



**A SPECIAL REPORT**

# The Rise of the First Nations Land Management Regime in Canada: A Critical Analysis

by **SHALENE JOBIN** and **EMILY RIDDLE**

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## Abstract

Federal Budget 2018 contains significant investments in the First Nations Land Management regime, including \$143.5 million over five years beginning in 2018-19, and \$19 million per year ongoing. In December 2018, the First Nations Land Management Act was amended, lowering the voting threshold for ratification and giving First Nations increased flexibility in investing or spending funds generated under the First Nations Land Management Act. As Canada moves towards a strategy of sectoral self-governance – slowly deconstructing the *Indian Act* rather than negotiating all-encompassing self-governance agreements – the management of reserve lands is becoming a critical component of this model and a supposed means for First Nations to ‘catch up’ to the speed of business and build prosperity for their communities. Though the Land Code may provide First Nations with increased jurisdiction over reserve lands, it does not fundamentally challenge the allocation of land beyond reserves (territory). Also, by opening up reserve lands to the market, it may further contribute to the dispossession of land for First Nations people.

## Keywords

First Nations Land Management, *Indian Act*, Land Management, Treaty, Title, Reconciliation

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## FRONT COVER ART BY CHRISTI BELCOURT, “GOOD LAND”, 2007

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***"Can we stop the power of the white man from spreading over the land like the grasshoppers that cloud the sky and then fall to consume every blade of grass and every leaf on the trees in their path? Before this happens let us ponder carefully our choice of roads."***

***- Ahtahkakoop, 1876<sup>1</sup>***

# PART I: FIRST NATIONS LAND MANAGEMENT FOUNDATIONS

**DURING THE 2015** federal election campaign, the Liberal Party of Canada campaigned on a platform of significant commitments to Indigenous peoples, including the promise to “renew the relationship between Canada and Indigenous Peoples.” But tellingly, they framed their platform as “both a right thing to do and a surefire way to economic growth.”<sup>2</sup> In the emerging era of sectoral self-governance, the First Nations Land Management Regime has become a key feature not only in the federal government’s notion of the “right thing,” but also their plans to chip away at the *Indian Act* and make First Nations more “economically independent.” Of course, this economic growth or independence does not include a redistribution of land or resources, rather it is an expectation that First Nations should support their members through economic activities exclusively on reserve lands.

Despite this concern, the First Nations Land Management Regime has grown considerably with many communities applying and being accepted into the process each year. Indeed, we do not outright reject the positive possibilities for communities taking over the management of reserve lands from the federal government and developing their own land management policies.

**However, it is important to analyze the First Nations Land Management Regime within the larger context of alienation from our traditional territories through market forces and colonial policies.**

In our view, as treaty people, the threat of the First Nations Land Management Regime is that it overwrites our treaty history and obligations. Beyond this, for people whose nations do not have historical or contemporary treaties with the Crown, the threat of the politics of distraction is also at play in that we believe we should be having a larger, more robust conversation with the Crown regarding jurisdiction and management of lands and resources in Canada. It is important to state at the outset that the *Indian Act*, the *First Nations Land Management Act*, and the Framework Agreement on First Nation Land Management make no substantive reference to treaties. This regime is about a very limited type of self governance and does not substantively implement the self-determination envisioned by our ancestors through treaty or inherent rights. This aforementioned point conforms to much government policy and was highlighted by *The Royal Commission on Aboriginal Peoples* in 1996. The report stated that “it is almost as if Canada deliberately allowed itself to forget the principal constitutional mechanism by which the nation status of Indian communities is recognized in domestic law.”<sup>3</sup> This includes the Numbered Treaties, the eleven agreements that span Ontario, the Plains and into B.C. and the Northwest Territories, negotiated between 1871 - 1921.

**One of the goals of the Numbered Treaties, from an Indigenous perspective, is to protect Indigenous territories and livelihoods.**

However, we know that the hegemonic Canadian perspective of the Numbered Treaties (and all other treaties into the very recent present) is that they are land surrenders to the Crown. For those without agreements with the Crown, who refer to their land as ‘unceded’, the scope of this regime is obviously very limited. In this report, we first review the *political economy* of the regime, since economic development is a major motivation for both First Nations and Canada.

**Though, we believe the current economic system we are working within will never provide robust freedom for Indigenous peoples, we also believe that we should not outright reject efforts to ensure fewer of our people live in poverty.**

Second, since this report is meant to be a resource for communities, we critically examine the *process* of creating and ratifying a Land Code. Much of the criticism of FNLMA stems from the ratification process and whether it constitutes proper consent. Later we write about the *implications* of this regime for Treaty and non-Treaty First Nations, as well as the larger landscape of Indigenous governance in Canada.

## **a. Political Economy of the First Nations Land Management Regime**

Current and proposed Canadian legislation, including the voluntary *First Nations Land Management Act* and proposals for First Nations private property ownership, seek to alter the relationship communities have to their reserve land bases by offering a mechanism for First Nations to take over the ‘everyday’ management of those lands. Under a community developed Land Code, First Nations are able to act at the “speed of business”, set terms for land related transactions, business licencing, zoning, and draft their own land management bylaws. This opens up reserve lands to further development (of course this is one of the main motivations for First Nations to enter the process). Currently, under the *Indian Act*, First Nations have to acquire permission from the Minister of Crown Indigenous Relations to allow commercial development of reserve lands. In a three-part review

<sup>1</sup> Arthur J. Ray, *Bounty and Benevolence: A History of Saskatchewan Treaties* (Montreal: McGill-Queens University Press, 2002), 132.

<sup>2</sup> Liberal Party of Canada. 2015. “A New Nation-to-Nation Process.”

<sup>3</sup> Canada, *Royal Commission on Aboriginal Peoples. Vol 1: Looking Forward, Looking Back*, 1996.

<sup>4</sup> KPMG. “Framework Agreement on First Nation Land Management Resource Centre, Partial Benefit-Cost Study Findings Final Report”, 2016.

of the First Nations Land Management Regime, KPMG found that the Framework Agreement generates positive benefits for Canada, meaning that overall, the Regime has contributed to the Canadian economy.<sup>4</sup>

**However, there are currently no studies that prove whether the First Nations Land Management Regime has reduced poverty on reserve or whether increased overall wealth of those First Nations has contributed to better socio-economic indicators, such as health, language renewal, or cultural revitalization.**

Through the First Nations Land Management Regime, the federal government offloads fiscal, fiduciary, and environmental responsibilities and serves to benefit from the increased business capacity of First Nations. Though KPMG found that no First Nations that entered the process would choose to go back to land management under the *Indian Act* (which is not actually an option), First Nations who have ratified a Land Code have critiqued the cost and effort borne solely by the First Nation to develop land policies and laws, as well as higher insurance borne solely by First Nations to cover extended liabilities with regards to environmental management. Though the federal government is responsible for environmental damage and contamination that occurred before the transfer of land management, a First Nation assumes liability and responsibility for any environmental issues that occur after a Land Code takes effect.

Additionally, though First Nations receive funding to hire a land manager or other such staff to contribute to the development and enforcement of laws under the Land Code, including environmental assessment laws, these funding levels are set out in the Individual Agreement. Operational funding to support the implementation of a Land Code and corresponding laws is generally agreed to every five years for a fixed amount, so it is not guaranteed that a First Nation will always be able to access this funding or to what extent.

## **b. Who Benefits from Reserve Marketization?**

Ultimately, the aim of the *First Nations Land Management Act* is to put reserve land on the global market, subjecting communities to increased market forces. Under the Framework Agreement First Nations report an increase in businesses owned by external partners.<sup>6</sup> The political ideology of neoliberalism, counter to the tenets of many traditional Indigenous economic philosophies, supports the deregulation of society through a consolidation of power and profit for corporations, over human, community needs (not to mention needs of the land). Some Indigenous scholars identify neoliberalism as a new form of colonization affecting Indigenous peoples, which can lead to increasing social inequality.<sup>8</sup> Instead of the social, political, cultural, legal and economic spheres interacting in balance within a society, neoliberalism embeds those

spheres in, and under, the economic sphere, and they are seen primarily through that lens.

Many non-Indigenous scholars, however, advocate for neoliberal conceptions of capital accumulation and corresponding institutions of governance for Indigenous peoples as an answer to “undeveloped” economies. Tom Flanagan, for example, argues that Indigenous peoples’ “problem” lies in a lack of private property and that “as quickly as possible, Indian bands should receive full ownership of their reserves, with the right to subdivide, mortgage, sell, and otherwise dispose of their assets, including buildings, lands, and all natural resources”.<sup>10</sup> Similarly, Hernando De Soto articulates the need for private property systems in which private property rights are enforced. From this perspective, land can be used as collateral for economic enterprise.<sup>11</sup> Manny Jules argues that Indigenous peoples historically had property rights, and so, others suggest a “reinstatement” of private property rights for First Nations would enable effective integration into the Canadian economy.<sup>12</sup>

Since the publication of *Beyond the Indian Act: Restoring Aboriginal Property Rights*, there have been few published Indigenous nation-specific rebuttals or suggested alternatives that account for a continuous relationship to territory. Flanagan’s main argument within that text is that First Nations must convert their reserve lands to fee-simple in order to reach economic independence. This led to the First Nations Property Ownership Proposal. In 2010, Neskie, Manuel and Emma Feltes wrote a rebuttal to the campaign for the First Nations Property Ownership Proposal arguing that it undermines the collective title held by First Nations people and would effectively result in extinguishment of title.<sup>13</sup> In 2014, Shiri Pasternak argued that First Nations Property Ownership legislation was “discursively framed to acknowledge Indigenous land rights while the bill simultaneously introduces contentious measures to individualize and municipalize the quasi-communal

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<sup>5</sup> KPMG. 2014. “Framework Agreement on First Nation Land Management, Update Assessment of Socio/Economic Development Benefits Final Report.”

<sup>6</sup> KPMG. 2014. “Framework Agreement on First Nation Land Management, Update Assessment of Socio/Economic Development Benefits Final Report.”

<sup>7</sup> Rauna Kuokkanen, 2006. “Sámi Women, Autonomy, and Decolonization in the Age of Globalization.” In Keynote speech from Act 4: *Beyond Subject and State? Indigenous Interests in the Age of Globalization*, University of Lapland, June 2006.

<sup>8</sup> David Harvey. 2005. *A Brief History of Neoliberalism*. New York: Oxford University Press. 16.

<sup>9</sup> Shalene Jobin. 2014. “*Cree Economic Relationships, Governance, and Critical Indigenous Political Economy in Resistance to Settler-Colonial Logics*.” PhD Dissertation. Edmonton, AB: University of Alberta.

<sup>10</sup> Thomas Flanagan. 2006. “Can Native Sovereignty Coexist with Canadian Sovereignty?” In *Crosscurrents: Contemporary Political Issues*, edited by Mark Charlton and Paul Barkers. Toronto: Thomson/Nelson. 50.

<sup>11</sup> Hernando De Soto. 2000. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. New York: Basic Books, Christopher Woodruff. 2001. “Review of de Soto’s *The Mystery of Capital*.” *Journal of Economic Literature* 39: 1215–23.

<sup>12</sup> Tom Flanagan, Christopher Alcantra, and André Le Dressay. 2010. *Beyond the Indian Act: Restoring Aboriginal Property Rights*. Montreal: McGill-Queens University Press.

<sup>13</sup> Neskie Manuel and Emma Feltes. “Privatization of reserves promoted by liberalization gurus.” *Rabble*. 2010.

land holding of reserves.”<sup>14</sup> Though the First Nations Property Ownership legislation has not been introduced by the federal government, some of the same logics are at play in the First Nations Land Management Regime.<sup>15</sup>

**We have seen a shift to targeting individual First Nations, rather than blanket legislation when it comes to opening up reserve lands for development.**

It is also important to understand the potential reasons why the federal government may be interested in the Regime. One reason could be related to rendering void the fiduciary responsibility that the federal government holds to First Nations related to the aspects included in the regime. A second reason could be to open up lands to market interests for more expedient resource development. Finally, the Framework Agreement has been shown to generate profits for Canada.

**In a case study research project it was found that for five First Nation’s economic projects examined (which they called the “big winners”), the Framework Agreement provides profits to Canada of “between roughly \$270 million and 1.4 billion” over the anticipated lifetime of the economic development project.**

This increased revenue generated for Canada is due to First Nation’s ability to “work at the speed of business,” meaning it is easier for a First Nation to open businesses on-reserve, work with industry and forge business relationships with industry which lead to the development of reserve land.

The increased profits derived from reserve land eventually flow into the Canadian economy, thereby showing *why* Canada remains invested in removing barriers to business on-reserve. Study results show that First Nations operating within the First Nations Land Management Act report an increase in businesses owned by external

partners.<sup>17</sup> But, importantly, First Nations need to be aware of how the increase in market control may negatively impact their lands and nations.

**We find ourselves at a similar juncture faced by First Nations people in the 1960’s: we are being forced to defend the arcane nature of the *Indian Act* in order to protect our current rights.**

In 1969, the federal government authored the Statement of the Government of Canada on Indian Policy, which sought to effectively to abolish the *Indian Act*. In the *Unjust Society*, Harold Cardinal calls this a “thinly disguised programme of extermination through assimilation”.<sup>18</sup>

### **c. Limitations of *Indian Act* / Settler Colonial Governance**

It should be noted that it is band councils elected under the *Indian Act* that have the power to opt into the First Nations Land Management Regime. Though it is generally agreed upon that First Nations need to be able to exert more jurisdiction and control over governance, we are being offered this increased control through an imposed governance system, since Canada generally accepts those bestoyed power through the *Indian Act* as our official representatives. As we know, the *Indian Act*, 1876 had two main purposes, building on the Gradual Civilization and Enfranchisement Acts that came before it: 1) to assimilate First Nation individuals until they qualified for enfranchisement into the Canadian body politic; and 2) to force an exclusively male, British-style municipal type government onto First Nation communities.<sup>19</sup> Additionally, the majority of chiefs and councillors elected under the *Indian Act* are men. Today, First Nations women are also more likely to be urban — having been forced off reserve after successive discriminatory federal laws — and therefore while they may be able to vote as band members to either accept or deny a Land Code put forward by their leadership, they serve to benefit less from economic activities on reserve.

Finally, it is important to acknowledge that First Nations in Canada have a diversity of traditional and elected governance systems. Following arrests of Wet’suwet’en and supporters blocking pre-construction activities for the Coastal Gaslink pipeline, Trevor Jang writes “the band councils are responsible for managing reserve lands, while the hereditary system is what governed the broader traditional territory which is what the pipeline is proposed to cross.”<sup>20</sup> Similarly, nêhiyaw scholar Sylvia McAdam writes that “The *nêhiyawak* believe the women have jurisdiction over land and water, which is contrary to the processes of land claims which are primarily male-dominated chiefs — elected according to the imposed *Indian Act*.”<sup>21</sup>

<sup>14</sup> Shiri Pasternak. 2014. “How Capitalism will Save Colonialism.” Antipode 00(0): 2

<sup>15</sup> Jeremy J. Schmidt. 2018. Bureaucratic Territory: First Nations, Private Property, and “Turn-Key” Colonialism in Canada. *Annals of the American Association of Geographers* 108, 4. Forward, Looking Back, 1996.

<sup>16</sup> KPMG. 2016. “Framework Agreement on First Nation Land Management Resource Centre, Partial Benefit-Cost Study Findings Final Report.”

<sup>17</sup> KPMG. 2014. “Framework Agreement on First Nation Land Management, Update Assessment of Socio/Economic Development Benefits Final Report.”

<sup>18</sup> Harold Cardinal. 1999. *The Unjust Society*. Toronto, ON: Douglas and McIntyre, Ltd. 1

<sup>19</sup> John S. Milloy. 2008. “Indian Act Colonialism: A Century Of Dishonour, 1869-1969.” National Centre on First Nations Governance

<sup>20</sup> Trevor Jang. 2019. “The Real War Facing the Wet’suwet’en Nation.” VICE Canada.

<sup>21</sup> Sylvia McAdam. 2015. *Nationhood Interrupted: Revitalizing Nêhiyaw Legal Systems*. Saskatoon, Sk: Purich Publishing Limited.

**Given this state of affairs, there is an important point to make here: many First Nations who have implemented a Land Code tout the ability to create their own laws as a major benefit, but we question to what extent these reserve land management laws correspond to Indigenous legal systems.**

This alienation of Indigenous peoples from those legal systems is wrapped up in the dynamics and logics of settler colonialism. We use the term *settler-colonial* to refer to the ongoing subjugation that Indigenous peoples face generally. Settler-colonial logic, related to the economy, is what Jobin refers to as a double-edged sword.<sup>22</sup> The first edge is about control — governing control. One may see this through the *Indian Act*, which legislates First Nations people and communities “from cradle to grave.”<sup>23</sup> We may see gaining economic control as an important step towards independence in governance. What is often missed is the corresponding edge of the blade: that colonialism has also centred on disrupting and destroying Indigenous economies, and, specifically, relationships to land.<sup>24</sup> The irony of this logic is that gaining more freedom from the Canadian government through the First Nations Land Management Regime or by opening up lands to the market through economic development, places Indigenous people under the governance of exploitative global capitalist markets.<sup>25</sup> Boldt argues that the “reserve system was created to clear Indians out of the way of Canadian economic development.”<sup>26</sup> The removal or alienation of Indigenous peoples from their full territories through the First Nations Land Management Regime or other processes that enable capitalist pursuits produces analogous results. It is clear that the First Nations Land Management Regime exists because of this logic.

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<sup>22</sup> Shalene Jobin. 2014. “Cree Economic Relationships, Governance, and Critical Indigenous Political Economy in Resistance to Settler-Colonial Logics.” PhD Dissertation. Edmonton, AB: University of Alberta.

<sup>23</sup> QC Brian A. Crane, Robert Mainville, and Martin W. Mason. 2008. *First Nations Governance Law*. Markham, ON: LexisNexis Butterworth's.

<sup>24</sup> Ibid.

<sup>25</sup> Julián Castro-Rea, and Isabel Altamirano-Jiménez. 2008. “North American First Peoples: Self Determination or Economic Development?” In *Politics in North America: Redefining Continental Relations*, edited by Yasmeen Abu Laban, Radha Jhappan, and François Rocher. Peterborough, ON: Broadview Press.

<sup>26</sup> Menno Boldt. 1993. *Surviving as Indians: The Challenge of Self-Government*. Toronto: University of Toronto Press.



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## PART II: FIRST NATIONS LAND MANAGEMENT PROCESSES

Given these debates and contextual issues, we now turn to the process of the First Nations Land Management Act, and importantly the ratification process, along with the benefits for First Nations who re-orient their views on land towards economic development through the regime. Finally, we consider the articulation of land codes in unique Treaty and non-Treaty circumstances. It is in this latter section that concerns arise regarding the threats posed by First Nations Land Management Act, in contrast to the benefits.

### a. Getting Started with Land “Management”

Aspiration for economic development is the key component in consideration for entry into the First Nations Land Management Regime.<sup>27</sup> The applications are reviewed according to government-developed criteria including, “a track record of successful economic development projects implemented; a track record of success in negotiations with industry partners leading to joint ventures ... and access to capital, for example land and resources or cash equity that can be developed or leveraged to create further economic benefits.”<sup>28</sup> Importantly, under FNLMA the federal government ceases to have a fiduciary duty related to the aspects of land dealt with in the Act.<sup>29</sup> Still, as mentioned above, a 2013 survey asked First Nations under FNLMA “if they would consider returning to land operations under the *Indian Act*” and “88% responded “No”; one indicated “Don’t Know,” and one did not respond.”<sup>30</sup>

**A key indicator of success was determined by respondents to be increased efficiency in land management related activities compared to when under the *Indian Act*. For example, KPMG found that on average leases and permits could take 584 days under the *Indian Act* and are now taking on average 17 days under a land code.**<sup>31</sup>

One of the most significant outcomes for First Nations under the Framework Agreement is the creation of new jobs. It was reported that with the 32 communities surveyed an approximate 4,000 jobs were created on reserve. Though the nature of these jobs were not noted for all communities, those that were noted were often temporary construction or industry jobs. The communities chosen for case studies (Dokis First Nation, Henvey Inlet First Nation, Mississaugas of Scugog, Island First Nation, and Westbank First Nation) furthered economic projects in energy, casinos, and retail development. The nature of economic development of course largely depends on the extent to which a First Nation is surrounded by urban development. Westbank First Nation is often depicted as a champion of the First Nations Land Management Regime but their territory is very urbanized and their reserve lands are home to many non-Indigenous people, which is not desirable or realistic for other communities.

Upon acceptance into the Land Code process, First Nations leadership signs the Framework Agreement and receive funds from the First Nations Land Resource Centre (LABRC) to develop a Land Code and engage with members. LABRC is the service delivery organization that supports the technical and administration tasks that fall under the Framework Agreement and is funded by the Ministry of Crown Indigenous Relations. In addition to supporting the development of a Land Code, LABRC helps with communication campaigns to inform members on the initiative, and oversees the process generally. The community ratification process is developed by the First Nation in accordance with the Framework Agreement.

### b. The (Evolving) Rules for Community Ratification

Before the 2018 amendments to the First Nations Land Management Act, twenty-five percent of eligible voters had to approve the proposed Land Code and Individual Agreement. Voting threshold was a significant barrier in this process because many First Nations have a large portion of their band members living off-reserve or out of territory. Considering this, it is questionable that an initiative of this scope could be approved through the consent of one quarter of the band membership, which has been the case. Many communities have taken their Land Code up for vote and not been able to meet the threshold despite the majority of voting members approving.

**With the 2018 amendments, the default approval does not require a minimum percentage of community participation. Therefore, as long as a council publishes notice of the vote, even if only ten eligible voters come out to vote, and a majority of voters approve, then the Land Code and Individual agreements will come into effect.**

It is very concerning to us that there is no lower limit to community participation in the voting threshold. Even though this may provide a community with “increased control,” this lowers the obligation of a First Nations to obtain consent from their membership, allowing

<sup>27</sup> Aboriginal Affairs and Northern Development Canada. 2014. Questionnaire for First Nation Entry to the Framework Agreement on First Nation Land Management and the First Nations Land Management Act. 3.

<sup>28</sup> Aboriginal Affairs and Northern Development Canada. 2013. First Nations Land Management Readiness Guide: A Guide for First Nations Interested in the First Nations Land Management Regime. Guide.

<sup>29</sup> JFK Law. 2015. “What is the First Nations Land Management Act.”

<sup>30</sup> KPMG. 2014. “Framework Agreement on First Nation Land Management, Update Assessment of Socio/Economic Development Benefits Final Report.”

<sup>31</sup> KPMG. 2014. “Framework Agreement on First Nation Land Management, Update Assessment of Socio/Economic Development Benefits Final Report.”

leadership to significantly alter their governance over reserve lands with the approval of potentially a small portion of those they represent.

Another important requirement of the ratification process is a verifier who is jointly selected by the First Nation and Canada. The Verifier approves the above noted community ratification process to ensure it is in alignment with the Framework Agreement and oversees the voting process. Following this process, First Nations are able to exit the lands section in the *Indian Act* and assume similar but parallel administrative powers.

Within the current *Indian Act*, 122 sections prescribe most aspects of First Nation private and public life. Nearly 90 provisions give direct authority and powers to the Ministers of Indigenous Services and Crown-Indigenous Relations over Chief and Council.<sup>32</sup>

### **There have been numerous amendments to the *Indian Act* since its inception and a clear turn towards slowly 'gifting' communities sectoral self-governance by chipping away at the *Indian Act*.**

This is undertaken through the First Nations Land Management Regime, Custom Membership Codes and Custom Election Codes and other mechanisms. First Nations are encouraged by the federal government to apply for funding and support for this code-development through the Ministry of Indigenous Services and many communities take these opportunities. Each of these “codes” require their own ratification processes, as well. While perhaps self-evident, the psychological benefit of removing significant aspects of the racist, condescending, and oppressive *Indian Act* cannot be underestimated. It is almost impossible to imagine a time when we are not living with the traumatic legacies of the legislation that was designed to extinguish us.

### **c. What is the Case for FNLMA?**

Under the 2012 amended First Nations Land Management Regime, First Nations accepted into the process are able to opt out of the thirty-two sections of the *Indian Act* “related to land, resources and environmental management and remove Ministerial oversight and approval relating to the development and use of their land. From Canada’s perspective, the ‘enabling’ legislation unlocks two key elements — land management, and First Nation law making — that improve First Nation land management.”<sup>33</sup>

**Under the government’s FNLMA regime First Nations are able to collect land revenues directly (except oil and gas royalties), and have the authority to create laws. In addition, these lands continue to be “reserved for Indians” under section 91.24 of the *Canadian Constitution Act, 1867*.<sup>34</sup>**

Moreover, First Nations are able to make their own decisions about land use without referral to the minister of Indian Affairs (this could apply to one or multiple reserves as well as reserve lands that may be added later through the additions-to-reserve process). According to the government of Canada, “under the First Nations Land Management Act all administration of land is transferred to the First Nation, including the authority to enact laws with respect to land, the environment and resources (except oil and gas, uranium and radioactive minerals, fisheries, endangered species and migratory birds).”<sup>35</sup> These powers are attractive for First Nations because they do offer greater authority and control.

Research completed by the First Nations Development Institute (FNDI) finds that a key element in building sustainable Indigenous communities is gaining control of assets, and a key natural asset for First Nations are lands.<sup>36</sup> FNDI goes on further to state that, “it is only through the control of these assets, that the economic well-being of Native communities will be improved and sustained.”<sup>37</sup> FNDI believes First Nations are moving into an era of asset control with “new opportunities to control, create, retain, leverage, utilize, or increase their assets.”<sup>38</sup>

In sum, there appears to be a long list of benefits to First Nations under the Regime. That being said, these are communities that have, by and large, demonstrated a relationship with their lands very specifically tied to capitalist and often resource extraction ideologies. This is, after all, a precondition for approval.

### **The wealth disparity between First Nations people and settlers will only truly be resolved when we gain access and control over greater lands and resources.**

As such, this FNLMA-based framing, or reframing, of Indigenous economies needs to be more fully explored and contrasted with the diversity of alternative Indigenous worldviews, including through a treaty lens.

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<sup>32</sup> Canada. 1996. Report of the Royal Commission on Aboriginal Peoples. Ottawa: The Commission. Volume 1, Part II, Chapter 9.

<sup>33</sup> Aboriginal Affairs and Northern Development Canada. 2013. First Nations Land Management Readiness Guide: A Guide for First Nations Interested in the First Nations Land Management Regime. Guide. Government of Canada.

<sup>34</sup> Ibid.

<sup>35</sup> Canada. 2012. “Frequently Asked Questions - First Nations Land Management Regime.”

<sup>36</sup> KPMG. 2014. “Framework Agreement on First Nation Land Management, Update Assessment of Socio/Economic Development Benefits Final Report.”

<sup>37</sup> KPMG. 2014. “Framework Agreement on First Nation Land Management, Update Assessment of Socio/Economic Development Benefits Final Report.”

<sup>38</sup> Rauna Kuokkanen, 2006. “Sámi Women, Autonomy, and Decolonization in the Age of Globalization.” In Keynote speech from Act 4: *Beyond Subject and State? Indigenous Interests in the Age of Globalization*, University of Lapland, June 2006.



## PART III: MANAGING TREATY AND NON-TREATY LANDS

### a. Land Codes and Historic Treaties

The two authors of this paper are both members of Treaty Six First Nations (Alexander and Red Pheasant), and the initial research that this report is built on was specifically about the implications of the First Nations Land Management Region within a specific Treaty Six context and framework. We asked a number of questions, but of these, the most important issue examined was whether the First Nations Land Management Regime moves us closer to or further away from the intention of those who negotiated treaty on our behalf. After reviewing First Nation interpretations of treaties, notions of communal land tenure, and Treaty Six laws relating to our relationship to the land, we can say the threat is very real that the First Nations Land Management Regime overwrites our treaty history and obligations. We also consider the power of interpretation to resist that imposition.

**The First Nations Land Management Regime fails to deal with Indigenous territory that extends beyond Indigenous reserves, and as such, is not in alignment with Indigenous understandings of continued jurisdiction for both Numbered Treaty nations and those without similar agreements with the Crown.**

The question of utilizing Indigenous territory (beyond reserves) for livelihood pursuits was an important part of treaty negotiations. But the First Nations Land Management Regime's focus solely on reserve lands negates this important aspect of treaty. On this point, Batchewana First Nation has raised concerns of the First Nations Land Management Act. Chief Dean Sayers explains, "There are nationhood agreements [treaty] in Robinson-Huron, in which we retain underlying title and if those agreements fail they revert back to us. In the assertion the crown makes over lands, which are stolen lands, we find real problems with the First Nations Land Management Act based on that foundation."<sup>39</sup>

Reflecting this position, Anishinaabe and Métis legal scholar Aimee Craft writes, "to understand the numbered treaties, we need to understand them as part of an evolving tradition of treaty-making with a long history."<sup>40</sup> Of course, this includes consideration of Indigenous legal systems and an understanding of Treaty beyond written documents. For Numbered Treaty First Nations, their agreement with the Crown generally remains the most important governance document (except in cases where those communities have negotiated a subsequent self-government agreement).

The First Nation population is growing and communities are increasingly expected to economically support themselves with their small reserve land bases. However, there is consensus among

many Elders from Numbered Treaty First Nations, substantiated by numerous oral accounts and published sources that treaties were never meant to confine communities or the reserve, nor, were settlers ever meant to gain subsurface land rights through Treaty. As noted in a report on Treaty Six written by the Saskatchewan Indian Cultural Centre:

At the time of treaty signing, it was understood through verbal agreement that the land which was opened to the white settlers was only to the extent of the depth a plough would furrow. This was indicated by a gesture of a closed fist with thumb extended. "The rest" was to be retained by the Indian people. Thus, the birds of the air, fish in the sea, the trees, the rivers, the minerals were not given up.<sup>41</sup>

The focus, then, on the First Nations Land Management Regime as an avenue to unlock the economic potential of First Nation lands, must be seen to ignore First Nation perspectives on treaties, and more, a "politics of distraction"<sup>42</sup> against the larger issues as identified in a Treaty perspective, Indigenous jurisdiction beyond reserve lands and Indigenous claims to subsurface land rights among them.

These interpretations also posit a communal understanding of land exists in two ways on reserves: in customary law including economic practices, and also officially within the governing structures of the *Indian Act*.

**Turning back to the Treaty negotiations and to Elders with knowledge of treaty allows us to see how our ancestors wanted us to live and shows both the continuity and differences in how Indigenous people relate to territory today.**

For example, Saskatchewan Elders' primary concern when interviewed by the late Harold Cardinal, was for First Nations to "re-establish or reassert their connection to traditional lands and territories, a connection that many saw as constituting a critically important component of the treaty relationship with the Crown."<sup>43</sup> Specifically, in *nehiyawewin* (Cree language) concepts of *pimatisiwin* (life) are described by Elders as including the spiritual, physical, and economic connection to territory (*askiy*, land).

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<sup>39</sup> Jamie McIntyre. 2018. "The First Nations Land Management Act: A New Approach." Northern Policy Institute.

<sup>40</sup> Aimee Craft. 2013. *Breathing Life Into the Stone Fort Treaty: an Anishinabe Understanding of Treaty One*. Saskatoon, SK, Canada: Purich Publishing Limited.

<sup>41</sup> Saskatchewan Indian Cultural Centre. 1980. Treaty Six: "... for as Long as the Sun Shines, the Grass Grows, and the Rivers Flow ..."; Saskatchewan and Alberta, 100 Years, 1876-1976. Saskatchewan Indian Cultural College, Curriculum Studies and Research.

<sup>42</sup> Taiaiake Alfred and Jeff Corntassel. 2005. "Being Indigenous: Resurgences Against Contemporary Colonialism" *Government and Opposition* 40.4.

<sup>43</sup> Harold Cardinal and Walter Hildebrandt. 2000. *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized As Nations*. Calgary, AB: University of Calgary Press.

In the terms of treaty, perhaps the greatest act of decolonial imagination for First Nations is to simply (re)turn to those original intentions of our ancestors who still had practical jurisdiction over the expanse of treaty territories and were faced with the monumental transition of moving onto reserves. Indeed, increasingly we see an emerging ‘desubjectification’ occurring: a move away from identifying with colonial narratives<sup>44</sup> and reshaping of how First Nations see and connect with land, pushing our perspectives of reserve boundaries to include the expanse of treaty territories. This can be operationalized further with Cornthassel’s view of “daily acts of resistance”<sup>45</sup> through which, as the Elders hope, we may re-establish and re-assert our connection to the expanse of territories and traditional lands.<sup>46</sup> This can include more concerted efforts of Indigenous peoples who are, and already have been, ‘restorying’<sup>47</sup> and restoring landscapes and waterscapes with our own Indigenous names, stories, and governing frameworks.

To date, in historic treaty contexts at least, the First Nations Land Management Regime cannot seem to accommodate such an expansive treaty interpretation. In the modern treaty cases, or areas without treaties, interpretation challenges are less extreme. And yet here, too, there are limitations within the First Nations Land Management Regime.

## b. Modern Treaties and (potential) Privatization

Despite the section above, it is important to note that the First Nations Land Management process does not force communities to cede title. This is particularly pertinent for those First Nations who do not have historic agreements with the Crown and look to the legal possibilities unlocked in the 2014 Tsilhqot’in decision, a decision that confirms the existence of Aboriginal title in British Columbia as a “managerial” stake in the land. In other words, these are primarily communities that the Crown cannot restrict jurisdiction to merely the reserve.

**There are many misconceptions here actually. The fears about the *First Nations Land Management Act* forcing the surrender of title lands are linked to concerns about privatization, which is another widely held misconception about the First Nations land management regime.**

This section considers how the First Nations Land Management Regime unfolds in non-treaty areas and how it *may* unfold as a pathway to land privatization. Ultimately, we find that while concerns are merited, entering into the *First Nations Land Management Act* does not lead automatically to either surrender or privatization.

Despite the limitations of the First Nations Land Management Regime, there has been much misinformation shared regarding its apparent commonalities with the modern treaty processes, like the BC Treaty Process. Janice Switlo, a settler lawyer, argues that the

First Nations Land Management Act is part of a “new regime” of dispossession, suggesting that when a First Nation ratifies a Land Code it constitutes a “total surrender to the Queen” (meaning that First Nations surrender both reserve lands and traditional territory when they implement a land code).<sup>48</sup> There is legitimate concern that by signing the Framework Agreement on First Nations Land Management, a First Nation acknowledges that title to reserve land is currently under the jurisdiction of the Crown.

**We should continually be vigilant about the erosion of our title and rights, but similar conclusions could be made about all current regimes that have First Nations ‘opt out’ of the *Indian Act* through the ratification of various codes.**

Under the BC Treaty Process, which has a much larger scope than the First Nations Land Management Regime and much greater consequences when an agreement is reached, reserve lands become treaty settlement lands, along with any other lands acquired through the process. In the First Nations Land Management Regime, the status of reserve lands remains the same under the *Indian Act*; it is only the management of that land that is altered. Though the BC Treaty Process has moved towards the language of ‘modified rights’ rather than extinguishment of title, the BC Treaty Commission continues to cite ‘certainty’ as one of the main motivating factors for treaty-making in BC. According to them, “certainty, as it related to treaty making, refers to the need for all parties—each First Nation, Canada, and BC to have clearly defined land ownership and jurisdiction.”<sup>49</sup> While the *First Nations Land Management Act* does promote certainty, it does not require extinguishment of title. The Framework Agreement states that it is, “not a treaty and does not affect treaty rights or other constitutional rights of the First Nations.”<sup>50</sup>

Beyond this misconception, the First Nations Land Management Regime has been marketed and regarded as both an alternative to the BC Treaty Process and a stop-over on the way to fulsome self-governance. As noted in the introduction, the movement towards sectoral self-government represents a shift as the BC Treaty Process has been largely regarded as a failed project. Only three treaties have been successfully negotiated and implemented so far

<sup>44</sup> Glen Sean Coulthard. 2007. ‘Subjects of Empire: Indigenous Peoples and the Politics of Recognition’ in Canada’. *Contemporary Political Theory* 6 (4): 437-460.

<sup>45</sup> Jeff Cornthassel. 2012. ‘Re-envisioning Resurgences: Indigenous Pathways to Decolonization and Sustainable Self-Determination’. *Decolonization: Indigeneity, Education & Society* 1(1):86-101

<sup>46</sup> Harold Cardinal, and Walter Hildebrandt. 2000. *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized As Nations*. Calgary, AB: University of Calgary Press. 43.

<sup>47</sup> Cora Jane Voyageur, Laura Brearley, and Brian Calliou. 2014. *Restorying Indigenous Leadership: Wise Practices In Community Development*. Banff, Alberta: Banff Centre Press.

<sup>48</sup> Janice Switlo. 1999. Apple Cede: First Nations Land Management Regime.

<sup>49</sup> BC Treaty Commission. 2019. “What is the Goal of Certainty in Treaties?”

<sup>50</sup> Canada. 1996. Framework Agreement on First Nations Land Management.

(Maa-nulth, Tla'amin, and Tsawwassen). Both Tsawwassen and Tla'amin implemented a Land Code before completing their treaty negotiations and Westbank had done so prior to negotiating a self-government agreement.

### **Taking over the management of reserve lands, it seems, is seen by the federal government as a 'test' before taking over the responsibility of self-government.**

For example, the Matsqui First Nation developed their own Environmental Assessment Law as a result of their Land Code. Though this law only currently applies to their reserve lands, it could be viewed as a capacity-building exercise for their larger territory should they one day be able to exert full jurisdiction over their territory to increase governance. This could be an option for those who choose not to pursue BC Treaty or a self-government agreement.

### **Without going through a formal process of 'surrender' communities are able to obtain greater resources and tools that potentially enable them to work towards policies and tools for asserting title.**

In the case of the Matsqui First Nation, had they not implemented a Land Code, they would not have been provided with the resources to develop such a law. In the report, "*Canada's Emerging Indigenous Rights Framework: A Critical Analysis*," Hayden King and Shiri Pasternak also argue that land management capacity building is likely to foreground any movement out of the *Indian Act* as well, at least as a process preferred by Canada. Though, overwhelmingly it is preferred on reserve lands exclusively.<sup>51</sup>

There are also concerns that the First Nations Land Management Regime could result in the conversion of reserve land into fee simple land tenure (also known as private property). Under common law this is considered the highest form of land ownership (surpassed only by the Crown's dubious claims to radical title over all lands in Canada). The reserve lands of First Nations who have taken over management via the First Nations Land Management Regime remain reserve land protected under Section 91(24) of the *Constitution Act* and 80 of the *Indian Act*, therefore they are not at risk of becoming private property through this process. That being said, with the surveying required and dispute resolution provisions of the *First Nations Land Management Act* communities opting into the regime are more suited and prepared for privatization. As Shiri Pasternak notes, investments in communities who have gone through the First Nations Land Management Regime process are successful without converting their land to fee simple.<sup>52</sup>

It is worth considering the work of Jeremy J. Schmidt here. Schmidt has shown how the Canadian policies are promoting the municipalization of First Nations reserves,<sup>53</sup> effectively

domesticating Indigenous nations into the Canadian state rather than actually dealing with them in a 'nation-to-nation' manner that the Liberal government has insisted. This argument is a common one, however Schmidt goes further, exploring how municipalization unfolds in land tenure processes and showing how the proposed *First Nations Property Ownership Act*, a regime separate (though linked by common logic) to the *First Nations Land Management Act* forces communities into regulatory processes that *may* lead to a loss of control over communal lands, as well as provincial oversight and municipal-style regulation. As noted by Chief Shane Gottfriedson, the current First Nations land tenure system was created in the 19th Century "was seen as a temporary measure: Indians would be placed on reserves until they were sufficiently acculturated to hold property in their own right, live independently of government supervision and protection, obtain the right to vote, and become subject to taxation".<sup>54</sup>

We can see how and why these misconceptions exist.

### **Surrendering title and privatization are significant fears for First Nations exercising jurisdiction on so little land. With the *Indian Act's* many tools to remove land from First Nation control, it is not surprising that analysts of the First Nations Land Management Regime to date are skeptical.**

While the regime could contribute to a potential and dramatic change to land tenure systems on reserve towards free market access and privatization, there is actually nothing in the legislation that requires either scenario to take place. Certainly notions of communal land tenure are discouraged and there is a push towards conceptualizing the land as a productive, economic asset that should be owned. These are elements of the regime that should be recognized, debated in communities, and weighed against any positive reserve-based jurisdiction First Nations may accrue.

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<sup>51</sup> Hayden King and Shiri Pasternak. 2018. "*Canada's Emerging Indigenous Rights Framework: A Critical Analysis*." Yellowhead Institute.

<sup>52</sup> Shiri Pasternak. 2014. "How Capitalism will Save Colonialism." *Antipode* 00(0).

<sup>53</sup> Jeremy J. Schmidt. 2018. *Bureaucratic Territory: First Nations, Private Property, and "Turn-Key" Colonialism in Canada*. *Annals of the American Association of Geographers* 108,4.

<sup>54</sup> Chief Shane Gottfriedson. 2013. "Escaping Canada's Indian Act: Who Should Own Our Lands?" Property and Environment Research Center.



## Conclusion: Managing the 0.2% Economy

As we have noted, the federal government has heavily invested in the First Nations Land Management Regime in the 2018 Budget and we expect it will continue to be a main component of their push to promote sectoral self-governance, particularly as the success of the BC Treaty Process remains meagre and the work to implement historical treaties remains unfulfilled.

**The First Nations Land Management Regime has been marketed as both a test of self governance to those nations who wish to enter self-government agreements and as an alternative to such final agreements.**

We do not expect the Liberal Party of Canada to remove support for this initiative. Even if Canada elects the Conservative Party of Canada in the Fall 2019 election, we predict this will remain a major component of Canada's strategy to deal with First Nations people.

The Government of Canada's logic embedded within the First Nations Land Management Regime pushes First Nations towards a certain type of neoliberal economic development,<sup>55</sup> including increased resource extraction, and subjects First Nations to be increasingly under the logics of capitalist market forces. A critical analysis demonstrates that "this type of economic development is mainly intended to open Indigenous lands to the market rather than to provide Indigenous peoples with the means for their social reproduction".<sup>56</sup> The Regime has also been demonstrated as a financial win for Canada.<sup>57</sup>

**For those First Nations which align to the government of Canada's developed economic criteria, there are economic benefits, increased efficiencies, and the potential for new job creation on reserve. There are also: the increased burden of having to deal with the aftermath of legacy issues of the *Indian Act* system, increased cost and efforts to develop laws and policies, and the negation of a fiduciary responsibility of the Crown.**

Beyond this, our conversation regarding the redistribution of resources cannot be limited to reserves or to as the late Secwepemc leader Arthur Manuel would say, "the 0.2 percent economy",<sup>58</sup> which is the total land base covered by Indian reserves in Canada. If communities choose to move forward within the First Nations Land Management Regime, they may find benefits for their citizens, but we must remain vigilant in asserting our jurisdiction on our territories beyond reserved lands.

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<sup>55</sup> The applications are reviewed according to government-developed criteria, including: "a track record of successful economic development projects implemented; a track record of success in negotiations with industry partners leading to joint ventures ... and access to capital, for example land and resources or cash equity that can be developed or leveraged to create further economic benefits". Aboriginal Affairs and Northern Development Canada. 2013. Creating the Conditions for Economic Success on Reserve Lands. Government of Canada.

<sup>56</sup> Julián Castro-Rea and Isabel Altamirano-Jiménez. 2008. "North American First Peoples: Self Determination or Economic Development?" In *Politics in North America: Redefining Continental Relations*, edited by Yasmeen Abu Laban, Radha Jhappan, and François Rocher. Peterborough, ON: Broadview Press.

<sup>57</sup> KPMG. 2016. "Framework Agreement on First Nation Land Management Resource Centre, Partial Benefit-Cost Study Findings Final Report."

<sup>58</sup> Arthur Manuel. *Unsettling Canada: A National Wake Up Call*. Toronto: Between the Lines, 2015.



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