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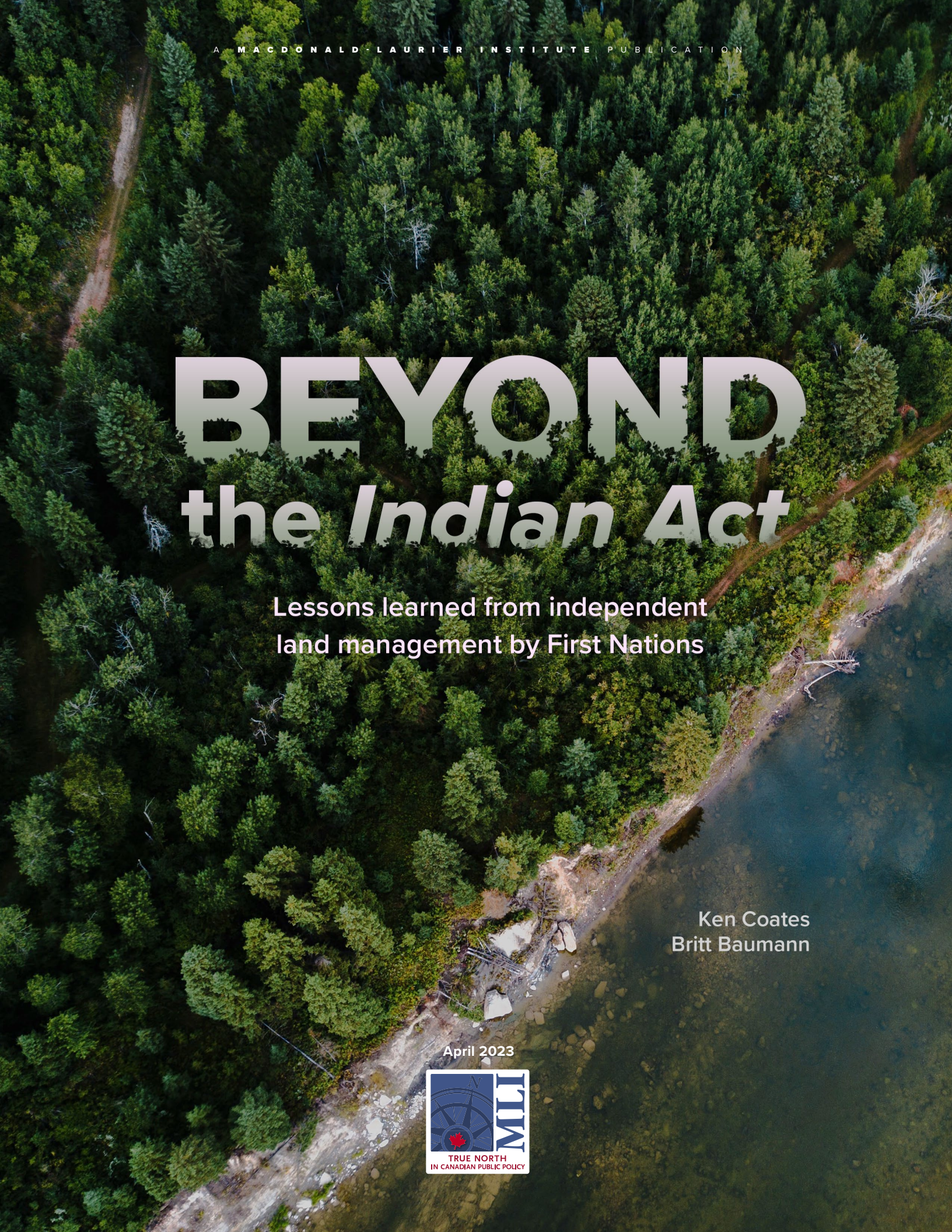

BEYOND the *Indian Act*

Lessons learned from independent land management by First Nations

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The *Indian Act* has asserted control over the lives of First Nations peoples since 1876. The Act codified the management of reserve lands, and it is the primary legislation that defines First Nations rights within Canada, such as treaty rights and legislative privileges. Yet the Act is seriously flawed.

Originally designed to facilitate assimilation, those living under it have been subjected to gender discrimination, racial segregation, the suppression of cultural activities, and mandatory attendance at Canada's Indian residential or day schools. Under the *Indian Act*, First Nations need permission from the minister of Crown-Indigenous Relations even for such routine processes as the allotment of reserve land to a band member or the transfer of land between band members. Additionally, ministerial approval is also required for transactions involving non-band members regarding the lease of reserve land for residential or commercial use, or the simple issuance of a permit for a power or water line.

For several decades, it was the intention of both First Nations and the federal government to improve upon the *Indian Act* and to facilitate sectoral self-governance. The organized efforts to increase First Nation control over their own land started in 1991 when a group of 13 First Nations from across Canada developed a proposal that would allow First Nations to withdraw from those provisions of the *Indian Act* that concern land management. The intent was to replace the Act's land centralized and cumbersome land management regime with a so-called "land code" of the First Nations' making.

The negotiations came to fruition in 1999 when the government of Canada passed the *First Nations Land Management Act* (FNLMA), which enabled several dozen First Nations to independently establish and administer land codes that conform to First Nation values, traditions, and community goals. Often described as a steppingstone for First Nations seeking to reclaim their autonomy, some observers consider the FNLMA to have been an important and effective pathway for exiting the *Indian Act*.

The full economic impact of the FNLMA is yet to be determined. The rise of third-party partnerships has become increasingly important to First Nations, and the ease of operations under a FNLM regime has led to an increase in the number of businesses owned or partially owned by external partners. As one example of the decrease in bureaucracy

under the FNLMA, under the *Indian Act* it took an average of 584 days to complete an approval for a permit or lease; under the FNLM regime the average approval time has dropped to only 17 days.

That said, enthusiasm for the FNLMA has not been universal, and there was extensive criticism of the legislation. For some critics, the FNLMA was a highway to reserve marketization, which would open reserve lands to market forces. To the strongest opponents, such a measure represents a renewed form of colonialism where third-party business is given the opportunity to gain an economic interest from First Nation lands. While many First Nations benefited from their decision to make use of the FNLMA, these benefits were limited and unequally shared among the participating First Nations. Furthermore, participation in the FNLMA regime has not been universally accessible or desirable and hence the FNLMA was deemed to be inadequate. Ultimately, in December 2022 the FNMLA was repealed in favour of the more streamlined and less regimented *Framework Agreement on First Nation Land Management Act* (FAFNLMA).

As a nation, Canada has struggled with the reality that First Nations people tend to understand the concept of private property rights differently than do the proponents of private property and market liberalism. First Nations obviously value and wish to preserve their constitutionally enshrined rights to the land. To be successful, any amendment or other legislation pertaining to the *Indian Act* must proclaim First Nation treaty rights as inalienable. Recognition of Indigenous title to land is the linchpin that maintains the relationship between Canada and the First Nations.

Policy proposals that do not respect Indigenous rights will not be supported by First Nations people and ignoring the importance of Indigenous rights will lead to disruption in the relationship between First Nations peoples and Canada. MLI

La* Loi sur les Indiens *confère *un pouvoir de contrôle sur la vie des Premières Nations depuis 1876. Cette loi codifie la gestion des terres de réserve, principal mécanisme de législation qui définit les droits des Premières Nations au Canada, notamment les droits issus des traités et les privilèges législatifs. Pourtant, cette loi présente de graves lacunes.*

Les personnes assujetties à cette loi, initialement conçue pour faciliter l'assimilation, se sont vu imposer des discriminations fondées sur le sexe et la race, la privation d'activités culturelles et l'obligation de fréquenter les pensionnats et les externats indiens du Canada. Sous le régime de la Loi sur les Indiens*, les Premières Nations doivent obtenir l'autorisation du ministre des Relations Couronne-Autochtones pour mettre en œuvre des processus routiniers comme l'attribution de terres de réserve à un membre de la bande ou le transfert de terres entre membres. En outre, l'approbation ministérielle est également requise pour les transactions conclues avec des non-membres : location de terres de réserve à des fins résidentielles ou commerciales ou simple octroi d'un permis pour une ligne de transport d'électricité ou d'eau.*

Pendant plusieurs décennies, les Premières Nations et le gouvernement fédéral ont voulu améliorer la Loi sur les Indiens *et faciliter l'autonomie sectorielle. Ils ont commencé à concerter leurs efforts pour accroître le contrôle des Premières Nations sur leurs propres terres en 1991. C'est à ce moment qu'un groupe formé de 13 Premières Nations des quatre coins du pays formulait une proposition qui permettait le retrait des Premières Nations des dispositions de la loi en ce qui concerne la gestion des terres. On visait à remplacer l'encombrant régime centralisé de gestion des terres prévu par la loi par un « code foncier » élaboré par les Premières Nations.*

Les négociations ont abouti à l'adoption en 1999 de la Loi sur la gestion des terres des Premières Nations (LGTPN), laquelle a permis à plusieurs dizaines de Premières Nations d'établir et d'administrer de manière indépendante des codes fonciers conformes à leurs valeurs, à leurs traditions et à leurs objectifs communautaires. Souvent décrite comme un tremplin pour les Premières Nations qui demandaient la restitution de leur autonomie, la LGTPN offrait désormais, de l'avis de certains observateurs, une voie de contournement importante et efficace à la Loi sur les Indiens.

Les retombées économiques totales de la LGTPN n'ont toutefois pas encore été déterminées. Les partenariats avec des tiers ont pris le pas pour les Premières Nations, alors que la simplicité de manœuvrer dans le cadre de la LGTPN a fait progresser le nombre d'entreprises possédées entièrement ou partiellement par des partenaires externes. Comme exemple d'allégement bureaucratique apporté par la loi, citons le délai moyen pour obtenir l'approbation d'un permis ou d'un bail : il était de 584 jours en moyenne en vertu de la Loi sur les Indiens *; sous le régime instauré par la LGTPN, ce délai est passé à seulement 17 jours.*

Cela dit, comme en font foi les nombreuses critiques à l'égard de cette loi, l'enthousiasme n'a pas été universel. Pour certains, la LGTPN était une autoroute vers la commercialisation des réserves puisqu'elle exposait leurs terres aux forces du marché. Pour ses plus fervents opposants, une telle mesure instaurait une forme renouvelée de colonialisme qui offrait aux entreprises tierces la possibilité de tirer un intérêt économique des terres des Premières Nations. La décision de faire usage de la LGTPN a été bénéfique pour de nombreuses Premières Nations participantes, mais les avantages ont été limités et inégalement répartis entre elles. En outre, comme la participation au régime instauré par la LGTPN n'était ni accessible ni souhaitable universellement, cette loi a été jugée inadéquate. Finalement, en décembre 2022, la LGTPN a été abrogée en faveur de l'Accord-cadre relatif à la gestion des terres des Premières Nations, plus claire et moins rigide.

En tant que nation, le Canada a eu du mal à s'adapter à l'idée que les Premières Nations comprennent la notion de droit de propriété privée d'une façon qui diffère, en général, de celle des partisans de la propriété privée et du libéralisme de marché. De toute évidence, les Premières Nations apprécient et souhaitent préserver leurs droits constitutionnels à la terre. Pour être efficace, toute modification ou autre législation relative à la Loi sur les Indiens *doit proclamer l'inaliénabilité des droits issus des traités*

des Premières Nations. La reconnaissance du titre foncier autochtone joue un rôle central pour préserver la relation entre le Canada et les Premières Nations.

Les propositions de politiques qui ne respecteront pas les droits autochtones seront rejetées par les Premières Nations. De fait, mépriser l'importance de ces droits perturbera les relations entre les Premières Nations et le Canada. **MLI**

> "From cradle to grave, the *Indian Act* is in your face."
>
> *– Meko Nicholas, executive director of the Lands Advisory Board Resource Center (LABRC) and member of Tobique First Nation (Anderson 2019).*

Introduction

In 1999, the government of Canada passed the *First Nations Land Management Act* (FNLMA), which was designed to allow First Nations to opt out of the *Indian Act*'s centralized and cumbersome land management regime. This legislation enabled several dozen First Nations to independently establish and administer land codes that conform to First Nation values, traditions, and community goals. Often described as a steppingstone for First Nations seeking to reclaim their autonomy, some observers consider the FNLMA to have been an important and effective pathway for exiting the *Indian Act*.

Yet the FNLMA has achieved only moderate success in reaching the policy goals of individual First Nations and of Canada's federal government. Ultimately, the FNMLA was repealed and replaced by the *Framework Agreement on First Nation Land Management Act* (FAFNLMA) in December 2022. The goal of the FAFNLMA is to assert the primacy of the originally negotiated Framework Agreement (FA) on First Nations land management, and to ensure the continuity of institutions and land codes that were created under the repealed legislation. This ongoing and evolving process of delivering control of reserve lands into the hands of First Nations has provided an opportunity for both reflection and policy design renewal.

For several decades, it has been the intention of both First Nations and the federal government to improve upon the *Indian Act* and to facilitate sectoral self-governance. Still, while there is strong evidence that many First Nations have benefited from their decision to make use of the FNLMA, these benefits were limited and unequally shared among the participating First Nations. Furthermore, participation in the FNLMA regime has not been universally accessible or desirable.

These realities are fundamental to understanding why the FNLMA was deemed to be inadequate, and why many First Nations individuals and organizations called for improved legislation. Many observers believe the new FAFNLMA legislation better aligns with the FA negotiated between the federal government and the signatory First Nations (LAB 2022). In future, it will be necessary to understand the benefits and limitations of the FNLMA, and how the new FAFNLMA may facilitate further self-governance options for those First Nations that choose to create independent land codes.

Independent land management by First Nations has several benefits. Those First Nations that chose to use the FNLMA regime have gained administrative control over their reserve lands and can exercise rights and privileges pursuant to economic development, use, and possession of land. After First Nations approve the adoption of an independent land code, it means that reserve land management is no longer subject to federal government supervision or approval. An additional benefit is that the First Nation attains greater control over economic development while moving at the "speed of business," rather than at the speed of the Ottawa bureaucracy. At the same time, enacting a land code is expensive and many assert that the federal government is underfunding the process required to develop an independent land code.

Consequently, some First Nations cannot afford the cost of establishing and maintaining an independent land management system. Furthermore, any liabilities associated with independent reserve land management fall to the First Nation rather than to any government agency. Therefore, while the FNLMA was a useful tool for enabling First Nations autonomy, not every First Nation found the process to be accessible or suitable. It is yet to be determined if the new FAFNLMA will become a superior tool to the FNLMA.

The problem of the *Indian Act* and the development of the FNML regime

First Nations and the government of Canada proposed the FNLM regime to reduce or eliminate the control the *Indian Act* has asserted over the lives of First Nations peoples since 1876. The *Indian Act* codified the management of reserve lands, and it is the primary legislation that defines First Nations rights within Canada, such as treaty rights and legislative privileges. Yet in addition, the Act defines First Nations identity and the governance of First Nations lands. Despite significant amendments over more than a century, the *Indian Act* remains a prominent factor in Canada's troubled relationship with First Nations peoples.

Although the *Indian Act* was originally designed to facilitate assimilation, those living under it have been subjected to gender discrimination, racial segregation, the suppression of cultural activities, and mandatory attendance at Canada's Indian residential or day schools. As such, the *Indian Act* is seriously flawed and struggles to escape its colonial and discriminatory origins. Once described as "both a fortress and a prison" (Gibson 2009, vi), the *Indian Act* is so inter-connected with Canadian Indian policy that only a few major changes have been completed.

The development of the FNML regime gives interested First Nations an opportunity to evade the "prison" of the *Indian Act* while still maintaining the "fortress" of enshrined rights and privileges. Under the *Indian Act*, First Nations need permission from the minister of Crown-Indigenous Relations even for such routine processes as the allotment of reserve land to a band member or the transfer of land between band members. Additionally, ministerial approval is also required for transactions involving non-band members regarding the lease of reserve land for residential or commercial use, or the simple issuance of a permit for a power or water line. Any leases become contracts between the leaseholder and the government of Canada; all the revenue from these leases is held in trust by the federal government.

Receiving a ministerial approval for a lease or a release of funds can take months or even years. Due to such delays, First Nations communities struggle to act with commercial dispatch under the *Indian Act*, and many argue that this situation curtails economic growth on reserves (Canada 1998). If First Nations choose to take advantage of the tools made available by the FNLM regime, and

have the administrative capacity to do so, they can opt out of the *Indian Act*'s paternalistic land management regime and liberate their land use decisions from ministerial oversight.

Creating the FNLM regime was itself a difficult and contentious process. While successive Canadian governments have attempted to solve the problems inherent in the Indian Act, the issues crystallized in 1969. In June of that year the federal government presented a policy paper, formally known as the *Statement of the Government of Canada on Indian Policy, 1969*, but more commonly called the "White Paper" (Canada 1969). White papers are commonplace, but they only occasionally translate into official policy. They are typically described as "trial balloons," designed to elicit public responses and advice for improvements. This particular initiative became *the* White Paper, and it remains recognizable as such more than 50 years later. The wholesale rejection of the White Paper was so intense that opposition to it has been considered the catalyst for the contemporary Indigenous rights movement within Canada (Nickel 2019).

> *Creating the FNLM regime was itself a difficult and contentious process.*

Brought forward by then Prime Minister Pierre Trudeau and Minister of Indian Affairs Jean Chrétien, the White Paper was greeted with widespread criticism from First Nations peoples (Indigenous Foundations 2009). The government claimed that the White Paper had been constructed with the help of First Nations, but ultimately the proposed policy had set aside the advice of many First Nations leaders (Nickel 2019). Consequently, the ill-fated White Paper has been described as: "[a]t best, a perversion of consultative democracy, and at worst, a case of duplicity" (Weaver 1981). In hindsight, Canada's federal government failed to effectively consult with First Nations and clearly misread the priorities and sentiments espoused by young First Nations activists.

The White Paper called for the abolishment of the *Indian Act*, but the process of doing so was radical and alarming. The document described a plan to eliminate Indian status, dissolve the Department of Indian Affairs, transfer

responsibility for Indian Affairs to the provinces, convert reserve lands to fee simple, and to gradually terminate existing treaties (Indigenous Foundations 2009). Many First Nations people viewed the proposal as a project of assimilation, tending to see the proposed policy as a "[u]nilateral action on the part of the Crown to interfere with the existing relationship" (Canada 1999; see also Union of BC Indian Chiefs, 1970; Indian Chiefs of Alberta, 1970/2011.) Their official response became known as the "Red Paper."

Within six months of the release of the White Paper, the Indian Association of Alberta, led by Harold Cardinal, notified the government of Canada of their concerns about the White Paper, and asserted that their formal counter to the proposed policy would come in the form of document titled *Citizens Plus*, also known as the "Red Paper" (Indian Chiefs of Alberta, 1970/2011). The Red Paper, released in June 1970, attacked the proposal to abolish Indian status and instead asserted that recognition of status was a requirement for the attainment of social justice and the preservation of Indigenous culture. Furthermore, the Red Paper asserted that total abolishment of the *Indian Act* itself could not be tolerated as it provides the legal framework that enshrines Indigenous rights. The government's intention to transfer responsibility for Indigenous peoples and reserve lands to the provinces was considered particularly untenable, as doing so would mean a withdrawal from treaties previously negotiated with the Crown.

The chiefs' attitude toward the privatization of reserve lands was succinctly stated:

> To us, who are Treaty Indians, there is nothing more important than our Treaties, our lands, and the well-being of our future generation. We have studied carefully the contents of the Government White Paper on Indians and we have concluded that it offers despair instead of hope. Under the guise of land ownership, the government has devised a scheme whereby within a generation or shortly after the proposed Indian Lands Act expires, our people would be left with no land and consequently the future generation would be condemned to the despair and ugly spectre of urban poverty in ghettos. (Indian Chiefs of Alberta 1970/2011, Preamble)

The response to the White Paper was so powerful that the proposed policy was withdrawn, driving assimilation off the government agenda. Importantly,

as a method of assimilation, termination of the *Indian Act* had been a recognized option for many years. Although the former Prime Minister Trudeau may have acquiesced that his government had failed to understand the complexities of the matter because it relied on liberal ideologies concerning freedom and equality, the government could not have been unaware of the inherent strategy for assimilation in the White Paper. Diamond Jenness, in his role as Dominion Anthropologist, had advised the federal government on Indigenous policy matters and had advocated for the repeal of the *Indian Act* in his 1947 publication *A Plan for Liquidating Canada's Indian Problem in 25 Years*. Likewise, the government was certainly aware of the failure of the "Indian termination policy," a similar policy attempted earlier in the United States, which has been recognized for devastating socio-economic effects on Indigenous peoples (Walch 1983). Policy analysts should have anticipated the open admission of the goal of assimilation as a major point of contention.

The lessons learned from the fallout of the 1969 White Paper led to a new direction in the long and ongoing project to resolve the inherent problems of the *Indian Act*. As a nation, Canada struggled with the reality that First Nations people tend to understand the concept of private property rights differently than do the proponents of private property and market liberalism. Importantly, the negative response to the White Paper demonstrated that recognition of Indigenous title to land is central to the relationship between Canada and First Nations peoples. Importantly, the vigorous negative response to the White Paper demonstrates that recognition of Indigenous title to land is the linchpin that maintains the relationship between Canada and the First Nations.

Both policy analysts and policy-makers must acknowledge the need to deal with the problems of the *Indian Act* without extinguishing Treaty rights or status. Since the failure of the White Paper, comprehensive land claims agreements have become the most common mechanism for exiting the *Indian Act*. Since 1973 a total of 27 new treaties have been negotiated. Not every First Nation is ready to negotiate a comprehensive land claim agreement, however, which means that First Nations seeking incremental reforms require an alternative mechanism to assist them in that process.

The organized efforts to increase First Nation control over their own land started in 1991 when a group of 13 First Nations from across Canada developed a proposal that would allow First Nations to withdraw from those provisions of the *Indian Act* that concern land management. The intent was to

replace the *Indian Act*'s land management regime with a land code of the First Nations' making. Negotiations with the government of Canada began in 1996 and in December of that year an additional First Nation joined the group. As a result of these negotiations, the Framework Agreement on First Nations Land Management was enacted in 1999 when the House of Commons ratified the agreement by passing the *First Nations Land Management Act* (LAB, *Annual Report 2002-2003*).

Canadian legislators were not universal in their acceptance of the FNLMA and the philosophy behind it. During debate in the House of Commons, Reform Party members expressed concern that both the FNLMA and the Nisga'a Final Agreement were creating a third order of government without proceeding through the proper channels, which they argued would have required a constitutional amendment. One Reform MP argued that the FNLMA would establish a kind of feudal regime as the individual property rights of First Nations people would not be protected (Canada 1998). Members for the Liberal and NDP parties, by contrast, highlighted the importance of giving autonomy to First Nations over their lands, and of not having the money collected from leases on reserve land being held in trust by Canada, thereby rendering it inaccessible to the First Nations without ministerial approval (Canada 1998).

Many First Nations supported the new legislation. In 2003, the FNLMA was amended to allow additional First Nations to become signatories of the Final Agreement. Following the ceremonial addition of 22 First Nations to the Final Agreement in March of that year, Chief Robert Louie of Westbank First Nation (British Columbia), and head of the Lands Advisory Board, stressed the increased autonomy under the FNLMA, noting that: "[t]his is a land management initiative conceived by the Chiefs, developed by the Chiefs, negotiated with Canada by the Chiefs, and recognized by the Parliament of Canada" (LAB, *Annual Report 2002-2003*). Additionally, Chief Austin Bear of Muskoday First Nation (Saskatchewan) observed that "Our communities are very capable of conducting the day-to-day management of our reserve lands and resources. We should all remember that we exercised this responsibility for hundreds of years before the *Indian Act* was imposed on us" (LAB, *Annual Report 2002-2003*). Since 2003, the number of First Nation signatories to the Framework Agreement has steadily increased with roughly one in three First Nations having made use of the FNLMA.

The process of implementing the FNLM regime

Until the FNLMA was repealed in December 2022, four legal documents comprised the FNLM regime: (1) the Framework Agreement (FA), negotiated in 1996 between the 14 original First Nations signatories and the government of Canada; (2) the *First Nations Land Management Act* (FNLMA), in which the FA was ratified by Parliament; (3) an FA-based land code that participating First Nations develop individually; and (4) an individual agreement between the First Nation and the government of Canada, which transfers the responsibility of the management of reserve land to the First Nation.

Since 1999, when the FNLMA came into force, the FNLM regime involved very specific and regulated steps that were designed to facilitate the adoption of independent land codes on reserve lands. First Nations interested in developing their own land code must apply to the federal government for admission to the FNLM regime. Once they become signatories to the FA, they develop and ratify a land code. Part VIII of the FNLMA established the Lands Advisory Board Research Council, a First Nations-led organization designed to support communities wanting to develop land codes. Once a land code is developed and ratified, the First Nation opts out of the approximately 40 provisions in the *Indian Act* relating to land management.

Becoming a signatory of the FA does not cede or extinguish Indigenous title, as the White Paper sought. Instead, the FA explicitly states that it is "not a treaty and does not affect treaty rights or other constitutional rights of the First Nations." Nor does the status of reserve land become "treaty settlement land," as it does under a treaty process, nor are reserve lands of First Nations with operational land codes converted into fee simple lands. Reserve lands remain protected under the *Constitution Act* s.91(24) and *Indian Act* s.80. The only change is the way that reserve lands are managed. The need for ministerial oversight is eliminated, and First Nation Councils are given autonomy over the land and the natural resources present on their reserves.

The process for developing a land code has been streamlined through the use of a "model land code" published by the Lands Advisory Board Research Council. This model serves as a template by which a First Nation's council or a law firm acting on behalf of the First Nation can create an individual land

code. It contains sections outlining measures to ensure financial accountability, dispute resolution, liability, and procedures for amending the code. With few exceptions, the land codes stipulate that First Nations can expropriate land for specifically defined community purposes, and they may participate in a voluntary exchange of land only if the land to be received is equal or greater than the land given.[1]

Individual First Nations have significant flexibility in designing their land codes, so the codes differ from one another, especially in areas that define land use and property interests. Importantly, there are just three situations in which the First Nation must seek community approval for land management matters. These situations include the finalization of the agreement between the federal government and the First Nation, the passage of the land code, and any voluntary exchange of land with the Crown (Lavoie and Lavoie 2017). Matters beyond these three situations are left to the discretion of the First Nation. Neither the FNLMA nor the FA dictate how First Nations should deal with land leases, transfer of leases, or the transfer of member interests.

Consistent with the *Indian Act*, most First Nations land codes provide for Certificates of Possession (CP), which grant the holder rights to permanent interest in the land, including the right to profit from any resources extracted from the land. These CPs additionally grant the holder the right to build a home or business on the land. Presently, no land code allows for non-members to be granted a CP, or any other form of permanent interest in reserve land, but many land codes diverge from the *Indian Act* insofar as they allow CPs to be transferred between members without requiring consent from the First Nation's council or community. Importantly, the FNLM regime wrests control of land transfers away from the government of Canada and gives it instead to individual First Nations. The *Indian Act* clearly states that: "[n]o transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister" (*Indian Act* R.S.C., 1985, c. I-5, section 24) and the process of receiving that ministerial approval is time consuming and inherently paternalistic. In one notorious case, it took 11 years to complete a transfer of a CP (Alacantra 2003, 410). In contrast, First Nations that enact a land code have successfully eliminated the long wait for ministerial approval for routine transactions.

Non-members may hold leases, though they sometimes need the approval of the band council or of a community vote. Leaseholders do not own the land, but they do own the lease, and depending on the land code, they may sell

the lease to anyone, including a non-member. Additionally, no First Nation land code prohibits the mortgaging of leasehold interests (Lavoie and Lavoie 2017). In British Columbia, members of the Stó:lō Nation, a group that includes Leqamel First Nation, Matsqui First Nation, Skawahlook First Nation, Squiala First Nation, Sumas First Nation, and Tzeachten First Nation, allow for CP holders to issue themselves a lease. By granting themselves a lease, the CP holder can use their lease, but not the land itself, as collateral for a loan or mortgage.

> *Individual First Nations have significant flexibility in designing their land codes.*

Generally, land codes will permit leases between 25 and 35 years without approval; consent of the community or council is required for longer leases, although there are some land codes that allow for 49-year leases without specific approval. For example, Beecher Bay First Nation, Shxwha;y Village; Tla'amin Nation, Squiaala First Nation, Ts'kw'aylaxk First Nation, and Tsawout First Nation do not require community approval for a lease of any duration, and Leqamel First Nation, Seabird Island First Nation, Tla'amin Nation, Tzeachten First Nation, We Wai Kai First Nation, and Westbank First Nation do not require the approval of council for the transfer of a leasehold interest. First Nations in British Columbia, particularly those with a significant number of non-members living on reserve lands, tend to be less restrictive about leases. No First Nation allows for the transfer of permanent interest in reserve land to non-members (Lavoie and Lavoie 2017). There is currently no mechanism for a First Nation community to divest themselves of reserve lands.

Some First Nations do things differently than the aforementioned scenarios. The members of the Saskatoon Tribal Council, which includes the Kinistin Saulteaux Nation, Muskoday First Nation, Whitecap Dakota First Nation, Yellow Quill First Nation, and One Arrow First Nation, have allocated land based on another model. They do not allow for CPs, nor any other form of permanent interest in the land to be granted to members. Instead, members

are allocated residential lots which do not grant rights over resources. However, these First Nations do provide for a 99-year "marketable residential lease," which may be granted to members or non-members and can be transferred or sold without consent of the council or members. Thus, this particular type of lease is extremely alienable, and suited to encouraging non-members to live on reserve land. Despite being restrictive insofar as granting permanent interests in the land, the Saskatoon Tribal Council members are at the forefront of on-reserve economic development (Kotzer 2014; Regina Leader-Post 2015).

Since 1999, approximately a third of the First Nations across Canada have become signatories to the FA (LAB, *Annual Report 2019-2020*). Enthusiasm for the FA has been attributed to the desire of First Nations to free themselves from the oppression of the *Indian Act* and move toward reconciliation. Advocates consider that: "[c]ommunities operating under a land code are changing the course of history, by actively dismantling the *Indian Act* and decolonizing" (LAB, *Annual Report 2016-2017*). There are now 204 signatories to the FA and 95 First Nations have enacted land codes under the FNLM regime. Since 2012, the number of signatories to the FA and the number of First Nations that have operational land codes have doubled with over half of the operational land codes in British Columbia (Jung 2019).

Becoming a signatory to the FA does not necessarily translate into enacting a land code. Although there are communities actively developing land codes across most of Canada, there are no operational land codes in Alberta or Prince Edward Island (Jung 2019). Additionally, over half of the communities actively developing a land code are in British Columbia and Ontario, the two provinces with the largest First Nations populations (Jung 2019). While many signatories across Canada have yet to enact a land code, four First Nations within British Columbia, the Cowichan Tribes, Lil'wat Nation, ʔaq'am, and Seabird Island, have already moved beyond the *Indian Act* and have become self-governing.

Many First Nations have tried, but thus far have not succeeded in enacting a land code. Of the original signatories, three First Nations enacted land codes in January 2000: the Mississauga of Scugog Island, Muskoday First Nation, and the Chippewas of Georgina Island. Only nine of the original 14 signatories have created land codes, but four of these First Nations are now classified as "voted inactive." This means that these four held a community vote on ratification of a land code but the measure did not pass and the communities have chosen not to vote further on the matter (LAB, *Annual Report 2019-2020*).

Only one of the original 14 signatories, St. Mary's First Nation in Fredericton, New Brunswick, is actively continuing to develop a land code. As of March 2023, 11 of 204 signatories are classified as "voted inactive," 18 communities are classified as "short-term inactive," and 16 communities are classified as "inactive" (LAB 2020). This means that the effort to adopt an independent land code has stalled in 45 communities, or over 20 percent of the signatories. Still, 102 First Nations communities have successfully used the FNLMA to create and enact an independent land code.

First Nations response to the FNLMA

Enthusiasm for the FNLMA was not universal, and there was extensive criticism of the legislation, which eventually led to a repeal and replacement of the FNLMA with the FAFNLMA. Some First Nations want more flexibility in adopting a FNLM regime than is possible through the FNLMA. For instance, the FNLMA outlined several mandatory requirements that First Nations must meet before they may opt in to a FNLM regime, which included the requirement to exactly identify the lands that would be subject to a land code (Hayden, Isaac, and Middleton 2023). The FAFNLMA does not contain mandatory requirements for the opt-in process, but instead is in alignment with the original FA, which provides guidance on the necessary and possible content of independent land codes. As well, the FA provides signatory first Nations with authority over land management and law-making. This means that it will be the First Nation that will have the ultimate authority in granting land interests, managing natural resources, and creating laws concerning development, conservation, protection, management, use, and possession of reserve land, including all interests, land rights, and licences.

The First Nations that have succeeded in enacting an independent land code seem content with their decision. In a 2014 study that surveyed 32 First Nations with operational land codes, no communities reported a desire to return to land management under the *Indian Act* (KPMG 2014). Reversion to the *Indian Act* after a First Nation has implemented a land code is not an op-

tion outlined within the FNLMA, and any land codes that were adopted under the FNLMA are now protected by the new FAFNLMA. There are few incentives to return to the *Indian Act* regime anyway, and First Nations tend to be pleased with the significantly decreased processing times for land management. Under the *Indian Act*, for example, it took an average of 584 days to complete an approval for a permit or lease; under the FNLM regime, the average approval time is only 17 days (KPMG 2014). Although there was dissatisfaction with the FNLMA itself, the legislation was useful in helping individual First Nations decrease the administrative burden on reserve lands management. The new FAFNLMA is expected to provide this same degree of usefulness.

Many First Nations claim that adopting an FNLM regime has provided their members with a greater sense of autonomy. The Chippewas of Georgina Island, for example, enacted a land code in 2000. They believe the FNLMA has improved their experience with land management tasks. Prior to the development of a land code, potential cottagers would meet directly with representatives from the Department of Indian Affairs and Northern Development while the Georgina Island First Nation Council and band members sat at the back of the room (Anderson 2019). Chief Bill McCue claims, "[i]t was like our community got pushed aside to the kiddie table" (Anderson 2019). Although McCue had been "leery" of participating in the FNLM regime, as "it was something no one had done before," ultimately, he found the benefit of being able to manage his community's land outweighed the fear of the unknown for him and his council (Anderson 2019).

Considering the transformative nature of adopting an independent land code, some First Nations communities desire incremental change instead of any rapid abandonment of the *Indian Act* regime. The Penticton Indian Band, for example, informed the Standing Committee on Aboriginal Affairs and Northern Development that they did not feel ready to quickly transition to a FNLM regime. Instead, the community preferred a phased-in approach that would allow the band to build the appropriate capacity and experience before taking on greater administrative responsibilities (Warkentin 2014, 155). Often, however, First Nations communities believe their concerns about the FNLMA outweighed any potential benefits and have resisted enacting a land code even when the concept is promoted by the band councils. The Squamish Nation, an original signatory of the FA, rejected a proposed land code after members expressed concern over the inclusion of an expropriation clause, and the poten-

tial for authority to become concentrated in the hands of a minority of leaders (Burke 2011). Some community leaders have expressed a belief that land codes can become tools that: [e]nable a particular type of development led by a very powerful Chief and Council" (Jung 2019). If there is a lack of trust in leadership, it can dissuade community members from adopting a land code.

> *The FNLMA was believed to reconfirm elements of the culturally oppressive authority of the* Indian Act.

There were various First Nations and many individual First Nations people who rejected the concept behind the FNLMA. Their criticism is directed toward the notion that Canada is in the position of recognizing First Nation title to land in the first place, or that the government of Canada even has the power to provide title to First Nations, when Indigenous title to the land precedes the existence of Canada (Coast 2015). Furthermore, there is an argument that First Nations who have signed the FA are acknowledging that the title to reserve lands is under the jurisdiction of the Crown and that enacting a land code amounts to the surrender of both reserve lands and traditional territories (Jobin and Riddle 2019). Evidence of these sentiments arises whenever First Nations choose to vote against the adoption of a land code. The Lil'wat First Nation, for instance, has been classified by the Land Advisory Board Research Council as "voted inactive" after an organized coalition opposed ratification of a land code in 2015. Another example is the Wiikwemkoong First Nation, which has been classified as "actively developing a land code," but whose adoption of a land code has been stalled for years (Erskine 2019).

The FNLMA was believed to reconfirm elements of the culturally oppressive authority of the *Indian Act*. For example, one of the principal concerns raised during debate in the House of Commons was that the FNLMA would perpetuate the gender discrimination inherent in the *Indian Act*, which stripped women of band status if they married an individual who was not a status Indian (Canada 1998). Citing the work of the British Columbia Native Women's Society, the Opposition charged that the government planned

to "turn over land management to bands without first putting an end to the unequal status of reserve women" (Canada 1998). Specifically, there is great concern for the status of women on reserves and their equitable access to leadership roles. After losing their own status, women could no longer pass on Indian status to their children, nor could they be allocated reserve land. Importantly, when First Nation members lose their status, they become ineligible to participate in governance or elections.

Although the *Indian Act* was amended in 1985 to address overt gender discrimination, preference for patrilineal descent persists, and many band members who marry non-status individuals continue to be unable to pass Indian status to their children (APTN 2019). Despite amendments to the *Indian Act* and attempts to move beyond the policies of assimilation, the FNLMA continued to retain what some critics view as disagreeable elements. Some assert that the FNLMA could be used as a tool for further assimilation. This criticism is related to the fear that adopting a land code is a stepping-stone toward the conversion of reserve lands into private property, which many believe would lead to potential end of collective ownership of First Nations land.

Privatization of reserve lands

Resistance to the FNLMA and the ideology that underpins the legislation cannot be ignored. First Nations rights advocate Rolland Pangowish asserted that the Wiikwemkoong Unceded Indian Reserve should reject a land code under the FNLMA as he did not believe the federal government can be trusted to act in good faith due to having actively fought against First Nations rights and the orders of the Supreme Court of Canada to respect First Nations rights (Pangowish 2019a; Canadian Press 2020; Barrera and Stefanovich 2019). Although some people may dismiss Pangowish's fear as overstatement, certain groups and individuals do seek to transform all reserve lands to private property. Pangowish states:

> Some fear that despite federal assurances, the words in the Bill and agreements that say land claims and Con-

> stitutionally protected rights will not be surrendered and this is not sufficient reason to accept it. Too many undefined areas of the law regarding inherent rights and self-determination may be affected by agreeing to a new definition of reserve lands, that in legal effect are no longer a reserve, let alone title resting with the Unceded Reserve members. (Pangowish 2019b)

Even though the FNLMA does not allow for reserve lands to be converted into fee simple ownership, there are proponents of such a plan. Several analysts have called for the total privatization of reserve lands that would enable First Nations, and individual band members, to dispose of their property as they wish (Jobin and Riddle 2019). As tempting as this prospect might seem to certain individuals, private property rights do not necessarily value traditional Indigenous economic models and could create rapid disruption within First Nation communities.

In 2010, the First Nations Tax Commission hosted the First Nations Property Ownership Conference. This event brought together international proponents of privatization of Indigenous lands to promote the privatization of reserve lands in Canada (Manuel and Feltes 2010). High-profile attendees included the noteworthy Peruvian economist Hernando de Soto, who has long argued for the expansion of private property rights and the need for Indigenous communities to adopt formal systems of property ownership as a tool of poverty relief and economic development. In the language of market liberalism, de Soto refers to reserve lands as "dead capital" (2000). Another prominent attendee was political scientist Tom Flanagan, who has written extensively on Indigenous history and policy in Canada. One book of which he was a co-author, *Beyond the Indian Act: Restoring Aboriginal Property Rights,* argued for privatization of reserve lands as a pathway out of the *Indian Act* and proposed the creation of a *First Nations Property Ownership Act* (Flanagan, Alcantara, and Le Dressay 2010).

Proponents of the First Nations Property Ownership Initiative (FNPOI) promote privatization as a superior alternative to the FNLM regime, asserting that First Nations must be enabled to convert reserve land into fee simple before they can achieve full economic independence (Flanagan, Alcantara, and Le Dressay 2010). Flanagan suggests that: "[i]n Canada, only the mentally incompetent, children, and First Nation members on reserve cannot legally

own property" (Flanagan, Alacantara, and Le Dressay 2010). Thus, the main argument advanced is that First Nations members are discriminated against as reserve lands are held in common, rather than in fee simple, and that it is the communal ownership of reserve lands that leads to poverty. The FNPOI was backed by the Harper government but faced stiff opposition across the country (Boutilier 2016).

> *The extinguishment of collective title can lead to the loss of Indigenous lands.*

De Soto and Flanagan's ideas on the privatization of reserve lands are unappealing to many First Nations people. For one, there is legitimate concern that conversion of reserve lands to fee simple would extinguish the collective title that is protected by section 91(24) of the *Constitution Act*, 1867 (Manuel and Feltes 2010). Furthermore, there is evidence that the extinguishment of collective title can lead to the loss of Indigenous lands, as demonstrated in the aftermath of the *Dawes Act* in the United States (Boutilier 2016). Second, Indigenous communities remain divided in their acceptance of neo-liberal, private ownership-based economic policy as the remedy for social inequality and conditions of poverty. Third, the arguments underpinning the need for the privatization of reserve lands in Canada tend to be weak.

A 2016 article attempted to support the FNPOI by erroneously claiming that "Indians can't own land, so they can't build equity" (Riley 2016). Moving beyond the reality that the value of land is subjective depending on desired use, there is nothing that prevents a First Nations member from private ownership of the lands that are available for private ownership by any Canadian. There are, however, a great many barriers that prevent Canadians from attaining private ownership of just any parcel of land they might desire. Canadians, for example, have great difficulty in acquiring a private interest in national or provincial parks. By legislative design, there is a barrier to Canadians acquiring private interest in First Nation reserve lands.

The FNPOI has been criticized for its potential to extinguish Indigenous title and privatize reserve lands (Pasternak 2015; Schmidt 2018). But importantly, proponents of the FNPOI and the privatization of Indigenous land in general are actively seeking a way to access the "dead capital" contained in reserve lands. They believe the remedy is to get the lands out from under federal control and into the hands of individual market actors; the situation in the US seems clear:

> Indian reservations contain almost 30 percent of the (United States's) coal reserves west of the Mississippi, 50 percent of potential uranium reserves, and 20 percent of known oil and gas reserves—resources worth nearly $1.5 trillion, or $290,000 per tribal member. Tragically, 86 percent of Indian lands with energy or mineral potential remain undeveloped because of federal control of reservations that keeps Indians from fully capitalizing on their natural resources if they desire. (Riley 2016)

While proponents of reserve land privatization hope that First Nations peoples will eagerly accept the premise that private property rights will lead to prosperity, many of them need convincing. Much of the policy analysis that calls for the privatization of reserve lands is associated with hopes for greater assimilation (Gibson 2009). The relationship between privatization of reserve lands and the assimilation of Indigenous peoples is so interconnected that Flanagan openly called for assimilation when he stated:

> In order to become self-supporting and get beyond the social pathologies that are ruining their communities, aboriginal people need to acquire the skills and attitudes that bring success in a liberal society, political democracy, and market economy. Call it assimilation, call it integration, call it adaptation, call it whatever you want: it has to happen. (Flanagan 2000, 195)

The task of converting reserve lands to fee simple is predicated on the assumption that a liberal market economy is not only the end-goal for Indigenous economic policy in Canada, but also that it is the preferred economic foundation for society at large. While the adoption of a liberal market econ-

omy is supported by Canadians in general, and by many First Nations people, it is not the only way to organize an economy. Nor is it necessarily the form of economic arrangement preferred by or most beneficial to individual First Nations communities. Like the FNLMA, the FNPOI was proposed as opt-in legislation, but ultimately it relies on the use of reserve lands to generate wealth, which may prove to be unsustainable over the long-term. Once reserve lands are sold off, Indigenous rights are extinguished, and the land is gone forever.

The FNLM regime and economic development

For some critics, the FNLMA was a highway to reserve marketization, which would open reserve lands to market forces. To the strongest opponents, such a measure represents a renewed form of colonialism where third-party business is given the opportunity to gain an economic interest from First Nation lands. Critics of the FNLMA believe that the process of reserve marketization is counter to traditional Indigenous economic models, and that the acceptance of neoliberal economic solutions will lead to increased social inequality for First Nations people (Jobin and Riddle 2019).

Many First Nations choose to participate in Canada's liberal market economy. Over the last two decades, there has been significant growth in Indigenous economic activity, and there are now thousands of Indigenous-owned companies and more than 260 Indigenous economic development corporations in Canada (NCCIH 2020). The economic development corporations work to stimulate community-based entrepreneurship on reserves. The goal is to base economic activities in Indigenous world views while promoting Indigenous tradition, heritage, and culture. Many Indigenous economic development corporations seek a balance between environmental concerns, equity, and economic prosperity. In general, they seek mixed economies, providing opportunity for business, but also room for a traditional harvesting activity economy, all while ensuring equitable social benefits.

Although there might be an assumption that First Nations that succeed in economic development are making great strides in improving the financial foundations of their communities, the reality is not comforting. In most communities, much of the revenue generated by First Nations economic development is channelled back into funding local infrastructure. In some situations, less of the generated revenue is reinvested into further economic development, and some believe this situation to be economically unsustainable (Richards and Krass 2015). Even if more revenue were directed to that purpose, First Nations economic development does not always contribute to increased community well-being. Instead, the most important tools for increasing community well-being have been through improvements in basic community infrastructure, including education and health care (Vining and Richards 2016). Thus, one can be skeptical of the notion that investment in revenue-generating commercial enterprises is the best path for a First Nation that seeks to improve community well-being.

First Nations' distrust of liberal economic ideology has knock-on effects. Instead of investing in economic development, underfunded First Nations governments must often borrow money to build the same basic infrastructure that is generally available to all Canadians. For example, the First Nations Financial Authority (FNFA) provides First Nations with access to a $1.3 billion lending portfolio. Some First Nations have taken advantage of the borrowing opportunity to invest in commercial enterprises that produce significant financial returns to the First Nation. Other First Nations, however, borrow funds to maintain their basic community infrastructure (FNFA *Annual Report* 2020/21). The reasons why some First Nations choose community infrastructure projects over revenue-producing economic development is complicated. In the first place, they are suspicious about the proposed economic solution. Building wealth through commercial development has worked well for many communities, although it is not a magic panacea. Many First Nations are located in remote, non-commercial areas where there is less capacity to experiment with commercial enterprise. Consequently, they continue to struggle financially to meet their basic needs.

Economic costs and benefits of adopting an FNLM regime

The full economic impact of the FNLMA is yet to be determined. The rise of third-party partnerships has become increasingly important to First Nations, and the ease of operations under a FNLM regime has led to an increase in the number of businesses owned or partially owned by external partners. This engagement with external partners may channel profits out of the community. Some Indigenous scholars have expressed concern that subjecting reserve land to market forces may result in new forms of colonization (Jobin and Riddle 2019; Harvey 2005). Still, there are many instances where the First Nation is at least a partial owner of new businesses on their reserve, which has created new jobs and greater prosperity in the community.

Despite the assertion that adopting an independent land code has the potential to promote economic growth, there has been little research that examines the FNLM regime's effect on poverty reduction, or the improvement of other socio-economic indicators such as health, language renewal, or cultural revitalization (Jobin and Riddle 2019). A 2020 study comparing the Community Well-Being (CWB) scores of First Nations communities revealed that self-governing First Nations have the highest CWB scores (Fligg and Robinson 2020). On average, those First Nations that adopted a FNLMA land code have lower CWB scores than the communities that are self-governing, but the communities that continue to be governed under the *Indian Act* have the lowest CWB scores.

There should not be, however, an assumption that these findings mean that adoption of the FNLM regime leads to a guaranteed rise in CWB. On the contrary, the study further revealed that First Nations, on average, had already experienced a rise in CWB before their land code came into effect. Of the sampled communities, 91 percent of communities experienced an increase in CWB before they enacted a land code, but only 61 percent of communities experienced an increase in CWB after their land code was enacted (Fligg and Robinson 2020). Put simply, enacting a land code will not lead to a rise in CWB, but First Nations with higher CWB scores in the first place are more likely to enact a land code. The improvement in CWB would seem to precede and may encourage the implementation of a land code, rather than be generated by it.

In terms of economic impact, adoption of a land code is only one factor amongst many that influence economic outcomes. First Nations communities that have negotiated an Impact Benefits Agreement (IBA) for commercial or industrial development on their traditional territories tend to have higher CWB scores than communities that have not (Fligg and Robinson 2020). Additionally, First Nations communities with an IBA have a higher proportion of their population engaged in full-time labour and earning higher incomes than those that do not, both of which are other indicators used to measure CWB. In general, First Nations communities that engage in land claim agreements have agency in resource decision-making, participate in business development, tend to be more successful in building social capital, and are better at building the capacity to support increased autonomy than those that do not (Fligg and Robinson 2020). The FNLM regime is just one tool in a set of many that are used to improve autonomy and CWB for First Nations communities.

> *The FNLMA has been useful in promoting self-determination for First Nations communities.*

The time frame in which a land code is adopted makes a difference, which complicates any determination of the efficacy of the FNLM regime. On average, First Nations that had operational land codes by 2011 have CWB scores that are approximately 8 points higher than the national average of First Nations that achieved operational land codes between 1991 and 2016 (Fligg and Robinson 2020). The First Nations that enacted a land code under the FNLM regime are already more economically developed than the average. There is another factor in play. First Nations in British Columbia are over-represented in the study as First Nations in that province not only tend to have higher CWB scores, but have had greater success in enacting a land code than First Nations in other provinces. Conversely, First Nations from the Prairies are under-represented. Those First Nations in the prairie provinces that enacted a land code continued to have lower than average CWB scores. Based on the research available to date, it would be over-reach to suggest that the FNLMA has had a universal positive

socio-economic impact on First Nations communities. It is clear that First Nations with well-being scores that are already higher than average are in a better position to take advantage of the tools provided by the FNLMA.

The FNLMA has been useful in promoting self-determination for First Nations communities. Taking over the management of reserve land could be viewed as capacity-building for other "*Indian Act* exit legislation," such as the *First Nations Fiscal Management Act* or the *First Nations Elections Act* (King and Pasternak 2018). The FNLMA might also have provided a path toward full treaty or self-governance agreements, as was the case with the Tla'amin Nation, the Tsawwassen First Nation, and the Westbank First Nation. The FNLMA was a flexible tool that allowed First Nations to achieve self-governance in an incremental manner, and even to experiment with the development of First Nations policy. For example, after implementing a land code, the Matsqui First Nation continued to expand their autonomy initiatives by enacting an environmental assessment law.

There were limits, however, to the self-determination made available through the FNLMA legislation. Specifically, the regime only applies to what has been termed the "0.2% economy," which refers to the total landmass in Canada that is reserve land (Manuel 2015). During debate of the FNLMA in the House of Commons, MP for Churchill Beverly Desjarlais noted that "[t]his bill establishes a framework to transfer land management power to bands, but what needs to be clarified and guaranteed is the Dene people's right to apply this framework in their traditional lands north of 60 as well as south" (Canada 1998). The agency available to First Nations through the FNLMA concerned only a very small portion of their traditional territories as it is limited to the management of reserve lands. It remains unclear if the FAFNLMA can serve as a remedy to this problem.

The ratification of a land code is time consuming and requires First Nations communities to shoulder most of the financial burden (Jung 2019). Furthermore, despite increased funding for the process, the government of Canada has been unable to keep up with requests from additional First Nations to become signatories to the FA (Warkentin 2014). Some First Nations have sought a more efficient avenue to realize their goals, with many, particularly in the North, turning to comprehensive land claims or treaties. Treaties have much greater scope than the FNMLA did, as treaties provide avenues for sweeping changes to the governance structures of First Nations. Self-gov-

erning frameworks, like those established through treaties, appear to have a greater impact on CWB scores than FNLMA land codes do (Fligg and Robinson 2020). There have only been 27 comprehensive land claim treaties negotiated since 1973; pursuing a comprehensive land claim is long and expensive and is not really a simple alternative to the adoption of a land code through the FAFNLMA.

First Nations do not need to choose whether they will pursue enactment of a land code under the FNLM regime or a comprehensive land claim treaty. They may choose to negotiate treaties alongside the development of an FNLM land code, or they may choose to proceed with negotiating treaties after they have successfully implemented an independent land code. Both the Tla'amin Nation and the Tsawwassen First Nation took the incremental approach to achieving their autonomy goals. In their cases, the creation and adoption of a land code served as a stepping-stone. Ultimately, the main benefit in adopting an independent land code is the agency the First Nation gains, and their ability to nullify some of the most paternalistic aspects of the *Indian Act*. While adopting a land code may help a First Nation build the capacity to self-govern, there remains little evidence that ratifying a land code will necessarily lead to greater prosperity or other social advantages for the First Nation.

Lessons learned

The debate between the First Nations that are enthusiastic about adopting an FNLM regime, and those that are not, is important. The opportunity for First Nations to pursue independent land management has not meant that the FNLMA was an adequate piece of legislation. On the contrary, the FNLMA was eventually repealed in favour of the more streamlined and less regimented FAFNLMA. Adopting an independent land code can be seen as using the tools that are available rather than accepting wholesale the economic value system that lies behind any legislation. Of course, this is how incremental change takes place. Inadequate measures must be adopted and then continually refined until the parties are satisfied. Many believe the path to economic justice has only just

begun, and many First Nations are willing to work with *what is* until *what ought to be* becomes available.

As First Nations and the government of Canada continue to work toward replacing the restrictive constraints of the *Indian Act*, much can be learned from the example of the FNLMA. Its success was that it sought to solve the problems inherent in the *Indian Act* while at the same time preserving First Nations and treaty rights. At a bare minimum, any new policy proposals meant to improve upon the *Indian Act* must re-confirm the understanding that Indigenous rights to their reserve lands is inviolable. Policy proposals that do not respect Indigenous rights will not be supported by First Nations people and ignoring the importance of Indigenous rights will lead to disruption in the relationship between First Nations peoples and Canada.

> *"Policy proposals that do not respect Indigenous rights will not be supported by First Nations people.*

Alternative policy proposals such as the FNPOI have not sought to preserve Indigenous rights beyond the idea that Indigenous peoples have a right to the ownership of land and should be free to commercially profit individually from their land. The proponents of the privatization of Indigenous lands strongly assert that Indigenous lands should be transformed to the highest and best use, or rather, the highest and best commercial use as defined by the free market. In this model, the liberation of "dead capital" is the ultimate goal. Proponents of the FNPOI believe that Indigenous rights to the land are best dealt with through commercial transactions. Yet their prescription of privatization remains connected to assimilation or, in the arguments of supporters, greater economic integration. Furthermore, the goal of FNPOI appears loosely connected to Indigenous rights and social justice, save that provided by economic opportunity. Instead, privatization of reserve lands appears mainly to be in the service of fulfilling a specific economic remedy. Under this imagining of the process, reserve land management could lead to assimilation through privatization.

In terms of practical strengths, the FNML regime has done well as an opt-in program. First Nations choose whether they wish to participate. This strength will continue under the new FAFNLMA legislation and, expectedly, will allow even greater flexibility for additional First Nations who wish to participate. Not only can First Nations use the FAFNLMA to reclaim their autonomy, but the process of land code development has become a stepping-stone for other moves toward First Nations autonomy. First Nations can also make use of the FAFNLMA as a tool for administrative capacity-building. Furthermore, the flexibility of the FNLM regime ensures that First Nations can develop land codes that reflect community priorities rather than the aspirations of outsiders. They can decide for themselves the highest and best use of their land.

Policy-makers must guard against the idea that one set of economic ideals will fit all Indigenous communities in Canada. Individual First Nations have different needs and desires; what works for one community does not necessarily work for another. Importantly, while many First Nations are located on high-value lands with great commercial potential, many others are located in non-commercial areas that are unlikely to be commercially important within the foreseeable future. Therefore, socio-economic solutions must be tailored to the situation of individual First Nations. There is no one-size-fits-all solution.

Importantly, the FNLM regime does not alter or extinguish constitutionally protected Indigenous title or rights. It only transfers the management of the land from under the *Indian Act* to the First Nation (Jobin and Riddle 2019). Still, a significant number of First Nations people suspected there were ulterior motives inherent in the FNLMA, as is evidenced by the many First Nations that chose not to adopt the land code proposed by their leadership. Therefore, improved communication between the federal government and First Nations, and between First Nations leadership and First Nations members is necessary.

How much the lack of trust influences reluctance to participate in the FNLM regime is unknown, as there are additional reasons why many First Nations people think the FNLM regime is inadequate. For example, not every First Nation can afford the cost of developing a land code. Once that land code is adopted, there will be the financial burden of additional administration costs for the First Nation. To ensure equitable access to the benefits of adopting an

independent land code, the federal government must be willing to provide adequate funding packages.

First Nations obviously value and wish to preserve their constitutionally enshrined rights to the land. To be successful, any amendment or other legislation pertaining to the *Indian Act* must proclaim First Nation treaty rights as inalienable. Innovations to the *status quo* must provide more than the downloading of administrative duties from the federal government. They must provide real rewards in terms of community well-being and Indigenous autonomy. Furthermore, while the benefits of adopting an independent land code support autonomy and self-determination, rewards in the form of prosperity and the improvement of community well-being are less certain. Considering that the new FAFNLMA is better aligned with the FA, there is reason to believe that more First Nations may become interested in adopting independent land management. MLI

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Endnotes

1 See Jung (2019) for a more comprehensive comparison of language used in land codes.

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