

First Nations Property Rights and Economic Prosperity

Issue

Many First Nations people in Canada seek a higher quality of life and to participate fully in the economy. However, members of First Nations communities are limited in their ability to own land in fee simple title on-reserve. This limitation precludes First Nation members from owning their homes and leveraging land equity to invest in business opportunities, which places them at a disadvantage relative to the population at large.

The Importance of Property Rights

Property rights are fundamental to create wealth. In a study of wealth creation in the West, Peruvian economist Hernando de Soto explains: "By making assets fungible, by attaching owners to assets, assets to addresses, and ownership to enforcement, and by making information on the history of assets and owners easily accessible, formal property systems converted the citizens of the West into a network of individually identifiable and accountable business agents."¹

The absence or poor quality of property rights on many reserves results in higher rates of poverty, lower property values, and less commercial development. Indeed, according to the Auditor General of Canada, an investment project on-reserve can cost up to four to six times more than off-reserve, because investors must first establish tradable property rights on-reserve in order to do business.

The Current Situation on Reserve

Currently, the crown owns the vast majority of reserve land, and First Nations are only able to exercise limited rights over it, these include:²

- *Customary Rights*, which recognize traditional family and/or individual control over sections of land. These rights, however, lack security of tenure, are neither surveyed nor enforceable in a court of law, and can be subject to arbitrary decisions by the band council.
- *Certificates of Possession*, which are authorized under the *Indian Act* and are enforceable in a court of law. These certificates, however, are limited as a wealth creation tool since the holder must be a band member (which renders a small market and a low real estate value) and cannot be mortgaged.
- *Lease Agreements*, which enable First Nations to enter into long-term contracts for the use of reserve lands because they can be sold to non-band members and are enforceable in a court of law. The agreements, however, are limited in that they are temporary in nature, there is no consistency in the terms across First Nation communities, and leases are susceptible to issues of non-renewal based on the terms (or lack thereof) in the lease. Leases also involve high transaction costs (e.g., gaining band/government approval) relative to non-reserve land.
- The *First Nations Land Management Act*, allows the signatory First Nations bands (fifty-eight since 1999) to opt out of thirty-four economically restrictive land-administration codes of the *Indian Act* and to develop their own. The challenge with the FNLA is that it did not establish a technical assistance agency, thus the signatories are left alone to develop their own property rights systems, which could lead to a multitude of unsupervised and disconnected systems that would only accentuate the uncertainty, the lack of consistency, and the high transaction costs of doing business with First Nations.

¹ De Soto, Hernando. 2000. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*.

² For a more complete discussion of property rights on reserve, see Flanagan, Tom. Alcantara, Christopher. Le Dressay, André. 2010. *Beyond the Indian Act: Restoring Aboriginal Property Rights*.

As a result of these limited forms of on reserve property rights, First Nation communities are at a disadvantage in terms of their ability to leverage land to enable home ownership and business development. In order to address this challenge, an enforceable property rights system needs to be in place. Ideally, such a system would allow transfers of ownership of reserve land from the crown and enable the creation of property title for band members. Four elements would be then critical to the success of this system:

- land title
- certainty of title in the registry
- prioritization and ranking of competing interests
- assurance that the registered owner is the true owner³.
- Moreover, signing into the system would be voluntary and transitional provisions would be put in place to ensure governance capacity, infrastructure, and tax and land administration systems.

The First Nation Tax Commission Solution

To resolve this challenge the First Nation Tax Commission (FNTC), which has overall responsibility for maintaining the integrity of First Nation taxation, is proposing the *First Nation Property Ownership Legislation* (FNPOL). This legislation envisions a property rights structure similar to the rest of Canada which, incidentally, operates under the principles of the broadly adopted Torrens land registration title system. The FNPOL would be optional for First Nations; would ensure that the underlying title or reversionary right remains under First Nation control; and that First Nations would retain the land management and the property tax jurisdiction regardless of who resides on their land.

The FNPOL would give band members the right to grant individual property rights so that their residents can purchase their homes, build equity and leverage property for business development. The economic benefits of this would be significant. The FNTC estimates that if sixty-eight First Nations in British Columbia converted their lands using this legislation, the benefits from increased property values, employment opportunities and increased revenue potential would be over \$4 billion.

Recommendation

That the federal government work with the *First Nations Tax Commission*, interested First Nations communities, the provinces and other stakeholders to develop a voluntary legal framework and support structure to enable First Nations to have access to full, unrestricted fee simple ownership of reserve land.

³ Flanagan et al 163