

THE INDIAN ACT

A Barrier to Entrepreneurship

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Executive Summary

Indigenous leaders and Canadian politicians often call for the repeal of the Indian Act, yet repeal never seems to happen. There is no general agreement on what should replace the Act, and First Nations are deeply attached to some of the special protections it affords, such as immunity from taxation on reserve. Because repeal is politically impossible, the focus in practice has been on gradual improvement through amendments to the Act and passage of supplementary legislation.

The original purpose of the Indian Act (1876) was to create temporary protected spaces where Indians could live while they were assimilated into the Canadian community. Accordingly, Indian reserves were owned by the Crown and all economic transactions involving reserve land and its produce had to be approved by government officials. But by the middle of the 20th century it was becoming clear that Indians did not want assimilation and that the lands set aside by the Indian Act had become *de facto* permanent homelands. Thus arose a new challenge—how to make reserve communities functional in Canada’s market economy, which depends on entrepreneurship and voluntary transactions, not top-down government decisions.

Canadian policymakers have been grappling with this challenge since the Indian Act revisions of 1951, which introduced certificates of possession (CPs), a new form of quasi-private property for reserve lands. CPs have allowed reserve residents to own their own homes, but their utility in the larger marketplace is limited because they can be sold only to members of the same band.

Canada has subsequently created a number of collective institutions to help First Nations participate in the economy. These include Indian Oil and Gas Canada, the First Nations Tax Commission, the First Nations Land Management Framework Agreement, and the First Nations Finance Authority. While created by federal statute, these institutions are run by First Nations people themselves. They offer advice and technical competence that individual First Nations would find difficult to achieve on their own.

These achievements are the result not of repealing the Indian Act but of incremental amendments to the Act and of supplementary legislation to create opportunities not foreseen in the Act. Much has been ac-

completed, but much remains to be done in order to facilitate Indigenous entrepreneurship and participation in Canada's market economy. Here are three examples:

1. The collective institutions that Canada has created to foster Aboriginal entrepreneurship are helpful mainly to those First Nations whose reserve land is more valuable because of location near a city or town or because of location near valuable natural resources. On the urban side, Canada should continue to support creation of urban reserves, which can be important foci of business activity for First Nations. With respect to natural resources, Canada's federal government should stop blocking pipeline construction and other resource development. The exploitation of natural resources is by far the best opportunity for First Nations located in remote areas to improve their standard of living through entrepreneurship.
2. On-reserve property rights are still limited by the Indian Act, but experimentation is taking place. Several First Nations now have fee-simple ownership as a result of modern land-claims agreements, while the Westbank First Nation has introduced the "A to A lease" as a way of making certificates of possession freely tradable in the market. Such experiments need to be studied and made better known.
3. First Nations have entered the gaming industry to the extent allowed by the provinces, whose gaming cartels generally keep First Nations out of the more profitable metropolitan markets. Amendments to the Criminal Code, passed in 1985 without consulting First Nations, gave the provinces control over gaming. Ottawa could pass further amendments to create greater opportunities for Indigenous entrepreneurship in this area.

Through these and other legal innovations, Canada's First Nations can transcend the limitations of the Indian Act and profit from the same opportunities for entrepreneurship as other Canadians. This, not redistribution through government programs, is the true path toward prosperity and economic self-determination.

Introduction

Everybody loves to hate the Indian Act. In 2010, Sean Atleo, then National Chief of the Assembly of First Nations, called upon the federal government to repeal the Act within five years (Canadian Press, 2010). In 2012, Stephen Harper's Conservative government endorsed a private member's bill to repeal certain sections of the Act, saying this was the first step along the path of repealing it altogether (Blackburn, 2012). Not to be outdone, the Liberals introduced a motion to repeal the Act immediately (Canadian Press, 2012). After coming to power, Justin Trudeau's Liberal government announced its intention of working towards repeal of the Act through discussions with the Assembly of First Nations (Fife, Curry, and McCarthy, 2017). The Green Party and the People's Party have also joined the chorus calling for repeal (Green Party of Canada, Undated; Harapyn, 2019). Even Mary Simon, the first Indigenous Governor General, has requested a special briefing from officials about what they are doing to "allow First Nations to move away from the Indian Act" (Taylor, 2022).

Ken Coates, a leading authority on Indigenous issues, predicted in 2008 that the days of the Indian Act were numbered (Coates, 2008: 32). He saw the evidence for that prediction in the modern land claims settlements being signed in Canada's North and in British Columbia, agreements that kept First Nations outside the Indian Act. Yet the Indian Act is still in force, except for First Nations that have signed modern treaties or have negotiated self-government agreements. The fundamental problem is that if the Act is repealed, it will have to be replaced with new legislation, and there is no agreement on what that would look like. Moreover, many First Nations people, though they claim to hate the Act, want to preserve certain protections that it gives them, such as immunity from taxation upon Indian reserve land and income earned on reserve (Diabo, 2017), as well as the Crown's general fiduciary responsibility.

Calling for repeal is in reality a rhetorical position. What is happening instead, and what has been happening since the Act was first passed in 1876, is a steady stream of amendments and supplementary legislation. The changes were designed initially to strengthen the hand of the federal government but more recently have been undertaken in response to requests from First Nations. A count of all amendments to the Indian Act

would yield a very large total. One scholar notes that after 1876 the Act was “amended almost annually for the next fifty years,” and that “nearly fifty First Nations-related federal statutes were passed between 2005 and 2020” (Collis, 2021).

Critics often refer to the Act dismissively as more than 125 years old, but today’s Indian Act, as amended and supplemented, is a far cry from the Act of 1876. Canadian law, including the Indian Act, is ever evolving, and improvements are easier to obtain through incremental amendments and supplementary legislation than through the “big bang” of repeal and replacement.

This paper looks at several important amendments and supplementary statutes intended to make Indian reserves more functional for First Nations people seeking increased autonomy and prosperity in a modern market economy. Reserves were not established with this end in mind; indeed, the primary goal was separation from mainstream Canada. That they are owned and controlled by government is hardly a recipe for competitive success in the marketplace. But Canada has tried for the last 75 years, with some degree of success, to bridge the gap that First Nations face between governmental ownership and control of their lands and resources, and participation in the economic marketplace, which is driven by private decisionmaking.

The Indian Act has also been amended for many important reasons, such as gender equality and loss of Indian status through enfranchisement. But I focus on economic development here because it is a crucial factor for First Nations trying to improve their well-being. Chief Clarence Louie, who has led the Osoyoos Indian Band from poverty to prosperity, has written:

As a Chief, when it comes to the quality of life on your Rez, you only have two basic options: You can either become a Chief who is an administrator of poverty and underfunded government welfare programs, or you can become a Chief who creates revenue-generating jobs that make money for your First Nation. It’s either a dependent (someone else feeds you) model or an independent (feed yourself) model. (Louie, 2021: ch. 9)

Amendments to the Indian Act and supplementary legislation won’t automatically bring prosperity to First Nations, but they can help to clear away the legal roadblocks on the path to greater autonomy and self-determination.

1876 and All That

The Indian Act was passed in 1876 as a consolidation and updating of previous legislation dealing with Indians (Indian Act, 1876). It reflected a consensus among both Liberals and Conservatives in Parliament that being Indian was a temporary status because First Nations were expected to die off or be assimilated. Treaties and the Indian Act would set aside land reserves, not as permanent homelands, but as temporary places of refuge for Indians, places to live in safety while they learned the arts of civilization. Policymakers' ultimate goal for Indians was enfranchisement, either as individuals or as groups, in which they would attain full civil and political rights as British subjects (the legal status of Canadian citizenship did not yet exist). Meanwhile, Indians would have a status somewhat like wards of the Crown, though that exact phrase was not employed in the legislation. They would be in tutelage while acquiring literacy, Christianity, and the ability to make a living through agriculture, which was the main occupation in Canada at that time. When the Indian Act was passed in 1876, Canada had not yet treated with most natives of northerly areas where agriculture was not possible. As Minister of the Interior Frank Oliver said at the beginning of the 20th century, they were “best left as Indians” (Coates, 1984).

The temporary status of reserves combined with the ultimate goal of enfranchisement explains many features of the Act. Reserves would be owned by the federal Crown for the use and benefit of the Indians (Indian Act, 1876: s. 4). Reserve lands, including the trees upon them and the minerals beneath them, could not be sold or leased without the approval of the Superintendent-General of Indian Affairs (s. 26 (3)). Reserve lands could not be taxed, thus protecting them from seizure by local or provincial governments for non-payment of taxes (ss. 64-65); nor could reserve lands be used as security for borrowing, thus preventing seizure by private lenders (s. 66).

There was a provision for a simple form of private property, known as the location title or location ticket, to be granted by the Superintendent-General (ss. 6-7). It could be transferred to other band members but not to outsiders (s. 8), thus keeping the reserve intact for the time being. Few other details were spelled out because the main function of the location ticket was

to act as an endowment for Indians seeking enfranchisement, who could take with them reserve land on which they had located (ss. 92-93).

Because Indian reserves were seen as temporary, little thought was given to their economic viability. Indians were expected to learn how to farm so they could feed themselves, and government assistance was provided, though not always effectively, towards that goal (Carter, 1990). Beyond that, Indians often went off reserve to work as farmhands, cowboys, lumberjacks, miners, and fishermen, though there was a tragic rise in welfare dependency due to the expansion of the welfare state in the 1950s and 1960s (Flanagan, 2008: 174-177). But the absence of private property, Crown ownership of land and resources on reserve, centralized approval by the Superintendent-General of all major decisions, and lack of access to credit meant that Indian reserves had little economic viability except as places to live and raise food.

Yet as time went by, it became more obvious that the original understanding of the reserve as a temporary refuge and place of tutelage did not fit the reality on the ground. Because few Indian men became enfranchised (many Indian women became enfranchised by marrying outside the band, which resulted in automatic revocation of their Indian status), reserves became more like permanent homelands. Options for wholesale enfranchisement and surrender of Indian status were discussed prior to the Indian Act amendments of 1951 (Leslie, 1999: 112-243) and again with the Liberal government's 1969 White Paper (Canada, 1969); yet both times Indian leadership decisively rejected those offers, the latter time so resoundingly that it sparked the rise of the Indigenous rights movement in Canada.

If Indian reserves were to be permanent homelands, Canada had to consider how they could become more economically viable. Agriculture alone could not support a growing population, and Canada was rapidly changing from an agricultural to an industrial economy. How could Indian reserves, owned by the Crown and centrally administered by a government department, become loci of prosperity for their residents in Canada's new economy? No one had an immediate answer, but ever since the Indian Act revision of 1951, Canada has tried to create institutions to facilitate the participation of government-owned and administered Indian reserves in a dynamic market economy. No entirely satisfactory solutions have emerged, but some progress has been made through creation of hybrid institutions to bridge the gulf between government ownership and administration on one side and the market on the other.

Certificates of Possession

The first major innovation was the transformation of location tickets into certificates of possession (CPs) in the 1951 Indian Act. CPs would be granted with the approval of the band council and the responsible minister. They were to be listed in a permanent Reserve Land Register in Ottawa (Indian Act, 1951: s. 21). They would entitle the recipient to lawful possession and could not be confiscated without compensation to be determined at the discretion of the minister (s. 23). They could be given or sold to another member of the same band with ministerial approval (s. 24), but not to outsiders. In an important innovation, CP holders could lease their lands with the approval of the minister (s. 58(3)). In retrospect, the whole scheme seems shot-through with government control, but it was an improvement over what had previously existed.

After approval of the 1951 amendments, issuance of CPs, as compared to the earlier device of location tickets, shot up dramatically. About 41,000 pieces of land on reserve were held under CP by 2012. However, only 315 First Nations, about half the total number, had any CPs at all. Of these 315, most had less than 5 percent of their land under this form of lawful possession, and only about 10 percent had more than half their land allotted to CPs. Lawful possession through the mechanism of CPs was heavily concentrated in southern Ontario (more than half of the total number) and in southern British Columbia and Quebec (each with about a fifth of the total). All of these were places where reserves were located close to urban areas where economic opportunity was close at hand. This same tendency was also visible elsewhere on a smaller scale (Brinkhurst and Kessler, 2013: 5-12). This makes sense because it takes effort to acquire a CP, and land closer to cities is likely to be more valuable, thus making the effort worthwhile.

Several researchers, using somewhat different methodologies, have shown a positive association between the use of CPs and the standard of living within First Nations, even after controlling for the effect of other variables (Flanagan, 2019b: 29-32). However, the direction of causation is not entirely clear. Are First Nations whose land is already valuable or who have better access to jobs and income because of location near an

urban area more likely to adopt the usage of CPs, or does the adoption of CPs promote a higher standard of living? As is often the case in economic relationships, causality may run in both directions. The positive effect of CPs seems strongest for housing quality. Though the linkage hasn't been completely tested, it seems likely that the security of tenure based on CPs encourages holders to invest more in the construction and maintenance of their homes, as compared to those who live in band-owned housing.

A dramatic use of CPs has been made by the Westbank First Nation, situated on Lake Okanagan in central British Columbia across from the fast-growing city of Kelowna, on a piece of high-value real estate overlooking the lake (Flanagan, 2019a). Much of the land on the Westbank reserves was allocated to members via CPs in a sort of land rush after the band became independent in 1963. Members then leased their individual CPs to outsiders for fairly large-scale housing and commercial development. Further improvements were made when Westbank achieved self-government, freeing the reserves from the legal constraints of the Indian Act and enabling them to adopt their own constitution in 2005. CPs were retitled as "allotments," and Westbank instituted its own land registry. Granting of allotments was now controlled entirely by the First Nation, without need for approval by the minister, so that the process could move much more quickly. The assessed value of property on the Westbank reserves increased dramatically after adoption of the constitution, as investors responded positively to the certainty conferred by the new rules (Flanagan, 2019a: 12-13).

An important innovation was approval of "A-to-A" leases. Under this new provision, allotment holders can grant themselves leases, which can be sold to anyone, thus effectively obviating the Indian Act restriction on transfer of CPs to non-members of the band. Even though the allotment itself cannot be sold, sale of the lease amounts to almost the same thing in practice, thus strengthening the busy real estate market on the Westbank reserves.

This innovation could perhaps be adopted by other development-minded First Nations because it allows a real estate market to exist without full alienation of reserve land to outsiders. The sale of reserve land to outsiders has always been a sticking point for Canadian First Nations who saw how the Dawes Act in the United States led to the sale of much reservation land, a development that the US federal government has been trying to repair ever since the 1930s (Flanagan, Alcantara, and Le Dressay, 2010: 42-54). These fears led the Harper government to not proceed with its proposed First Nations Property Ownership Act, which would have introduced fee simple title on reserves on an optional basis (Flanagan, Alcantara, and Le Dressay, 2010: 160-181). But adoption of A-to-A leases

would bring some of the benefits of fee simple ownership while reducing fears about loss of land to outsiders.

Apart from the rejection of the Property Ownership Act, several First Nations in British Columbia, such as the Nisga'a, Tsawwassen, and Tla'aminn, have adopted forms of fee simple ownership as a result of modern land claims agreements. These include various restraints on the rights of ownership, such as limitations on the area of land that can be owned and restrictions on sales. These innovations would be worth study to determine if there are forms of fee simple ownership that are more flexible than CPs but would still be acceptable to First Nations concerned about preserving their land base.

CPs were an innovation directed at individual members of First Nations, giving them some choice and control in the use of reserve lands. Other innovations have been of a collective character, creating institutions by which many small and scattered First Nations could act together in the marketplace. Creation of such collective institutions, to be discussed in the rest of this paper, has become the dominant trend in amending and supplementing the Indian Act.

Indian Oil and Gas Canada

The discovery of oil at Leduc, Alberta, in 1947, set off a scramble for drilling rights in the Western Sedimentary Basin, and it soon became apparent that many Indian reserves contained land that was worth drilling. According to s. 18(1) of the Indian Act, “reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart” (Indian Act, 1951). Based on this legal responsibility, the Canadian government initially adopted a paternalistic approach, managing all oil transactions for Indian bands and depositing royalties in the Consolidated Revenue Fund.

As time went on, however, the government started to devolve responsibility. The Indian Oil and Gas Act was passed in 1974, and in 1987 Indian Oil and Gas Canada (IOGC) was created to replace Indian Minerals West within the Department of Indian Affairs. The Indian Resource Council (IRC) was also established as a First Nations advisory body to IOGC. In 1993, IOGC became a Special Operating Agency within the Department of Indian Affairs, giving it a board of directors and a status resembling a Crown corporation. In 1994 the offices of IOGC were moved from downtown Calgary to the Tsuut’ina reserve on the outskirts of the city, and two years later the IOGC co-management board was appointed so that the IRC could share managerial responsibility for the agency (Flanagan, 2021a: 3).

Today’s First Nations are largely in control of the oil and gas industry on their reserves and the revenues derived from it. While IOGC is still legally part of the federal government, the co-management board consists almost entirely of First Nations people. The executive director is a member of the Siksika Nation, and the president of the advisory Indian Resource Council belongs to the Samson First Nation. Both of these First Nations are important participants in the oil and gas industry. IOGC is a party to all negotiations between oil companies and individual First Nations, offering expert advice to the latter. IOGC also ensures that safety and environmental regulations are followed. In its reporting capacity, it advises Parliament on gaps in existing legislation, leading in 2019 to the modernization of the Indian Oil and Gas Act.

In 2005, the Samson First Nation, at one time the largest Indian oil producer, took control of its trust fund away from the Consolidated Revenue Fund; that is, it became responsible for managing its own oil wealth (Flanagan, 2021a: 4), totalling over half a billion dollars (Samson Cree Nation, 2021: 1). This new possibility was confirmed by legislation and extended to other bands in 2006 (Canada, 2015).

When the most recent IOGC report to Parliament was compiled on August 1, 2021, there was active oil or gas production or exploration on 36 First Nations, while another 18 had non-producing or historical petroleum industry infrastructure. IOGC has 189 member First Nations with an active interest in the industry, and estimates that perhaps 300 First Nations have some degree of hydrocarbon potential, either from production or transmission (Canada, 2021). The Indian Resource Council represents these First Nations as a lobby group.

The establishment of a collective institution combined with gradual devolution of authority has worked, but perhaps not perfectly. Critics allege that IOGC has not been aggressive enough in developing resources on Indian reserves (Weber, 2016). The IOGC wants the government to make it fully independent of government control, but to retain fiduciary responsibility as a backstop against losses (Narine, 2021). There may be room for improvement of the devolved regime that Ottawa has allowed to evolve, but the next steps are not yet clear.

First Nations with rights to mineral and timber resources do not get any assistance similar to that provided by IOGC. It would be worthwhile to compare the returns received by First Nations for their hydrocarbons to those received for minerals and forest products, in order to estimate how much value-added IOGC confers. Such a study would require specialized expertise far beyond mine; but, if carried out, it might show whether it would be worthwhile to establish something like IOGC for First Nations' minerals and forest products. Of course, the fact that most mineral and timber resources are off reserve in traditional territories makes a difference in that First Nations do not have the same claim to them as they do to subsurface minerals beneath their reserves.

Property Tax

In 1988, Parliament added a new subsection to s. 83 of the Indian Act, allowing band councils to levy property tax on Indian reserves: "... the council of a band may, subject to the approval of the Minister, make by-laws for... taxation for local purposes of land, or interests in land, in the reserve, including rights to occupy, possess or use land in the reserve." This was the first Indian-led amendment to the Indian Act. It is often referred to as the Kamloops Amendment, because the leadership came from Manny Jules, then Chief of the Kamloops Indian Band, who got the support of 120 First Nations to ask for the amendment (Flanagan, Alcantara, and Le Dressay 2010: 144). After mobilizing supporters for the Kamloops Amendment, Jules has remained a key figure in the cause of obtaining more autonomy for First Nations.

The main purpose of the legislation was to allow First Nations to levy property tax on reserve leaseholds, including residential and commercial developments, mining and forestry leases, and transportation and communication rights of way, such as railways, pipelines, and hydropower. It was a pro-development measure inasmuch as it encouraged First Nations to look at their land in an economically rational way as a revenue-producing asset. It also provided band councils with stable revenues that could be used to provide better services to on-reserve businesses as well as residents. Jurisdiction over taxation was enlarged in 2005 with passage of the First Nations Fiscal Management Act, which gave band councils the power to levy property transfer taxes, development fees, and similar charges.

An important feature of the legislation was establishment of a collective institution, the Indian Taxation Advisory Board. The idea of an independent institution was carried forward in the 2005 legislation, and in 2007 it was renamed the First Nations Tax Commission. Manny Jules, who, along with Harold Calla of the Squamish First Nation, has been involved in most of the major Indigenous financial innovations in recent decades, has been the chief commissioner of the institution from the beginning. It has the authority to approve all local revenue laws passed by First Nations and to resolve conflicts between band councils and those who are taxed. It has developed model laws, and it guides First Nations through the process of adopting their own laws, thus providing expertise

that few First Nations could develop on their own. The authority of participating First Nations to levy taxes and of the FNTC to approve them has been upheld in the Federal Court of Canada (Indigenous Law Centre, 2014, December 19).

Over 150 First Nations now have active property tax systems under one of the two legislative authorities (FNTC, 2021/22: 7). Their efforts raise in the aggregate about \$100 million a year (Woolley, Doxtator, Macnaughton, and Sandler, 2021: 791, 794). That is a small amount in view of the size of reserves across Canada, but it reflects the relatively low state of development on these lands. Moreover, the distribution of revenue is far from equal:

Two First Nations—Westbank, with reserves in the Okanagan, and Squamish, with reserves in the BC lower mainland—accounted for over one-quarter of the \$96 million in revenue; over one-half was raised by just 10 nations. Among First Nations reporting their tax revenue in the First Nations Gazette, the median amount of revenue raised in 2019 was approximately \$130,000, and the majority of First Nations in Canada do not collect any property taxes at all. (Woolley, Doxtator, Macnaughton, and Sandler, 2021: 791, 794).

As with certificates of possession, statistical analysis has shown a positive association between having a property tax system and a higher Community Well-Being (CWB) score (Flanagan, 2019a: 35), but there are also similar questions about causation. Does enacting property tax lead to a higher standard of living, or does a higher standard of living lead to enacting a property tax because there is more worthwhile property to tax? Regardless of causation, adopting property taxation has become a common feature of better organized, more prosperous First Nations.

Quebec lawyer Audrey Boissonneault has recently argued that the First Nations' property tax system is too controlled by the federal government, which has retained authority to enact regulations and to appoint members of the governing board. She proposes that First Nations themselves should choose members of the board, and that the First Nations Tax Commission be only advisory. In her view, a robust understanding of self-government means that individual First Nations should have the right to devise their own tax systems without external approval (Boissonneault, 2021). In contrast, André Le Dressay, an economist whose specialty is the study of First Nations' economies, defends the current regime as a story of success in enlarging the fiscal base of First Nations (Le Dressay, 2021).

Gaming: A Missed Opportunity

In 1985, the federal government made a deal with the provinces to transfer jurisdiction to amend the Criminal Code. The provinces would give Ottawa \$100 million toward the cost of the 1988 Winter Olympics, and in return the federal government would give the provinces the right to legalize gambling (Belanger, 2006: 52). This was around the same time that Chief Manny Jules was trying to build support for the Kamloops Amendment, to give First Nations jurisdiction over property tax on reserves; but apparently no one was thinking about gaming and First Nations in a parallel way.

The provinces proceeded to legalize gambling while requiring the industry to form a cartel (Flanagan, 2020). Provincially appointed commissions license casinos, dictating where they can and can't operate, what games they can offer, what the house take will be, and what percentage will go to the provincial government. Provinces own some casinos and license others, but in all cases they regard the industry as a cash cow for themselves. They treat First Nations as an afterthought, granting some licenses but not in lucrative metropolitan markets. Alberta, which has licensed First Nations' casinos in Edmonton and Calgary, is the only real exception.

Claiming an inherent jurisdiction over gaming on reserves, First Nations challenged provincial jurisdiction but lost in the *Pamajewon* case (*R. v. Pamajewon*, [1996] 2 S.C.R. 821). A First Nations gambling industry does exist today, but it is not as robust as it could be. Most of the 23 First Nations casinos are located far from metropolitan areas or destination resorts, while provincial regulatory commissions prevent expansion. Saskatchewan, where First Nations have their own commission to regulate their share of their gaming industry, is a partial exception; but even there First Nations have no casinos in the biggest potential markets of Regina and Saskatoon.

It is interesting to speculate on what might have been. The federal government had no obligation to transfer jurisdiction over gambling to the provinces; or, if it had wanted to do so, it could have exempted Indian reserves. It could have consulted First Nations, leading to the establishment of a First Nations Gaming Commission somewhat like the First Nations Tax Commission. Legislation could have limited the new commission to genuine regulatory functions, preventing it from imitating the provincial

cartels. The result would have been a more competitive and entrepreneurial First Nations gaming industry with many spillovers into related fields such as entertainment and real estate development.

Is it too late for the federal government to do this? Legally, no. Parliament could pass legislation to take back jurisdiction over gambling on Indian reserves, and then the executive government could carry out consultations as described in the preceding paragraph. But this course of action would be politically difficult, because provinces would be loath to see a reduction in the revenues they now derive from gambling. Perhaps, as a less drastic strategy, the federal government could threaten to use its legislative power in order to get the provinces to relax their restrictions on First Nations' gaming.

First Nations Land Management Framework Agreement

The First Nations Land Management Framework Agreement (FNLMA) is another First Nation-led initiative. Unlike property taxation, it began not as an amendment to the Indian Act but as a way of opting out of the Act's provisions for control of reserve land, most of which grant ultimate decision-making authority to the minister. The Framework Agreement was launched in 1996 as a compact among 13 First Nations and the minister and ratified by legislation in 1999, as required in the Agreement.

The First Nations Land Management Resource Centre provides technical and legal assistance to First Nations in developing their land codes. The Lands Advisory Board (LAB) is a more political body, liaising with First Nations and advising the government on changes to legislation and regulations. Unlike the First Nations Tax Commission, members of the LAB are not appointed by the Crown but are elected by First Nations that participate in the FNLMA. The current chairman of the LAB is Robert Louie, former chief of Westbank First Nation, which at one time made considerable use of the FNLMA, although it has since moved on to full-fledged self-government.

First Nations join the Agreement with the intent of developing their own land codes, which have to be approved by a band referendum and by the minister before they can be adopted. Once approved, the codes supersede the land provisions of the Indian Act, including further ministerial approval of decisions. As of February 2022, 194 First Nations had signed onto the Framework Agreement, of which 100 now have functioning land codes that they themselves have designed and approved.

Obviating the need for ministerial approval allows First Nations to “move at the speed of business, not the speed of government” in their economic development. Many codes, however, require approval by vote of chief and council and/or by band referendum in order to lease band land and CPs or to transfer CPs. In a study of FNLMA land codes that were publicly available in 2017, the findings did not allow for easy generalization:

Of the thirty-three codes we studied, twenty-seven require a vote of the community as a whole to lease community lands to a non-member, while six do not. However, the lease-term threshold for requiring such a vote differs across the communities. Thirteen of the codes have a threshold of 35 years or more, and seven have a threshold of 15 years or less. Only six codes do not require council or other approval for the transfer of an existing leasehold interest to a non-member, while the remaining twenty-seven do require such approval. Ten codes require council or other approval for the transfer of a member interest to another member, while the remaining twenty-three do not. (Lavoie and Lavoie, 2017: 571)

First Nations have latitude to shape their own land codes. Some want ease of leasing and sale in order to facilitate economic transactions, while others want stronger safeguards to ensure that land remains under community control.

Statistical research suggests that entry into the FNLMA is positively associated with a higher CWB index (Flanagan, 2019a: 33), though the same caveats about causality apply as with certificates of possession and adoption of property tax. Approval of a land code through the FNLMA is time-consuming and expensive. First Nations that enter the process are likely to perceive their lands as having potential economic value that they hope to unlock. Like the other innovations discussed thus far, the FNLMA seems to hold greater promise for First Nations with valuable assets than for poor First Nations in remote locations.

A recent Yellowhead Institute publication acknowledges that the FNLMA gives First Nations greater control over their reserve lands and may lead to greater prosperity, but also has two major criticisms of it (Jobin and Riddle, 2019). First is that the FNLMA further entangles First Nations in the “neo-liberal” market economy. This criticism will be persuasive only to those who reject capitalism; for others, including many Indigenous leaders and community members, greater involvement in the market economy is one of the main goals of reforming the Indian Act. The other major criticism is that, by leading First Nations to focus on management of their reserve lands, the FNLMA distracts them from the more important task of recovering off-reserve land rights lost by treaties and government legislation. This criticism also seems off the mark because it ignores the extension of off-reserve land rights through the jurisprudence of consultation developed by the Canadian courts in the *Haida Nation* decision and its progeny (Newman, 2014; Flanagan, 2019b: 117-130).

First Nations Finance Authority

The First Nations Finance Authority (FNFA) was the brainchild of a group of Westbank First Nation administrators and consultants who experienced firsthand the difficulties of obtaining financing to provide paved roads and utilities for their expanding real estate developments. Borrowing large amounts of money requires an asset to pledge as security, but s. 89(1) of the Indian Act prevents reserve land from being seized by a lender if a loan is not serviced. Leases and other revenue streams can be used as security, but Westbank needed to develop parts of its real estate endowment to create those types of assets. The First Nation managed to bootstrap its way to prosperity, but the difficulties of borrowing remained in the minds of key personnel.

In 2005 the federal government adopted the proposed solution: The First Nations Fiscal Management Act. The Act created the FNFA as a pooled-risk borrowing consortium. The FNFA would not itself lend money; rather it would bring potential borrowers together to obtain favourable rates from lenders. Borrowers would be screened for their ability to service the loans they were seeking. They would have to exhibit adequate revenues from property taxes, resource revenues, business enterprises, land claims settlements, or other sources. The FNFA would then pool these loans and fund them by issuing debentures. Lenders would offer below-market interest rates because they were dealing not with small band governments of dubious credit worthiness but with a large organization, ultimately backed by the government of Canada, that had removed most of the risk by screening borrowers.

As of 2021, the FNFA had 121 member First Nations, with 74 loans totalling \$1.3 billion. The largest loan was \$250 million to a consortium of Mi'kmaq First Nations to buy Atlantic fishing licenses as well as a half-ownership of Clearwater Seafoods (FNFA, 2021: 6). Some loans were for business purposes such as this; others were for building reserve infrastructure such as administrative and community buildings.

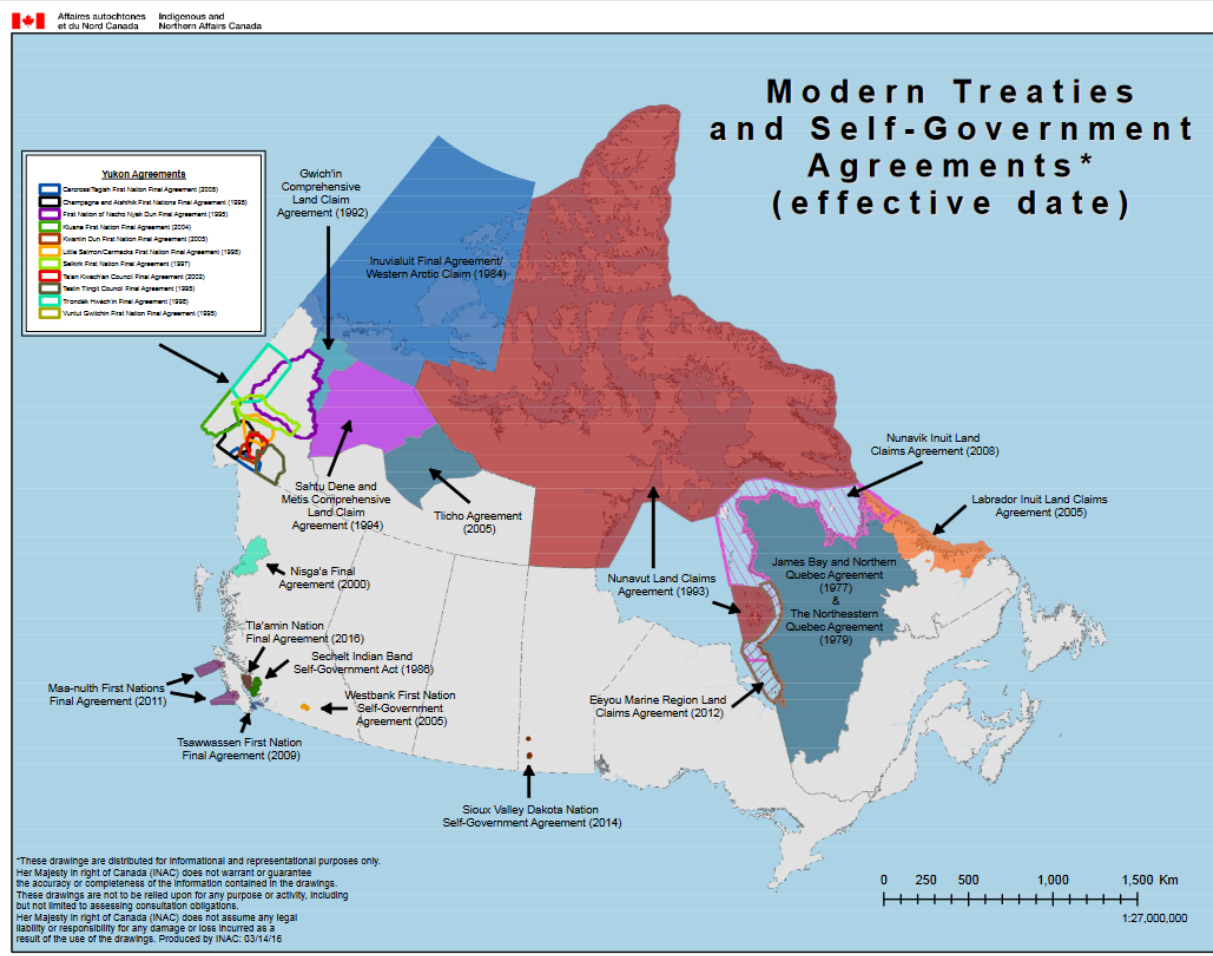
The FNFA is largely self-financing. It boasts that no member has ever defaulted on a loan repayment. However, the federal government plays a backstopping role, having provided about \$53 million in special funding during the pandemic year of 2021. The FNFA also would like to

receive federal money on a larger scale to close the “infrastructure gap... that has built up over generations” (FNFA, 2021: 7). Translation: Many First Nations, particularly those in rural, remote, and northern regions, do not have adequate revenue streams to support unsubsidized borrowing, so there is a limit to what a pooled-risk organization can accomplish.

Self-Government

Self-government would appear to be an attractive off-ramp from the Indian Act. According to the government of Canada, “there are 25 self-government agreements across Canada involving 43 Indigenous communities” (Canada, Crown-Indigenous Relations and Northern Affairs, 2020). That statement is true but a bit misleading in the context of this paper. As

Map 1: Modern Treaties and Self-Government Agreements



Source: Canada, Indigenous Relations and Northern Affairs, 2019, Annex D.

Map 1 shows, almost all self-government agreements have been negotiated in northern Canada or British Columbia, where no treaties had been signed and land claims were still pending. In those cases, self-government was negotiated along with a comprehensive land claim involving substantial financial compensation, which provided an incentive to get the whole package done.

At the time of writing, a partial self-government agreement was announced with five Anishinabek Nations in northern Ontario, which still has to be approved by legislation. It covers governance and membership but, at least as reported, does not seem to cover land or other aspects of economic development (Canada, 2022). Negotiations had been underway since 1995.

Self-government on its own is time-consuming and expensive to negotiate, but it can also produce impressive annual revenue streams for Indigenous governments. The only three First Nations to complete stand-alone agreements, i.e., without the incentive of a land claim settlement, are Sechelt (with a municipal-like structure from the 1980s, Westbank (an economic powerhouse), and Sioux Valley Dakota (also financially independent). The reality is that First Nations can achieve some, but not all, aspects of self-government by participating in established mechanisms without the additional effort and cost of negotiating self-government. They can issue certificates of possession with enhancements such as “A to A” leases. They can get expert assistance in developing hydrocarbon resources from Indian Oil and Gas Canada. They can levy taxes by working with the First Nations Tax Commission. They can devise their own land codes through the Land Management Framework Agreement. They can borrow money through the First Nations Financial Authority. And they can enhance their revenue by establishing urban reserves (discussed below).

Analysis

The historical record shows that Canada has made substantial attempts to amend or move beyond the constraints of the Indian Act in order to facilitate the participation of First Nations in the economy. The first such effort, included in the 1951 version of the Indian Act, enlarged individual property rights on reserve by converting location tickets into certificates of possession to be recorded in the Indians Lands Registry. Subsequent efforts moved the focus from enhancing individual rights to building collective institutions—Indian Oil and Gas Canada, the First Nations Tax Commission, the Land Management Framework Agreement, and the First Nations Financial Authority. As these institutions have developed and undergone further legislative amendments, they have converged on a general model including the following features:

- *Introduced by First Nations.* Starting with the Kamloops Amendment in 1988, groups of First Nations have submitted draft legislation to create these institutions and have also requested further amendments.
- *Managed by First Nations.* All these institutions have a board of directors and senior management consisting mainly of First Nations people.
- *Collective action.* All these institutions offer technical advice as well as approve the initiatives of participating First Nations. This creates public standards for the oil and gas leases, tax laws, land codes, and loan agreements that participants create and enter into.
- *Continuing role for the Crown.* The federal government remains involved in several ways—passing and amending necessary legislation and regulations, appointing directors (in some cases), and providing financial support (with considerable variation from case to case).

Criticism of this institutional model tends to run along two lines. One is that the institutions, backed by the government of Canada, restrict the inherent sovereignty of First Nations, who should be free to make their own deals with oil companies, pass their own tax laws, and design their own land codes. The other line of criticism is that the government exercises too much control over some of the institutions by appointing directors

(all but one for the First Nations Tax Commission, and some of the directors of Indian Oil and Gas Canada), laying down regulations that constrain First Nations' tax laws, and subjecting land codes to ministerial review before they can become operational.

Without trying to debate the details of these criticisms, some general considerations are important. First, there is value in having public standards for First Nations' laws and practices. Oil companies conducting exploration, lenders considering loans, and tenants wondering whether to locate on Indian reserves don't want to confront 600-plus different legal systems. The institutions discussed here set public standards for participating First Nations and thus reduce transaction costs for all concerned.

Second, even if these institutions are formally independent, they are created by statute, so business interests will inevitably perceive the federal government as the ultimate guarantor of stability. Investors don't want to see their investments confiscated, tenants don't want their leases torn up, and lenders want to be repaid. If things "go south," as the saying goes, aggrieved parties will expect the federal government to do something. Being aware of such expectations, the government has to maintain some degree of authority over the institutions because it will be held responsible to avoid bad outcomes, as, for example, happened with assisting the First Nations Financial Authority during the Covid pandemic.

How successful have these legal innovations been in helping First Nations to participate in the economy and thereby raise their standard of living? Researchers have found positive correlations between the First Nations' Community Well-Being Index and the use of certificates of possession, adoption of a property tax, and participation in the Land Manage-

Table 1: Extent of Adoption by First Nations of Various Innovations

CPs	41,000 on reserves of 315 First Nations, mostly in southern Ontario, BC, and Quebec. Most who have CPs have only a small amount of land allotted this way.
IOGC	189 members, 36 actively producing, 18 with historical infrastructure.
FNTC	About 150 members with active tax systems yielding about \$100 million annually, median \$130,000.
FNLMFA	194 members, 100 functioning land codes.
FNFA	121 members, 74 loans totalling \$1.3 billion.

ment Framework Agreement. Another indication of success is the extent to which First Nations have adopted these innovations. Rational actors would only go to the trouble and expense of participating in these economic institutions if they expected economic gains. Table 1 summarizes the available information on the extent of participation.

The general pattern is clear. All of these legal innovations have attracted the interest of substantial numbers of First Nations—around 100, 200, even 300, depending on the case; but only a smaller number are able to make substantial use of them at the present time. Most reserves with CPs have only a few lots allocated; only 36 members of IOGC are actually producing oil and gas; most tax systems yield little revenue; there are only 100 functioning land codes; and only 74 First Nations have taken out (mostly small) loans through FNFA. Amendment of the Indian Act and passage of supplementary legislation is facilitating participation of a significant number of First Nations in the market economy, but not a majority.

At present these legal innovations and institutions are best suited to First Nations whose lands are more valuable, whether because of location near metropolitan areas or possession of natural resources. Members are more likely to want CPs for valuable lands, a First Nation's possession of valuable lands makes it more worthwhile to expend money and time adopting property tax and a land code, and desirable lands and natural resources can create revenue streams to support borrowing through the FNFA.

Given the importance of land values to Indigenous economies, it is crucial to adopt public policies that enhance the value of First Nations' lands, thereby making it more worthwhile to make use of the mechanisms that have been created. One innovation that is proving successful is the creation of urban reserves. There are now more than 120 urban reserves located both in large cities and in smaller communities (Canada, 2017). They are typically purchased by First Nations in the real estate market, often using funds from treaty land entitlement settlements, and then added to the reserve in question by federal order-in-council. Reserve land can't be taxed, so a First Nation negotiates a fee-for-service agreement with the host municipality for utilities, roads, police and fire protection, etc., when it establishes an urban reserve.

No legislative change is required to create urban reserves; it can be done through administrative policy under existing legislation. The "addition to reserve" (ATR) process was long criticized for being too slow (National Aboriginal Economic Development Board, Undated), so the Ministry of Indigenous and Northern Affairs changed it by a policy directive in 2016 (McClurg, 2016). According to Ken Coates, the new process is

indeed faster and more transparent, though there are still inconsistencies and delays.¹

Urban reserves allow First Nations, even those in remote locations, to engage more effectively in the marketplace by going where concentrations of workers and consumers exist. I have previously showed the potential of urban reserves to increase the standard of living of First Nations in a quantitative study of such reserves in Saskatchewan, where treaty entitlements have allowed several First Nations to acquire urban land (Flanagan, 2019b: 110-116). Urban reserves could be particularly useful for First Nations' gaming if the stranglehold of provincial regulatory commissions can ever be broken.

Another effective way for Canada to enhance the participation of remote First Nations in the economy would be to enhance the value of their lands by facilitating, rather than obstructing, natural resource development. The Liberal government of Justin Trudeau blocked the Northern Gateway and Energy East pipeline proposals, failed to give energetic support to Keystone XL, and slow-walked the construction of Trans Mountain and Coastal GasLink by allowing environmental protests free rein (Flanagan, 2019c). Most recently, the federal government is threatening the future of Ontario's Ring of Fire mining proposal by failing to appeal the potentially obstructive Ontario Court of Justice's *Restoule* decision (Flanagan, 2021c). Outside the field of natural resources, the same logic applies to federal failure to do something about provincial obstruction of First Nations' gaming.

Unfortunately, federal policy under this government is trending in the wrong direction. Instead of making it easier for First Nations to help themselves through economic advance, the Trudeau government is emphasizing compensation payments for historical grievances (Flanagan, 2021b), most recently the \$20 billion in payments to individuals as part of the settlement of child welfare claims (Flanagan, 2022). Such payments temporarily put cash in the pockets of recipients but do nothing to promote long-term economic independence. In fact, they may inhibit economic advance, because they make it appear that the road to wealth lies in cultivating past grievances rather than acquiring skills and making products to sell in the marketplace.

¹ Ken Coates, email to author, April 6, 2022.

Recommendations

For convenience, the suggestions made in the course of this paper are summarized below:

1. There is little value in spending time and effort on unlikely visions of repealing the Indian Act. Recognize that incrementalism is a more practical strategy of reform.
2. Develop strategies for improving the utility of certificates of possession as well as the limited forms of fee simple title that are already in use, with the aim of making them more widely adopted.
3. Commission an econometric study of Indian Oil and Gas to determine whether it provides returns to First Nations higher than they could achieve by acting individually in the market. If the answer is yes, consider establishing similar organizations for other types of natural resources from First Nations' traditional territories.
4. Use federal legislative power to increase opportunities for First Nations' gaming, either by amending the Criminal Code or by nudging the provinces with threats of amendment.
5. To the extent possible, continue the trend of increasing First Nations' control over organizations, such as IOGC, FNTC, FMLMA, and FNFA, established to encourage their active participation in the marketplace.
6. Look for ways to make self-government negotiations less expensive and time-consuming, so that more First Nations can achieve the benefits of self-government without also pursuing a land claim.
7. Stop throwing up roadblocks to the development of oil and gas and of other natural resources. Such development represents the best chance for the prosperity of many First Nations in remote locations.
8. Continue looking for ways to expedite the development of urban reserves, which have great potential for advancing First Nations' participation in the economy.
9. Reduce the emphasis on paying compensation for past grievances, whose growth has been hypertrophic since the Indian Residential Schools Settlement Agreement of 2005. Class actions and other legal campaigns may provide temporary cash payments to individuals but

do not usually lead to the kinds of changes that would make First Nations more economically independent.

These suggestions are not by any means an overall plan for government to deliver economic prosperity to First Nations. They are meant to exemplify the sort of incremental changes that will help to remove barriers, so that First Nations can achieve prosperity for themselves.

References

Belanger, Yale D. (2006). *Gambling with the Future: The Evolution of Aboriginal Gaming in Canada*. Purich.

Blackburn, Mark (2012, October 18). Harper Government Unveils “Path” to Repeal Indian Act. APTN. <<https://www.aptnnews.ca/national-news/harper-government-unveils-path-to-repeal-indian-act/>>, as of May 4, 2022.

Boissonneault, Audrey (2021). Policy Forum: A Critical Analysis of Property Taxation under the First Nations Fiscal Management Act as a Self-Government Tool. *Canadian Tax Journal* 69, 3: 799-812. <<https://www.ctf.ca/CTFWEB/Documents/CTJ%202021/Issue%203/799-2021CTJ3-PF-2a-Boissonneault-e.pdf>>, as of May 4, 2022.

Brinkhurst, Marena, and Anke Kessler. (2013). *Land Management on First Nations Reserves: Lawful Possession and its Determinants*. Working Paper 13-04 (April). Simon Fraser University, Department of Economics. <<http://www.sfu.ca/~akessler/wp/detlawful.pdf>>, as of May 4, 2022.

Canada (1969). *Statement of the Government of Canada on Indian Policy*. Government of Canada. <https://oneca.com/1969_White_Paper.pdf>, as of May 4, 2022.

Canada (2015). *First Nations Oil and Gas Moneys Management Act (FNOGMA): Moneys Provisions*. Fact Sheet. Government of Canada. <<https://sac-isc.gc.ca/eng/1100100032344/1581871588204>>, as of May 4, 2022.

Canada (2017). Urban Reserves. Government of Canada. <<https://sac-isc.gc.ca/eng/1100100016331/1611939200241>>, as of May 4, 2022.

Canada, Crown-Indigenous Relations and Northern Affairs (2020). Self-government. Government of Canada. <<https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>>, as of May 10, 2022.

Canada (2021). *2021 Report to Parliament on the Indian Oil and Gas Act, RSC 1985, c I-7*. Government of Canada. <<https://pgic-iogc.gc.ca/eng/1643211839606/1643211857719>>, as of May 4, 2022.

Canada (2022). Canada and Anishinabek First Nations Sign Historic Self-Government Agreement. News Release (April 7). Crown-Indigenous Relations and Northern Affairs, Government of Canada <<https://www.canada.ca/en/crown-indigenous-relations-northern-affairs/news/2022/04/canada-and-anishinabek-first-nations-sign-historic-self-government-agreement.html>>, as of May 4, 2022.

Canada, Indigenous Relations and Northern Affairs (2019). Implementation of Modern Treaties and Self-Government Agreements July 2015 – March 2018: Provisional Annual Report. Government of Canada. <https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/treaties-agreements_prov-annual-report-2015-2018_1573224351034_eng.pdf>, as of May 9, 2022.

Canadian Press (2010, July 10). Atleo Calls for End of Indian Act Within Five Years. CTV News. <<https://www.ctvnews.ca/atleo-calls-for-end-of-indian-act-within-five-years-1.534253>>, as of May 4, 2022.

Canadian Press (2012, October 22). Liberals Introduce Motion to Repeal Indian Act. CTV News. <<https://www.ctvnews.ca/canada/liberals-introduce-motion-to-repeal-indian-act-1.1005397>>, as of May 4, 2022.

Carter, Sarah (1990). *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy*. McGill-Queens University Press.

Coates Ken (1984). Best Left as Indians: The Federal Government and the Indians of the Yukon, 1984–1950. *Canadian Journal of Native Studies* 2: 179-204. <<http://www3.brandonu.ca/cjns/4.2/coates.pdf>>, as of May 4, 2022.

Coates, Ken (2008). *The Indian Act and the Future of Aboriginal Governance in Canada*. National Centre for First Nations Governance (May). <<https://fngovernance.org/wp-content/uploads/2020/05/coates.pdf>>, as of May 4, 2022.

Collis, Susan (2022). W(h)ither the Indian Act? How Statutory Law Is Rewriting Canada's Settler Colonial Formation. *Annals of the American Association of Geographers* 112, 1, 167-183.

Diabo, Russell (2017, September 22). When Moving Past the *Indian Act* Means Something Worse. *Policy Options*. <<https://policyoptions.irpp.org/magazines/september-2017/when-moving-past-the-indian-act-means-something-worse/>>, as of May 4, 2022.

Fife, Robert, Bill Curry, and Shawn McCarthy (2017, August 28). Trudeau Pledges to End Indian Act in Cabinet Shuffle. *Globe and Mail*. <<https://www.theglobeandmail.com/news/politics/trudeau-shuffles-cabinet-and-pledges-to-end-indian-act/article36099306/>>, as of May 4, 2022.

First Nations Finance Authority (FNFA) (2021). *Stronger Together: 2020/21 Annual Report*. First Nations Financial Authority. <<https://www.fnfa.ca/wp-content/uploads/2021/07/FNFA-Annual-report-2020-21-English-Web.pdf>>, as of May 4, 2022.

First Nations Tax Commission [FNTC] (2021/22). *Corporate Plan 2021/22*. First Nations Tax Commission. <https://fntc.ca/wp-content/uploads/CPs/fntc_corporate_plan_2021-04-16.pdf>, as of May 4, 2022.

Flanagan, Tom (2008). *First Nations? Second Thoughts*, 2nd ed. McGill-Queen's University Press.

Flanagan, Tom (2019a). *Property Rights and Prosperity: A Case Study of Westbank First Nation*. Fraser Institute. <<https://www.fraserinstitute.org/sites/default/files/property-rights-and-prosperity-case-study-westbank-first-nation.pdf>>, as of May 4, 2022.

Flanagan, Tom (2019b). *The Wealth of First Nations*. Fraser Institute. <<https://www.fraserinstitute.org/sites/default/files/wealth-of-first-nations-2019.pdf>>, as of May 4, 2022.

Flanagan, Tom (2019c). *How First Nations Benefit from Pipeline Construction*. Fraser Institute. <https://www.fraserinstitute.org/sites/default/files/how-first-nations-benefit-from-pipeline-construction_0.pdf>, as of May 9, 2022.

Flanagan, Tom (2020). *Cartels and Casinos: First Nations' Gaming in Canada*. Fraser Institute. <<https://www.fraserinstitute.org/sites/default/files/cartels-and-casinos-first-nations-gaming-in-canada.pdf>>, as of May 9, 2022.

Flanagan, Tom (2021a). *First Nations and the Petroleum Industry: From Conflict to Cooperation*. Fraser Institute. <<https://www.fraserinstitute.org/>>

[sites/default/files/first-nations-and-the-petroleum-industry-from-conflict-to-cooperation.pdf](#)>, as of May 9, 2022.

Flanagan, Tom (2021b). *Fiscal Explosion: Federal Spending on Indigenous Programs, 2015-2022*. Fraser Institute. <<https://fraserinstitute.org/sites/default/files/fiscal-explosion-federal-spending-on-indigenous-programs-2015-2022.pdf>>, as of May 9, 2022.

Flanagan, Tom (2021c, November 29). Courts Take Activist Approach to Treaty Interpretation. Blog post. Fraser Institute. <<https://www.fraserinstitute.org/blogs/courts-take-activist-approach-to-treaty-interpretation>>, as of May 9, 2022.

Flanagan, Tom (2022). *A \$40 Billion Settlement for Indigenous Child Welfare. Is Anyone Minding the Fiscal Store?* Fraser Research Bulletin. Fraser Institute. <<https://www.fraserinstitute.org/sites/default/files/40-billion-settlement-for-indigenous-child-welfare.pdf>>, as of May 9, 2022.

Flanagan, Tom, Christopher Alcantara, and André Le Dressay (2010). *Beyond the Indian Act: Restoring Aboriginal Property Rights*. McGill-Queen's University Press.

Green Party of Canada (Undated). Repeal the Indian Act. Green Party of Canada. <<https://www.greenparty.ca/en/convention-2018/voting/proposals/g18-e001>>, as of May 4, 2022.

Harapyn, Larysa (2019, September 25). Maxime Bernier Wants to Abolish the Indian Act and Build a Border Fence." *National Post*. <<https://nationalpost.com/news/politics/election-2019/exclusive-maxime-bernier-wants-to-abolish-the-indian-act-and-build-a-border-fence>>, as of May 4, 2022.

Indigenous Law Centre, (2014, December 19). Buffalo Point Cottagers Ass'n v. Buffalo Point First Nation. Blog post. Indigenous Law Centre, University of Saskatchewan. <<https://indigenoulaw.usask.ca/blog/2014/buffalo-point-cottagers-assn-v.-buffalo-point-first-nation.php>>, as of May 4, 2022.

Jobin, Shalene, and Emily Riddle (2019). *The Rise of the First Nations Land Management Regime in Canada: A Critical Analysis*. Yellowhead Institute. <<https://yellowheadinstitute.org/wp-content/uploads/2019/09/fnlma-report.pdf>>, as of May 4, 2022.

Lavoie, Malcolm, and Moira Lavoie (2017). Land Regime Choice in Close-Knit Communities: The Case of the First Nations Land Management Act. *Osgoode Hall Law Journal* 54: 559-607.

Le Dressay, André (2021). In Defence of the First Nations Fiscal Management Act. *Canadian Tax Journal* 69, 3: 829-833. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3962538>, as of May 4, 2022.

Leslie, John F. (1999). *Assimilation, Integration or Termination: The Development of Canadian Indian Policy, 1943-1963*. PhD Thesis. Carleton University. <https://www.collectionscanada.gc.ca/obj/s4/f2/dsk1/tape9/PQDD_0013/NQ42797.pdf>, as of May 4, 2022.

Louie, Clarence (2021). *Rez Rules: My Indictment of Canada's and America's Systemic Racism against Indigenous Peoples*. E-book. McClelland & Stewart.

McClurg, Michael (2016). Canada Announces New “Additions to Reserve” Policy. Olthuis Kler Townshent LLP. <<https://www.oktlaw.com/canada-announces-new-additions-reserve-policy/>>, as of May 9, 2022.

Narine, Shari (2021, July 16). 25 Years Later and First Nations No Further Ahead in Control of Oil and Gas. *Windspeaker*. <<https://windspeaker.com/news/windspeaker-news/25-years-later-and-first-nations-no-further-ahead-control-oil-and-gas>>, as of May 4, 2022.

National Aboriginal Economic Development Board (Undated). *Improving the Economic Success of Urban Additions to Reserve: Achieving Benefits for First Nations and Local Governments. Stage II: Economic and Fiscal Benefits Generated in Urban ATRs*. National Aboriginal Economic Development Board. <<http://www.naedb-cndea.com/reports/improving-the-economic-success-of-urban-atr.pdf>>, as of May 9, 2022.

Newman, Dwight (2014). *Revisiting the Duty to Consult Aboriginal Peoples*. Purich.

Samson Cree Nation (2021). Consolidated Financial Statements, March 31, 2021. MNP LLP. <https://fnp-ppn.aadnc-aandc.gc.ca/fnp/Main/Search/DisplayBinaryData.aspx?BAND_NUMBER_FF=444&FY=2020-2021&DOC=Audited%20consolidated%20financial%20statements&lang=eng>, as of May 4, 2022.

Taylor, Stephanie (2022, March 16). Canada's first Indigenous Governor General Requested Briefing on the Indian Act. Canadian Press and *RD News Now*. <<https://rdnewsnow.com/2022/03/17/canadas-first-indigenous-governor-general-requested-briefing-on-the-indian-act/>>, as of May 4, 2022.

Weber, Bob (2016, February 9). First Nations Lawsuit over Oil Resources Grows. *Toronto Star*. <<https://www.thestar.com/news/canada/2016/02/09/first-nations-lawsuit-over-oil-resources-grows.html>>, as of May 4, 2022.

Woolley, Frances, River Doxtator, Alan Macnaughton, and Daniel Sandler (2021). Policy Forum: Editors' Introduction—First Nation Property Taxation. *Canadian Tax Journal* 69, 3: 791-97. <<https://www.ctf.ca/CTFWEB/Documents/CTJ%202021/Issue%203/791-2021CTJ3-PF-1-Editors.pdf>>, as of May 4, 2022.

Legislation

First Nations Fiscal Management Act 2005). S.C. 2005, c. 9. [First Nations Fiscal Management Act \(justice.gc.ca\)](https://www.justice.gc.ca/first-nations-fiscal-management-act).

Indian Act (1876). S.C. 1876, chapter 18. <https://nctr.ca/wp-content/uploads/2021/04/1876_Indian_Act_Reduced_Size.pdf>, as of May 4, 2022.

Indian Act, 1951. S.C. 1951, chapter 149. <<https://caid.ca/IndAct1951.pdf>>, as of May 4, 2022.

Case law

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511. <<https://www.canlii.org/en/ca/scc/doc/2004/2004scc73/2004scc73.html>>, as of May 4, 2022.

R. v. Pamajewon, [1996] 2 S.C.R. 821. <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1411/index.do>>, as of May 2, 2022.

Restoule v. Canada (Attorney General), 2018 ONSC 7701. <<https://www.ontariocourts.ca/decisions/2021/2021ONCA0779.htm>>, as of May 10, 2022.

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