of Indian Affairs (Hall et al. 1988, 483). In 1919, the Deputy Superintendent General gained the power to grant location tickets to returning Indian war veterans without band consent (Canada 1996, 283). In 1927, Parliament passed legislation which stated that if an individual Indian made permanent improvements on reserve land, then he must receive compensation if he is lawfully removed from the reserve.

The 1951 Indian Act: The Current Certificate of Possession System

In 1951, the Department of Indian Affairs introduced the CPs to replace location tickets. According to the Superintendent General of Indian Affairs W.E. Harris, the location ticket system was unsatisfactory. Amendments to the Indian Act were needed as the Indian population were growing rapidly, getting wealthier, had "pulled [their] weight in two world wars," and were now an indispensable part of the community (Canadian Parliament 1951, 1353, 1355). Minister of Interior Bruce agreed, stating that "[t]he Indian is our brother" and Canada's relationship with them had to be modified (Canadian Parliament 1951, 1355). One of Minister Bruce's main goals in the 1951 Indian Act was to introduce a more

comprehensive and expanded system of private property that would eventually allow for the permanent integration of Indians into Canadian society. During debate, the Minister stated that

The underlying purpose of Indian administration has been to prepare the Indian for full citizenship with the same rights and responsibilities as those enjoyed and accepted by other members of the community.... The ultimate goal of our Indian policy is the integration of the Indian into the general life and economy of the country. (Canadian Parliament 1951, 1356)

The Certificates of Possession System in the 1951 Indian Act was a major step towards fulfilling that goal.

In Canadian law, there are two main types of private property ownership. *Estate in fee simple* is the highest interest in land an individual can hold. Fee simple ownership means that the individual "has the land forever and has full freedom to sell it to someone else" (Henderson 1978, 9). The individual can grant the land to anyone in a will and has absolute and exclusive use of the land forever. The second type of ownership is a *life estate* in the land. Under a life estate, the individual owns the land only as long as he lives. Due to the temporary nature of ownership, the individual cannot sell or transfer the land. Also, the individual cannot designate the land to someone else in the event of his death and he cannot exploit the natural resources of the land (Henderson 1978, 9). The individual however, does enjoy all of the other benefits of individual ownership, including the right to construct a house or other buildings on the land.

The CP system gives individual Indians living on reserves property rights that fall somewhere between fee simple and life estate interests. Underlying legal title to reserve land still resides in the Crown, as reserves are set aside by the Crown for the use and benefit of First Nations (Department of Indian Affairs and Northern Development 1995, Directive 02-01, 1). However, individual Indians are able to gain lawful possession to an individual allotment of land through a CP. To obtain a CP, the council must first pass a band council resolution (BCR) allotting the land to the applicant. The BCR must list the name of the band member(s) acquiring the land, a proper description of the land, and the signatures of a quorum of band council members. Next, the application is sent to the Minister of Indian Affairs for approval (Cadieux 1989, 1-2). If the paperwork is in order, the Minister issues a Certificate of Possession (CP) to the band, which forwards it to the individual member. Lastly, the CP is registered in the Indian Lands Registry in Ottawa.

So what does lawful possession under a CP actually mean in terms

of *de facto* property rights for Indigenous people on reserves? In terms of practical application, there has been very little research done on the topic. The 1951 Indian Act lists some of the important rights that an Indian receives under a CP. It does not, however, specify whether an Indian who has been issued a CP has a fee simple interest or a life estate interest in the land. Rather, a CP recognizes that the individual Indian (who must also be a band member of the First Nation which he has been allotted land from) has *lawful possession* of the allotted land [section 20 (2)]. Moreover, a CP is "evidence of his [the successful applicant's] right to possession of the land described therein" and gives the holder lawful possession of the allotted land (Imai 1997, 31). It also gives the holder several important rights such as the right to build a home on the land, and the use of the land for resource extraction. CP holders can also divide up the land among their children, each of whom then receives CPs to smaller, individual tracts of land. A CP also allows the owner to transfer his interest in the land to several people in two ways. The first arrangement, *tenants in common*, occurs when each tenant has an equal interest in the property. More importantly, when one holder dies, the deceased's share falls to his or her descendents. The second arrangement, *joint tenancy* (ie husband and wife), occurs when all of the owners still have equal rights to the property. However, in the case of one person's death, his or her's interest falls to the other joint tenants listed on the CP (Cadieux 1989, 3; Payne 2002). Although both of these arrangements are not listed in the Indian Act, they were developed out of common law to deal with joint ownership issues (Brascoupe 2002; Payne 2002). These arrangements are accomplished through s. 24 of the Indian Act, which allows a CP holder to transfer his land to another band member. Such a transfer however, is contingent upon the approval of the Minister of Indian Affairs. Similarly, the CP holder can also transfer his land to another band member through a will, but it only becomes legal if the Minister approves it (s. 45). A CP holder can also lease his land out to either a fellow Indian or to a non-Indian through s. 58(3). Again, the consent of the Minister is necessary. The Minister also has the power to cancel a CP if the CP was incorrectly issued due to fraud or error (ss. 26-27), or if the CP holder requests it (s. 27). In the event that a CP holder is no longer entitled to live on the reserve and therefore loses the CP, the holder must receive some sort of compensation from the Minister (ss. 24, 25). Another important attribute is that land held under a CP is safe from legal seizure (s. 29) and aside from band-council-imposed taxes, is exempt from taxation (s. 87) (Place 1981, 11). This is important because immunity from seizure restricts the ability of the CP holder to mortgage his property or use it as equity to expand a business

(Smyth 2002). Banks and other financial institutions are reluctant to lend money due to the inability to collect on defaults.

Canadian Courts and Certificates of Possession

Although the legislation regarding CPs seems to be straightforward, the litigation involving CPs demonstrates the contrary. Problems have arisen when the Indian Act does not contain specific provisions for certain situations, such as the division of matrimonial homes in divorce provisions, or has provisions which are ambiguous, such as in the phrase "lawful possession" and the application of leases. Another problem confronted by the courts is the role of the Minister and the band council. More often than not, the courts have ruled in favour of Ministerial discretion at the expense of band council jurisdiction.

Overall, the courts have had a large role in defining the exact nature of the various CP rights. In the rest of this chapter, I will focus on CP cases to illustrate the intricacies of Indian property rights as compared to fee simple interest and life estate interest in land. Cases involving the meaning of "lawful possession," the ability to transfer a CP, the right to make a lease and a will, and the division of matrimonial property, among others, will demonstrate some of the unique characteristics of the rights that a holder enjoys under a CP. I will not however, discuss Aboriginal title cases such as *Sparrow* (1990 1 SCR), *Van Der Peet* (1996 2 SCR), or *Delgamuukw* (1997 3 SCR) as they deal more with Aboriginal title in general rather than focusing on the nature of CPs.

CPs and "Lawful Possession"

In many ways, CPs give band members a significant amount of power over an individual tract of reserve land. Section 20(1) of the Indian Acts states that "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." As well, s. 20(2) mandates that "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." The crucial phrase in both ss. 20(1) and 20 (2) is the meaning of "lawful possession" and it has been left to the courts to interpret this phrase. Justice Marceau in the case of *Pronovost v. Minister of Indian and Northern Affairs* (1986) 1 CNLR 51 described it as follows:

The Act speaks of a right of "possession" which be proven by a Certificate of Possession, taking the place of a real estate title: it speaks of a right which does not derive from that

of an owner but which may nonetheless be transferred as such, both by *inter vivos* and *mortis causa*, although such a transfer can only be fully effective after it has been approved by the Minister; and this hybrid right, which is both patrimonial and personal, is applied formally to the land by the Act without specifying what becomes of buildings or improvements on the land. It has been called a *sui generis* right: that is undoubtedly true, but what I wish to emphasize here is that this *sui generis* right defies any rational classification under our traditional property law. (1 CNLR 56)

The courts had further opportunity to elaborate on the exact nature of this phrase in the case of *Westbank Indian Band v. Normand* (1994) 3 C.N.L.R. 197. In this case, the band council brought a negligence suit against the defendant on behalf of a band member who held a certificate of possession for land damaged by flood water. The band argued that the defendant had released the flood waters onto the farmlands and thus should pay some sort of compensation for the damaged lands. The Federal Court of Appeals ruled that the band had no right to sue the defendant for negligence. Rather, it was up to the band member holding the certificate of possession to pursue a suit against the defendant. According to the Court, a certificate of possession transfers all "incidents of ownership" from the band to the individual holder. As such, Gary Swite should have been the one to sue the defendants for damages (3 CNLR 199).

In *Simpson v. Ryan* (1996) 106 FTR 158, Simpson had a certificate of possession for reserve land on the Duck Lake reserve. He decided to transfer the land to himself and his daughter as joint tenants. He did not however, obtain band council consent and did not register the transfer with the Ministry, as required by section 24 of the Indian Act. Later, Simpson wanted to build a mobile home park on the land but his daughter objected. The Federal trial court ruled that under section 24, band council consent for transfer of possession was unnecessary since a CP invests in its owner all incidents of ownership. Since the transfer did not meet the requirements of section 24, the transfer of the certificate of possession to himself and his daughter as joint tenants was invalid. Thus, Simpson retained sole ownership of the certificate of possession (106 FTR 160).

In *Dale v. Paul* (2000 AJ No. 751 Alta Master), Cecile Dale had a valid CP for a piece of land under dispute on the Enoch Indian Reserve in Alberta. She had allowed her brother, Harry Sharphead, to live on the property. For a brief period of time, Sharphead's wife, Elsie Paul, the respondent, also lived with him on the property. After Harry Sharphead's

death, Dale gave permission to Ruby Sharphead to live on the property, but the respondent Elsie Paul moved onto it first, claiming that Harry had given her permission to live on the property in the event of his death. She argued that oral bequests had to be honoured according to Native custom. The court ruled, however, that Paul did not have a right to reside on the property because Cecile Dale had a valid CP to the land. A CP was "the highest form of title an Indian can have to land that is part of an Indian reserve," as it gave the holder "fee simple certificate of title" (Imai 1999, 56). Thus, the court ordered Paul to vacate the property in accordance with the wishes of the CP holder, Cecile Dale.

In *Watts v. Doolan* (2000 FCJ No. 470 Fed. T.D.), the Kincolith Indian Band Council had, without obtaining permission, built a radio antenna, two satellite dishes, and a wooden frame building on land held under a CP by Marlin Watts. Watts brought an action against the band for trespass and subsequently won. The court ruled that since Watts held a CP to the land, the band had no right to erect communications equipment on his property without his permission, and it awarded Watts \$10,300 in lost rent, damages, and interest (para 1, 14).

Three cases dealt with the question of whether an individual Indian could hold lawful possession of an allotted piece of land without a certificate of possession. In *George v. George* (1997) 2 C.N.L.R. 62, both parties were members of the Burrard Indian Band. In 1971, they acquired a parcel of land from Mr. George's father, which they then built a house on. In order to pay for the house, he received money from DIAND as well as a loan from the Canadian Mortgage and Housing Corporation (CMHC). In order to receive the loan, Mr. George had to sign a document in which he acknowledged that he was transferring his "lawfully entitled...possession of the land" to the Band until the CHMC loan was paid off. This document was signed by the chief and was formally recognized by the band through a Band Council Resolution (BCR). Later that same year, the Minister of Indian Affairs approved the loan (2 CNLR 65). In 1990, Mr. George and his wife separated. At issue in this case, therefore, was whether or not Mr. George had lawful possession of the land even though he did not have a CP. The BC Trial Court ruled that numerous references to Mr. George's lawful possession of the land, combined with the existence of a 1988 BCR asking the Minister of Indian Affairs to issue a CP to him, demonstrated that he indeed had lawful possession of the land pursuant to s. 20(1) of the Indian Act. Moreover, the approval of the Minister of Indian Affairs of the allotment could be inferred from the fact that the loan monies were issued by the CMHC (2 CNLR 68-69). The British Columbia Court of Appeals agreed with the Trial Court's ruling that one could *infer* lawful possession based on the actions of the band council

and the Minister of Indian Affairs. A CP was merely evidence of lawful possession and lawful possession could be established without a CP (2 CNLR 74).

Three years later, the British Columbia Supreme Court in *Nicola Band v. Trans-Can. Displays et al.*, (2000 B.C.S.C. 1209) tackled the question of whether a customary land holding was enforceable without a certificate of possession. A traditional or customary land holding is a right to land based on the historical occupation and the individual's traditional use (i.e. agriculture or residential uses) of the land (www.courts.gov.bc.ca, p. 23). According to Justice Smith,

Ownership of lands based on traditional or customary use of the land does not exist independent of interests created by the [Indian] 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. (emphasis in original) (p.23)

Thus, lawful possession requires an allotment by the band council and the approval of the Minister to be legally recognized. The court affirmed that a CP is merely evidence of lawful possession.

The courts have also ruled that lawful possession can be obtained through section 22 without a certificate of possession. Section 22 reads

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 so included. (Imai 1998, 50)

In the case of *Stoney Band v. Poucette* (1999) 3 C.N.L.R. 321, Poucette and his family received land in 1981 from the Stoney Band in exchange for surrendering other land to the band. Over the next years, Poucette and his family made permanent improvements to the land and raised horses and cattle on the lands. In 1996, he received notice from the Stoney Band that his land was to be used for agricultural purposes for the benefit of the whole band. He was given two weeks to vacate the land (3 CNLR 322). The plaintiff argued, among other things, that the defendant did not have a CP to the land and therefore the land was band land. The defendant argued that he and his family had occupied the land since 1981 and had made improvements to land up until the inclusion of the land into the Stoney Band in 1995 (3 CNLR 327). The Alberta Court of Appeals ruled in favour of the defendant, stating that a CP was not necessary for lawful possession since it is merely the evidence of possession. Moreover, since Poucette made improvements to the land prior to it becoming band land, he had lawful possession of the

land according to s. 22 of the Indian Act (3 CNLR 327-328).

Based on the cases cited, the rights enjoyed by CP holders seem to be quite sweeping. CPs themselves are not required for lawful possession; rather they are merely evidence of lawful possession. A CP seems to invest the owner with all incidents of ownership thus mimicking the fee simple rights that non-Indians enjoy off reserve. However, this is not entirely the case. The Federal Court of Appeal in *Boyer v. Canada* (1986 4 CNLR 53) outlined some of the very important differences between CPs and ownership in fee simple:

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

The usefulness of CPs is limited by the fact that they can only be transferred within the band, thus making it difficult for members to use their property as equity to build housing, restructure debt load, or expand a business (Imai 1998, 46; Smyth 2002). Moreover, since the Certificate of Possession (CP) system comes from the Indian Act, and since Parliament has exclusive authority over Indians and lands reserved for Indians, problems can occur when there are procedural gaps in the CP system. The Constitution does not allow provincial statutes to apply to Indians and their reserve lands when such statutes clash with provisions in the Indian Act or other federal statutes. Thus, when a problem that is not covered by the Indian Act arises, such as the division of a matrimonial home during a divorce proceeding, Indians are unable to rely on other federal or provincial statutes for redress. Another factor limiting the usefulness of CPs is the discretionary power of the Minister. Transactions can take a long time to complete, due to the need for governmental approval. In one case at Six Nations, it took eleven years to complete a transaction involving a CP (Martin and Martin 2002). Moreover, some of the transactions can be detrimental to the band council since certain transactions, such as leases, only require the consent of the CP holder and the Minister. In other words, the band council is excluded from the process. In light of a lack of federal leadership to fix these problems in the legislation, it has been left to the courts to resolve these issues.

Divorce and the Division of Property

One such gap has been the absence of a provision dealing with the division of property in the event of a divorce. Off-reserve, spouses have

a legal right to a portion of matrimonial property—property which is used for a family purpose—in the event of a separation or divorce (*Derrickson v. Derrickson* 1986 2 CNLR 53). However, the Indian Act lacks such a provision thus forcing the courts to come up with their own makeshift rule. At issue in the case of *Greyeyes v. Greyeyes* (1983) 1 C.N.L.R. 5 was whether a spouse had a legal interest in matrimonial property within the meaning of the provincial Matrimonial Property Act. This Act gave spouses a legal interest in property once they married, which in this case a couple did in 1951. At the time, the respondent had a CP to 480 acres of farm land. During the length of their marriage, both parties contributed equally to the raising and caring of the family. In 1976, the respondent left the applicant and has lived separately since. After the separation, the respondent purchased a home for \$35,000. The applicant then went to the courts seeking compensation in the form of a portion of the matrimonial property and a portion of the equity in the new home (1 CNLR 5). The court ruled that although the home and the farm land did constitute matrimonial property, the court could not divide up the land among the parties since “lands reserved for Indians are exclusively within the jurisdiction of the Parliament of Canada, and it is beyond [the court’s] jurisdiction to order a division or sale of such land” (1 CNLR 6). Nonetheless, the wife did have an interest in the land and therefore was entitled to some form of compensation even though the husband had sole possession of the CP over the farm land (1 CNLR 7).

In the case of *Laforme v. Laforme* (1983) 2 CNLR 88, the parties were married in 1976 and held a CP to a parcel of land as joint tenants. Several years later, they divorced and the plaintiff went to court demanding that the court partition or sell the lands and that the defendant pay half of the value of the land to the plaintiff. The court, relying on *Sandy v. Sandy* (1980) 2 CNLR 101, ruled that the Indian Act superseded the Family Reform Act of 1978, and therefore no court-ordered division of property was available to the parties (2 CNLR 89). The Family Reform Act was a provincial statute and did not apply to Indian lands since such lands fell squarely within federal jurisdiction (2 CNLR 90).

Three years later, the Supreme Court was asked to rule on whether provincial statutes had force on reserves in light of the lack of a provision dealing with divorcing couples in the Indian Act. In *Paul v. Paul* (1986) 2 CNLR 74, both the husband and wife filed for divorce. The wife obtained an order for interim possession of the matrimonial home under section 77 of the British Columbia Family Relations Act, which allowed the courts to give one spouse “exclusive occupancy of the family residence” for a limited amount of time (2 CNLR 75). The husband however, had sole ownership over a certificate of possession for the land and

house, and sought an order to quash the wife's interim possession of the home. The Supreme Court of Canada ruled that Section 77 of the British Columbia Family Relations Act ran afoul of the certificate of possession provisions in the Indian Act (2 CNLR 78-79). Therefore, since the husband had lawful possession of the land as evidenced by his possession of the CP, and because the Indian Act lacked any specific provisions dealing with matrimonial homes, the husband was given possession of the matrimonial home and the women could not seek relief under section 77. Provincial laws which contradicted the Indian Act were ruled to have no force since the Constitution under Section 91 (24) grants Parliament exclusive power over Indians and Indian lands.

The *Paul v. Paul* case did not however, address the provision in the British Columbia Family Relations Act which called for compensation to be paid to a divorcing spouse for his or her legal interest in the family's assets. In the case of *Derrickson v. Derrickson* (1986) 2 CNLR 45, a husband and wife filed for divorce. The Court was asked to decide whether the divorcing wife, a member of the Westbank First Nation, had a right to half of her family's assets as mandated in the British Columbia Family Relations Act (2 CNLR 47). The husband however, had a certificate of possession over the majority of the family's assets. The Court ruled that the woman did not have a right to her husband's assets since the husband possessed a CP over the land. Provincial legislation had no force in regards to possession of reserve lands since Parliament had exclusive jurisdiction over Indians and their lands (2 CNLR 52). Such legislation could "significantly impact on the ability of the Band and the federal Crown to ensure that reserve lands are used for the benefit of the Band" (2 CNLR 55). Moreover, if the court did exercise its power under the Family Relations Act to divide up matrimonial property, it would come into conflict with the right of the Minister of Indian Affairs to manage land transfers involving Indian land (2 CNLR 60). The Court did rule however, that a provincial statute could entitle a woman to compensation since the Indian Act does not prevent CP holders from paying compensation in lieu of the division of property in the event of a divorce (2 CNLR 63). Thus, provincial laws were applicable as long as they did not contradict the objectives and spirit of the Indian Act.

These decisions were upheld in the *George v. George* (1996) 2 CNLR 62 case which I described above. Relying on *Derrickson v. Derrickson*, the court ruled that although the court cannot divide up Indian land, it can order that compensation be given to the spouse if it can be determined that the property in question was matrimonial property under s. 45 of the Family Relations Act. Since there was still no legislation governing this issue of compensation, the court was free to order Mr. George

to pay compensation to his wife (2 CNLR 62, 72).

In 1997, the Court had to decide a case (*Paul v. Kingsclear Indian Band* 1997 137 FTR 275) involving the division of property held under a certificate of possession in joint tenancy (when the death of one person grants the other person solitary possession of the CP) by a Native husband and non-Native wife. After getting married and acquiring a CP, the couple built a family home on their allotted reserve land. Several years after their marriage, they separated and divorced. The non-Native woman and her new partner continued to reside in the matrimonial home after the divorce. Under section 23 of the Indian Act, the Native man sought compensation for his contributions in building the house and an injunction preventing his former spouse from continuing to live in the house. The Federal Court of Appeal ruled that there were no grounds for preventing the woman from residing in the house since she was listed as a joint tenant under their CP (137 FTR 279). Furthermore, the man was not obliged to receive compensation unless the Minister of Indian Affairs wished to grant compensation (137 FTR 281). Under section 23 of the Indian Act,

An Indian who is lawfully removed from lands in a reserve upon which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by the Minister. (emphasis added) (Imai 1998, 26)

In this case the Minister did not provide any compensation and thus the husband was not entitled to any. This ruling reinforced the discretionary power of the Minister over individual Indian private property rights.

The last important case involving matrimonial homes was *Darbyshire-Joseph v. Darbyshire-Joseph* (1998 BCJ No. 2765). A Native couple living on the Squamish reserve jointly held a certificate of possession over an individual allotment of land and their matrimonial home. The couple divorced with the man winning custody over the children; the woman continued to reside in the home. The man wanted to move back into the home but the woman demanded compensation for her interest in the home under the jointly held CP. The British Columbia Supreme Court observed that the Indian Act did not have a provision with regard to the partition of property held under a CP. Thus, the partition of property was not possible. Furthermore, lacking a federal or provincial statute mandating compensation, the court could not rule on whether the woman was entitled to compensation. As such, the court ruled that the man and woman had to work out the matter between themselves (Imai 2001, 57).

These cases on the division of property held under CPs demonstrate two important peculiarities of the CP system. First, the Indian Act

is paramount in cases involving CPs. If the Indian Act does not have a specific provision dealing with a certain problem, then the courts must defer to the spirit of the Indian Act and the will of Parliament. Second, these cases on the division of matrimonial property reaffirm the discretionary power of the Minister. Off-reserve private property rights in Canada are not subject to the will of any Minister in the Canadian government and yet Indian individual property rights are. Thus on the subject of division of property resulting from divorce, the CP system gives Indians less rights and privileges than what a regular Canadian would enjoy with either a fee simple interest or life estate interest in property.

The Right to Lease

The right to lease reserve land is another area in which Indians do not enjoy the same property rights that other Canadian citizens do. When an Indian wants to lease land to another Indian, he can do so without involving the band council or the Minister of Indian Affairs. However, when an Indian wants to lease their land to a non-Indian, then the Minister of Indian Affairs and, to a somewhat lesser extent, the band council, has influence.

Individual Indians can lease their land to non-Indians by two methods: a land surrender as outlined under s. 38(2), or the leasing arrangement spelled out in s. 58(3) of the Indian Act. Under s. 38(2), the CP holder gives up his or her land to the band. The band then surrenders the land to the Crown for a pre-determined amount of time for commercial or residential purposes. From that time until the end of the lease, the land is no longer reserve land. However, at the end of the lease, the land reverts back to being reserve land. Temporary surrender requires band consent and the band has the option of attaching conditions to the surrender (Imai 1998, 62, 78). The most common type of lease which CP holders employ is the one outlined in s. 58(1) and (3) of the Indian Act. S. 58(1) reads "where the land is in lawful possession of any individual, [the Minister may] grant a lease of such land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession." Under this provision, both the consent of the band council and the Minister of Indian Affairs is required. More importantly, s. 58(3) states that "the Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated" (Imai 1998, 78). In this provision, the Indian registers the lease directly with Indian Affairs, without seeking band council consent. The courts have upheld these provisions resulting in an Indian private property system dissimilar to Canadian common law with respect to leases. In other words, the

leasing abilities of individual Indians with CPs is somewhat constrained compared to off-reserve residents.

Some of the intricacies involved in leasing to non-Indians are captured in the case of *R. v. Devereux* (1965) S.C.R. 567. In 1950, Harry Devereaux, a non-Indian, was granted a 10-year lease to a parcel of land at the request of Rachel Ann Davis, CP holder and member of the Six Nations Band. This lease was granted with the approval of the Minister of Indian Affairs under s. 58(3) of the Indian Act. Eight years into the lease, Mrs. Davis died. After the 10-year lease expired, the Minister of Indian Affairs extended it for two successive years using s. 28(2) of the Indian Act. Under s. 28(2), the Minister can grant to "any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve to reside or otherwise exercise rights on a reserve" (Imai 1998, 47-48). After the two one-year permits expired, the band council passed a BCR asking the Attorney of General to evict the defendant based on the fact that he was unlawfully in possession of the lands. The Supreme Court of Canada decided in favour of the Attorney General, holding that since the expiry of the lease of the leases, the defendant could not point to any provision in the Indian Act which gave him lawful possession of the land (SCR 570). Therefore, according to this case, an individual non-Indian could acquire a lease from a CP holder in two main ways: through s. 58(3) or s. 28 (2) of the Indian Act, both of which required the consent of the Minister of Indian Affairs.

There does exist informal leasing arrangements which do not involve either Indian Affairs or the band. "Buckshee" leases are not registered with Indian Affairs, and more importantly are not enforceable in the courts or by the band council (Willgress 2002, *Tsartlip Indian Band v. Canada* 1999 181 DLR 4th 730, para 10, 28). Leases that are registered with Indian Affairs however, are protected by the law, and parties can seek remedy in the courts. The case of *Mintuck v. Valley River Band No. 63A* (1977) 1 CNLR 12 (Man. Ct of Ap.) dealt with the legal options of CP holder leasing their land under s. 58(3). Mintuck, band member, entered into a lease with Indian Affairs for ten years for agricultural development. The band council passed a resolution supporting the lease, and mandated that after five years, a share of the crop would be paid to the band. Soon after, the plaintiff was harassed by several unidentified band members. After a band council election, the new band council passed a resolution terminating the lease. According to Justice Guy, the band had a duty to ensure that nothing was done to hinder the fulfillment of the contract. The BCR "deprived the plaintiff of his right provided by the lease and thus breached their duty" (1 CNLR 13). Justice Matas ob-

served that the BCR was “unlawful interference with the plaintiff’s economic interests” (1 CNLR 14). Therefore, the appeal was dismissed and the trial judge’s original decision to award \$10,000 in damages to the plaintiff was upheld (1 CNLR 13).

The case of *Boyer v. Canada* (1986) 4 C.N.L.R. 53 reaffirmed the Minister’s power over leases and clarified the Minister’s fiduciary duty when a CP was involved. John Corbiere, a member of the Batchewana Indian Band, obtained a certificate of possession to a parcel of reserve land in 1973. In 1980, he asked the band council for a BCR giving him permission to lease the land to a corporation which he and his wife were the sole shareholders, for the purpose of land development. The band council initially approved the lease even though further work, such as feasibility studies and financing arrangements, still had to be done. In 1982, Corbiere’s corporation was given a lease by the Minister of Indian Affairs under s. 58(3). In 1983, the lease was drafted and sent to the band council, which objected to the lease and disputed the power of the Minister to approve it without their consent. The Minister granted the lease anyway and the band council challenged the lease in the courts, arguing that the Minister could not issue a lease without band council approval (4 CNLR 56). The Federal Court of Appeal ruled that the Minister could in fact grant a lease under section 58 (3) of the Indian Act without band consent. “[T]he ‘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 locate” (4 CNLR 60). Band council consent was not necessary since the lease was between the individual CP holder, who has lawful possession of the land, and the Minister of Indian Affairs. S. 58(3) is quite clear – there is no mention of need for band consent for lease operating under this provision (4 CNLR 61). All that is required is the Minister’s approval.

Eleven years later, the Federal Court of Appeal modified the *Boyer* ruling in the case of *Tsartlip Indian Band v. Canada* (1999) 181 DLR 4th 730. In this case, Blaine Wilson, Tracy Wilson, Geneviere Elliot, Lavina Olsen, and George Wilson (the locatees) were members of the Tsartlip Indian Band and held two certificates of possession for an individual allotment of reserve land on the Tsartlip Indian Band reserve. The locatees were also shareholders of the Clydesdale Estate Holdings Ltd. In 1995, they wanted to build a home park for non-Indians through their company on their land but the band refused to give permission, citing environmental and shortage of land concerns. Later that year, Wilson and his associates ignored the band and built 25 manufactured homes for non-Indian residents on the land without a permit or a lease (181 DLR 4th 734-735). The band council responded by passing a by-law which re-

quired band council approval for any commercial projects on reserve land. Wilson and his associates countered by applying for and receiving a lease directly from the Minister under section 58 (3) of the Indian Act. The lease was made retroactive so that the new by-law would not affect the lease (181 DLR 4th 137, 740). The Federal Court of Appeal ruled that the Minister had a duty towards both the CP holder and the band, as well as to uphold the principles of the Indian Act. In *Boyer*, the band council objected to the lease based on a matter of principle – that being that the Minister did not have the authority to grant a lease on his or her own. In this case however, the band council objected to the lease based on environmental and land shortage concerns. According to Justice Decary, the park “threatened their way of life” and the Minister had a responsibility to take into account band concerns because the Indian Act is “very much band-oriented where use of lands in the reserve is at issue.... The intent of Parliament, clearly, is to require the consent of the band council whenever a...non-Indian is to exercise any right on a reserve for a period longer than a year” (181 DLR 4th 748). In this case, the Minister failed to do so. Thus, the Court struck down *Boyer* and required the Minister to take into account the interests of the Band as a whole in future uses of section 58(3).

Although this is a substantial check on Ministerial power, the Minister's power is still extensive. The inability of Indians to lease to non-Indians without a formal transfer of possession, and the power of the Minister to issue leases and permits without band council consent severely restricts the ability of bands and individual members to use their property to further their own interests. Leases which may benefit individuals but hurt the band as a whole cannot be completely stopped by the band council.

One practice among CP holders is to develop their land through a corporation owned by them. In the case of *Assessor of Area No. 25 – Northwest-Prince Rupert v. N & V Johnson Services Ltd. and Williams (Gitwangak Band)*(1988) 4 CNLR 83, Norman Johnson and his wife Vina, tried to develop their land held under CP through a corporation in which they were the majority shareholders. To do so, they leased the land to their corporation using s. 58(3) of the Indian Act. They alleged that the leased land was held in trust by the corporation and therefore was exempt from taxation under s. 13(h) of the Taxation Act (which stated that land held in trust for the use of Indians would be exempt from taxation) and s. 87 (which reads that Indian property is exempt) of the Indian Act. However, no evidence was produced to show that the land was being held in trust (4 CNLR 87). In terms of whether “land occupied by a corporation whose shareholders are Indians exempt from assessment and

taxation," the court found that "[a] corporation is an artificial person. By its nature, it can have neither race nor religion nor sex" and therefore could not be considered a person for the purposes of a tax exemption (4 CNLR 87-88). As such, corporations should be taxed unless the Parliament passes a law legislating otherwise (4 CNLR 90).

Recently, the court had to tackle the question of what happens to rent money when the CP holder dies. In *Songhees First Nation v. Canada* (2002) www.courts.gov.bc.ca, the late Irene Cooper, band member, had a CP to a parcel of Songhees First Nation land which she leased through two leases through the Minister of Indian Affairs under s. 58(3). The leases were to expire in 2015 and 2045. In 1996, Ms. Cooper died. In her last will and testament, she left all of her rights and interests in the allotted land to her children. Her children however, were not members of the Songhees First Nation and therefore were not allowed to gain lawful possession of the land according to s. 50 of the Indian Act (para 9-10). S. 50 did allow for descendants who are not members of the band to receive compensation from the sale of the allotted lands (para 14). However, there was no provision that dealt with who should receive the rent money in the event of the death of a CP holder. Basing its decision on several related provisions in the Indian Act, the Supreme Court of British Columbia ruled that rent was "inextricably derived from a property interest in land" and that "Ms. Cooper's rights to possession and occupation terminated upon her death" (para 21). Since Ms. Cooper's interest in the land terminated at death, and since the children were not entitled to live on the reserve, they were not entitled to any rent.

In summary, the courts have ruled that a CP is not necessary for an individual to have lawful possession. Rather, the essential requirements for lawful possession are band consent and the consent of the Minister of Indian Affairs and Northern Development. Furthermore, an individual Indian could acquire through section 22 lawful possession if he or she made improvements on lands that he or she owned before the land became reserve land. The Court's rulings with respect to leases and the division of matrimonial homes reaffirm the power of the Indian Act and the Minister. The ability of Indians to lease to other Indians is somewhat restricted by the discretionary power of the Minister. As well, the interests of the band as a whole can be bypassed through this provision. The absence of a provision regarding the division of property means that whether a spouse receives compensation in a divorce is at the discretion of the Minister. Quite clearly, Indian spouses do not enjoy the same protections that non-Indians have. This body of litigation shows that Indian private property rights are unique. The power of both the band council and the Minister over individual allotments means that individual

property rights for Indians on reserves is less substantial than the rights enjoyed by non-Indian Canadian citizens living off reserves.

Conclusion

The Certificate of Possession private property system originated from a colonial desire to protect, civilize, and assimilate the Indians. At the root of these three objectives was a desire for Indian land. Private property was seen as a means of emancipating the Aborigines from their state of savagery and a means of acquiring their land through purchase, either through the Crown or through the newly emancipated Indigenous owners of private land. As Alan Cairns observed, "the goal was assimilation...territorial separation was a preparation for assimilation" (Cairns 2000, 48). By 1951, however, the Canadian government wanted to balance the ability of Indians to enjoy the benefits of private property and the protection of the territorial integrity of reserve lands from non-Indian acquisition. Thus, the CP system itself was inherently contradictory. The system purports to give them a system of private property which allows them to enjoy private property rights for the purposes of raising their standard of living, and yet such rights are limited and weakened by the discretion of the Minister and the band council.

Today's First Nations have quite clearly demonstrated that they can manage their own affairs.² Further study on the CP system is necessary to give policy makers and academics the necessary knowledge to make improvements to the system. As mentioned earlier, Terry Anderson has argued that private property has helped some Indigenous peoples in the United States solve some of their social and economic problems. A similar Canadian study looking into the cultural, social, and economic effects of CPs and private property ownership on Indians and their reserves would provide valuable information for Canadian government policy makers in their current drive to reform the Indian Act. Whether one supports the idea of private property rights for Indians or not, clearly the present system needs to be changed. Based on the above caselaw, I make the following recommendations:

- 1) Parliament should amend the Indian Act to include a provision outlining a procedure for dealing with the division of matrimonial property in the event of a divorce, or allow provincial divorce statutes to apply.
- 2) Band councils should have a greater say in the granting of leases under s. 58(3). Band councils are responsible for the general welfare of the band, and have extensive knowledge on the environmental

conditions and municipal services available for projects. In a time of chronic housing and land shortages on many reserves in Canada, the band needs to be involved in land management decisions much in the same way that municipalities employ zoning by-laws for the benefit of its citizens. Land is in such high demand among members and non-members, and among on-reserve and off-reserve members, for a variety of uses. The band council needs to have a greater say in leasing arrangements.

- 3) Indian Affairs involvement in CP transactions should be phased out. Based on interviews with several First Nation Land Managers, much of their work is hindered by the slowness of Indian Affairs. Eliminating the role of Indian Affairs would speed up transactions and eliminate the problems that come from officials in Ottawa making decisions for places they have never visited nor do not have intimate knowledge of.

Notes

1. This paper is a compressed version of Masters thesis entitled, "Certificates of Possession: A Solution to the Aboriginal Housing Crisis in Canada," and is part of a larger body of work on Individual Property Rights on Canadian Indian Reserves. The author would like to thank Don Smith, Rick Ponting, Rainer Knopff and Tom Flanagan for their help with this project.
2. Two very interesting case studies are the Westbank First Nation near Kelowna, B.C., and the Six Nations Territory in Ontario. Westbank operates under s. 60 of the Indian Act, which gives them pre-approval from Indian Affairs for almost all of the transactions involving CPs. Six Nations is currently employing an innovative use of CPs to meet their housing shortage.

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