LAND REGISTRATION AND ABORIGINAL LAND RIGHTS: THE CANADIAN EXPERIENCE

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A. INTRODUCTION

It is tempting to regard the function of property law -- and registration rules in particular – as being the promotion of economic prosperity. After all, the principal function of all title recording systems is to regulate and facilitate the transfer of property as a commodity of exchange. However, property can serve other ends, such as optimizing utility, happiness, freedom, and distributive justice. It may also be seen as a means or developing or enhancing personhood interests, that is, as means to embody and support self-development and identity. In the context of societies as a whole, we might speak this function as preserving or promoting grouphood or nationhood interests. We know that these other values are part of the property law mix, for otherwise we would not have rules that restrict certain kind of transfers, such as the rules designed to protect cultural property. In sum, the efficiency function of private property is sometimes pitted against other property-based values.[2]

This paper addresses one such point of mediation. It considers the extent to which principles of land registration in Canada intersect with the entitlements, interests, and values of Canada's First Nations. This intersection is complex. There are myriad First Nation communities in Canada, and a range of Aboriginal property rights recognized under law. Moreover, throughout Canada, which has a federal system of governance, there are many registration systems in place. Aboriginal rights intersect with these registration systems in a host of ways. In this paper, I will focus on the major

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[2] See further B. Ziff, *Principles of Property Law*, 6th ed. (Toronto: Carswell, 2014) at 10*ff*.

areas of interplay. As a starting point, I will provide an overview of land registration in Canada. This will be followed by a summary of Aboriginal property rights. Finally, I will address the critical points of intersection of these two important aspects of Canadian life and law.

B. PRIORITIES AND REGISTRATION IN CANADA[3]

As alluded to already, registration and priority systems share a common goal – to provide an effective means of facilitating transactions by providing reliable information about the nature of the interests affecting a given parcel of land. There are two fundamental premises that inform these systems. One is that a given tract may be encumbered with a variety of different property rights. The priority afforded to these interests can be crucial. The second foundational idea can be summed up in one word – risk. All property transactions carry an element of risk. These may concern such things as the state of buildings on the land, activities occurring on neighboring properties, and so forth. Land registration systems do not purport to deal with these off-title concerns whatsoever. Instead, the focus is solely on risk as that relates to ownership. And here, the dangers are essentially of two kinds – wrongdoing and error. In other words, registration rules are concerned with the prospect that the vendor has acted unlawfully, or that for some other reason the title conveyed is somehow defective.

Registration systems can be analyzed by the ways in which these risks are allocated. And the manner of risk-allocation in Canada has changed overtime. In short, the evolutionary pattern has been as follows: initially, the risk of wrongdoing or fraud rested heavily on the shoulders of the purchaser. In consequence, where the transaction was flawed, a dispute over entitlement to the land in question would be resolved in favour of the original owner. Security of the original title was the prevailing objective, and not the facility of transfer. Over time, the law in some has moved to provide greater protection – in varying degrees -- to a *bona fide* purchaser. The result of those changes has been to shift the risk of a flawed transfer onto the true (or original) owner, who therefore might be derived of the land in favour of the innocent purchaser.

English law provides the starting point of analysis for most of Canada.[4] There is no notion of registration under the English common law. Instead,

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[3] See further *ibid.* at ch. 12, *passim.*

[4] The exception is the province of Quebec, which was once a colony of France, and which therefore has a civilian legal system.

a concept of priority was adopted. And, in general, in the transfer of an interest at common law, a simple rule was adopted – first in time is first in right. As there was no government repository of documents of title, the vendor was required to retain past transfer documents to prove his or her chain of title. Still, no matter how diligent and honest a purchaser may have been in ascertaining the relevant interests governing a property, no matter how perfect the chain of title *appeared* to be, the risk of defects lay with the purchaser. If the title of the vendor was itself derived from a forged deed, any sale by that vendor is a nullity.

That approach creates a sensible bright-line rule, but it tells only part of the story. Owing to what may euphemistically be called accidents of history, a parallel system of justice emerged alongside the common law; conventionally this is referred to as equity. Among other things, courts of equity recognized rights over property that the common law did not. For example, the English concept of the "trust" is a creature of equity. Given these two sources of property rights, priority issues could arise that involved clashes of legal and equitable interests. Four basic priority issues could emerge:

1. a prior legal interest followed by a subsequent legal interest (Legal v. Legal)
2. a prior legal interest followed by a subsequent equitable interest (Legal v. Equitable)
3. a prior equitable interest followed by subsequent legal interest (Equitable v. Legal)
4. a prior legal interest followed by an equitable legal interest (Equitable v. Equitable)

The idea of four contests is important, because the priority-establishing rules differed in each setting. First-in-time was by and large the governing principle, but not universally so. In particular, in the case of contest #3 – a prior equitable interest followed by a legal transfer – protection was afforded to a *bona fide* purchaser for value. In the case of a dispute over land in that instance, the innocent purchaser would prevail, and the original owner would be deprived of his or her interest, leaving that party with a claim, if any, for monetary relief against a wrongdoer. It is the approach to contest #3 that became the foundation of the modern law of land registration in Canada.

The first wave of legislative reform sought to eliminate the most acute deficiencies of the common law and equitable rules. Beginning in the late 18th century, registration systems were introduced in Canada. These systems created a government repository for documents of title. They also

provided that, generally speaking, a party acquiring property would be bound only by the interests registered on a state-created abstract of title. In this way, the risk on the purchaser was reduced. Instead, a party with a prior right was induced to register that interest on pain of losing priority to an innocent purchaser. However, the act of registration did not in any other way validate the legitimacy of the right claimed. In brief, a forged deed was void, and remained so even after registration. A careful search of title remained necessary. This kind of system (there are several variants), is still the principal registration regime in parts of Canada.

The second wave of reform began in the latter part of the 19th century. Drawing mainly on the South Australian model designed by Robert Torrens in the 1850s, this system reduced the risk to an innocent purchaser even more. The cardinal elements of a Torrens system are commonly described by reference to three principles, dubbed "mirror", "curtain", and "net". Under the mirror principle, the register was designed to provide a comprehensive record of all existing rights affecting a given parcel (as under the prior registration system). The "curtain" principle means that a purchaser need not investigate the source of title of the vendor. Instead, the state *certifies* ownership of the party named on the government folio of title. As a result, no historical search of the vendor's title is required. If a *bona fide* purchaser acquires title from the registered owner, the purchaser is said to acquire an indefeasible title. This means that past defects, including past forgeries, will not affect the validity of the purchaser's title.

It can be seen that a Torrens regime facilitates facility of transfer, removing much of the risk from the shoulders of the purchaser. However, there remains the prospect for error and dishonesty; these are now borne by the original owner, who may be forced to yield title to a *bona fide* purchaser. Rectifying that loss falls within the province of the "net" principle. An owner deprived of title by the operation of the system is entitled to seek monetary compensation from a fund set up for this purpose. Typically, the fund is created by requiring transferees to contribute a fee on the registration of a transaction.

Although these are the main attributes of all Torrens title systems, it should be stressed that no two land titles systems in Canada are identical; there is a surprising degree of diversity. They do share this common characteristic – no single system adheres to the three cardinal principles comprehensively; inevitably one finds exceptions, qualifications, and derogations. As an example – one that will be important in the discussion below – in no system is the requirement that all interests must appear on the title followed slavishly. Instead, the systems tolerate some invisible clouds on

title, sometimes referred to as "overriding interests". Such interests will run with the land into the hands of a *bona fide* purchaser even though they are not listed in any way on title. As will be seen, Aboriginal property interests may fall into that category.[5]

C. ABORIGINAL LAND RIGHTS IN CANADA

The fundamental question involving Aboriginal title in Canada is a common one in states with a colonial history: to what extent did the imposition of European imperial sovereignty in North America affect pre-existing rules governing Aboriginal property rights? Although this question has hovered over Canada for centuries, there was virtually no judicial engagement with that issue until the 1970s,[6] and only in the last 20 years has there been meaningful judicial guidance.[7]

The core concepts are straightforward: the assumption of British sovereignty did not extinguish the pre-existing land holdings of the myriad Aboriginal nations in British North America. Instead, those interests fell under the aegis of the new sovereign until such time as they were validly altered or extinguished. Extinguishment can occur either (i) by surrender of the lands by a First Nation to the Crown (typically by treaty), or (ii) by valid unilateral state action.[8]

However, issues around extinguishment arise only once it is shown that a given First Nation held pre-existing rights over a given territory. To prove Aboriginal title, the claimant First Nation must prove that the lands at issue were exclusively occupied at the time of the assertion of Crown sovereignty. Such a title, if proven, confers a right of use and occupation over those lands. However, even where Aboriginal titles is not recognized,

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5 See Part D (iii), *infra*.

6 Prior to constitutional reform in 1982, there were only two decisions of note as to the nature of Aboriginal rights in Canada. In the first of these, decided in 1888 by the Judicial Committee of the Privy Council, Aboriginal land rights were described as being personal and usufructuary in nature: *St. Catharines Milling & Lumber Co. v. The Queen* (1888) 14 App.Cas. 46 (P.C.) at 54. That somewhat perplexing characterization stood as law for a century, but has now been abandoned. The second case is *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313, 1973 CarswellBC 83.

7 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. An important precursor is *Guerin v. R.*, [1984] 2 S.C.R. 335.

8 See further Ziff, *supra* note 2, at 195*ff*.

a claimant group can assert a non-title right for those significant cultural practices (whether site-specific or otherwise) that existed at the time of first European contact. The right so recognized would be usufructuary, and would not confer a right of exclusive occupation over the relevant territory.[9]

In the course of framing these basic rules, the Supreme Court of Canada has described a set of guiding meta-principles. Hence, it has been said that in dealing with the Aboriginal peoples of Canada, the "honour of the Crown" must always be upheld.[10] In addition, the governing law is based on a reconciliation of Aboriginal and non-Aboriginal perspectives.[11] Arising out of that intermixture is another important meta-principle – the law governing Aboriginal property rights is *sui generis* (unique). That is true from top to bottom: it describes the principles governing title, reserves, treaties,[12] and the fiduciary obligations owed by the Crown.[13]Plus, basic common law and equitable doctrines pertaining to property do not necessarily apply.

Among other things, the *sui generis* label serves as a filter, limiting, where sensible, the application of any number of common law rules of property; one should not assume that any given Anglo-Canadian property law doctrine applies to such lands. The Supreme Court of Canada has also identified several built-in unique elements of Aboriginal title: (i) title pre-dates the assumption of British sovereignty, and therefore does not derive from a sovereign dispensation of the land; (ii) lands are held communally; (iii) title is inalienable except by surrender to the Crown; and (iv) title lands may not be used in a way that is incompatible with traditional uses. The constitutional provisions governing Aboriginal peoples are likewise unique.[14] The constitutional framework is especially important to this paper, and so deserves some elaboration.

Canada achieved nation-status in 1867. It is a federation, with jurisdictional powers being divided between the federal (national) government and the (now) ten provinces. Primary jurisdiction over property rights was conferred on the provinces; hence the existence of provincial land registration

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9 These principles were confirmed in *Delgamuukw v. British Columbia, supra* note 7. See also *Tsilquot'in Nation v. British Columbia*, 2014 SCC 44.

10 *R. v. Marshall; R v. Bernard*, 2005 SCC 43, at paras. 49 *et seq*.

11 *Ibid.* at paras. 45-47.

12 *Simon v. R.,* [1985] 2 S.C.R. 387; *R. v. Sioui*, 1990 CarswellQue 103; *R v. Badger*, 1996 CarswellAlta 587 (S.C.C.) at para. 78.

13 *Guerin v. R., supra* note 7, at para. 104; *Wewaykum Indian Band v. R.*, 2002 SCC 79.

14 *Tsilquot'in Nation v. British Columbia, supra* note 9, at para 72.

systems.[15] However, jurisdiction over Aboriginal peoples is conferred upon the federal government.[16] In consequence, it is the federal government that can accept a surrender of Aboriginal lands. Likewise, after 1867 the federal government held the power of unilateral extinguishment of Aboriginal land rights.

However, that power no longer exists. In 1982, Canada adopted a constitutionally entrenched bill of rights, and protections for Aboriginal rights.[17] In essence, existing Aboriginal rights – including pre-eminently land rights – were recognized and affirmed. Although the governing provision speaks in absolute terms, it has been recognized that some of the protected rights are not immutable. The state (at either the federal or provincial level) may infringe those rights, but only if such measures satisfy a stringent justificatory test. In essence, state action can validly affect Aboriginal land rights provided the action is in furtherance of a significant state objective, and provided also that the impairment is done in a way that properly accounts for Aboriginal interests.[18]

However, the state can only *infringe* Aboriginal entitlements, it does not empower the government to *extinguish* such rights altogether. No matter how weighty the government's objective, and even if the extinguishment is undertaken in full compliance with the dictates of the honour of the Crown, after 1982, neither level of government can expropriate Aboriginal property rights.[19]

The recognition of pre-existing Aboriginal title forms the foundation of current Canadian law. However, it is not the only means by which Aboriginal interests are recognized. There are vast areas of Canada in which those rights were surrendered to the Crown. In these areas, treaties serve to delineate rights to holdings and other matters. Flowing from this, there are areas that have been reserved by the federal government for use by

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15 *Constitution Act, 1867,* sub. 91(24), reproduced in R.S.C. 1985, Appendix II, No.5.

16 *Constitution Act, 1867, ibid.,* sub. 91(24).

17 *Constitution Act, 1982*, s. 35, enacted by the *Canada Act,* 1982 (U.K.), c. 11, s. 1. The text of the *Constitution Act, 1982* can be found in R.S.C. 1985, Appendix II, No. 44.

18 *R. v. Sparrow,* [1990] 1 S.C.R. 1075. Even inchoate rights-claims, that is, those that have not yet been judicially recognized, may be protected in against unilateral state action: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* 2010 SCC 43.

19 *R. v. Van der Peet,* [1996] 2 S.C.R. 507, at para. 28; *R. v. Marshall; R v. Bernard, supra* note 10, at para. 39. Provincial law can validly infringe Aboriginal rights, though a province's capacity to do so limited by the federal structure Canadian governance.

Aboriginal peoples. Hundreds off such "reserves" are found across Canada. In the last twenty-five years, a modern treaty making process has emerged, out of which other unique arrangements have been fashioned. As we will see below, all of these modes of title connect in some way with principles of land registration.

D. POINTS OF CONFLICT

Having described in broad terms the array of registration systems in place in Canada, and the variety of legally recognized Aboriginal rule systems, it is now possible to consider the interplay of these two legal constructs. There are two main points of contact. One concerns the impact of generic land titles legislation on claims seeking the recognition of Aboriginal title rights. The second involves the adoption of land titles rules within recognized Aboriginal territories. I will discuss each in turn.

Consider this scenario: the government confers a title to public lands on a landowner. That private landowner registers this Crown grant under the provincial land titles system and receives a certificate of title. Three questions emerge: (i) what is the effect of the grant on a pre-existing Aboriginal entitlement? (ii) what is the effect of issuance of the certificate of title on those rights? And (iii) can an Aboriginal nation avail itself of the land registration system either before or after the Crown grant? Each of these issues will be addressed in turn.

(i) what is the effect of a Crown grant on pre-existing Aboriginal entitlements?

The answer to this question is more complicated than it appears. Countless Crown grants have been issued over Crown lands in Canada concerning tracts that have not been surrendered, and are therefore potentially amenable to an Aboriginal title claim. Yet there is no definitive ruling on the effect of such a private grant on the tenability of a land claim. By contrast, the position in Australia is comparatively clear – Native title is extinguished by an inconsistent grant. That can be so not only for a transfer of an absolute (fee simple) interest, but also by the granting of certain long-term Crown leases.[20]

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[20] See *Wik Peoples v. Queensland* (1996) 187 C.L.R. 1 (H.C.); and *Queensland v. Congoo*, [2015] HCA 17. See further B. Edgeworth, "Extinguishing Native Title; Recent High Court Decisions" (2016) 8 Indigenous Law Bulletin, Issue 22, at 28, online: <www.austlii.edu.au/au/journals/IndigLawB/2016/6.pdf>.

The position is Canada is complicated by constitutional concerns. These are best discussed along a timeline. Before Canada achieved nationhood status (in 1867), the colonial governments issued land grants to settlers. However, it has been offered that the power to extinguish Aboriginal title was reposed not in those local legislatures, but in the Imperial Parliament in Britain. If so, the local/colonial land grants could not extinguish Aboriginal title. After 1867, a Crown grant by a province that purported to affect Aboriginal entitlements either expressly or by implication, would arguably be outside the power of the province (*ultra vires*) and hence ineffective.[21] The extinguishment of Aboriginal title requires that the state manifest a clear and plain intent to do so. It has been questioned that an inconsistent grant, without more, will suffice to meet that rigorous standard. Moreover, it may even be the case that inconsistent grants in fee simple are *subordinate* to Aboriginal title.[22]

There is little doubt that this issue will eventually be resolved by the Supreme Court of Canada. In 2014, the Supreme Court of Canada recognized aboriginal title to lands in British Colombia. This marked the first successful claim. However, though the ancestral lands of the claimant group included property that is presently held privately, the claim did not seek any form of entitlements over those lands.The areas that were targeted in the litigation remained Crown lands.[23] At present, there are at least two lawsuits that involve Aboriginal title claims in relation to privately owned lands.[24] Even so, a final resolution may be years away. The history of Aboriginal rights litigation suggests that the process is a long and winding one.

The stakes, of course, are very high. If Aboriginal title is held to survive fee simple grants, this might mean that thousands of private landowners

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21 It has been argued that a Crown grant arising from the purported exercise of the Crown's prerogative power cannot validly result in an extinguishment McNeil, *supra*, note ---, at 311*ff*. See also K. McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask.L.Rev. 431, at 444.

22 See McNeil, *supra* note 21, at 444, n. 57, and the references cited there.

23 See further J. Borrows, "Aboriginal Title and Private Property" (2015) 71 S.C.L.R. (2d) 92.

24 One is in British Columbia: see "B.C. government opposes aboriginal group's land claim near Kamloops" *Global News*, 17 January 2016, online: <globalnews.ca/news/2459010/b-c-government-oppose-aboriginal-groups-land-claim-near-kamloops>. The other is in New Brunswick: P. Cormier, "Mi'kmaq First Nation files land claim for vast portion of New Brunswick" *Global News*, 10 November 2016, online: <globalnews.ca/news/3057843/mikmaq-first-nation-files-land-claim-for-vast-portion-of-new-brunswick>.

will lose their titles. However, Malcolm Lavoie has suggested a different response. A remedy might be fashioned that recognizes Aboriginal title, but also preserves private ownership over the same area. Instead of ejecting private titleholders and returning the ancestral lands, the remedy could be a claim against the Crown for breach of its fiduciary duty to First Nations' peoples. In effect, to draw on law-and–economics terminology, a liability rule would be established in place of a property rule.[25]Professor Lavoie also proposes that the Crown could be ordered (i) to co-operate in land exchange agreements under which Crown lands are made available, or (ii) to assist in the reacquisition of traditional territories from private owners.[26]

(ii) *what is the effect of the issuance of a certificate of title on Aboriginal land rights?*

Even if an inconsistent grant cannot *per se* extinguish Aboriginal title, is it possible that the effect of the indefeasibility provisions of a land registration system can confer priority on a certificate of title issued in the name of a private owner? After all, as a general rule, a *bona fide* purchaser for value would acquire title free from an antecedent title claim that was not disclosed on the register at the time of the private transfer.

Again, Canada's constitutional structure is relevant. Here the questions concern whether an otherwise valid general law, such as a land titles statute, can indirectly work to affect a matter falling within federal constitutional competence. Again, land titles legislation is a matter of provincial competence; the provinces hold a wide-ranging power to legislate in relation to property rights. But what if the working of the statute incidentally affect Aboriginal rights, a matter of federal competence?

The law governing this kind of interplay between otherwise valid provincial laws that affect Aboriginal rights is now assessed with reference to the constitutional protections introduced in 1982: provincial laws that are found to apply to Aboriginal rights may be valid if the relevant statutory measure can be justified.

It is hard to imagine that the justificatory test could be met. Perhaps it cannot even be engaged. It was noted above that full extinguishment of Aboriginal title by state action at either level is no longer possible. Only

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[25] See G. Calabresi & A.D. Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral", 85 Harv.L.Rev. 1089 (1972).

[26] M. Lavoie, "Aboriginal title Claims to Private Land and the Legal Relevance of Disruptive Effects" in D. Newman, ed., *Business Implications of Aboriginal Law* (Toronto: LexisNexis, forthcoming).

justifiable infringements are permissible. A landowner's claim of priority as a *bona fide* purchaser would purport to subordinate the Aboriginal interest, extinguishing it in all but name. It would be akin to a 'constructive' taking of Aboriginal title. If so, the postponing effect of the principle of indefeasibility on Aboriginal title would seem to be unconstitutional. Again, extinguishment is no longer possible.

(iii) *can an Aboriginal nation avail itself of the land registration system?*

On a number of occasions, Aboriginal claimants have sought to avail themselves of the governmental land titles systems by placing a notice or claim on the title to registered lands. The *sui generis* nature of Aboriginal has generated uncertainty as to whether it is possible to record Aboriginal claims under the existing land titles statutes. In general, these notices have been held to be invalid. A variety of host of grounds have been advanced. In one case, the right to file a caveat (a notice of a claim) was rejected because the plaintiff-first Nation was asserting that the land in issue was within a federal reserve. If that claim were to succeed at trial, the lack of registration under provincial law would pose no bar to the recovery of those lands, because the federal Crown would not be bound by the operation of the provincial land titles regime.[27] That mode of reasoning has been applied to Aboriginal land claims that are not dependent on proof that the land is a reserve.[28] The right to file a caveat was refused in one decision because the interest claimed under the caveat (a right to hunt) was not found to be an interest in land.[29] In another case it was said that, because Aboriginal title is inalienable except through surrender to the Crown, that holding

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[27] *Lac La Ronge Indian Band v. Beckman* (1990) 70 D.L.R. (4th) 193, 1990 CarswellSask 447 (C.A.). The right to file a lis pendens was acknowledged (in obiter dictum), on the basis that the authority to do so is contained in the *Queen's Bench Act*, and not the *Land Titles Act*. I do not understand why the legislative source of the right should matter at all. The placement of the right to file a lis pendens one in statute and not another seems somewhat arbitrary; it is a pure matter of form.

[28] *Chippewas of Kettle & Stony Point v. Canada (Attorney General)* (1994) 17 O.R. (3d) 831, 1994 CarswellOnt 528 (Gen.Div.).

[29] *James Smith Indian Band v. Saskatchewan (Master of Titles)* (1995) 131 Sask.R. 60, 1995 CarswellSask 60 (C.A.) leave to appeal to S.C.C. refused [1996] 10 W.W.R. lix (note). The majority in *James Smith Indian Band* left open the possibility that some Aboriginal interests might be compatible with land titles registration and would therefore fall within the system. Wakeling J.A. doubted this proposition. See also *Ontario (Attorney General) v. Bear Island Foundation*, 1984 CarswellOnt 1320, 49 O.R. (2d) 353 (H.C), affirmed (1989) 68 O.R. (2d) 394 (C.A.), affirmed [1991] 2 S.C.R. 570.

was incompatible with Torrens systems, which are designed to promote transferability.[30]

These decisions seem to suggest both that Aboriginal rights claims are not embraced by the registration rules, but also that they are not affected by those rules. That approach comports with the idea that a certificate of title issued in the name of a private owner has no effect of a pre-existing title claim (as discussed above). In essence, Aboriginal land rights are regarded as overriding interests, which are capable of running with the land even though they do not appear on the mirror of title.

E. POINTS OF CONVERGENCE

In the preceding section, the discussion related to conflicts between Aboriginal interests and inconsistent private property claims. The second element of interface has a completely different point of convergence – the adoption of land registration system to reflect interests held on Aboriginal lands.

Historically, the sole such community was the reserve. Reserve lands are owned by the Crown. The *Indian Act*[31] prescribes forms of individual ownership by Nation members, as well as rights of inheritance (within the Nation). Importantly, the land restraint on alienation applies to land: the only permissible mode of transfer of title to a non-Aboriginal entity is by means of a surrender to the Crown. The *Indian Act* ownership rules now serve as a default regime. In the last twenty years, First Nation communities living on reserves have been given power to alter their internal ownership principles.[32] However, the general restraint on alienation cannot be altered. In effect, then, third-parties transfers may be undertaken only where the Crown serves as an intermediary. Leases to non-Band members are possible, though long-term leases can be granted only by using the Crown as intermediary.

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30 Uukw v. The Queen in Right of British Columbia, [1987] 6 W.W.R. 240, 1987 CarswellBC 220 (C.A.) leave to appeal to S.C.C. refused [1987] 6 W.W.R. 240n. That ruling pre-dates Delgamuukw, supra note 7, but the same kind of reasoning has subsequently been applied (in 2000) to deny a right to file a notice of pending litigation (a lis pendens): Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles), [2000] 10 W.W.R. 222, 2000 CarswellBC 1853 (C.A.).

31 R.S.C., 1985, c. I-5.

32 *First Nations Land Management Act* S.C. 1999, c. 24. See further T. Isaac, "First Nations Land Management Act and Third Party Interests" (2005) 42 Alta.L.Rev. 1047.

It was mentioned above, that in recent years a number of modern treaties have been implemented. These are markedly different from their historic antecedents. The treaties endeavour to affirm and bolster rights to self-government and land. Some treaties contemplate the registration of rights conferred over designated ancestral lands within the provincial land titles systems; some create stand-alone registries; others allow for either mode to be used.[33]

Of these new arrangements, I believe that the Nisga'a treaty stands as the boldest initiative to date. This modern treaty,[34] commonly referred to as the *Nisga'a Final Agreement* (or *NFA*) came into force in 2000. In essence, it was the culmination of about 150 years of political activism by the Nisga'a peoples, and followed some twenty years of negotiation.[35] It governs almost 2,000 square kilometres of land located in the picturesque Nass Valley in northwest British Columbia.

The *NFA* contains two elements of significance to the present discussion. First, the *NFA* confers considerable governance authority on the Nisga'a Nation to create laws applicable to the treaty lands, including rules concerning property entitlements. Second, it affirmed the existence of Aboriginal title, but converted that title into the conventional Anglo-Canadian form of holding, the estate in fee simple. Taken together, the treaty allows for the transfer of fee simple title to non-Nisga'a owners. In that regard, the *NFA* provides that **"the Nisga'a Nation may … dispose of the whole of its estate in fee simple in any parcel of Nisga'a lands to any person … without the consent of Canada or British Columbia**."[36] Since 2012, Nisga'a legislation has authorized transfers to non-Nisga'a parties.[37]

This is a move of potentially monumental importance. It was mentioned above, that both Aboriginal title and reserve lands are inalienable extent by surrender to the Crown. Not so for lands governed by the *NFA*.

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33 For a detailed account, see N. Bankes *et al.*, "The Recognition of Aboriginal Title and its Relationship with Settler State Land Titles Systems" (2014) 47 U.B.C.L.Rev. 829.

34 *Nisga'a Final Agreement (NFA)*, online: <www.nnkn.ca/files/u28/nis-eng.pdf>.

35 S. Graben, "Lessons for Indigenous Property Reform: From Membership to Ownership on Nisga'a Lands" (2014) 47 U.B.C.L.Rev. 399, at 404.

36 *NFA, supra* note 34, Ch. 3, s. 4 (emphasis added).

37 *Nisga'a Landholding Transition Act*, online: <www.nisgaanation.ca/legislation/nisgaa-landholding-transition-act>.

The restraint on alienation has affected Aboriginal land rights since the earliest days of colonial practice. But why? Five reasons have been advanced. First, the limit was consonant that dealings with Aboriginal peoples involved transactions between sovereign powers, not private actors, and hence engaged the imperial state and not individual settlers. Second, control over purchases minimized the chances of unanticipated friction between First Nations and settlers. Third, it assisted the colonial powers in carrying out settlement in accordance with a pre-existing plan. Fourth, it meant that land prices would not rise owing to competition to acquire Aboriginal lands; there could be only one buyer (the state). Fifth, it served to protect Aboriginal peoples from sharp practices by settlers.[38]

Of these concerns, it is only the last one mentioned – the protection of Aboriginal peoples from entering into regrettable transactions – that remains at all viable. And this idea has come under increased attack in recent years. The attack takes two forms. One is that it is archaic and offensive to think that Aboriginal people need this kind of protection. Second, the fetter on alienability prevents First Nations peoples from increasing standards of economic well-being in their communities. As to this latter point, there is ample evidence that, in economic terms, the plight of First Nations peoples, especially on reserves lands, is dire. At last report, 81% of reserves in Canada had median incomes that fell below the poverty line.[39] In short, the standard of living experienced by First Nations peoples is a national disgrace; it has never been otherwise.

One sees in this pivotal aspect of the *NFA* the unmistakable mark of modern theories of economic efficiency. It is entirely consistent with the approach advocated by the Peruvian economist Hernando de Soto. In *The Mystery of Capital*,[40] de Soto's addressed the economic plight of developing and post-Soviet nations. He argued that, despite appearance, these nations held considerable wealth. Yet these countries have low standards of living because that wealth takes the form of *de facto*, and hence insecure, claims to land; in short, much of the land is illegally held. Because such titles are precarious (at best), the exchange value of these hardscrabble patches is depressed. Even more important, the land's full value cannot be unlocked

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38 M. Lavoie, "Why Restrain Alienation of Indigenous Land?" (2016) 49 U.B.C.L.Rev. 997, at 999-1000.

39 J. Press, "Over 80% of reserves have median income below poverty line, census data shows" online: <globalnews.ca/news/3795083/reserves-poverty-line-census/>.

40 H de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York, Basic Books, 2000).

because it cannot be used as loan security. It is, in de Soto's words, dead capital. By comparison, Western nations have well-oiled *de jure* legal structures to protect and record titles. This, he argues, makes all the difference. Accordingly, de Soto proposed that unlocking the capital potential of real property can be accomplished by giving legal status to the immense extra-legal holdings now in existence.

As mentioned, de Soto was writing with developing and post-Soviet economies in mind. But, despite that contextual setting, as soon as the *Mystery of Capital* was published its relevance for Aboriginal peoples in Canada was identified by those proposing the privatization of lands on reserves.[41] As de Soto himself observed: "You don't have to travel to Zambia or Peru to see dead capital. All you need to do is visit a reserve in Canada. First Nation people own assets, but not with the same instruments as other Canadians. They're frozen into an Indian Act of the 1870's so they can't easily trade their valuable resources."[42] It is worth noting, however, that the *Nisga'a Final Agreement* was concluded at about the same time that *Mystery of Capital* was published (2000). Therefore, while de Soto's views are consonant with the *NFA*, they may not be directly causal.

Of course, the opening of the Aboriginal lands to commercial exploitation, including the sales and mortgages in favour of non-Nisga'a interests will not guarantee a vibrant market in land. Building on de Soto's core thesis, it has become increasingly evident that the formulation of a successful and vibrant market requires that other structural ingredients be present. Capital markets cannot flourish without stable financial institutions. Adequate creditors' remedies, bankruptcy laws and a sound judicial system are also essential, as is an effective registration regime.

The importance of a well-functioning registration system returns the analysis to the initial topic – risk allocation through land registration principles. To that end, the Nisga'a government has enacted the *Nisga'a Land Title Act*,[43] a lengthy and detailed statute (240 sections in 153 pages) that

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41 See T. Flanagan & C. Alcantara, "Individual Property Rights on Canadian Indian Reserves", *Public Policy Sources*, online: <www.fraserinstitute.org/sites/default/files/PropertyRightsonIndianReserves.pdf>. See also T. Flanagan, C. Alcantara & A. LeDressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal & Kingston: McGill-Queen's U.P., 2010).

42 Quoted at <www.newswire.ca/news-releases/who-should-own-reserve-lands-restoring-first-nation-property-rights-545846722.html>.

43 *Nisga'a Land Title Act*, online: < www.nisgaanation.ca/legislation/nisgaa-land-title-act>.

establishes a Torrens title system. The keystone provision of the Act enshrines the applicable concept of indefeasibility in these terms:

> *Effect of indefeasible title*
>
> 17. (1) An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Nisga'a Nation and all other persons, that the person named in the title as registered owner is entitled to the estate in fee simple to the parcel of land described in the title, subject to the following:
>
> (a) the subsisting conditions, provisos, restrictions, exceptions and reservations including royalties, contained in the original Nisga'a grant or in any other disposition made by the Nisga'a Nation;
>
> (b) a tax, charge, rate, assessment or debt payable to the Nisga'a Nation or a Nisga'a Village and imposed or made a lien on the land at the date of the application for registration or that may after that date be imposed or made a lien on the land under a Nisga'a Lisims enactment;
>
> (c) a lease or agreement for lease for a term not exceeding three years if there is actual occupation under the lease or agreement;
>
> (d) a road;
>
> (e) a right of expropriation under a Nisga'a Lisims enactment;
>
> (f) a charge, pending court proceeding or other matter noted or endorsed on title or that may be noted or endorsed on title after the date of the registration of the title;
>
> (g) the right of a person to show that all or a portion of the land is, by wrong description of boundaries or parcels, improperly included in the title;
>
> (h) the right of a person deprived of land to show fraud, including forgery, in which the registered owner has participated to any degree.[44]

The Act purports to create a system of immediate indefeasibility. In other words, an innocent purchaser who acquires title by means of another wise void transfer (such as a forged instrument) is entitled to retain title.[45] The deprived owner is thereupon entitled to seek compensation from an assurance fund. By contrast, a good faith transferee of a "charge" acquires

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[44] S. 17.

[45] S. 20. See also para. 17(1)(h).

no such protection.[46] The term charge is defined broadly in the Act, and includes mortgages, leases, life estates, and easements.[47] A full-scale inquiry is therefore required before acquiring those interests. In this way, the Act operates as a simple registry system: registration serves as a notice of the claimed interests but does not in any way certify its validity. One registers for what it is worth.

F. REFLECTIONS: CAPITULATION OR RECONCILIATION?

I suggested above that achieving reconciliation is a meta-principle in the emerging law of Aboriginal rights in Canada. Among other things, this has been taken to mean that the governing legal doctrines should be the product of a blending of common law and Aboriginal perspectives. In looking at the terms of the *Nisga'a Final Agreement*, the common law perspective is easy to identify: Nisga'a ancestral lands may now be sold, mortgaged, etc., as a commodity to any party that values it most. Traditional forms of ownership are replaced by the estate in fee simple – a century's old term drawn from the English feudal system of landholding. The mode of registration is a version of the Torrens title system developed in pre-federation Australia. The use of these constructs serves to create a portal for the influx of non-Nisga'a investment. The rights and procedures described are intelligible in large measure to non-Nisga'a economic actors. They speak the language of conventional Canadian property law.

But such a dramatic change comes at a cost. What interests and values are threatened by removing the prohibition on alienation that has prevailed in Canada for centuries? There is a risk of financial ruination. But, more importantly, the erosion of personhood/grouphood/nationhood values is also at stake. The central status of land as a means of *cultural* identity and sustenance may be undermined. That would be tragic. There are myriad First Nations in Canada, each with a distinct cultural fabric. Yet, even amid the extraordinary indigenous diversity, I am aware of no First Nation that does not regard the attachment to ancestral lands as essential to identity and flourishing. That appears to be universal.

Does the *NFA* mark a capitulation of cultural values in favour of mainstream market forces? That indeed may be the result of the land regime us-

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46 S. 21.

47 S. 1 (definition of "charge"). Also included as a charge are as follows: an assignment of rents, a mortgage of a lease, a restrictive covenant, a statutory covenant, and a statutory right of way.

hered in by the Nisga'a Final Agreement. However, it need not be. Indeed, the legal infrastructure and the early practices under the NFA suggest an attempt to mediate the promise of a de Sotoan solution with measures designed to impede the danger of cultural dissipation or degradation.

To date, a cautious approach has been taken to privatization of Nisga'a lands. Not all land is currently available for non-Nisga'a ownership. Even the parceling out of private titles to Nisga'a owners has been minimal. The first such transfer did not occur until 2013.[48] These grants are on an extremely modest scale – small plots can be allocated to Nisga'a citizens or organizations for residential uses only. Broader powers of transfer are reposed in the Nisga'a Nation as a whole.

Of greater importance are the structural protections. As already noted, the *NFA* confers not only fee simple titles, but also broad powers of governance. Among the rights of self-government conferred on the Nisga'a Nation is the right of expropriation. The Nisga'a government may exercise the power of expropriation "for public purposes and public works".[49] As a result, the Nisga'a retain a virtually unfettered right to reclaim ancestral lands, even those held by third-parties. Moreover, it should be noted that there is no protection in Canadian law against the exercise of the power of expropriation, even when no compensation is paid. Some recourse may be available for foreign investors protected via trade and investment agreements, but that aside, political and economic prudence are the only checks against the use of the expropriation power by a government in Canada. In addition, under the *NFA*, if a fee simple title expires, the land escheats (albeit indirectly) to the Nisga'a Nation, and not to the federal or provincial Crown. In essence, underlying title is reposed in the Nisga'a peoples. It is by means of these robust sovereignty powers that the Aboriginal perspective is reconciled with mainstream Canadian law. Of course, it may be decades before it is known whether this mediation of mainstream and Aboriginal values is optimal.

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48 "B.C.'s Nisga'a becomes only First Nation to privatize land", online: <www.cbc.ca/news/canada/british-columbia/b-c-s-nisga-a-becomes-only-first-nation-to-privatize-land-1.2355794>.

49 NFA, supra note 34, ch. 11, para. 50(a).