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## International Perspectives on First Nations Land Tenure Reform<sup>1</sup>

Jamie Baxter<sup>2</sup> and Michael Trebilcock<sup>3</sup>

### Introduction

Consider the following scenarios:

First Nation A is a densely populated community in the arid interior of the Okanagan Valley. The community's lands are designated by the federal government as an *Indian Act* reserve.<sup>4</sup> Located just two kilometres from a mid-sized city centre, First Nation A has a few businesses and a small pulp and paper industry. However, despite having designated a business development area on the reserve and despite a growing number of skilled individuals from active training and education initiatives, the community's vision for a strong commercial sector has failed to materialize. A full one-third of First Nation A's citizens now live outside the community, many of them far away in major cities such as Vancouver or Winnipeg. Those who remain turn to the surrounding areas to access most public services and to look for jobs.

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

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

These First Nations are hypothetical reserve communities in Canada confronting real-world economic challenges: high unemployment;<sup>5</sup> nascent business development and investment opportunities; and crises in affordable housing.<sup>6</sup> These chal-

allenges are pervasive, though not in every combination nor in every community (RCAP 1996). What legal options are or should be available for First Nations to improve economic and social well-being? Land tenure reform is one possibility. Internationally, land tenure has attracted attention from the legal institutions considered foundational for economic development. But past lessons demonstrate that the people of First Nations must discover the arrangement suitable to their community's unique social, economic, political, geographical, and historical context to craft a successful development strategy. Existing land tenure regimes may be unreflective of local traditions and capacities, and insufficiently flexible to meet the development objectives of some First Nations in Canada. Where part of the community's goals are to use resources more efficiently and to promote growth by participating in national and international economies, harmonizing land tenure inside the community with regimes outside and enforcing rights at the level of the state may provide greater tenure security for interest holders and produce net economic benefits. However, these reforms may entrench inefficient regimes, undermine traditional tenure systems, pose serious threats to community cohesion, and fail to consider crucial supporting institutions, creating greater uncertainty and diminishing prospects for community-led development.

In this paper we consider the potential economic outcomes of further "formalizing" land tenure in reserve communities under a proposed First Nations Land Title System (FNLTS) using insights from Indigenous experiences around the world. The proposal for an FNLTS is currently being developed by the First Nations Tax Commission, a statutory organization formed in 2007 under the federal *First Nations Fiscal and Statistical Management Act (FNFSMA)*.<sup>7</sup> A functional FNLTS would create a national land title registry for First Nations communities that attempts to clarify how property rights are held on reserves (for community members and non-community members) and to make land title more easily transferable (within the community and to outsiders). As an initiative to promote commercial development in reserve communities, an FNLTS also has direct implications for increasing community government revenues under band-administered property tax systems facilitated by the commission. Overall, an FNLTS is intended by the commission to coexist with the other institutions and supporting programs already available to First Nations under the *FNFSMA*.

In this chapter we use the broader concept of land tenure as inclusive of, but not limited to, the term "property rights" to describe reform options confronting First Nations under an FNLTS. In addition to defining rights to use land, to appropriate value from that use, and to transfer rights to a third party, land tenure regimes may also attach positive duties or responsibilities to rights holders as incidents of "ownership" (Rakai 2005). Land tenure reforms also require decisions about the initial arrangement or allocation of property rights, which will be key considerations for First Nation under an FNLTS. Property rights do, however, attract most of our attention in examining economic outcomes and we use two aggregate concepts to describe them.<sup>8</sup>

The first concept is tenure security, which concerns the use of and appropriation of value from property. The greater an interest holder's tenure security, the more predictably she can enforce her claims to use and appropriation. Conversely, tenure is insecure when use and appropriation rights are either undefined or vulnerable to invasion from illegitimate claimants or from the state (Fitzpatrick 2005). A recurring theme in our discussion of reforms is that First Nation members and non-members (outsiders) may experience different degrees of tenure security under the same tenure regime. Part of the reason for this divergence is because use, appropriation, and transfer rights are defined differently according to Indian status and/or community membership under a given regime.<sup>9</sup> On this ground, "community outsiders" refers to individuals legally differentiated from members of the community or band, even though some of those individuals may self-identify as members and be recognized as such by the community itself.<sup>10</sup> But an important implication of our emphasis on predictable enforcement of rights is that perception—individuals' anticipation or risk assessment of whether property rights will be enforced—determines tenure security alongside, and as a reflection of, the formal rules that define property rights. For example, whereas the content of traditional tenures may be comprehensible to community members, apprehension about or mistrust of unfamiliar rights can render that same regime less comprehensible, and thus less predictable, to outsiders. On this ground, community outsider is not a formal or legal designation, but a cultural and experiential one. Tenure security, then, is in part a matter of perception based on past experiences and world views. We draw attention to both rule-based and perceptual differences in tenure security whenever they lead to potentially different economic outcomes for interest holders under a given regime.<sup>11</sup>

The second aggregate concept is transfer rights. Transfer rights define the way a titleholder can transfer use and appropriation rights to third parties, either temporarily (as with lease agreements) or permanently (as with the sale or bequest of title). The central idea driving calls to formalize land tenure is that improved tenure security and greater transfer rights can contribute positively to a well-defined set of economic development goals for interest holders under certain conditions.

In Canada today, First Nations' land tenures on- and off-reserves are subject to multiple layers of oversight and to rapidly shifting common law interpretations of Aboriginal title (Slattery 2000).<sup>12</sup> In turn, land tenure systems themselves may be premised on diverging—sometimes competing—traditions and world views within a wide diversity of communities (Little Bear 1986; Henderson 2000).<sup>13</sup> There are more than six hundred First Nations in Canada and approximately three thousand reserves,<sup>14</sup> many with their own unique tenure arrangements and goals for economic development. Mapping international experiences with reforms onto this complexity therefore presents a special challenge.

First Nations peoples in Canada are not, of course, without guidance from their traditions and experiences about how to use their own resources for community economic development. Strategies developed from these roots have the best

chance of being informed by and consistent with community values. However, given that land tenure in reserve communities has been directly influenced by non-Indigenous governments for well over 350 years (Dickason 1997),<sup>15</sup> traditional roots and non-Indigenous institutions have become inextricably intertwined. As a result, First Nations may find that current reserve tenures are mismatched to their own traditions, or to tenure off-reserve, or both. When outside investment is a key source of capital for economic development, First Nations also have strong incentives to improve the legal linkages that allow them to tap into the flow of wealth and resources from the national and international economies.

As with other issues arising from intersections between Canadian and Indigenous law, recognizing common ground between Indigenous and Western legal practices can provide valuable guidance for First Nations decision-makers in forging these connections (Borrows 2002). For example, some traditional land tenures may provide access to and use of community land by individuals or groups outside the community. Outside users and investors can potentially find methods to translate and adapt to these arrangements, based on their own familiarity with common law leases, in ways that do not compromise their willingness to engage in commercial activity on reserves. Some traditional land tenures also employ forms of private title that permit exclusionary rights similar to land tenure off-reserve, contrary to persistent stereotypes.<sup>16</sup>

In other respects, decision-makers will benefit from attention to First Nations differences when called on to address development goals using traditional laws and knowledge. Group or communal tenures, for example, may provide economic benefits over individual title regimes and can enable the community to steer development collectively (RCAP 1996).<sup>17</sup> Aspects of Indigenous law may also be incompatible with indefeasible transfers to community outsiders in some cases, meaning that the opportunity to alienate title can entail high social costs, including the risk of dispossessing individuals or entire communities (Little Bear 1986). Recognition of differences may ultimately help to determine the appropriate scope and form of federal and provincial involvement in structuring land tenure for economic development on reserves, balanced with the level of autonomy demanded by First Nations peoples in shaping reforms themselves.

Some authors have observed that Indigenous communities around the world are increasingly confronting globalized economic systems that strain traditional practices, values, and world views (Aikau 2007; Anderson, Honig, and Peredo 2006; Anderson, Dana, and Dana 2006). In a similar way, Indigenous peoples now face a growing international development scholarship, attended by influential polities, that regards centralized, formal land tenure regimes as superior to alternatives (World Bank 2004).<sup>18</sup> Our study attempts to confront this predicament head-on. By engaging with the broader debate on tenure formalization, we speak directly to “mainstream” economic development goals of using resources more efficiently and growing local economies by increasing commercial activity and promoting residential and enterprise investment. We consider the consequences

of land tenure choices for some, but not all, development outcomes. Recognizing that land occupies a central place in many areas of social, cultural, and political life for First Nations distinct from but not necessarily unconnected to economics, a core assumption of this development focus is that some communities will want to weigh these efficiency and growth factors in the balance.<sup>19</sup> For some First Nations, these development goals may be secondary, even oppositional, to overriding concerns about socio-economic equity (e.g., between community members), social upheaval, and redress for historical injustices. For those that view these mainstream economic development goals as congruent with their present situation and ambitions, the success of land tenure reforms to meet these goals will be contingent on the full range of considerations that we discuss below.

In its present form, the proposal for an FNLTS has at least four significant characteristics: (1) the underlying allodial title in the reserve land passes from the Crown to the First Nation as a communal interest, so that the land governance provisions of the *Indian Act* no longer apply; (2) the First Nation acquires jurisdiction, under Canadian law, to grant indefeasible title to private owners, transferable to third-party interests, including to non-Aboriginal individuals or entities; (3) a title registry will be implemented at the national level to record all interests in lands under the new regime; and (4) adopting the FNLTS will be optional for First Nations. In the next section, we outline briefly the theoretical insights that inform our analysis. Next, we bring international experiences to bear on the challenges that First Nations are likely to face under an FNLTS regime. Given that the proposed title system merely creates a legal framework, First Nations may have a degree of flexibility to define and administer the land tenure system created within this legislative scheme. However, the past and present experiences of Indigenous communities with formalization programs in the United States, New Zealand, Australia, and South Africa also demonstrate that FNLTS tenure reform will surely be inappropriate for some First Nations in Canada in some contexts. In the final section, we draw some brief conclusions about when an FNLTS may or may not be appropriate for a First Nation and provide suggestions for future research relating to the proposal.

## **Land Tenure and Development in Theory**

Beyond the apparent consensus in academic and policy forums that land tenure matters for economic development, there is substantial debate on two questions. Firstly, what is the economically optimal form and content of a land tenure system given the particular context of the community in question, accounting for pre-existing socio-economic and political institutions? Secondly, how and under what conditions do land tenure regimes change over time? Divergent answers to these questions are frequently attributed to property formalists on one side and informalists on the other. Formalists tend to endorse government sanctioned, designed, and imposed land titling systems that leverage the coercive power of the state to create greater certainty and stability in defining and enforcing property rights.

Conversely, informalists emphasize the adaptive capacity of more localized social norms and customary land tenure regimes as decentralized control mechanisms that evolve over time (Fitzpatrick 2006). While a constructive discourse has emerged at points between these competing views, the question of when land tenure should be formalized in a given context is not greatly illuminated by fixing formalists and informalists at opposite poles. A more rigorous approach, we suggest, is to understand the underlying rationales for enacting tenure reforms and to assess proposals on the basis of their capacity to meet the development objectives of the relevant community.

Sometimes positions in the formalization debate also reflect lines drawn between individual and communal property rights—a dichotomy prominent in discussions about Indigenous communities and economic development (Galbraith, Rodriguez, and Stiles 2006). But a careful distinction should be made between the reasons for formalizing land tenure and the means employed for creating private property rights. It is correct to say that many of the state-supported regimes advocated by development scholars are typified by Western legal traditions, where private property rights are vested in individual actors. Emphasis on private property rights by institutionalists has evolved from early attempts to give an historical explanation of disparities in economic growth rates between the developed and developing world. In particular, they have tried to explain why the West has sustained rapid economic growth in contrast to less successful economies elsewhere. Douglas North and Robert Thomas were among the first modern scholars to draw the connection between private property rights and development, and a number of authors have since followed or extended this theme (North and Thomas 1973; Anderson and Hill 1975). More recently, DeSoto (2000) has advanced the claim that state-supported private property protections provided the security of ownership over physical resources that allowed capital to serve as the primary engine for economic growth in Western states. His central conclusion is that these mechanisms are commonly absent in developing countries, creating vast amounts of “dead” or unproductive capital in the form of land and other resources.

While the link between private property regimes and economic growth can be persuasive from historical and explanatory standpoints, broad claims about the independent role of private property rights are insufficiently precise for crafting successful development policies for the future. In spite of the fact that economic historians frequently aggregate the features of Western and non-Western regimes, the great diversity of land tenure systems across the globe requires consideration of a range of constituent elements.<sup>20</sup> And while formal land tenure has typically enshrined private rights, there is no reason to believe that granting private title is appropriately viewed as a worthwhile objective in itself. As with the relationship between formal and informal institutions, certain contexts will invariably fore decision-makers to abandon an “all-or-nothing” approach to land tenure reform



and to think creatively about regimes that combine relevant features of both individual and communal systems.

In a recent synthesis of property rights and development research, Trebilcock and Veel (2009) challenge researchers and policy-makers to take a more nuanced approach to identifying optimal land tenure regimes by considering the full range of costs and benefits associated with formalization, by accounting for institutional preconditions, and by contemplating the interconnected processes of institutional change. This approach is particularly useful for First Nations reserve communities in Canada with a diversity of economic, social, and political characteristics. A more nuanced approach also has the benefit of avoiding triumphalist accounts of world economic history that seek to frame development by narrating an overly simplified story about how the West has “won.”

## The Current Situation in Canada

Under the status quo in Canada today, First Nation’s reserve land tenure system may be one or some combination of three regimes. First, Indigenous tenures refer to community-defined traditional systems, sometimes referred to as “customary tenure.” However, customary tenure combines two distinct concepts. Non-formal tenures consist of decentralized, socially determined, and often implicit land use rules. By comparison, Indigenous tenures are likely highly structured, with detailed, explicit rules regarding land use, value appropriation, title transfer and inheritance, and the initial allocation of rights by a relevant structure of governance. These systems have often evolved over extremely long time spans. The actual content and governance of Indigenous land tenure vary widely between communities where they are employed as a consequence of unique traditions, practices, and histories.

Secondly, the federal *Indian Act* itself constructs a statutory land tenure regime. Main elements of this scheme are certificates of possession (CPs) issued under s. 20(2) of the *Indian Act* and are the closest analogue to private property rights held off-reserve in Canada. CPs replaced the original location ticket system after *Indian Act* reforms in 1951. Since then, CPs have gained wide usage. By the early 2000s, 10,059 location tickets and 145,000 CPs in total had been issued to individuals on 301 reserves (Alcantara 2003). Some First Nations communities allot the majority of their reserve land to individual certificate holders, while others may have implemented CP allotments only to a limited extent, if at all. Communities may also utilize a mix of property schemes, with a portion of the reserve being held by individual CP holders and the remaining property governed according to traditional systems.

Third, the *First Nation Land Management Act (FNLMA)* provides an option for First Nations to draft and implement their own land codes, replacing the land management provisions of the *Indian Act* with community-level jurisdiction over allotment of property rights to band members and leasing agreements with off-



reserve parties.<sup>22</sup> Adoption of the *FNLMA* scheme and the development of land codes have not yet become a popular tenure reform option for reserve communities in Canada, although it appears that uptake is growing. Currently, fifty-eight First Nations have signed onto the framework agreement for the *FNLMA*, with over half of those administering fully functional land codes under the Act (Lands Advisory Board 2008).

## International Indigenous Experiences

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

Following the three-part model developed by Trebilcock and Veel (2009)—considering the optimal land tenure regime, the necessary preconditions, and the process of regime change—in this section we underscore the differences between reserve communities in Canada by identifying specific conditions or situations that will likely influence First Nation's land tenure decisions with respect to economic development. To do this, we first examine the potential costs of formalization and then consider the social, political, and economic institutions that are necessary for First Nations to realize the benefits of formalization. In general, international Indigenous experiences suggest that formalization reforms can lead to greater tenure insecurity if they undermine Indigenous tenure systems or exacerbate conflicting claims, and can lead to large land losses when the ability of private interest holders or of the group itself to alienate title to outsiders is unrestricted. In addition, where supportive institutions, including Indigenous institutions and practices, community governance, and markets do not exist or have been limited, the potential gains from formalization in Indigenous communities have been or are predicted to be minimal. Finally, past tenure systems and control over Indigenous communities by the state may have entrenched (potentially

inefficient) property interests in Indigenous communities, creating path dependency and increasing the costs of reform.

### ***1. Costs of formalization***

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

#### ***1. Titling Indigenous Tenures***

Formally recognizing an Indigenous tenure regime in First Nations may be a priority for both economic and non-economic reasons. One vision of land tenure in reserve communities that has gained some attention recently, both in Canada and elsewhere, is the possibility of maintaining or more formally recognizing Indigenous regimes—usually involving some form of communal or collective interests vested in the community as a whole—alongside forms of private, individual interests in order to promote development initiatives such as large-scale housing projects (Borrows and Morales 2005; Shillito 2007). The following section considers prospects for First Nations to administer Indigenous tenures under an FNLTS in some form.

One of the main reasons why Indigenous tenures might support efficient land use in First Nations is because the community is sufficiently close-knit to enforce social controls that prevent inefficient overuse of resources and reduce potential conflicts over claims to resource rents. First Nations need to address two potential effects of reform that can threaten to undermine the social foundations of Indigenous tenures. The problem of absenteeism results when tenure formalization causes increased out-migration of traditional interest holders.

Greater tenure security may imply that physical connection to or possession of the land ceases to be a dimension of land tenure, making claims enforceable without being physically present on the land. While greater geographical flexibility for interest holders can have positive economic effects—for example, increasing income potential by leasing the land—Indigenous experiences show that absenteeism may cause land to be underutilized. In addition, when non-economic out-migration pressures already exist, absenteeism may contribute to rapid declines in community cohesion and the erosion of social networks. Title fragmentation is a related problem that can occur when formalization reforms divide title into multiple co-ownership shares, when the titling system is implemented, or as the initial allocation of rights is inherited. Fragmentation can lock interest holders into complex co-ownership arrangements that impose high transactions costs and impede collective action, and can compound the potential for absenteeism.

It is significant that absenteeism and fragmentation problems have been widespread in Indigenous communities where formalization programs have attempted to maintain some form of collective title by attempting to recognize or even accommodate the communal nature of some Indigenous tenures, rather than directly imposing individual rights. Experiences from the Maori in New Zealand sound a caution to First Nation communities about the complexity of formalizing traditional rights under an FNLTS. Traditional land use and possessory rights in Maori communities are held by nested, collective units. In general terms, *iwi* (overarching tribes) normally consist of several *hapu* (subtribes), in turn composed of a number of *whanau* (extended families) (Kawharu 1977). While Indigenous tenures are organized according to these social units, individuals are often allocated non-exclusive access, occupation, and use rights over lands (Kingi 2002).

Maori Indigenous tenures proved resilient in the face of early settler influences to individualize rights, and flexible in adapting to the wave of Western-style agricultural that brought larger-scale production methods and a rapid growth in agricultural trade. Kingi argues that, prior to signing of the Treaty of Waitangi in 1840, “[w]hile the cumulative acquisition of new technologies and cultural accessories produced changes in the structure of Maori society, the organization of economic activity was still based on traditional tribal structures” (Kingi 2002). This adaptability proved beneficial for Maori farmers, who demonstrated skill in modern agricultural methods, using traditional practices as a foundation, and supplied large quantities of food both for their own communities and non-Maori (*pakeha*) settler colonies. The ability of the Maori to adapt their Indigenous tenure systems to changing circumstances derived in part from the fluidity of social and political arrangements, demonstrating that traditional rights were by no means static:

Before the arrival of Pakeha these competing claims of right [to land between Maori groups] were resolved through a variety of customary practices including the use of military force, and public pact. But there were no clear-cut rules, and all rights and

relationships changed over time. The dominant political force could eventually wane and merge with another more powerful group, or break up through internal conflict and re-allocate the land amongst newly formed groups. (Boast and Ereuti 1999, 44)

However, when growing colonial pressure to formalize tenure arrangements on Maori lands culminated in the *Native Land Acts* of 1862 and 1865, the social foundation of customary tenures began to erode. While the 1865 Act's purpose de jure was "to encourage the extinction of (Maori) proprietary customs" (Kingi 2002), the Native Land Court (later called the "Maori Land Court") created to implement formal titles to Maori lands stopped short of granting individuals rights. Instead, certificate of title were vested in groups of no more than ten individuals, who became tenants in common under English colonial law and took the land as a Maori freehold interest that was alienable to outsiders upon the consent of the co-owners, or by individuals after title was partitioned into individual interests.<sup>23</sup> Each member of the group was required to demonstrate a "customary" basis for their property claim to qualify for co-ownership.<sup>24</sup> Under the 1865 *Native Land Act*, the Land Court also had the power to vest land as a communal title in "tribes" in tracts larger than five thousand acres,<sup>25</sup> but actual incidents of these larger communal grants were rare (Boast 1999).

The arbitrary imposition of co-ownership titles on Maori land derived from a failure to recognize the true structure of existing Indigenous tenure arrangements rooted in broader forms of social organization, and ultimately led to fragmentation of title, interest-holder absenteeism, and, as discussed later, widespread land loss to European interests and to the Crown. Fragmentation of title by inheritance—perhaps the biggest effect of reforms—still hinders economic activity on Maori lands today. Since traditional interest holders were granted property rights as tenants in common, the partial interests of co-tenants became further divided among heirs after the death of the principal (Craig-Taylor 2000). Generations of intestate inheritance attached growing numbers of co-owners to tracts of land, each with ever smaller shares. While there is little empirical evidence that demonstrates a direct connection between fragmentation and land underutilization on Maori lands, the transactions costs of coordinating land use—for example, for agriculture—and for leasing arrangements very likely increased considerably with the number of co-owners (Boast 1999; Deaton 2007). More broadly, Kingi notes that Maori Indigenous land tenure included a system of reciprocal obligations on rights holders that was undermined by the imposition of Maori freehold title, as fragmentation made it impossible to maintain the local character of Indigenous tenure and as absenteeism spread (Kingi 2002).

The Maori experience also underscores the difficulties inherent in creating a "hybridized" tenure system on a First Nation where some lands are administered under an Indigenous regime, while title to other lands are granted as private interests and, potentially, made freely alienable. Boast notes that "[t]he process [of convert-

ing Maori customary title to Maori freehold title] was voluntary; Maori were quite free to leave their lands in customary title if they so wished. In fact, a number of factors combined to ensure that virtually all Maori land was eventually brought before the Court [to be converted to freehold title]. Today ... there seems to be little or no land remaining in customay title.” (Boast 1999, 53). Given the potential for individuals within a First Nation to realize large one-time gains from private title grants, social and political pressures may tend to polarize land titling decisions toward either an Indigenous tenure-only system or one that consists of all—mostly—private, alienable rights. From the perspective of institutional change, pressure to privatize rights at the expense of Indigenous tenures may derive from economic incentives. Indigenous communities like the Maori have historically been subjected to strong coercive pressures to privatize from outsiders. It will be incumbent on decision-makers in First Nations to be cognizant of these pressures if an adequately context-contingent tenure system is to operate successfully.

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

## ***2. Costs of Transition to an FNLTS***

An FNLTS appears to offer the flexibility to grant private-type interests and holds some limited potential for incorporating Indigenous systems. But there will also be costs in transitioning from one system to another. Especially in contexts where undefined status quo rights leave claimants’ interests relatively insecure, the process of formalization may exacerbate underlying conflicts that adversely affect the community.

**A. Transition from Indigenous Tenure.** Suppose that a First Nation community has declined to allocate individual interests under its current regime and currently has no leases with outsiders. Formalizing land tenure on this First Nation can raise the stakes for title claimants to have their Indigenous tenure claims recognized under the regime, escalating underlying disputes to land when

an FNLTS is seen as a permanent arrangement that entrenches property rights for the indefinite future.

At the individual level, conflicts may occur in a First Nation if there are overlapping rights to the same physical piece of land. If Indigenous tenure in a First Nation involves multiple layers of functional rights in land corresponding to different uses, how can these rights be recognized under an FNLTS? If some functional rights are prioritized over others in the formalization process, the potential for conflict is high. In recent attempts to recognize communal land rights to specially designed Indigenous lands in South Africa, conflicts surrounding overlapping individual or family rights have come to the fore. The *Communal Land Rights Act (CLRA)* was passed in South Africa in 2004 with the broad purpose of transferring communal title in former reserve areas from the state to local communities. Individual “Deeds of Communal and Right” can then be granted to individuals, overlaying the communal interest and therefore subject to the jurisdiction of the local council or chieftaincy. A central government minister is responsible for granting “new order rights” to individuals under the *CLRA*, which are recognized on the basis of traditional or historical claims to “older order rights.” While the *CLRA* has not yet been implemented, test cases “showed that the prospect of the transfer of private ownership raised the stakes in tenure disputes and triggered major tensions and conflict between competing interest groups” (Cousins 2007, 290–91). The problem of competing and overlapping rights to the same physical piece of land in these communities is derived from a history involving waves of settlement by refugees from the apartheid system who had themselves been forcibly removed from their land elsewhere (Cousins 2007).

The concept of “unpacking” overlapping property rights has received particular attention in South Africa as a way to address disputes arising from conflicting claims. The *CLRA* requires that a land rights enquiry must take place to determine the character and content of older order rights in an open adjudicative process (Cousins 2007). Older order rights are unpacked by granting an award of title to land or control (e.g., use and appropriation rights) over resources corresponding to the originating interests. Aside from the fact that this adjudicative process itself is likely to be expensive, one lesson from the South African experience is that where “overlapping and conflicting rights cannot be reconciled within one area, additional land will be required to relieve land shortages, to ensure that strengthening of the rights of some does not lead to the eviction of others” (Cousins 2007, 264). The effect of land shortages in First Nations reserve communities in Canada has been recognized as an impediment in the context of First Nations business development (RCAP 1996; Dorey 2005). In cases where a First Nation has opportunities to expand its existing land base by making additions to the existing reserve area—perhaps through the return of lands through a land claims process—the resolution of disputes arising from conflicting or overlapping claims may be less costly and more feasible for the community.



Strong community leadership is likely to be another element in successfully preventing and resolving competing or overlapping claims to land in a First Nation. If strong leadership and the capacity for dispute resolution are non-existent, these conflicts will likely impose high relative costs. To a large extent, existing *Indian Act* tenure regimes have already eroded leadership capacity in some reserve communities. The Six Nations community in Ontario is apposite, where the legitimacy of different systems of tenure and governance may be interpreted differently between community members.<sup>27</sup> Attempts to formalize Maori land tenure have concretely demonstrated the endogenous effects of some reforms on community capacity for dispute resolution:

Land was awarded to individuals and those individuals could sell their individual shares without reference to the tribe ... The consequences were far reaching. Individual claims and individual ownership exacerbated family disputes, always present but formerly controlled through the influence of chiefs and elders. The individual assumed an unaccustomed authority and traditional leadership waned” (Bourassa and Strong, 2002, 30-31).

In this respect, the significance of the unique relationships between individuals, Indigenous structures of governance, and the community as a whole in a First Nation cannot be underestimated when considering reforms.

**B. Transition from the Indian Act and FNLMA Regimes.** Suppose that a First Nation has allotted over 95% of its total land area to individual CP holders. Many of these individual allotments have houses, or are used privately for commercial or recreational purposes. The remainder of the land is either leased directly by the band to outsiders or is used for public works, administrative buildings, and public recreational areas. Registering individual interests in land previously held as CPs or individually under the *FNLMA* will apparently be a straightforward process of mapping new-order rights in the land registry directly onto status quo interests.<sup>28</sup> However, two challenges arise for this First Nation. First, the title fragmentation problem discussed in the New Zealand experience above may already exist to some extent in First Nations communities in Canada as a result of the way that CP interests are inherited. When existing CP estates are highly fractionated, the process of registering those fractionated interests under an FNLTS is likely to be complex, especially where record-keeping has been inaccurate, making it difficult to determine the actual group of heirs. Secondly, if a First Nation intends to reclaim previously allotted lands for community purposes or to except certain uses from private title granted under an FNLTS,<sup>29</sup> a high proportion of existing CP allotments may impose high costs. CP or *FNLMA* private interest holders may, in this case, face a type of expropriation or forced rearrangement of their rights, possibly provoking costly disputes.



Inheritance of CP interests on reserves may lead to a growing fragmentation of title into co-tenant interests, similar to the mechanism of title fragmentation extant on Indian reserves in the United States that resulted from an attempt to allot American Indian reservation lands beginning in the 1880's.<sup>30</sup> Section 42 of the *Indian Act* in Canada makes it possible for CP interest holders to bequeath their title interest through a will and determines how the title is divided or fragmented if the CP holder dies intestate. When groups of heirs are large and record-keeping has been poor, a First Nation may find it difficult or impossible to register these interests accurately under a new tenure system, creating the risk of discontinuities and outright loss of fragmented interests. A loose collection of strategies to solve title fragmentation problems in American Indian communities was enacted through the *Indian Land Consolidation Act (ILCA)* in 1983, with reforms in 1984 and 2000.<sup>31</sup> The *ILCA* created a mechanism for tribal land exchanges that allows an individual with several fractional interests to exchange those interests, through the tribal council, for a single piece of land, subject to federal approval and appraisal processes (Shoemaker 2003). However, the system of tribal land exchanges has proved to be time-consuming and labour-intensive in many cases (Shoemaker 2003).

In addition, the *ILCA* contained provisions that forced escheatment of small interests with low income earning potential back to the tribe on the death of the fragmented interest holder (Shoemaker 2003).<sup>32</sup> These escheatment provisions were struck down as unconstitutional takings without just compensation by the United States Supreme Court.<sup>33</sup> What is more, as Jessica Shoemaker (2003) notes, the escheatment provisions did not work in practice. During the seven-year period when the escheatment provisions of the *ILCA* were in operation, the number of fragmented interests in a twelve-reservation sample more than doubled (Shoemaker 2003). Finally, after the 2000 amendments to the *ILCA*, the Secretary of the Interior was given the power to purchase fragmented interests at fair market value with the consent of the majority of the interest holders. These lands are then held in trust for the tribe. While this strategy has been welcomed by some, concerns remain about loss of individuals' connections to particular lands and that this program may lead to an erosion of tribal jurisdiction as the federal government acquires greater control through the trustee relationship (Shoemaker 2003).

Another strategy with some potential to address fragmentation problems if an FNLTs is implemented, may be to form incorporations that manage fractioned title lands for the benefit of the group. After overcrowded titles on Maori lands started to receive attention as being detrimental to economic development, the 1909 *Native Land Act* included provisions for the Native Land Court to grant an incorporation of Maori land by vesting title as a fee simple estate in newly created corporations. Co-owners of the previously fragmented title became shareholders and were required to elect a committee of management with the powers of alienation (Boast 1999). One significant benefit of this scheme is that it allows the corporation to borrow money using land as collateral. However, incorpo-

ration does not necessarily solve problems with absenteeism, and may impose land management structures that are ill-suited to the needs and traditions of the community, making corporations difficult to administer.

The further formalization of private-type interests under an FNLTS may also have differential effects on the tenure security of community members versus outsiders. For some individuals, the registration of interests may improve tenure security by removing the federal government as an intermediary and vesting control in local band authorities, which are likely more accessible and familiar to community members, especially when they live in the community. In contrast, outside lessees may perceive their interests as less secure in the absence of federal government oversight. For both community members and outsiders, the power of First Nation's government to expropriate interests—both in the initial conversion of existing interests and after registered interests have been granted under an FNLTS—may affect heavily on tenure security in the transition to a new tenure regime.

### ***3. Costs of Alienability and Dispossession***

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

Historically, state-sanctioned formalization schemes legalizing title transfer to non-Indigenous settlers caused Indigenous peoples in both New Zealand and the United States to lose most of their traditional lands through exploitation, colonial government mismanagement and bad faith, and the promise of windfall gains to Indigenous individuals from the newfound marketability of their lands. However the mechanisms of land loss and the restrictions on transfers differed between these scenarios. In the United States, trustee restrictions against individual land transfers were imposed on American Indian allottees, and sales of "surplus" lands by the federal government to non-Indian settlers were the main cause of land loss. Between 1887 and 1900, the federal government allotted 32,800 parcels of Indian lands totalling 3,285,000 acres, and sold or forced tribes to cede 28,500,000 acres of surplus land (McDonnell 1991). By 1934, when allotment ended, 90 million

acres of Indian lands were transferred outside Indian control, representing two-thirds of their original land base before 1887 (Bobroff 2001). In New Zealand, Maori customary land was converted to Maori freehold land through the Land Court and granted without transfer restrictions to groups of co-tenants. For the Maori, land loss occurred mostly through private land sales to outsiders, including cases where co-tenant land was partitioned and subparcels were put up for sale.

One marked difference from the international experiences is that under an FNLTS, a First Nation will retain underlying allodial title to community lands, even where indefeasible private interests are granted to individuals. By contrast, for the Maori, as well as American Indians, “[t]he core process was one of tenurial substitution, involving the cancellation of the Maori customary allodial tenure and its replacement by classical English feudal tenure” (Boast 1999). This aspect of the proposed tenure framework allows a First Nation to retain rights of expropriation (e.g., for public purposes) and rights of reversion (e.g., when a private title owner dies without any heirs). More significantly, the jurisdiction derived from the underlying communal title of FNLTS land will afford First Nation communities the authority to place restrictions on the alienability of registered title interests off-reserve.

One possible strategy for First Nation communities is to impose temporary restrictions on individuals against selling lands to outsiders, although this strategy carries some risks.<sup>34</sup> Temporary restrictions could take the form of a complete ban on transferring title to non-community members for an initial period, say five years, to give the First Nation the opportunity to evaluate the effects of tenure reform without the possibility of irreversible land loss. Under the *General Allotment Act* of 1887 in the United States, grants of former reserve lands as trust patents were made to individual Indians; the remaining unallotted lands were made available for sale to non-Indians on behalf of the community. As trustees to allotted lands, the federal government retained legal ownership for a period of twenty-five years. Individual allottees were afforded use rights during this period, but were restricted from selling the land or encumbering it in any way. In view of the overwhelming loss of control over traditional lands, the trust restrictions placed on individuals appear somewhat contradictory to the policy of selling surplus lands, but legislators nonetheless justified these measures as protection against exploitation by non-Indians (Semour 1926). While the trust arrangements created subsequent economic challenges for allottees and their heirs, trusts did in fact provide some degree of protection against the outright loss of land that remained in Indian—at least individual Indian—control.

Title fragmentation on allotted lands however, as discussed above, probably also defeated any efficiency aspects of privatizing land tenure in the United States and, in fact, created greater opportunity for conflicts between expanding groups of co-owners. Since the inalienability of trust land precluded any collateralization or investment incentives, this strategy proved to be an al-around loss for most Indians in the United States, beyond the fact that it prevented them from

losing the remaining land title. The lesson for First Nation communities is that any transfer restrictions on private titles granted under an FNLTS must account for the processes of intergenerational transfer to avoid similar fragmentation problems.<sup>35</sup>

Another strategy to confront the risk of land loss may be for First Nation communities to create specially designated land areas that are available for sale to outsiders, restricting the transferability of interests on the remainder (Stephenson 2007; Borrows and Morales 2005). This strategy could provide tenure security for outsiders to invest in commercial developments, while restricting speculators from promoting rapid land loss not necessarily connected to community economic development goals. If a First Nation already has lands surrendered or designated under long-term leases, it may be relatively costless to convert leasehold interests into indefeasible private title arrangements. However, this strategy might be unworkable if most of the reserve land has already been allotted as CPs or under the *FNLMA*, since community-controlled land will be in short supply. Further, the possibility of windfall profits from selling designated lands may increase incentives for First Nations governments to expropriate previously allotted interests in order to make them alienable to outsiders, effectively decreasing tenure security for rights holders and increasing the potential for costly conflicts. One solution to this problem has met with some success for the Maori in New Zealand. In order to coordinate economic activities undertaken by Maori trusts, these trust entities frequently acquire additional lands, through purchase from the Crown, designated as “General Land owned by Maori.” This category of freely alienable title can be collateralized in order to gain access to credit, but is still subject to the jurisdiction of the Land Court to a limited extent (Smith 1999). As with remedies to resolve competing claims, the expansion of existing First Nation’s community land base may be a key consideration.

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

First Nation communities should be aware that increased diversity in the types of title interests in the community and in the mix of status and non-status interest holders can lead to social costs in addition to the increased complexity of administering the land tenure system itself. This has been the experience, to some extent, of American Indians in the United States as a result of the heterogeneous pattern of land ownership that resulted from allotment. After the American Allotment Period ended in 1934 with the *Indian Reorganization Act*, previously allotted lands in some communities were placed back under the control of Indian tribes. Lands that were ceded or sold, however, were not returned to tribes and remained

as fee simple lands outside their control, creating what is commonly referred to as “checkerboard reserves.” The resulting spatial pattern of lands under tribal control interspersed with non-reserve lands, often owned by non-Indians, has in some cases created major administrative costs for these communities since Indians and non-Indians are subject to different legal jurisdictions. Police services, for example, are extremely difficult to administer on this checkerboard pattern, with Indian individuals on reserve lands subject to tribal policing powers, while non-Indian individuals are subject to mix of state, county, and municipal police jurisdictions (Wakeling et al. 2001).

A final, overarching strategy for First Nation communities—one that supplements either or both of the previous two suggestions—is to ensure strong community cohesion and leadership so that Indigenous tenures are not undermined and to prevent the discounting of the future value of community lands that may result if a First Nation is plagued by health, social, economic, and political problems generally. Altman and colleagues observe: “[m]any consider that enabling Maori to deal in individual interests without reference to the community of owners undermined the customary bases for Maori land tenure, such as group rights and group decision making. This has contributed to excessive sales of Maori land to outsiders, contrary to the long-term interests of those communities” (Altman, Linkhorn, and Clarke 2005, 22). In First Nations where the community government or the community itself does not or cannot provide social stability, individual landowners may become increasingly prominent figures, threatening the long-term viability of the community.

#### **4. Social Inequalities: Gender, Wealth, and Political Power**

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

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

[A]fter 1876 and the passage of the *Indian Act*, Indian women were denied the right to vote in band elections or to participate in reserve land-surrender decisions, and, where their husbands died without leaving a will, they were required to be “of good moral character” in order to receive any of their husband’s property. (RCAP 1996, vol. 4, chapter 2, sectio 3.)

As discussed earlier, the current *Indian Act* also provides no protection for the division of matrimonial real property on reserves following the dissolution of marriage, leading to calls for reform from Aboriginal women's organizations. Confronted with this legacy, First Nations will need to consider carefully the link between land tenure and gender inequality within the community, including opportunities for the process of tenure design to address some of these issues. One small step may be to ensure that there are provisions for recognizing women's interests in land where they had previously been denied. Under South Africa's *CLRA* legislation, for example, "new order rights" are to be vested in women, on determination by the minister, even where the corresponding "old order rights" were vested only in men. These "new order rights" are also required to be vested jointly in all spouses in a marriage, whereas former regimes previously excluded female partners as interest holders—although some gaps still exist with respect to adult female members of a household who use the land but are not spouses (Cousins 2007). While some of these strategies provide a place to start, it will admittedly not be an easy task for First Nations to address long histories of inequality in a way that is viewed as fair by all parties. However, as with issues related to alienability and dispossession, the possibility of increasing formalization of land tenure under an FNLTS places strong pressures on First Nations to confront inequalities before arrangements of rights—and the outcomes that flow from those arrangements—are further entrenched and secured.

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

## ***II. Existence of Other Social, Political, and Economic Institutions***

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



First Nations plan to enforce Indigenous tenure arrangements and manage the pressures that will attend new jurisdiction to alienate land to outsiders.

### **1. Markets**

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

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

The Australian experience demonstrates how low land values in remote communities may affect home builder's and investor's options. Land acquired by the Indigenous Land Corporation in the Northern Territory of Australia has been valued at, on average, \$13 per acre (Altman, Linkhorn, and Clarke 2005). Altman, Linkhorn, and Clarke (2005) observe that the construction costs of housing development in these remote areas—in light of high transportation costs and the limited availability of construction materials and expertise—are disproportionately high compared to the mortgage value of the land (Altman, Linkhorn, and Clarke 2005). In a survey of financial sector experts in Australia, researchers found that Indigenous lands were generally perceived as being not commercially valuable, and therefore unlikely to be attractive to potential lenders or investors (Altman, Linkhorn, and Clarke 2005).

The converse will be true, of course, if a First Nation has valuable natural resource endowments or is close to commercial centres. It is worth noting though that commentators across a number of Indigenous communities have observed



that the history of colonization often left Indigenous peoples with low-value lands, as more valuable areas were appropriated or purchased through various private and public channels. At the time of the New Zealand *Treaty of Waitangi Act* in 1975, the Maori people held 3.1 million acres of land—only 5% of the total land in the country—that was of poor quality and generally non-arable (Bourassa and Strong 2002). The highest-value lands, primarily for agricultural use, were sold off to European settlers (Kingi 2002). Indigenous Australians, too, “have long been displaced (and their native title rights extinguished) from parts of Australia that are attractive for economic development, so that almost by definition, most land ... is unattractive for development” (Venn 2007, 137). If this pattern of land distribution resonates strongly with a First Nation community, it must be careful to take stock of its available resources, and future resources needs and entitlements, before pursuing the promised benefits of reforms.

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

While land tenure may become more closely harmonized with tenure off-reserve under an FNLTS, the structure of business enterprises and investment opportunities in First Nations may be very different from those off-reserve. For individuals like investors engaging in “passive” investments that support entrepreneurs on-reserve by leasing lands or supplying start-up capital, land tenure reforms may have the biggest effect in attracting investment. However, for more active investors who want to take part in the operation of enterprises on-reserve—such as outside corporations in a joint venture—the complexity and unfamiliarity of legal and governance institutions in First Nations may be the main determinants of investors’ willingness to invest, making land tenure reform relatively insignificant. For example, there may be legal and regulatory gaps that First Nations will need to address before complex business and investment schemes can be successful. The new *First Nations Commercial and Industrial Development Act (FNCIDA)* will have a prominent role to play in attracting investors to First Nation communities and in supporting joint ventures by filling some of the regulatory gaps that exist as a result of separate First Nation and provincial jurisdictions. Under the *FNCIDA*, outside investors will acquire greater business certainty in knowing the range of applicable regulations to commercial development projects, before those projects begin. For these reasons, if *FNCIDA* and related legislative measures fail to provide the needed business certainty or are slow to operate, larger and more complex investment initiatives may not materialize after tenure reforms are implemented, although smaller investments may be feasible.

On the other hand, the business risks perceived by investors in First Nation communities may already favour larger-scale business opportunities and will favour them more so once regulatory gaps are filled, meaning that investment markets for smaller enterprises may be more limited. Altman and Dillon (2005) observe that investments on Indigenous lands in remote Australia tend to be large scale and low risk, noting the prevalence of large mining projects on *ALRA* lands. Part of the reason for this may be that outside investors avoid higher-risk investments because they consider the commercial environment to be more uncertain, because tenure security is perceived to be weak, or because of concerns about political or social instability. This experience implies that land tenure reforms may benefit large enterprises like joint ventures—given that regulatory gaps are filled—more than small business ventures.

**C. Low Incomes of Potential Borrowers.** A final reason why credit market opportunities might be limited for First Nations is because of persistently low individual incomes in comparison to comparable potential borrowers off-reserve. Regardless of whether a home builder can collateralize her land as a result of it being alienable under an FNLTS, her income may still be too low to qualify for a mortgage from an off-reserve bank. Speaking again to the case of remote Indigenous communities in Australia, Altman, Linkhorn, and Clarke (2005) predict that “[g]iven very low mainstream employment rates, low incomes and lack of savings among remote and very remote Indigenous people, commercial lenders would be unwilling to lend, or would lend only relatively small amounts, for housing finance irrespective of the nature of the land title” (12). The barrier presented by lower-than-average incomes in First Nations, compared to off-reserve, illustrates the implications of interactions between land tenure reforms and other development initiatives, such as increasing employment opportunities in the community.

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

Secondly, while an FNLTS gives First Nations greater autonomy in determining the structure of land tenure regimes and removes layers of federal oversight, the federal government will probably still have a key role to play in First Nations

in operating credit and investment programs that meet the specific needs of First Nations communities. State-supported investment funds, for example, may be crucial elements to an overall plan of increasing investment through land tenure reform. First Nations communities should be wary that increasing market-based opportunities for enterprise investment and development could signal a rush for the federal government to reduce or dismantle state-supported initiatives tailored to the needs of reserves, leaving First Nations in a vacuum before markets have had the opportunity to develop in a sustainable way.

## ***2. Governance Capacity***

If an FNLTTS can be said to grant First Nations a high level of autonomy in determining the content of property rights and the allocation of those rights to interest holders, there is no doubt that this places particular weight on the community government's capacity to ensure the legitimacy of those interests and to resolve disputes between conflicting claimants. Nearly two decades of research from the Harvard Project on American Indian Economic Development on the connection between governance institutions and economic development on American Indian reserves emphasizes that governance will be crucial for land tenure reforms to be successful in First Nations. While many of the project's findings speak specifically to the importance of good governance in determining enterprise success directly—for example, in operating tribally owned enterprises—some of these conclusions can be generalized to explain why governance capacity in First Nations can be viewed as a precondition for land tenure reforms to lead to successful economic development outcomes. As with most of the status quo tenure regimes, the ability of rights holders to enforce property claims will be determined in reference to two levels of oversight: First Nations' internal rules for governing disputes and the rules in non-Indigenous courts.

If a First Nation does not have an effective dispute resolution mechanism to address competing claims, then almost by definition tenure security will be eroded for both community members and for outside investors. Dispute resolution will need to fairly adjudicate two kinds of conflicts: between individual rights holders—for example, between two community members with conflicting claims—and individual rights holders claiming infringement by the community government itself. The latter will affect an investor's incentives in particular, especially when he is wary about the fact that his title interests will in some cases be vulnerable to expropriation by the band. Jorgensen emphasizes that “[f]air dispute resolution is essential to the accumulation of human, financial, and infrastructural capital because it sends a signal to investors of all kinds that their contributions will not be expropriated unfairly” (Jorgensen and Taylor 2000, 6). If interest holders feel that their legal interests have been infringed upon by the community government or that the community's dispute resolution mechanism is inadequately developed to adjudicate individual conflicts, they may turn to non-Indigenous courts to resolve competing claims. The greater the capacity of a First

Nation's government to resolve these disputes on its own, in a manner that is regarded as consistent and fair by all parties, the lower the cost of resolution and the greater the relative benefits that will flow from adopting an FNLTS.

Good governance will be doubly important for First Nations in which land tenure reforms promise to improve the opportunities for successful enterprises where the community as a whole has a direct stake or ownership interest. Since management of the "politics-business connection" by insulating community-owned businesses and joint ventures from local politics is already a key consideration emerging from the Harvard Project (Cornell 2005), another layer of control vested in First Nations' governments in managing a land tenure regimes poses additional challenges to avoid conflicts of interest that impair the viability of these enterprises.

In addition to dispute resolution, First Nation's governance capacity also concerns its administrative capacity to operate an FNLTS on an ongoing basis, including the maintenance of a land registry office and training the required personnel. While the central registry itself will presumably be located in Ottawa, local land offices will likely need to administer the system and provide guidance and advice to community members. For very small communities with limited public funds and access to expertise, even these minimal demands may strain their existing resources.

### ***3. The Torrens Title System***

A central assumption of the FNLTS proposal is that a Torrens-type title registry can adequately incorporate the potential diversity of interests, including Indigenous and non-Indigenous tenures, private and communal interests. In considering the title interests suitable to the needs and objectives of the community, First Nations will need to test these assumptions against the actual capacities of the registration system. Since the FNLTS proposal calls for a national title registry, at some level the elements of the title regime will need to be standardized across First Nations communities. In the context of registering Indigenous title in Australia, Godden and Tehan (2007) observe that "[r]egistration systems have proven most adaptable in accommodating various forms of proprietary interest from share registers to water rights registers. However, the scale and complexity of ... adapting the current systems for recording native title interests to land registration systems, such as the Torrens title system—should not be underestimated" (293). A Torrens cadastral system is already the dominant title registry for non-Indigenous lands in Australia, where attempts are now being made to design a unified title registry that is capable of integrating Indigenous land tenure. Brazenor and colleagues (1999) provide some examples of how Indigenous land tenure in Australia will strain the existing system to account for the unique features of Indigenous title, for which recognition has grown since the 1993 *Native Title Act*. Central challenges are the accurate and appropriate spatial characterization of lands when boundary definitions may operate differently (e.g., according to topographic features rather

than mathematically defined parcels) and the integration of overlapping rights, restrictions, and responsibilities on Indigenous lands (Brazenor et al. 1999). The existence of functional as well as spatial rights in land—for example, different rights of use held by different “owners” to the same physical area—may also present challenges.

## Conclusions and Suggestions for Future Research

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

How to characterize that diversity when it comes to assessing whether a national titling system is a viable policy initiative overall will be an important next step in this vein of research. The First Nations Tax Commission estimates that the fiscal benefits of an FNLTS will heavily outweigh the fiscal costs of implementing and administering the system, especially when combined with taxing powers under the *First Nations Fiscal and Statistical Management Act* (Fiscal Realities 2007). Given the diverse circumstances of First Nations reserve communities, a main conclusion from our survey of international experiences is that an FNLTS is unlikely to be appropriate for all First Nations. Future research will therefore need to address how the present and future needs of individual communities, when viewed overall, should inform the decision to enact legislation that will provide the legal basis for First Nations to participate in a land title system. One suggestion is that the ongoing experience of reserve communities in adopting and operating under the relatively new *First Nations Land Management Act* (FNLMA) might be instructive in identifying how communities may respond to, and whether they will benefit from, an FNLTS. Below, we highlight three issues that may prove significant.

**Regionalism.** In our discussion above, we highlighted some important regional differences that could affect the success of an FNLTS, such as the remoteness of

Northern communities compared to those near urban centres and potential differences in the frequency of allotted CP land across reserves in different regions. Conversely, attention to regional similarities may provide a viewpoint from which to consider alternatives to a nationally based system. For example, whereas Northern reserve communities in Canada tend to be dependent on non-renewable resource economies such as mining and oil and gas development, economies in southern Canada are generally more diversified. Provincial similarities might also be significant. A full one-half of the signatories to the framework agreement for the *FNLMA* are First Nations in British Columbia.<sup>37</sup> There is only one First Nation in Quebec that is actively developing a land code under the Act, and there are none in the Maritime provinces.<sup>38</sup> The underlying reasons for these provincial and regional differences are as yet unclear. One implication for an FNLTS is that separate title systems for reserves administered at the provincial—instead of national—level might be a strategy to address the diversity of First Nations' situations and their objectives for land tenure reform.<sup>39</sup>

**Different Economic Outcomes for Community Members and Outsiders.**

Given that individuals and groups can experience tenure security and transfer rights differently under a given tenure regime according to their membership status in the community, First Nations may need to balance community demands with the potential to increase the flow of material wealth and resources from outside. Recognizing that First Nations peoples have historically had their tenure claims and development objectives subordinated to outside interests, the goal is to find a land tenure arrangement that does not force First Nations into a zero-sum game with outsiders. As a prerequisite, that arrangement will need to protect and prioritize community cohesion and community interests. The process of designing custom land codes under the *FNLMA* may provide some useful insights into how First Nations are currently attempting to balance, or align, competing objectives.

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

decisions or otherwise limiting their ability to chart their own community-led development paths.

Finally, it is clear that the diversity of First Nations in Canada, and the differences between Indigenous and non-Indigenous relationships to property concepts, defy conventional classifications (often from a Western view) of land tenure as private and communal, traditional and modern systems—even though we sometimes employ these concepts for lack of a more accurate typology. Each First Nation is left with the task of thinking creatively about the most appropriate combination of tenure forms and allocation of property rights for its own needs. Here, First Nation communities might gain insight from international experiences, as communities around the world continue to experiment with tenure regimes that capture the benefits of formalization without undermining community-based systems that are well-suited to local economic and non-economic objectives, and are adaptable to changing circumstances.<sup>40</sup> First Nations' strategies to strike these balances will test the flexibility of a national land title system in Canada. Demand for creative, flexible land tenure arrangements may therefore have a major role to play in determining whether an FNLTS will eventually become a viable legal option for First Nations communities.



## Endnotes

- 1 An extended version of this paper appears in Jamie Baxter and Michael Trebilcock, “‘Formalizing’ Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform” (2009) *Indigenous Law Journal* (forthcoming).
- 2 JD Candidate, Faculty of Law, University of Toronto
- 3 University Professor and Chair in Law and Economics, University of Toronto
- 4 We use the terms “Indian reserve community” and “First Nation reserve community” interchangeably to mean a community or band (“body of Indians”) on land, the legal title to which is vested in the federal government (under Canadian law), that has been set apart for the use and benefit of an Indian band, as defined in s. 2(1) of the federal *Indian Act*, R.S.C. 1985, c. I-5 [*Indian Act*]. The term “reserve” is also used to refer to lands designated under s. 38(2) of the *Indian Act*; see Part Two, Section II below. We employ these terms in order to explore their economic consequences, mainly under Anglo-Canadian law, recognizing that some First Nations use alternative definitions for their communities and lands. In general, we use the term “First Nation” to replace “Indian.” However, the term “Indian” is used when we need to distinguish between Status Indians, who are individuals registered under the *Indian Act*, and non-Status Indians, who are not registered. The federal requirements for registration are laid out in two subsections of the *Indian Act*:  
 Section 6(1): both of an individual’s parents are entitled to Indian registration  
 Section 6(2): one of an individual’s parents is entitled to Indian registration under s. 6(1) and the other parent is not registered.  
 As a result, individuals who have only one Indian parent registered under s. 6(2) do not qualify for registered Indian status. Additional complications in the definition of Indian status exist because amendments to the *Indian Act* in 1985 (Bill C-31) (i) reinstated the status of individuals who had lost their registration through earlier versions of the Act, causing a leap in the number of Status Indians, and (ii) provided the opportunity for individual First Nations to create their own rules regarding First Nations membership, meaning that those eligible for membership, as defined by the First Nations, are not necessarily those eligible for registration, as defined by the federal government. For further discussion see Clatworthy (2005). Registered Indian status is significant for land tenure on reserves because legal eligibility to hold certain land title interests on reserves under the *Indian Act* is contingent on registration.
- 5 In 2006, 51.9% of First Nations peoples living on-reserve were employed, compared with 66.3% of the off-reserve First Nations population (the statistics for Registered Indians living on- and off-reserve were 51.9% and 64.8% respectively) (Statistics Canada 2006).
- 6 According to census data, in 2006 over one-quarter (26%) of First Nations peoples on reserves lived in crowded conditions, and 11% lived in dwellings with 1.5 people or more per room. However, housing conditions on reserves showed some improvement since the 1996 census conducted by Statistics Canada, when 33% of the population on reserves were living in crowded conditions (Statistics Canada 2008).
- 7 *First Nations Fiscal and Statistical Management Act*, S.C. 2005, c. 9, [*FNFSMA*] at s. 17(1). The FNLTS proposal, while still in an early stage of development, is supported by a considerable body of research undertaken by the First Nations Tax Commission. While we attempt to provide a framework in this paper for assessing the effects of formalizing land tenure under a FNLTS, our discussion should not be taken to imply that the commission is necessarily failing to consider a given factor in its ongoing process of proposal development and consultation. The commission has extensive experience in working with First Nations communities through its taxing initiatives. In keeping with our respect for the commission’s special expertise, we anticipate that this paper will contribute to constructive dialogue on reserve land tenure reform.
- 8 Whereas the term “property rights” is commonly used to denote a collection or bundle of distinct entitlements that may be arranged in any number of ways, we employ the aggregate concepts of tenure security and transfer rights derived from Eggertson’s (1990) useful characterization.
- 9 For example, under the current *Indian Act*, possession and use rights in the form of certificates of possession can only be held by Status Indians of a given band, and these certificates cannot be transferred to outsiders, although the Act does make provisions for lease arrangements; *Indian*

*Act, supra* note 1 at ss. 20–28.

- 10 For example, an individual who has one parent who is a non-Status Indian and one parent who is a Status Indian under s. 6(2) of the *Indian Act* will be non-Status; *Indian Act supra*, note 1. However, this individual may have grown up on her home reserve and identify as a First Nations individual and as a member of the community. Under the *Indian Act* land tenure regime, she would still be considered an “outsider.”
- 11 While our discussion of formalization proceeds from the perspective and interests of a given First Nations community, this does not restrict considerations of tenure security and transferability to claimants within the community since development outcomes may be highly contingent on the claims of outsiders. Examples are the community’s ability to attract outside investors and the willingness of off-reserve financial institutions to provide loans.
- 12 A watershed example is the decision of the Supreme Court of Canada in *Geurin v. The Queen* [1984] 2 S.C.R. 335 [*Geurin*] where the Court acknowledged that a fiduciary duty was owed by the federal Crown in the management of lands for Aboriginal peoples. In *Geurin*, the Musqueam Indian band approved a surrender of a portion of their reserve lands to the Crown for the purpose of leasing the land to a golf club. The Court found that the federal government vitiated its duty to act in the best interests of the band members by unilaterally modifying the terms of the lease agreement.
- 13 Leroy Little Bear (1986) describes eloquently his interpretation of First Nations’ property concepts:
 

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

See Hepburn (2006) for an argument in the Australian context that concepts of Indigenous ownership rooted in differing and distinct ontological systems may be non-transferable to a system of private ownership.
- 14 Socio-Economic and Demographic Statistics Section, Indian and North Affairs Canada (personal email correspondence, February 20, 2009) (“There are 615 First Nations/Bands in Canada and an estimated 3,003 reserves of which about 38% are inhabited, or potentially inhabited (Indian Lands Registry System as of December 31, 2008)”).
- 15 While setting a starting point for British colonial involvement directly in administering land tenure in First Nations communities is somewhat arbitrary, Dickason notes that the first “reserve” in Canada was probably started in 1637 at Sillery, near Quebec City.
- 16 Indigenous communities are often perceived by outsiders as employing only communal forms of land “ownership” without individual use rights, or as having only open-access regimes where property rights are undefined. This presents a vastly oversimplified view of traditional land management and tenures in Indigenous communities (Henderson 2000).
- 17 The Royal Commission makes clear that economic development from an Aboriginal perspective is likely to be defined with reference to the well-being of the community as a whole:
 

Policy makers and the general public have tended to assume that the economic problems of Aboriginal communities can be resolved by strategies directed to individuals thought to be in need of assistance ... This approach ignores the importance of the collectivity in Aboriginal society (the extended family, the community, the nation) and of rights, institutions and relationships that are collective in nature. It also overlooks the fact that economic development is the product of the interaction of many factors—health, education, self-worth, functioning communities, stable environments, and so on. Ultimately, measures to support economic development must reach and benefit individuals, but some of the most important steps that need to be taken involve the collectivity—for example, regaining Aboriginal control over decisions that affect

- their economies, regaining greater ownership and control over the traditional land and resource base, building institutions to support economic development, and having non-Aboriginal society honour and respect the spirit and intent of the treaties, including their economic provisions. (3)
- 18 However, a more nuanced approach to property reforms has also been advocated by the World Bank (Deninger 2003).
- 19 Some development scholars have attempted to articulate Aboriginal economic development goals or aspirations in Canada more generally. Anderson characterizes what he calls a collective “Aboriginal approach” to development focused predominantly on the Nation or community, with four key components: (1) improving socio-economic circumstances of Aboriginal people; (2) attaining economic self-sufficiency; (3) attaining greater control over activities on the First Nation’s traditional lands; and (4) strengthening culture, values, and languages as part of the development process (Anderson et al. 2004). RCAP (1996) mirrors these elements of Aboriginal economic development: (1) to respect the economic provisions of treaties and to remedy past injustices concerning lands and resources; (2) to provide jobs, with descent incomes, that do not necessarily require moving from Aboriginal communities; (3) to create self-reliant and sustaining economies; (4) to ensure autonomy in economic decision making; and (5) to structure economies in accordance with Aboriginal values, principles, and customs so that development contributes to, rather than erodes, Aboriginal culture and identity.
- 20 In fact, it was the observation that institutions vary widely—even among the developed capitalist nations—that motivated North and his contemporaries to concentrate on institutional analysis in the first place (North 1990).
- 21 A comprehensive survey of these regimes is beyond the scope of this paper, and indeed the diversity of Indigenous tenure forms across First Nations defies reduction of these rich, complex systems to a set of common characteristics. A groundbreaking study, *Eagle Down is Our Law: Witsuwit’en Law, Feasts, and Land Claims*, by anthropologist Antonia Mills provides one of the most thorough accounts of an Indigenous land tenure system in a First Nation community. Mills describes in detail the relationship between the social organization of traditional Witsuwit’en societies, the lineage of hereditary titles that determines governance of lands and resources, and the centrality of the feast ceremonies in which those titles are transferred. The historical bases of this land tenure system are related to the unique patterns of resource use and “ownership” on Witsuwit’en lands (Mills 1994)
- 22 *First Nations Land Management Act*, R.S.C. 1999, c.24 [FNLMA] s. 8(1).
- 23 The reason for not granting individual titles outright is unclear, especially in light of widespread criticism of the 1865 *Native Title Act* as an engine of destruction (Kawharu 1977; Ward 1974).
- 24 The traditional basis of title was determined by the Land Court, and reflected a thin understanding of the complex bases of Maori claims to areas of land that included inheritance from ancestors (*take tupuna*), conquest (*take rapatu*), gifting (*take tuku*), discovery and exploration (*take taunaha*), and “keeping the home-fires burning” (*take ahikaa*) (Boast and Ereuti 1999). Part of the reason for the Land Court’s interpretations of the customary basis of title may be derived from recognition of a fundamental incongruence with Maori customary law, which did not recognize individual ownership of land (Boast 1999).
- 25 *Native Land Act, 1865*.
- 26 However, we hesitate to overemphasize the return or acquisition of lands as a panacea for economic development challenges for First Nations communities in Canada, at least on the grounds considered in this chapter. In Australia, for example, vast amounts of land have been returned to a form of Aboriginal control, following the *Aboriginal Land Rights (Northern Territories) Act, 1976* (Pollock 2001). But this fact alone has failed to produce much in the way of economic benefits for Indigenous peoples in Australia (Altman, Linkhorn, and Clarke 2005). The location of lands and the natural resources available will no doubt go a long way toward determining the economic outcomes of an increased land base.
- 27 *Logan v Styres*, [1959] 20 D.L.R. (2d) 416, 5 C.N.L.C. (Ont. H.C.) This case involved a claim brought by the hereditary chiefs of the Six Nations against the elected chief and council to stop the surrender of a portion of the reserve. See also Johnston (1986).
- 28 A First Nation might have the option to operate land administration simultaneously under the *FNLMA* and an FNLTS. For example, interests created under the *FNLMA* could simply be regis-

- tered in the new title system. The framework agreement for the *FNLMA* certainly appears to allow for this option (“Nothing in this Agreement prevents a First Nation, at any time, from opting into any other regime providing for community decision-making and community control, if the First Nation is eligible for the other regime and opts into it in accordance with procedures developed for that other regime”).
- 29 The title system proposal indicates that First Nations will be able to create exceptions and reservations to allotted title interests under an FNLTS—for example, in order to reserve timber, mineral, oil, gas, and water resource interests from a grant of individual title to investor (Lang Mitchner 2007).
  - 30 No systematic evidence exists as to the extent or specific causes of CP title fragmentation in First Nations reserve communities. A survey of a custom dataset identifying all undivided (fragmented) interests in Ontario reserve communities, generated from the Indian Lands Registry by the Department of Indian Affairs and Northern Development (DIAND) in 2006, revealed a total of 558 separate undivided interests. The problem of title fragmentation, as a result of intestate inheritance of CP interests, was also identified anecdotally through discussions with officials in the estates section at DIAND.
  - 31 *Indian Land Consolidation Act* 1983, Pub. L. No. 97-459, 96 Stat. 2515, 2517-19 (1982), cited in Shoemaker (2003).
  - 32 “The original version [of the *ILCA*] prohibited descent or devise of interests that amounted to less than 2% of the total tract and that produced less than \$100 in the year preceding the descendant’s death. In 1984, Congress amended the statute to prohibit descent and devise only if the interest had not produced \$100 in any of the five years preceding death” (Shoemaker 2003, 767). This type of scheme was also tried in New Zealand, under the *Maori Affairs Act, 1953*. Section 137 of the Act required that “uneconomic interests” (not exceeding 25 pounds) be compulsorily acquired, at market value, by a Maori trustee, who could then sell the interests to a restricted class of persons. This “conversion” process was abandoned in the *Maori Affairs Amendment Act, 1974* (Boast 1999).
  - 33 *Hodel v. Irving*, [1987] 481 U.S. 704.
  - 34 Research for the FNLTS proposal indicates that First Nations will have the option to designate “protected lands” that would be inalienable to off-reserve parties (Fiscal Realities 2007).
  - 35 It is unclear from research for the FNLTS proposal whether the band government would be able to define inheritance rights for titleholders. Notably, a First Nation will retain escheatment rights under the proposed FNLTS (Lang Michener 2007).
  - 36 For example, this may have been the case for First Nations in New Brunswick (Dickason 1997).
  - 37 “Signatories to the Framework Agreement” (2007) *First Nations Land Management Resource Centre* online <<http://www.fafilm.com/content/en/MembersCommunities.html>>. Signatories to the agreement fall into three categories: (1) Operational Nations have functional land codes that have been approved by the federal government; (2) Active Developmental Nations are in the process of actively developing land codes for approval; (3) Inactive Developmental Nations have expressed their intention to enact a functional land code under the Act by signing the framework agreement, but are not currently active in developing the land code. Another pattern worth noting is that of the 120 communities that have adopted taxing powers over commercial properties under the *First Nations Fiscal and Statistical Management Act*, over 100 of these are in British Columbia.
  - 38 There are two “Inactive Developmental” Nations in New Brunswick: Kingsclear and Saint Mary’s First Nations.
  - 39 This is an option that has been considered by the First Nations Tax Commission in developing the FNLTS proposal. An additional consideration is the fact that many provinces currently employ a Torrens system to administer land title off-reserve (e.g., British Columbia), while some use a mix of Torrens and deed systems (e.g., Ontario).
  - 40 Some communities, particularly in sub-Saharan Africa, have begun to experiment with “hybrid” systems that combine the features of different land tenure regimes. John Borrows and Sarah Morales have recently discussed the potential for Aboriginal communities in Canada to draw on lessons from a system of “starter-title” used in Namibia (Borrows and Morales 2005, *supra* note 153). Under this regime, starter-title is held by an individual who acts as a custodian for a family

or household, but title remains group-based because each household is subject to land-use rules created by a community association. This type of title can then be “upgraded” to other forms of title under criteria designed by the community (Borrows and Morales 2005).

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