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First Nations Property Rights & Land Tenure: Key Policy Issues

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This discussion paper was prepared for the Assembly of First Nations and does not represent the views of any person one or organization other than the author. It provides an overview of key policy issues affecting First Nations land and property rights with a focus on land tenure on reserves.

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Introduction

Dealing with land and property rights issues within First Nations reserve boundaries, traditional territories and settlement lands is an important element of First Nations development strategies across Canada.

Each First Nation has inherent rights and responsibilities to determine their own development strategy, to express their relationship to land through law and to determine what initiatives are needed to support their respective priorities in the area of First Nations land and property rights. These rights are now explicitly confirmed by international human rights law since the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* and by international case law.

In countless ways, First Nations across the country are asserting their fundamental rights to determine the development of their lands and resources, both within reserve boundaries and traditional territories. New governance models for land management have been created under various self-government arrangements but there are many First Nations who have visions that do not fit within existing initiatives or the constraints of federal policy and legal frameworks. Some First Nations have had opportunities to escape the *Indian Act* system but the vast majority of First Nations have not because the overall policy frameworks and negotiations processes does not allow First Nations to get to where they need to go quickly enough for a variety of reasons.

Numerous aspects of the Canadian legal system impinge upon First Nations rights to development and to self-determination. Within the *Indian Act* system, there is no provision or recognition of First Nations land tenure systems. Many other aspects of settler law attempt to define the relationship of First Nations to the land and to various property concepts and economic activities, independent of First Nations law and legal traditions and the principle of free, prior and informed consent.

Case law respecting Aboriginal title and Treaty rights often reveals engrained stereotypes about First Nations economic development activities and how these relate to land rights.

Additions to reserves and the fulfilment of Treaty land entitlement obligations is another issue critical to the economic and social well-being of First Nations. The current ad hoc

and cumbersome process to deal with additions-to-reserves has been an impediment to progress for many years.

This Discussion Paper provides an overview of some current issues relating to First Nations land and property rights, including land tenure issues within First Nations communities and more broadly, within First Nations traditional territories. The purpose of this Discussion Paper is to facilitate First Nations policy discussions with each other on these issues.

Some current policy issues in this area include:

- The respective roles of collective and individual landholding in First Nations lands;
- The role of land registries and different forms of collective and individual landholding;
- The role of First Nations law respecting land (on and off reserves) to guide First Nations governments in maximizing economic, social and political development for the benefit of all citizens and for the benefit of future generations;
- The need for Canadian law and policy to comply with international human rights standards requiring recognition of First Nations land and property rights and jurisdiction;
- The increasing irrelevance of the *Indian Act* land provisions to First Nations needs and values respecting land tenure;
- The resource needs of First Nations in moving forward with their respective visions of legal frameworks for reserve land management and the management of their rights and interests in traditional territories.

Landholding Regimes and Property Rights Within First Nations Communities

Efficient, well-managed, transparent systems for managing land rights and usage by citizens is obviously a desirable policy objective for every nation. Achieving this goal can be challenging and complex for peoples making the transition from colonial legal regimes to regimes of their own design. This is equally true for First Nations whether they are still dealing with the *Indian Act* or are operating under a self-government arrangement.

Globally, there is considerable experience and research on the challenges of moving from, or reforming, imposed colonial property systems. Overall, the research demonstrates that there are different models and approaches to reconciling and determining the respective roles and content of communal and individual systems of landholding as part of contemporary economic development

policies and strategies. Research within Canada is much smaller in volume but supports the view that there is not one right answer for all peoples.

Under the *Indian Act*, legal title to Indian reserves is held by the Crown for the "use and benefit of First Nations." The underlying or reversionary title to reserve lands also rests in the Crown, and in most cases, this is the Crown in right of the province. Under this regime, INAC and First Nation governments each hold responsibility for managing reserve lands.

Nevertheless, the rules and regulations for managing reserve lands set out in the *Indian Act* focus on the federal government's colonial role of intervening in dealings between First Nations and parties other than the federal Crown. As a result, antiquated and inadequate approaches within the *Indian Act* continue to present real barriers to First Nations. In addition, many First Nations manage land transactions within their community outside of the rules provided by the *Indian Act*. These are often referred to as "custom" systems of allotment. Regardless of their actual connection to traditional law, such First Nation-designed systems of reserve landholding are an important consideration when a First Nation is considering reserve land management reform in any process. At a minimum, custom systems of allotment represent locally created systems that community members are familiar with.

The colonial *Indian Act* system of control is not consistent with the original understandings underlying Treaties nor with the nation-to-nation relationship that all First Nations have with the Crown whether they have entered Treaties with the Crown or not.

The special political relationship between First Nations and the Crown, and principles relating to inalienability as a defining characteristic of "Indian" lands, are key elements of the nation-to-nation (that is, inter-national) legal framework developed jointly by First Nations and the Crown through the Treaty process. These legal principles are expressed in documents such as the Royal Proclamation of 1763 combined with the legally binding oral commitments and protocols made in accordance with the legal systems of First Nations – such as the 1864 Treaty of Niagara[1] (among many others). The gift giving and other protocols that emerged from First Nations law form part of the Treaty process and are physical symbols of the sacred commitments made orally by the Crown and First Nations.[2] Similarly, wampum belts record the mutual understanding of First Nations and the Crown (representing settler populations) concerning agreed-upon principles of mutual obligation and reliance and, just as importantly, they record the understanding of the equality and independence of First Nations as peoples. These founding principles of early international law in North America were jointly developed by First Nations and European nations, and have been incorporated into the Constitution of Canada.

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[1] John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal and Treaty Rights in Canada*, ed. Michael Asch. (Vancouver: UBC Press, 1997) p. 155.

[2] See for example, Cary Miller, "Gifts as Treaties: The Political Use of Received Gifts in Anishinaabeg Communities, 1820-1832", *American Indian Quarterly*, 26 (2) (2002) 221-245.

Mark Stevenson and Albert Peeling have summarized the key aspects of this unique legal framework as it relates to First Nations lands in the following way:

"Indian lands are inalienable except to the Crown. This is a fundamental attribute of Indian lands and cause for the courts to refer to the Indian interest in lands as *sui generis.* By stating that no private person may purchase Indian lands, the *Royal Proclamation* of 1763 outlines how Indian lands are to be exchanged. "…Lands…shall be purchased only for Us, in Our Name, at some Publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of our Colonies respectively, with which in they shall lie…" Clearly, the Crown in right of England wanted to protect and/or secure access to Indian lands within a recognized and "official" framework. This framework includes: the recognition of Indian title, the acknowledgment of a special relationship between Aboriginal peoples and the Crown, placing a limit on the alienability of Indian lands, and requiring that such lands only be alienated through a public process. These key elements of the Crown-Indian relationship formed the basis of the historic treaty process and continue to be a part of the guiding principles in today's Crown-Indian relationship. They have also been incorporated as a part of Canada's policy for the negotiation of modern land claims. And, these same key elements form, at least in part, the basis of the Crown-Indian fiduciary relationship which at times crystallizes into a fiduciary duty enforceable by the courts."[3]

In essence, the Crown undertook a positive duty to protect First Nations lands and First Nations peoples themselves from the impacts of settlement and settler law.

Most First Nations wish to see the Minister's role in reserve land transactions reduced or eliminated but without completely forfeiting the Crown's fiduciary duty to protect First Nations and First Nations lands from encroachment and assimilation. From this perspective, living up to the Crown's fiduciary duty means recognizing First Nations jurisdiction (instead of promoting the application of settler law) and supporting First Nations who do not want uncontrolled individual sales of reserve lands to non-members.

The Minister's role in many aspects of land management can be replaced by First Nations collective control and protections without completely forfeiting the Crown's fiduciary obligation. The 1996 *Framework Agreement on First Nations Land* Management (FAFNLM) and its implementing legislation (the *First Nations Land Management Act*) is one example of how this is possible.

First Nations operating under the *Framework Agreement on First Nations Land Management* and its implementing legislation (the *First Nations Land Management Act*) are free to create their own systems of land tenure, complete with new interests in First Nations lands, so long as these are consistent with their agreement with Canada and the implementing legislation. The reserve lands of all participating First Nations explicitly remain reserves within the meaning of the *Indian Act* and s. 91(24) of the *Constitution Act*, *1867*. Individual fee simple ownership as an option was

[3] Mark L. Stevenson and Albert Peeling, "Legal Review of Canada's Comprehensive Claims Policy", Assembly of First Nations Delgamuukw Implementation Strategic Committee, 2002 [*Stevenson and Peeling, Legal Review of Canada's Comprehensive Claims Policy*].

considered and rejected by the First Nations who launched the initiative leading to this Agreement. First Nations experience implementing the Agreement has shown that certainty of title as defined and regulated by First Nations law along with good governance practices, a reliable land registry system, enforceable laws and dispute resolution mechanisms are sufficient for lending institutions and investors to have confidence and certainty in financing arrangements. The fact that the land cannot be sold, that it will always be there as a collective resource, is a form of security itself. The *Framework Agreement on First Nations Land Management* has attracted a lot of interest from First Nations and many more have joined. However, under-resourcing of the process has meant many more are waiting for an opportunity to do so.

Existing self-government agreements provide examples of some of the choices in terms of the role fee simple title may play versus aboriginal title and s. 91(24) reserve status in First Nation land regimes outside of the *Indian Act.* The detail and complexity of each self-government and claims agreement makes comparison across individual land regimes difficult in a discussion paper format. For discussion purposes only, elements of some composite models are set out in Figure 1 and similarly, some general options for land registration systems are set out in Figure 2.

Across the many differences in the range of land management and land regime models across the current spectrum, both FAFNLM First Nations and self-governing First Nations report significant benefits from escaping the *Indian Act* land management system (as explained by various First Nations in some of these regimes at the AFN Policy and Planning Forum, Montreal, November 2010).

In each case, the First Nations concerned have had to decide whether their lands would continue to fall within s. 91(24) jurisdiction or whether they would instead move towards a degree of harmonization between their own laws and provincial laws relating to land management. Mark Stevenson points out that although both the case law and federal policy statements support the retention of s. 91(24) status for Treaty settlement lands, the outcome of negotiations in B.C. has usually resulted in a clause that prevents this.[4]

Other outcomes respecting the retention of s. 91(24) status have been possible. Under the Framework Agreement on First Nations Land Management and under the Westbank Self-Government Agreement, First Nations lands remain "Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*. Under the 1975 James Bay and Northern Quebec Agreement, the Category 1A lands of the Cree Nation remain within the meaning of "Lands reserved for the Indians" under s. 91(24). Under the Yukon Umbrella Final Agreement and individual Yukon First Nation Final Agreements settlement lands are generally not "Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*. However, in the case of some Yukon First Nations, existing

[4] Mark Stevenson, "First Nations Land Reform and the proposed First Nations Property Ownership Legislation", A paper prepared for the First Nations Property Ownership Conference, Vancouver, October 20, 2010. [*Stevenson, First Nations Land Reform*].

reserve lands may be retained as s. 91(24) reserve lands but are no longer subject to the *Indian Act.*

Recent comprehensive claims and self-government final agreements have resulted in new forms of fee simple ownership. Under many of the recent agreements, the First Nation holds some of their settlement lands collectively in fee simple or in a manner deemed equivalent to fee simple. Mark Stevenson points out that these Treaty Settlement Lands are not provincial fee simple lands in the traditional sense nor do they come under the exclusive jurisdiction of the federal government pursuant to section 91(24). "They are unique (sui generis) First Nation fee simple lands protected by section 35 and subject to First Nation law-making authority."[5]

Under the Nisga'a Final Agreement, the Nisga'a Nation has developed its own land regime and is implementing a modified Torrens land title system with the adoption of the Nisga'a Landholding Transition Act. Enacted by Wilp Si'Ayuukhl Nisga'a in the fall of 2009, the Act sets out processes by which individual residential lots in Nisga'a Villages can be granted in fee simple.

A related issue is the treatment of aboriginal title when First Nations escape the *Indian Act*. For First Nations maintaining their lands within s. 91(24) jurisdiction, aboriginal title status for these lands is retained. Under other arrangements, the treatment of this question may vary.

First Nations still living with the *Indian Act* should not be restricted to existing models or proposals; and funding issues that block progress in existing processes need to be resolved quickly. The relatively small numbers of agreements and the very long period of time required to negotiate them are evidence of the need for a joint First Nations-Canada process to build new policy and negotiation frameworks. In 2005, the federal government itself acknowledged the need for the "renewal" of policies and processes for addressing Aboriginal and Treaty rights.[6] The most critical problems with these policy and negotiation frameworks have been well documented including the many anomalies between federal policy and practice.[7]

Underlying current debates about the merits of different land regimes and different land registration systems are different assumptions and beliefs about the best way to pursue economic development strategies to maximize economic, social and cultural well-being for First Nations citizens. There need not be a stark choice between economic development strategies that are collectively focused on the one hand and more individually focused strategies on the other. First

[5] *Stevenson, First Nations Land Reform*.

[6] Department of Indian Affairs and Northern Development, *Renewal of Policies and Processes for Addressing Aboriginal and Treaty Rights*, Federal Background Paper for the Negotiations Sectoral Roundtable, January 12-13, 2005.

[7] See for example Assembly of First Nations, *Report of the Joint Committee of Chiefs and Technical Advisors on the Recognition and Implementation of First Nations Governments* (Ottawa: The Assembly, 2005); *Stevenson and Peeling, Legal Review of Canada's Comprehensive Claims Policy*; Mark Stevenson, "First Nations Land Reform and the proposed First Nations Property Ownership Legislation", A paper prepared for the First Nations Property Ownership Conference, Vancouver, October 20, 2010.

Nations across the country are designing and implementing economic development models and strategies that focus on strategies at the collective level and the individual level.

Differences can be seen in the way different First Nations view the required balance between the two. Some First Nations wish to pursue a model of economic development that is focused more on individual land ownership and entrepreneurship. However, most First Nations place great value on collectivistic values in relation to land for various reasons, including spiritual values and the need to address the threat of being engulfed further by settler societies and laws. In addition, for the many First Nations who do not have reserve lands close to major metropolitan centers, reasserting control over traditional lands and resources is a more realistic and pressing priority than converting relatively small individual plots of land into capital.

Nevertheless, a primarily collectivist orientation towards landholding does not preclude promoting individual entrepreneurship or the creation of new financial instruments to assist in the raising of capital. It should also be recognized that First Nations legal traditions and laws that retain key land and resources on a permanent basis for the benefit of the "collective" or "people", is not unlike the control the federal and provincial Crown exerts (under its questionable sovereignty) over "Crown" lands and resources by which fees and royalties are applied to users of the land, collected and held as government funds for the benefit of citizens.

In recent years, the issue of individual property rights and individual property ownership on reserves has acquired a profile within INAC, not seen since the early attempts to impose the *Indian Act* location ticket and Certificate of Possession (CP) system. The Department finally has woken up to the ever decreasing utility of the *Indian Act*'s land registry system and the widespread rejection and decreasing use of the Certificate of Possession system in favour of First Nations own systems of reserve land tenure.

Although these issues had been identified and discussed in earlier studies by Douglas Sanders[8], Bryan Ballantyne and James Dobbin[9] and Wendy Grant-John[10], the subject was largely ignored by the Department until the First Nations Property Ownership Act initiative (FNPO Act) was launched by Thomas Flanagan and Manny Jules.[11]

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[8] Douglas Sanders, "The Present System of Land Ownership" prepared for the Native Law Program, Faculty of Law at the University of British Columbia. (First Nations Land Ownership Conference, held at the Justice Institute of British Columbia on September 29 and 30, 1988).

[9] Brian Ballantyne and James Dobbin, "Options for Land Registration and Survey Systems on Aboriginal Lands in Canada" report prepared for the Legal Surveys Division of Geomatics Canada. (2000) [*Ballantyne and Dobbin, Options of for Land Registration and Survey Systems on Aboriginal Lands*].

[10] Wendy Grant-John, *Report of the Ministerial Representative Matrimonial Real Property On Reserves* (Ottawa: INAC, 2007).

[11] Tom Flanagan, Christopher Alcantara and André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's University Press, 2010) *[Flanagan et al., Beyond the Indian Act*]; Manny Jules, "Towards the First Nation Property Ownership Act – Presentation by Manny Jules to the House of Commons Standing Committee on Finance – September 15, 2009".

In response to a long neglected national issue, the Department has launched its own research effort without engaging First Nations in the research design. "Draft" papers commissioned by the Department have been prepared but not publicly circulated. The Departmental research efforts appear designed to work in tandem with the FNPO Act initiative, sponsored by the FNTC and academics such as Tom Flanagan.

The proponents of FNPO rely on the views of economist Hernando de Soto to support their belief in the advantages of moving to a fee simple Torrens style land regime. De Soto argues that the remedy for poverty everywhere, is legislative and institutional reform to deliver "security of title" in the form of formalized land titles registration systems.[12] Such reforms, he argues would enable poor people with "informal" land rights or rights in inefficient property law systems to convert these to secure land titles that could then be used to raise capital and to raise themselves out of poverty through mercantile capitalism. In adapting de Soto's theory to a First Nations context in Canada, the FNPO Act proposal further narrows it by exclusively endorsing the adoption of a Torrens land title system and individual fee simple property ownership as essential ingredients of this anti-poverty recipe. The FNPO Act proposal takes aim not only at the *Indian Act* CP system but First Nations' customary allotment systems in suggesting that current tenure systems used by First Nations are not capable of providing security of title. The FNPO Act proponents emphasize that the enabling legislation would be optional and that each participating First Nation also would determine whether all or which portions of their reserve lands would fall under the proposed legislation.

A significant aspect of the FNPO Act proposal is its reliance on the concept of "allodial title" to answer fears that granting First Nations a fee simple title in reserve lands will result in the loss of the collective land base, or "fractionated" reserves as was the case in the United States under the Dawes Act.

Allodial title is a property concept familiar to English common law legal systems but owes its origins to Roman law. The concept pre-dates the feudal tenurial system (the latter includes the notion of a fee simple estate in land).

Black's Law Dictionary defines "allodial" as "Free; not holden of any lord or superior; owned without obligation of vassalage or fealty; the opposite of feudal"; and defines "allodium" as "land held absolutely in one's own right, and not of any lord or superior; land not subject to feudal duties or burdens. An estate held by absolute ownership, without recognizing any superior to whom any duty is due on account thereof."

Over time, the concept of allodial title has been used in different ways in various places.

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[12] Hernando de Soto, *The Mystery of Capital* (New York: Basic Books, 2000). There are critiques of de Soto's thesis by other economists. See for example, James C. W. Ahiakpor, "Mystifying the Concept of Capital: Hernando de Soto's Misdiagnosis of the Hindrance to Economic Development in the Third World" *The Independent Review*, v. XIII, n. 1 (2008): 57–79. See also the cautions of Ezra Rosser, "Anticipating de Soto: Allotment of Indian Reservations and the Dangers of Land Titling" in D. Benjamin Barros (ed.), *Hernando de Soto and Property in a Market Economy, (*Farnham, Eng; Burlington VT: Ashgate Pub. 2010), p. 61

Academics in Canada and elsewhere have examined the concept of "allodial title" for its potential to reshape understandings of indigenous land and property rights as indigenous peoples struggle to emerge from the effects of settler colonialism.

Samantha Hepburn argues for the recognition of an indigenous allodial title in Australia, but one that would still have to be proven. Hepburn uses allodial title in a sense more consistent with its original meaning of complete ownership: "The holder of an allodial title to land would still hold all of the orthodox legal ownership rights associated with the private property relationship, including the right to use and enjoy the land, the right to any income from the land, the right to exclusively possess the land and the right to alienate or dispose of that land in such a manner as the owner should see fit." Hepburn's analysis would appear to preclude the need to grant fee simple title to the indigenous peoples concerned, because the nature of the ownership rights to be provided under this conception of allodial title is so complete. She also notes that the granting of rights or interests by the allodial title holder to others would be enforceable in the law through contract or otherwise.[13]

Sakej Henderson has made the important observation that, within English common law, the concept of "allodial title" has evolved from its original meaning of complete ownership without being subject to a feudal superior. It has come to be associated with the underlying interest of the sovereign in all lands claimed by the State.[14]

This latter understanding of allodial title as a reversionary title claimed by the Crown where land is held in fee simple, is applied by Flanagan, Alcantara and Le Dressay in *Beyond The Indian Act*, when they propose that the proposed FNPO Act should "transfer" the allodial title of the Crown in reserve lands to First Nations, as well as transfer a fee simple title interest in reserve lands or other lands held by First Nations.[15] The FNPO Act proposal in essence assumes the validity of the allodial title of the Crown - otherwise there would be nothing to transfer. The position provincial governments would take on federal capacity to "transfer" the Crown's allodial title is another complex and major issue with possibly different interests and issues in different provinces.[16]

As it affects First Nations subject to the *Indian Act* or the FNLMA, the Flanagan and Jules proposal in essence is a legislative model to swap aboriginal title for fee simple title combined with allodial

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[13] Samantha Hepburn, "Disinterested Truth: Legitimation Of The Doctrine Of Tenure Post-*Mabo"* [2005] *MULR* 1. [*Hepburn, Disinterested Truth].*

[14] James (Sakej) Youngblood Henderson, Marjorie L. Benson and Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000) at p. 70. [*Henderson, Aboriginal Tenure*]; *Hepburn, Disinterested Truth.*

[15] *Flanagan et al., Beyond the Indian Act.*

[16] Me. Peter W. Hutchins et Alexandra Parent, "Le Défi Perpetuel Pour La Reconnaissance d'un Effect Juridique à la Indianité et au Caractere Distinct des Première Nations surs leurs Territoires Traditionnnels", 'Forum Autochtone sur la gestion des ressources naturelles et du territoire, septembre 2010; Lang Michener LLP, "A Constitutional Analysis of the First Nations Land Title Recognition Act", (2009).

title – modeled in some aspects after certain land claims and self-government agreements. The costs of implementing a national First Nations Torrens land title system appear to be vastly understated by FNPO proponents. It would require not only start-up and operating costs for a Registrar's office and an assurance fund, but also a considerable amount of money to complete surveys and legal reviews of individual interests in what presumably the proponents hope is as large a number of First Nations as possible to ensure that ongoing operating costs are sustainable. (For example, Natural Resources Canada is spending $1.3 million per year just to deal with survey issues arising from the external boundaries of reserves for First Nations under the Framework Agreement on First Nations Land Management.[17] In the course of conducting these surveys of external reserve boundaries, many issues and problems arise from unregistered road allowances and other anomalies due to a general lack of care in the way the Crown has managed its fiduciary duty in relation to reserves.)

Most significant are the questions that are not answered. In many ways, the FNPO Act proposal is incomplete. Apart from the significant issues of policy it would raise for both Canada and First Nations, its viability hinges on answering many complex constitutional questions about the fiduciary duty of the Crown, Treaty rights, the section 35 status of fee simple lands held by First Nations and to what extent provincial laws in a range of areas would or would not apply to First Nations lands as a result of the FNPO Act.

The transfer to First Nations of the underlying and legal title of the Crown in reserve lands could effectively remove all reserve land status for First Nations, both under the *Indian Act* and under s. 91(24) of the *Constitution Act, 1867.* FNPO supporters argue otherwise but the answer to this question is far from straightforward.

While some First Nations have self-government or claims agreements that provide that First Nation settlement lands will not have status as "Lands reserved for the Indians" under s. 91(24), these agreements also have detailed provisions addressing the important question of the respective jurisdictions of First Nations and other governments, **and** enjoy the protection of section 35 of the *Constitution Act, 1982*.

If the underlying title in reserve lands is transferred to participating First Nations along with fee simple title, questions inevitably arise about the application of the rest of the *Indian Act* - including how and under whose laws membership/citizenship would be determined. Likewise questions necessarily arise about which government (provincial or First Nation?) would have jurisdiction to make laws respecting such matters as matrimonial real property and wills and estates, to name a few.

The proposal to transfer the allodial title of the Crown (back?) to First Nations is intriguing in many ways. By placing First Nations in the same position as provinces respecting allodial title, this aspect of the proposal inevitably raises questions about the effective recognition of First Nations inherent

[17] Information received from the First Nations Land Management Resource Centre.

sovereignty. However, these questions are not posed or answered by the proponents other than admitting that they have some challenging work to answer anticipated fears and objections from provincial governments.

A particular weakness of the FNPO argument., as so far elaborated, is its skewed and narrow presentation of the international research and domestic experience concerning land tenure reform, formal land registration or titling initiatives and indigenous systems of tenure. Opposing views and research, such as the studies discussed below, are largely ignored.

Pinkney and Kimuyu examined the history and impact of land ownership under two completely different legal tenure regimes in East Africa. They conclude that "except in unusual cases, land titling is unimportant for development" and that "governments should invest scarce fiscal and managerial resources in other areas".[18] The authors conclude that the results of their study are consistent with other African studies that have found little or no impact of titling on investment in land.[19] They further conclude that their study and others indicate that indigenous land tenure arrangements can provide considerable security for investment.

Bromley describes as flawed the inductive logic that says "rich countries have formalised land tenure, therefore formalisation of land tenure will help make you rich."[20] The abstract to Bromley's article in *Land Use Policy* summarizes his conclusions this way: "Unfortunately, empirical research on formalisation of tenure as a stimulus to agricultural investment is unable to establish any robust and reliable connection between more secure tenure and enhanced agricultural productivity. Urban slum dwellers who get titles but who are without work cannot possibly leverage credit from the banking sector. Formalisation erodes and displaces existing social networks and arrangements that do offer security. Formalisation offers little assurance that beneficial outcomes are inevitable. As with a long list of previous simple solutions to complex problems, this too shall pass."

Ho and Spoor warn that proceeding with land titling under conditions of low socio-economic development, can result in "empty institutions" rather than credible ones and a "rapid concentration of land in the hands of a mighty few" as land is increasingly marketized and commodified.[21] From the experience in Central and Eastern Europe, they conclude that societies and societal change are less pliable and malleable than social engineering and neo-liberal economics suggest. These authors suggest that "the successful creation of new institutions hinges in part on choice and timing in relation to the particular constellation of societal, economic, political and cultural parameters."

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[18] Thomas C. Pinkney and Peter K. Kimuyu, "Land Titling: Good, Bad, or Unimportant?" Chapter Ten in Thomas C. Pinkney and Peter K. Kimuyu (eds.) *Policy and Rural Development: Two Communities in East Africa* (Williamstown Mass: Williamstown College, 2000). Available at http://www.expository.org/policyruraldevelopment.htm.

[19] David A. Atwood, "Land Registration in Africa: The Impact on Aboriginal Production", World Development 18 (1990): 659-671; Shem Migot-Adholla, Peter Hazell, Benoit Blarel and Frank Place, "Indigenous Land Rights Systems in Sub-Sahran Africa: A Constraint on Productivity?" (1991) 5(1) *The World Bank Economic Review* 155-175.

[20] Daniel W Bromley, ""Formalising property relations in the developing world: The wrong prescription for the wrong malady" 26 *Land Use Policy* (2008): 20-27.

[21] Peter Ho and Max Spoor, "Whose land? The political economy of land titling in transitional economies", *Land Use Policy* 23 (2006) 580-587.

Baxter and Trebilcock likewise conclude that past lessons demonstrate that each First Nation must discover the arrangement suitable to their community's unique social, economic, political, geographical and historical context to craft a successful development strategy.[22]

Perhaps the most thorough Canadian analysis of the issue of land titling and registration models and factors to be considered in a First Nations context is the 2000 study by Ballantyne and Dobbins for the Legal Surveys Division of Geomatics Canada, Natural Resources Canada.[23] These authors reviewed land registration and holding issues on reserves including various self-government arrangements, examined the outcomes of land titling projects internationally and interviewed First Nations land managers on their views of priorities and relevant factors in decision-making. The authors state that the study was commissioned with "the goal of providing support and information to aboriginal groups and land managers that are or will be faced with recommending land registration and survey systems for their land bases". Some of their most telling conclusions are set out below:

- "…community participation is essential for successful reform. If the reform is orchestrated by elites and remote administrators intent on uniformity … and the beneficiaries of the reform do not agree with the changes and actively participate, the reform will not be accepted and progress will be very difficult." (p. 3.24)
- "..land tenure and cadastral reforms that attempt to significantly alter the existing customary tenure are likely to encounter problems. Land redistribution and drastic changes in rights to land decrease the security of tenure and create ambiguity. Titling and registration may be used to recognise the system that already exists. The most secure land tenure system is that with which people are accustomed. (p. 3.24)
- "Land tenure reform alone, that is not augmented by institutional and physical supports ….. is not likely to succeed. Infrastructure, such as roads, sewers, social services and access to credit must be introduced to achieve the overall purpose of land reform." (p. 3.24)
- "… there must be full social and economic justification to formally recognize rights in land through surveying and registration....Without such justification, cadastral reform in the developing world has been more likely to fail to achieve targets. Indeed, in a 1992 review of 12 World Bank land titling initiatives, only one project was considered to be a success and only two other were considered partial successes. Four broad problems were identified: lack of political support; conflicting bureaucratic priorities; lack of resources; underestimating the complexity of the task (p. 3.36)
- "Any series of property rights registration options must incorporate informal, traditional or customary systems of property rights in land. Such traditional systems have arisen over many generations in response to a complex web of historical, social, and economic forces, and are ignored at the peril of any system which seeks to sweep them asunder." (p. 5.2)

[22] Jamie Baxter and Michael Trebilcock, "'Formalizing' Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform" (2009) 7 *Indigenous L.J*. 45 [*Baxter and Trebilcock, Formalizing Land Tenure in First Nations*].
[23] *Ballantyne and Dobbin, Options of for Land Registration and Survey Systems on Aboriginal Lands*.

The Ballantyne and Dobbins study is one of several pieces of work that demonstrate that considerable work has been undertaken in various parts of Canada to develop indigenous systems of tenure and indigenous systems of land registration.[24] This experience suggests that without community support a new system of land registration may simply be ignored by the community and that there is a range of perspectives on the merits of land registration systems alone versus fee simple Torrens land title systems.[25]

Overall, the international and domestic experience on the role and merits of different land regimes, including land titling initiatives, requires careful examination - it is complex and should not be oversimplified.

A risk of oversimplifying the debate over the merits of fee simple title and land titling is creating the impression that the battle once again is about the superiority of Western economic values and legal norms to those of indigenous peoples.

The posing of a stark choice between collective or traditional landholding regimes versus integration into the domestic and global economy through the adoption of fee simple title and a Torrens land registry system also sets up of a dichotomy between collective and individual rights. The reality is there is a range of options and models that can combine communal values and individual landholding in ways that meet the priorities and values of different peoples.

In assessing any proposal for formalising land tenure through a national land title system, Baxter and Trebilcock have identified a broad range of factors that could affect the ultimate package of risks and benefits for any given First Nation.[26] They sensitively discuss issues relating to the different priorities of First Nations and varying approaches to the relationship between economic development, land, land tenure regimes and globalization. These authors argue that while there are close linkages to be forged between land tenure design on reserves and rights-based development strategies, a contextual weighing of the full economic benefits and costs of formalizing land tenure should be given priority over inflexible and overly broad approaches to reform. They point out that while the research may be somewhat ambiguous on the outcomes of formalizing land tenure, it is clear that successful reform strategies are rarely decontextual or ahistorical.

The Assembly of First Nations has rejected the FNPO Act as any kind of viable national initiative in Resolution 44/2010 in very clear terms; and in numerous resolutions has called for initiatives that will support First Nations inherent and Treaty jurisdiction over their lands – e.g. through the

[24] See also Brian Ballantyne, "Beyond Aboriginal Title in Yukon: First Nations Land Registries" in Louis A. Knafla and Haijo Westra (eds.), *Aboriginal Title and Indigenous Peoples* (Vancouver: UBC Press, 2010) p. 108; Mele Estella Rupou Rakai, "A Neutral Framework for Modeling and Analysing Aboriginal Land Tenure Systems" prepares for the Department of Geodesy and Geomatics Engineering, University of New Brunswick. Technical Report No. 227. (2005); *Ballantyne and Dobbin, Options of for Land Registration and Survey Systems on Aboriginal Lands*.
[26] *Baxter and Trebilcock, Formalizing Land Tenure in First Nations*

overhaul of comprehensive and self-government claims policies and processes, and additions to reserves policies.

Baxter and Trebilcock suggest that the concept of "customary tenure", depending on the context and the speaker, can include informal decentralized, socially determined land use rules as well as formal indigenous systems of land tenure. The latter are the product of the unique traditions, practices and histories of a people, and can be highly structured with detailed, explicit rules. Indigenous systems of land tenure today can also include their own distinctive laws and land registries. Thus, it is not clear on what basis, FNPO Act proponents appear to reject indigenous tenure systems not involving fee simple title and a Torrens registry system as capable of delivering security of tenure.

In discussing "security of land tenure" on reserves, a key question is security and certainty for **which** system of land tenure? The issue is not whether First Nations have concepts of property, but how the Canadian legal system is going to live up to its international legal obligations to recognize and support the distinctiveness of First Nations property concepts. While Western European legal traditions and economic theory treat land and "real property" as a set of material rights that can be and should be commodified and traded, indigenous peoples commonly view land and real property only partially in these terms and place great emphasis on the origins and obligations of property.[27] Indigenous peoples commonly see their relationship to the land "as more than a commercial interest, even if they traditionally rely on their land for material support."[28] Garrick Small and John Sheehan have examined the Australian experience with compensation for land to indigenous peoples. They conclude that where property is recognized as having both material and non-material values, it cannot be adequately valued in commercial terms alone.[29] Small and Sheehan also note that indigenous property concepts can be characterized by principles that vest ownership of the land not only in the contemporary membership but past and future generations too.

The core values of most First Nations in Canada respecting land within their reserves and traditional territories are distinct from those of Western legal traditions and reflect property valuation concepts that extend beyond monetary concepts. For example, the Tsilhqot'in First Nation successfully argued in a federal environmental review process that the cultural importance and spiritual value of the Teztan Biny (Fish Lake) area could not be replaced or mitigated, and that the economic benefits from a proposed mining project should not take precedence over the cultural and spiritual value of their land.

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[27] Garrick Small, and John Sheehan, "The Metaphysics of Indigenous Ownership: Why Indigenous ownership is Incomparable to Western Conceptions of Property Value" in Robert A. Simmons, Rachel M. Malmgren and Garrick Small (eds.) *Indigenous Peoples and Real Estate Valuation* (New York: Springer, 2008), p. 103. [*Indigenous Peoples and Real Estate Valuation*].

[28] *Small and Sheehan, Indigenous Peoples and Real Estate Valuation.*

[29] *Small and Sheehan, Indigenous Peoples and Real Estate Valuation.*

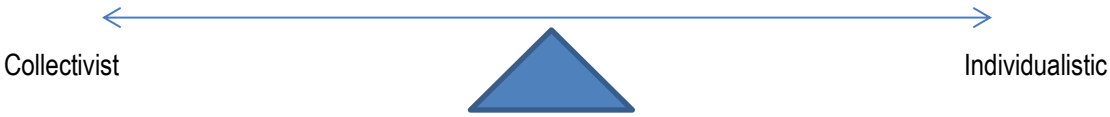
Some initiatives have emerged in recent years to harmonize First Nations systems of landholding with provincial systems in various ways. The *First Nations Commercial and Industrial Development Act* (FNCIDA) was enacted in 2005 in a speedy three week period. Under this Act, a First Nation council can request, by resolution, the federal Cabinet to bring their First Nation under this legislative scheme. In contrast to the FNLMA, there is no community referendum process requirement. The FNCIDA is intended to provide a ready-made set of regulations for specific commercial or industrial developments on reserve lands. This is done by incorporating by reference specific provincial laws (and regulations) that apply to named development projects on specific parcels of reserve lands. Broad regulatory powers are granted the federal Cabinet including the power "to provide for the relationship between the regulations and aboriginal and treaty rights referred to in section 35 of the *Constitution Act, 1982,* including limiting the extent to which the regulations may abrogate or derogate from those aboriginal and treaty rights."

A set of amendments to FNCIDA were passed in 2010 as "the *First Nations Land Certainty Act"*. These provisions apply only to those First Nations who have chosen to come under FNCIDA (and are separate from the much broader fee simple proposal represented by the FNPO Act proposal). The 2010 *First Nations Land Certainty Act* allows the federal Cabinet to make regulations respecting the establishment and operation of a system for the registration of interests and rights in reserve lands for the purposes of FNCIDA. Federal regulations may provide for the registration of existing interests in reserve lands as fee simple interests and the extinguishment of interests that are not registered. This use of federal regulatory power to effectively amend federal legislation could be vulnerable to legal challenge. In addition, the regulations may incorporate by reference any laws of the province, as amended from time to time, with any adaptations that the Governor in Council considers necessary.

Summing Up Key Policy Questions

In an address to the Indigenous Bar Association, Puglaas/Regional Chief Jody Wilson-Raybould spoke positively about the range of options and models available to First Nations to determine land reform issues in their communities in their own way. Regional Chief Wilson-Raybould emphasized the importance of a community going through a process to determine its own land tenure system and considering the full range of issues from its historical systems of tenure, tenures that may have existed extra-legally to the *Indian Act* and others.

Bernd Christmas and Edith Callaghan likewise suggest[30] there is a spectrum of economic development models available to First Nations. These authors emphasize the right of each First Nation to determine what model would work best for them and place the model of economic development chosen by Membertou First Nation in the center of a diagram somewhat similar to the figure below.



Assessing the risks and benefits of any proposal to restore First Nations well-being and prosperity, is necessarily complex given the breadth of issues, rights and interests at stake and the diversity of First Nations.

In summary, any initiative aimed at getting out of the *Indian Act* land provisions, faces four main categories of policy issues:

1) Determining forms of collective and individual landholding on reserves or settlement lands;
2) Policy choices respecting land registration systems;
3) Determining the relationship to s. 91(24) "Lands reserved for the Indians";
4) Impacts on the Aboriginal title status of reserve lands and on the fiduciary duty of the Crown and the need for some form of accounting by the Crown fiduciary for its management of reserve lands.

First Nations Property Interests in Traditional Territories

The acquisition of British sovereignty and law in Canada has been explained by various colonial legal doctrines that have questionable legitimacy in their application to indigenous peoples in Canada. The underpinnings of these doctrines are crumbling under the weight of international human rights law and domestic legal theory. This includes a growing understanding of First Nations perspectives and legal analysis of what happened in Treaty processes. As Sakej Henderson explains, First Nations understanding of the concept of "settlement" in a Treaty context, was that First Nations would share their lands and resources under First Nations jurisdiction. The Treaty

[30] Edith G.J. Callaghan, and Bernd Christmas, "Building a Native Community by Drawing on a Corporate Model" in Joseph Eliot Magnet (ed.), *Legal Aspects of Aboriginal Business Development* (Markham: LexisNexis, 2005) p. 31, see Figure 2 at p. 42.

relationship would respect the agreement to co-exist as separate nations linked in a partnership with the Crown and "The chiefs, with the cooperation of the Crown, would resolve any problems that arose from the settlement in a way to maintain the good order and treaty terms."[31]

The Doctrine of Settlement - A Crumbling Canadian Legal Fiction

As Art Manuel has observed, Aboriginal title highlights the uncertainty of the Crown's assumed title and jurisdiction. Peter Hogg noted as early as 1985[32], the reception of English and French law into British North America is by no means a straightforward story and the two main rules for reception of British law (settlement and conquest) have been applied in disregard of the existence of indigenous peoples and their possession of the land. (Hogg also concludes that it seems clear that all indigenous customary law did not disappear the time of European settlement.)

An example of the questionable claims of European sovereignty over First Nations lands is the continued reliance on the colonial legal doctrine of settlement. Under the doctrine of settlement, when an uninhabited territory was settled by British subjects, the rule of the common law was that the first settlers were deemed to have imported English law with them. In the assumed absence of any competing legal system, English law was deemed to follow British subjects and "filled" what Europeans conveniently declared a legal void in the new territory.

While this is the theory most commonly used to explain the introduction of English common law to First Nations territories, it clearly has factual, legal and human rights problems because it rests on the legal fiction that North America was either uninhabited, or uninhabited by peoples with legal systems. Such a legal doctrine can no longer be supported under international human rights law which recognizes that indigenous peoples are peoples equal to all others and recognizes their right, as peoples, to self-determination. The doctrine of settlement is also a subversion and betrayal of the mutuality of obligations and the equality of peoples inherent in the various Treaty processes.

The adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* in 2007 also calls into question the continued application of colonial legal principles such as the settlement doctrine which ignores the inherent jurisdiction and tenure of First Nations in their traditional lands. In terms of international law more broadly, there is a serious incongruity between the UN Covenants, such as the *International Covenant on Economic, Social, and Cultural Rights*, and the use of such racist colonial legal doctrines to rationalize the assumed sovereignty of the Crown.

The *United Nations Declaration on the Rights of Indigenous Peoples* represents a global statement that international human rights law applies to indigenous peoples, inclusive of the right to self-determination and recognizes the equality of indigenous peoples as peoples. The *Declaration on*

[31] *Henderson, Aboriginal Tenure* at p. 441.
[32] Peter Hogg, *Constitutional Law of Canada*, 2nd Ed., (Toronto: The Carswelll Company: 1985) p. 22.

the Rights of Indigenous Peoples, combined with other United Nations human rights covenants, has significant implications for domestic Canadian law.

Much contemporary legal theory analyzing domestic and international law supports the continuance of indigenous jurisdiction, law, and tenure in Canada and has identified areas of incongruence between international human rights law on the one hand, and Canadian case law and statute law on the other. This literature has developed considerably in recent years. Significant contributions in this area that suggest the need for a fundamental review of the current status of Canadian law include:

- John Borrows, "Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples and Colonialism", Chapter 5 in Recovering Canada: The Resurgence of Indigenous Law (Toronto: University of Toronto Press, 2002) at p.11.
- John Borrows, *Canada's Indigenous Constitution*, (Toronto, Buffalo, London: University of Toronto Press, 2010).
- James (Sakej) Youngblood Henderson, Marjorie L. Benson and Isobel M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000).
- Kent McNeil, *Common Law Aboriginal Title* (Oxford [England] : Clarendon Press, 1989).
- Kent McNeil, "The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison" in (eds.) Louis A. Knafla and Haijo Westra, *Aboriginal Title and Indigenous Peoples: Canada, New Zealand and Australia* (Vancouver: UBC Press, 2010) at p. 146.
- Mark D. Walters, ""The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44 *McGill L.J.* 711.

Sakej Henderson calls for a reformation of current legal analysis of Aboriginal title and tenure based on outdated, invalid colonial legal principles. This is necessary, he argues, because these colonial principles are at odds with the foundations of Canadian constitutional law as articulated by the Supreme Court of Canada as well as fundamental concepts of human rights as articulated by international human rights law. [33]

The Supreme Court of Canada itself has implicitly referenced the fundamental problems in explaining the sovereignty of the Crown in relation to indigenous peoples and their land rights in speaking of "the assumed sovereignty of the Crown" in *Haida Nation* v. *British Columbia (Minister of Forests)*.[34] The minority judgment in *Mitchell* v. *M.N.R.*[35] suggested that the s. 35 reconciliation

[33] *Henderson, Aboriginal Tenure* at p. 7.
[34] 2004 SCC 73, [2004] 3 S.C.R. 511 at para 20.
[35] 2001 SCC 33, [2001] 1 S.C.R. 911.

process will require negotiations to achieve the principle of “merged” or “shared” sovereignty” articulated by the Royal Commission on Aboriginal Peoples.

First Nations Systems of Land Tenure

Baxter and Trebilcock describe the term “land tenure” as meaning “a system of rights and responsibilities related to land” and the law of property rights as focusing primarily on the rights of users.[36] English property law is characterized by concepts that allow property to be subdivided into different component parts, interests and “rights”, and just as significantly by a large number of legal mechanisms for transferring, qualifying and encumbering interest in land.

First Nations’ concepts of land tenure, and legal rules respecting land use, are distinctive and reflective of First Nations’ cultural and spiritual values.[37] First Nations relationship to land is evident in traditional land tenure systems under which the people are regarded as belonging to the land. The people are tied spiritually to the land and in this regard, the ‘people’ encompasses past and future generations. As a result, land cannot be absolutely surrendered or alienated.

The relationship of First Nations peoples to their lands is often described as a holistic one that focuses on the interconnectedness of things. Such value systems and ways of knowing stand in contrast to the European-based concepts of property as a “bundle of rights” that can be divided, commodified, traded and exploited by individuals, solely for the benefit of individuals. To the extent these values may work for peoples living on colonized lands, they carry unique risks for colonized peoples whose exclusive collective occupation of lands has been dramatically reduced already.

Henderson argues that Aboriginal tenures are not an "interest in land" nor are they "use and occupation" deriving from British land law. Rather; Aboriginal tenure is derived from a pre-existing system of law and its entire allocation of responsibilities in aboriginal territory. Aboriginal law structures Aboriginal land tenure into multilayered Aboriginal "responsibilities"(“titles”) in different families or clans, defining their interrelated and cumulative "cares" (“uses” or “rights”) and ecology.[38] Henderson also makes the following points:

- Aboriginal tenure exists in a parallel relationship with the British common law doctrine of tenure in Canadian law and holds an equal or equivalent status, not a subordinate one.
- In Canada, Aboriginal tenure is not derived from Crown tenure; rather Crown title is derived from Aboriginal tenure.
- Reconciliation between aboriginal tenure and crown title will require the creation of a new constitutional law of property.[39]

[36] *Baxter and Trebilcock, Formalizing Land Tenure in First Nations*.
[37] *Henderson, Aboriginal Tenure*.at p. 7
[38] *Henderson, Aboriginal Tenure* at pp. 7-8.
[39] *Henderson, Aboriginal Tenure* at p. 8.

Notions of First Nations land "tenure" (First Nations systems of rights and responsibilities in relation to land) are not restricted to the context of reserve land management. These systems and legal traditions are just as relevant to the management of First Nations traditional territories beyond reserve boundaries.

Article 27 of the UN Declaration on the Rights of Indigenous Peoples supports this view by expressing an obligation of States to establish and implement, in conjunction with indigenous peoples fair, independent, impartial, open and transparent processes that give due recognition to indigenous peoples' laws, traditions, customs and land tenure systems. Article 27 expresses a companion obligation of States "to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned systems."

The dangers of oversimplifying core concepts in First Nations legal traditions respecting relationships to land and the evolution of Canadian settler property law has been pointed out by several legal scholars.[40] Bradley Bryan warns against trying to treat the respective land and property concepts of First Nations and European legal traditions as interchangeable.[41] Bryan notes that "[p]roperty is not simply something that arises in the state of nature but is rather a complex set of social relations that evolves through time."[42] Concepts of land tenure and property rights reflect a people's cultural values and relationships to land and therefore can vary across cultures: "The kinds of social relations that underlie a conception of property include the way that a culture creates community in the relations among its members with respect to land use, knowledge of territory, entitlements to use, and the procurement of goods, among others. Property is an expression of social relationships because it organizes people with respect to each other and their material environment. Property is not so much a statement of a thing as it is a description of a set of practices that we go through in our daily life with others."[43]

The love of breaking people and things down into abstract categories that characterizes European-sourced legal systems[44], combined with the colonial impulse to control, very often succeeds in separating questions of First Nations property rights from questions of First Nations inherent jurisdiction.

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[40] See for example, *Henderson, Aboriginal Tenure*; Richard Overstall, "Encountering the Spirit in the Land: 'Property' in a Kinship-Based Legal Order" in (eds.) John McLaren, A.R. Bubk, and Nancy E. Wright, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver, UBC Press, 2005). p. 22 and Philip Girard, "Land, Law, Liberalism, and the Agrarian Ideal: British North America, 1750, 1920" in the same publication at p. 120; *Small and Sheehan, Selling Your Family;* Garrick Small and John Sheehan, "The Metaphysics of Indigenous Ownership: Why Indigenous Ownership is Incomparable to Western Conceptions of Property Value" in Robert A., Simons, Rachel Malmgren and Garrick Small, *Indigenous Peoples and Real Estate Valuation*, (Boston, MA : Springer-Verlag, 2008), p. 103.

[41] Bradley Bryan, "Property as Ontology: On Aboriginal and English Understandings of Ownership" (2000) 13 *Canadian Journal of Law and Jurisprudence* 3 [*Bryan, Property as Ontology*].

[42] *Bryan, Property as Ontology.*

[43] *Bryan, Property as Ontology.*

[44] Kenneth B. Nunn, "Law as a Eurocentric Enterprise", (1997) 15 *Law & Ineq*. 323; Martha Minow, *Making All The Difference: Inclusion, Exclusion And American Law* (Ithaca and London: Cornell University Press, 1990).

At the negotiation table, the federal government often seeks ambiguity rather than certainty on the question of the character of First Nations jurisdiction even over their own reserve lands. Unambiguous recognition of First Nations inherent jurisdiction and title over their respective reserve lands would be an obvious starting point for a change in federal policy.

The failure to unequivocally recognize First Nations inherent jurisdiction over property matters in turn often leads to Euro-Canadian law being a reference point for describing First Nations property rights. A more flexible approach consistent with First Nations rights under international law would make it easier to express and reflect First Nations property and legal concepts in self-government and other agreements in relation to land.

Within First Nations legal traditions, land, property and inherent jurisdiction cannot be separated and the right of First Nations to express their values, concepts and law about their relationship and rights to land and property has been confirmed by international human rights law.[45]

Duty to Consult and Free, Prior and Informed Consent Issues

First Nations land and property rights in their traditional territories have gained significant recognition in recent years as a result of successful litigation in cases such as *Sparrow*, *Haida Nation*, *Mikisew Cree First Nation* to name a few.[46] While some environmental review processes have produced results recognizing the spiritual relationship and the fundamental rights of First Nations in relation to land, the task of securing such "wins" is expensive and time consuming.

The duty to consult is an ongoing duty that flows from the fiduciary relationship between First Nations and the Crown and from the duty of the Crown to be honourable in all its dealings with First Nations.

Within the framework of Canadian constitutional law, the purpose of the duty to consult is 'to reconcile' the asserted sovereignty of the Crown with the constitutional rights of First Nations and 'to reconcile' means to make two things coexist in harmony. The Supreme Court of Canada has said that the Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1) of the *Constitution Act, 1982*.

The case law outlines principles to determine the content of the Crown's duty to consult in different situations. Under section 35, a duty to consult and accommodate may arise where the Crown has knowledge of the existence, or potential existence, of an Aboriginal or Treaty right protected by

45 In addition to the UN Declaration on the Rights of Indigenous Peoples, see also the 2001 decision of the Inter-American Court of Human Rights in the Awas Tingni case The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of 31 August 2001, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

46 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (*Sparrow*); *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 108 (SCC) (*Delgamuukw*); *Haida Nation* v. *British Columbia*, [2004] 3 S.C.R. 511 (SCC) (*Haida Nation*); Taku River Tlingit First Nation v. British Columbia, [2004] 3 S.C.R. 550 (SCC) (Taku River); Mikisew Cree First Nation v. Canada, [2006] 1 C.N.L.R. 78 (SCC) (Mikisew).

section 35 of the *Constitution Act, 1982*; and is contemplating conduct (e.g. an action or decision) that may adversely affect such a right.

Crown practices required to meet section 35 obligations to consult and accommodate can vary from case to case. The Supreme Court has described a range of consultation and accommodation from the minimal to 'deep' consultation. What will be considered sufficient in a particular case will be influenced by the facts of a particular case, and will include the following considerations:

1. whether the right has been legally established or is asserted but yet unproven;
2. the nature of a known aboriginal or treaty right;
3. the strength of an asserted claim to an aboriginal or treaty right;
4. the seriousness of the threat to the right in issue;
5. what is required to maintain the honour of the Crown and respect the principle of reconciliation.

A wide range of decision-making by federal and provincial officials respecting lands and resources in First Nations traditional territories is made under the authority of federal and provincial legislation and regulations. Such decision-making must conform with the Crown's duty to consult and accommodate First Nations rights and interests. If it does not, decisions can be declared invalid and of no force and effect where a particular First Nation establishes an unjustifiable infringement of a section 35 aboriginal or Treaty right; and it is clear that meeting the test of justifiable infringement will usually require the Crown to meet a legal duty to consult.

The Crown cannot accurately assess the potential impact of its decisions on First Nations Aboriginal and Treaty rights without designing effective consultation processes capable of exchanging information and analysis with all potentially affected First Nations. This requires policies (and in some areas legislation) to guide officials in the performance of their functions and to establish the necessary processes of joint decision-making with First Nations. Some provinces have made more progress in developing formal policies and processes than others. The federal government has said for several years it is in the process of developing a formal policy in this area, but so far, continues with an *ad hoc* approach.

Too often, First Nations must engage in lengthy litigation or direct action to prompt the Crown to take its duty to consult seriously.

In addition, there are fundamental policy questions about ensuring Canadian law and policy conforms with international standards respecting the governments' obligations to obtain the free, prior and informed consent of First Nations in considering, planning, approving or implementing development activities in First Nations traditional territories.

The 2007 *United Nations Declaration on the Rights of Indigenous Peoples* describes First Nations rights to be consulted on, and to consent to, certain decisions affecting them within the context of international human rights law. Current federal policies from claims and self-government to ad hoc

policies and processes in the area of consultation and accommodation need to be overhauled to reflect the international principle of free, prior and informed consent.

Article 19 of the UN *Declaration on the Rights of Indigenous Peoples* declares that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

Other articles of the Declaration express requirements for obtaining the free, prior and informed consent of indigenous peoples relating to development activities in traditional lands. These include Article 32:

> Article 32
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The UN Declaration is now part of a larger body of international human rights law that requires States to recognize the rights of indigenous peoples in their traditional lands and their right to self-determination.[47] The free, prior and informed consent principle is entrenched as part of the broader international human rights system and especially as the rights of indigenous peoples are concerned. These include for example, the Committee on the Elimination of Racial Discrimination (CERD) in its General Recommendation XXIII (1997)[48] and the UN Declaration on the Right to Development.

In several cases in the Inter-American System of Human Rights, including *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *Maya Indigenous Communities v. Belize*,[49] and the *Moiwana Village v. Suriname*,[50] it has been determined that the rights of indigenous peoples and tribal communities are violated by a failure to ensure that free, prior and informed consent is obtained prior to activities that can deprive the peoples of their land or other natural resources. The right of

[47] Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, S. James Anaya : The Human Rights of Indigenous Peoples, in Light of the New Declaration, and the Challenge of Making them Operative, 5 August 2008, A/HRC/9/9 at para 43.
[48] UN doc A/52/18. Annex V.
[49] The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of 31 August 2001, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001); IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004.
[50] *Moiwana Village* v. *Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 124, at 1 (June 15, 2005).

indigenous peoples to have the communal and spiritual aspects of their property concepts and systems recognized and protected by settler states has been confirmed by these cases and as an aspect of their fundamental human rights.

First Nations Law and Policy on Consultation and Consent Requirements

First Nations and First Nation Provincial/Territorial Organizations (PTOs) and tribal councils have been developing their own policies and procedures to guide their own decision-makers and to express their expectations of Crown behaviour and of the private sector where consultation is an issue. These protocols express First Nations' expectations in approaching consultation initiatives. Generally speaking, these protocols require early engagement by the Crown (federal or provincial) and by private sector interests with the First Nations; respectful relationship building; recognition of inherent and Treaty rights; and respect for First Nations' rights to participate and benefit from development in their traditional lands and to participate in the decision making process. In some circumstances, protocols contain consent requirements.

The demands placed on First Nations to effectively manage the challenge of protecting their rights, the land and ensuring their citizens benefit from development are becoming increasingly complex. Collectively, First Nations have a depth of knowledge and experience in dealing with private sector interests and the Crown in matters relating to their traditional territories. This raises the question, what would be the most effective way for First Nations to share their expertise and experience with each other? And what are the obligations of the Crown to work with First Nations to ensure that each First Nation has the resources to carry out land use planning, mapping and surveys relating to their rights and interests in their traditional lands?

Engrained Stereotypes in Case Law

Problems and anomalies exist in judicial analysis of First Nations property rights on reserves and within First Nations traditional territories. These take the form of longstanding stereotypes in settler law about which economic activities First Nations people can engage in without jeopardizing their capacity to assert specific rights belonging to First Nations people.

At the base of these problems is the general failure of settler law to recognize the fundamental rights of First Nations to engage in both traditional and contemporary economic activities and retain their rights as peoples.

While Indian Affairs has been pushing to "modernize" on-reserve systems of regulating land use in order to encourage all manner of economic development, courts have held that engaging in "non-

traditional" or newer forms of economic activities on-reserve can result in the removal of tax exemption status and other rights.[51]

In *Bastien*,[52] a member of the Huron-Wendat Nation who lived on reserve and had a business making and selling moccasins, through a company operated on reserve, was nevertheless found liable to pay tax on his income from his business. Despite all of his connections and his business's connections to the reserve, the Federal Court held that because a majority of the caisse populaire's investments were placed in Canadian and global capital markets, this was enough to situate Mr. Bastien's money "off reserve" and therefore expose it to taxation. Thus, using a bank on reserve is insufficient to maintain the required connections to "Indianness" under the *Indian Act*, if the bank itself is part of the global economy. The Supreme Court of Canada has agreed to hear an appeal from this decision.

There are similar anomalies in section 35 case law dealing with First Nations economic activities and Aboriginal title or Treaty lands.[53] Judicial analysis has erected a dichotomy between section 35 rights and s. 91(24) 'Indianness' on the one hand; and engaging in the wage economy and economic development in the broadest sense on the other. There are penalties arising from the case law in both areas when First Nations engage in what courts regard as less "traditional" economic activities or cultural expressions of First Nations relationship to land that are viewed as closer to European/Canadian/American/global models. Judicial insistence on cultural continuity as defined by settler law is at odds with the right of First Nations to self-determination.

Out-dated Federal Policies

Major federal policies and processes for dealing with land rights issues in First Nations traditional territories (e.g. the ATR process, the comprehensive claims and self-government policies and processes) have not kept pace with section 35 case law, much less international human rights law.

The many issues in these areas received some joint First Nations-Canada examination in 2005 during discussions leading to the *First Nations-Canada Political Accord on the Recognition and Implementation of First Nations Governments*. The purpose of this Accord was to establish a forum where First Nations leadership could discuss with Canada what new initiatives are needed to address problems raised by the very outdated policies in areas such as comprehensive claims and self-government negotiations.

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[51] Constance MacIntosh, "From Judging Culture to Taxing 'Indians': Tracing the Legal Discourse of the 'Indian Mode of Life'", [2009] 47 *Osgoode Hall Law Journal* 399.

[52] *Rolland Bastien Estate v. Canada*, A-586-07, 2009 FCA 109, Nadon and Pelletier JJ.A., judgment dated April 8, 2009, leave to appeal to S.C.C. granted October 29, 2009..

[53] Peter Hutchins, Hutchins Legal Inc. (2010.) " 'What Makes Them Who They Are': Bribery And Coercion In Cultural Compromise". Presentation to INSIGHT 9th Annual Aboriginal Law Conference, Toronto, October 4-5, 2020.

The current government has not been interested in pursuing implementation of this Accord. Roundtables on topics such as Treaty Implementation, comprehensive claims policy and self-government policy have been held in recent years but there is no joint First Nations-Canada mechanism to move joint study and discussion to joint action and decision-making.

In other key areas, federal policy is simply missing – most notably how the federal government should organize itself to meet its consultation and accommodation obligations under section 35 of the *Constitution Act, 1982* and in matters relating to additions-to-reserves.

Additions-to-reserves is another area where the federal response has been unconscionably slow in meeting longstanding legal obligations of the Crown. Upon successful resolution of outstanding lawful obligations of the Crown (i.e. breaches of Treaty, statute and fiduciary obligations) and in agreements relating to outstanding Aboriginal title, First Nations often seek to acquire additional lands and have these lands treated as part of their reserve. In other cases, to meet the demands of a growing population, First Nations need to add land to its existing reserve. When seeking to acquire and then have lands converted to reserve status, INAC has developed a process for this land conversion through the operation of its Lands Manual (Chapter 10) but no clear policy statement exists. This approach introduces additional barriers and inefficiencies that at their core do not provide a framework that recognizes First Nations' regimes relating to land use. Presently, the INAC Lands Manual recognizes only three "categories" of application that will be accepted by the Department of Indian Affairs: (1) application resulting from legal obligations; (2) community additions; and (3) new reserves. In practice, the ATR process is both cumbersome and ineffective and often takes years to both understand and complete.

For a legal and political system so fixed on legal certainty, the Canadian legal system has been remarkably fuzzy when opportunities arise to recognize First Nations inherent jurisdiction over land and collective and individual property rights. There are notable judicial exceptions such as the *Tsquilotin* case.

The ineffectiveness of current policies and practices is evident in the very slow progress in reaching agreements respecting comprehensive land claims, self-government and TLE/additions to reserves.

While Canada is well aware of these issues, there is no dialogue with First Nations to design a process to address them. Unilateral policy change by Canada in key areas affecting First Nations Inherent and Treaty rights is not acceptable and is not consistent with Canada's constitutional or international obligations.

In summary, Canada and First Nations are faced with the fundamental question of how to restructure the domestic legal regime, federal and provincial, to properly reflect First Nations land and property rights in keeping with Aboriginal title and Treaty rights and First Nations right to self-determination under international law.

Diverse Realities Moving Forward

There are diverse views and values about human beings' relationship to land, and the relationship between land and property. This diversity exists among First Nations and among nations globally. Academic literature, indigenous knowledge traditions and diverse legal regimes document this diversity as it relates to indigenous peoples and other peoples in the developed and developing world.

The international literature reveals that there is more than one point of view on the respective roles and merits of communal land tenure and individual land ownership as ingredients of successful economic development strategies. This is a complex question and it is not likely to be answered by one perspective or by a single initiative.

For example, among Western European nations and within Canada, fee simple ownership is only one form of individual land ownership. Fee simple ownership does not apply in Quebec which operates under a civil law system distinct from English property law concepts.

The debate about the merits of English fee simple property concepts is itself shaped and impacted by colonialism, and its diverse legal, economic and social impacts on First Nations. This means that strategies out of the colonial hang-over of the *Indian Act* need to be informed by the diverse realities, needs and priorities of First Nations. There is not likely to be one "magic bullet" that works for everyone, independent of diverse community priorities and values.

There are many First Nations waiting in line to negotiate self-government agreements as well as specific and comprehensive claims agreements. For some time now, First Nations have been saying that an overhaul of out-dated federal policies respecting comprehensive and self-government negotiations is urgently needed. There are significant unresolved policy issues respecting the restricted land tenure options that Canada will contemplate in "self-government" and comprehensive claims negotiations processes. Existing agreement models do not answer these policy questions for all First Nations.

Breaking free of the economic constraints imposed by the *Indian Act* regime, and making progress in self-government and claims negotiations will require respect for different visions of land tenure and management and a view of institution building that seeks to match institutions with First Nations priorities.

Creativity should be welcomed from all sources, not just a favoured few.

Across the diversity of First Nations, some common interests and perspectives can be identified. These include:

- Through their respective laws and development strategies, First Nations are each re-

asserting their inherent jurisdiction over their lands and resources, both reserve lands and, more broadly, over their traditional territories in accordance with their legal traditions, laws and spiritual values.

- First Nations support one another in implementing their own development strategies and in asserting their equal right as peoples to self-determination, by virtue of which they each are free to determine their political status and to pursue their economic, social and cultural development.
- Individually and collectively, First Nations are working to end the paternalistic, cumbersome and inflexible *Indian Act* land management system in accordance with their right to self-determination - not new imposed federal policies or legislation.
- First Nations property rights and land tenure systems apply to First Nations traditional territories, on and off reserves.
- Properly resourced First Nations governments exercising inherent jurisdiction over their lands can provide the same degree of security of title as any other government and need not rely on European property concepts such as fee simple title in order to do so.
- First Nations are entitled to shape and implement their respective visions for asserting jurisdiction over their lands and implementing their inherent rights and respective Treaty relationships.
- In order for all interested First Nations to break free of the *Indian Act*, a process is needed to determine legislative and policy priorities and such a process must be founded on recognition of First Nations right to self-determination and free, prior and informed consent.
- First Nations inherent jurisdiction over reserve lands is inextricably tied to First Nations citizenship issues, and any process intended to address either subject should include consideration of the other.
- First Nations are entitled to the resources required for capacity building and governance necessary to achieve a measure of decolonisation consistent with the United Nations *Declaration on the Rights of Indigenous Peoples*. This includes intergovernmental transfer arrangements that will support the technological, human and institutional capacity for First Nations designed land management systems including mapping, surveys and land use planning needs for governance of land and resources, on and off reserves.

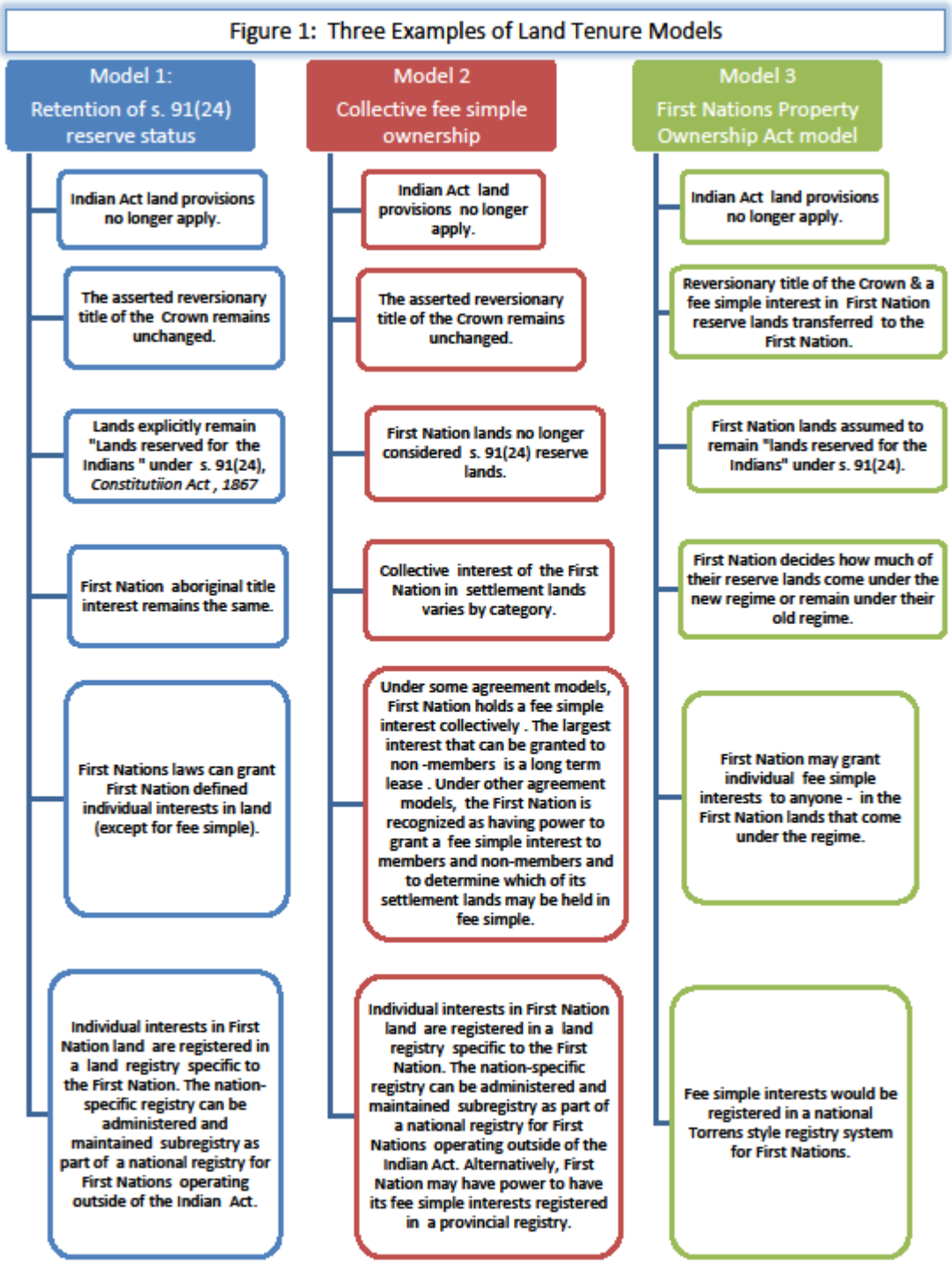
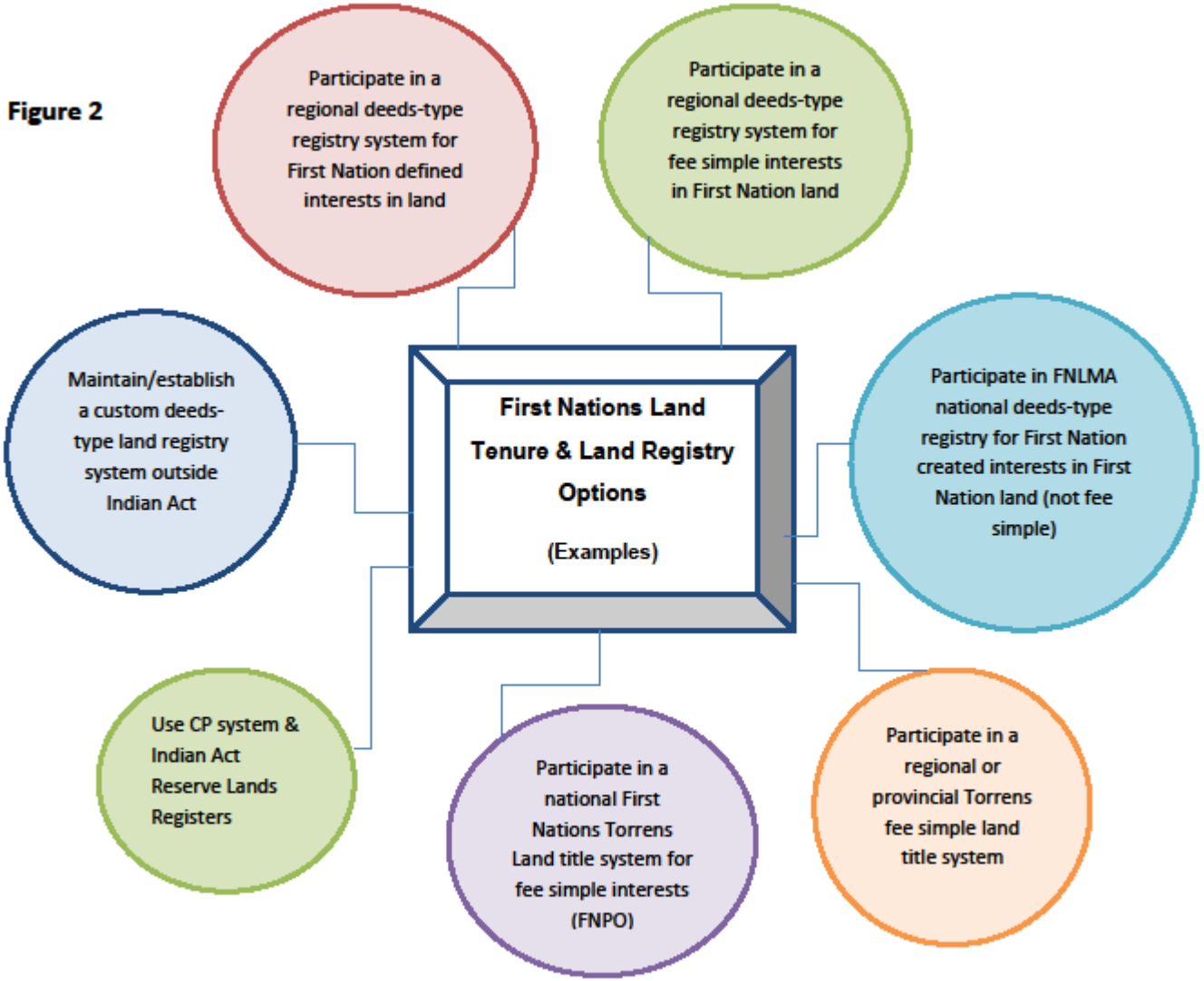


Figure 1: Three Examples of Land Tenure Models
Model 1: Retention of s. 91(24) reserve status
Indian Act land provisions no longer apply.
The asserted reversionary title of the Crown remains unchanged.
Lands explicitly remain "Lands reserved for the Indians " under s. 91(24), Constitutiion Act , 1867
First Nation aboriginal title interest remains the same.
First Nations laws can grant First Nation defined individual interests in land (except for fee simple).
Individual interests in First Nation land are registered in a land registry specific to the First Nation. The nation-specific registry can be administered and maintained subregistry as part of a national registry for First Nations operating outside of the Indian Act.
Model 2 Collective fee simple ownership
Indian Act land provisions no longer apply.
The asserted reversionary title of the Crown remains unchanged.
First Nation lands no longer considered s. 91(24) reserve lands.
Collective interest of the First Nation in settlement lands varies by category.
Under some agreement models, First Nation holds a fee simple interest collectively . The largest interest that can be granted to non -members is a long term lease . Under other agreement models, the First Nation is recognized as having power to grant a fee simple interest to members and non-members and to determine which of its settlement lands may be held in fee simple.
Individual interests in First Nation land are registered in a land registry specific to the First Nation. The nation-specific registry can be administered and maintained subregistry as part of a national registry for First Nations operating outside of the Indian Act. Alternatively, First Nation may have power to have its fee simple interests registered in a provincial registry.
Model 3 First Nations Property Ownership Act model
Indian Act land provisions no longer apply.
Reversionary title of the Crown & a fee simple interest in First Nation reserve lands transferred to the First Nation.
First Nation lands assumed to remain "lands reserved for the Indians" under s. 91(24).
First Nation decides how much of their reserve lands come under the new regime or remain under their old regime.
First Nation may grant individual fee simple interests to anyone - in the First Nation lands that come under the regime.
Fee simple interests would be registered in a national Torrens style registry system for First Nations.

Figure 2


First Nations Land Tenure & Land Registry Options
(Examples)
Participate in a regional deeds-type registry system for First Nation defined interests in land
Participate in a regional deeds-type registry system for fee simple interests in First Nation land
Maintain/establish a custom deeds-type land registry system outside Indian Act
Participate in FNLMA national deeds-type registry for First Nation created interests in First Nation land (not fee simple)
Use CP system & Indian Act Reserve Lands Registers
Participate in a national First Nations Torrens Land title system for fee simple interests (FNPO)
Participate in a regional or provincial Torrens fee simple land title system