The First Nations Property Ownership Initiative and Alternatives

November 1, 2010

The proposed First Nations Property Ownership Act (FNPO) is an initiative that would "permit First Nations who wish to hold the legal title to their lands to do so; and ... to do so without risking the loss of their governance powers...no matter what ownership rights the First Nations may themselves decide to allow."[1]

In addition to allowing for First Nation ownership of lands, and the ability of First Nations to grant fee simple titles, proponents argue that FNPO could bring the following benefits:

- To allow First Nations to manage land and make land and development laws without the involvement of the federal government
- To enable use of land as security (e.g., mortgages)
- To enable registration of interests in land in a Torrens style registry, increasing certainty and greatly reducing transaction costs
- To provide options to ensure that reserve property can be transferred to non-status members[2].

We share our First Nation clients' frustration with the barriers to economic development on reserve created by the *Indian Act* system and INAC "red tape", which in our view is a major contributor to poverty in First Nations communities. The FNPO is one response to concerns about poverty and lack of access to capital and development opportunities for First Nations. In our view there are many questions to be answered regarding the FNPO. For example:

- How will reserve lands be transferred to fee simple ownership without inviting in provincial jurisdiction? For example, the provincial government takes the position in Treaty negotiation that all fee simple lands held by First Nations must be subject to provincial jurisdiction and 'concurrent' legislative authority.
- What will be the nature of the underlying title to the lands subject to FNPO?
- What legislative regime will apply to FNPO lands, what will be the source of the legislative power, and where will it sit in relation to federal and provincial jurisdiction?
- Will creation of fee simple titles remove aboriginal title through the doctrine of merger in property law?
- How will titles on reserve be cleared for registration in a Torrens system when there are so many historical conflicts over CPs, family lands, boundaries, etc. on most reserves?
- Will the mere creation of fee simple title magically create development and wealth or do development and wealth depend more on a combination of factors such as geographic location, proximity to urban centres, access to transportation, availability of infrastructure, etc.?
- Does granting fee simple title to a First Nation member create any benefit if that member has no income and cannot afford to make payments on a mortgage even if they can secure one?

[1] First Nations Tax Commission, "Who Should Own Reserve Lands? The First Nations Property Ownership Initiative – A Discussion Paper", October 2010.

[2] See: "Questions about the First Nations Property Ownership Initiative," October 2010, www.fnpo.ca; and "Who Should Own Reserve Lands?" cited above.

We are hopeful that the above questions can be answered and all of the outstanding issues can be resolved. We believe that a fee simple option, if properly crafted and developed in full cooperation with First Nations, may provide a worthwhile path for some First Nations. However, in the short term we believe there are existing tools and options that are under-utilized or under-appreciated. These existing tools and options hold significant opportunities for First Nations to pursue economic development and for First Nation members to generate equity.

We have set out some of the existing tools and options below.

1. Certificates of Possession

Under s. 20(2) of the *Indian Act* the Minister "may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein". A Certificate of Possession ("CP") has many of the attributes of fee simple land. It entitles the holder to exclusive use and possession in much the same manner as a fee simple. The primary restriction on a CP is that it cannot be transferred to a non-member. However, a CP can be leased to a non-member and such leases have significant market value, in many cases equal or near to the value of fee simple land off-reserve. In addition, leases of CPs are mortgageable. For First Nations with Land Codes (see below), CPs can also be self-leased (i.e. the CP-holder leases the land to himself or herself) with this lease becoming the security for a mortgage.

What FNPO cites as the major limit of CPs, the inability to sell to non-members, is also a major strength in that the non-alienability keeps the land within the First Nation community. In short, CPs are a unique, flexible and highly valuable form of property ownership on reserves which allow for exclusive use and occupation and generation of equity without putting reserves at risk of becoming permanent checkerboards and broken up communities. We recognize that there are many problems with reserves. However, there is a certain strength and sense of community and culture that derives from having First Nation members and families living in the same place over many generations, as First Nations did for thousands of years prior to the arrival of Europeans.

2. Use of Reserve Land and CPs as security

Currently, neither First Nation members nor non-members can acquire a fee-simple interest in reserve land. However, leases of reserve land to non-members, and mortgages of those leases, are common under both *Indian Act* designations and First Nations' own Land Codes.

Less common are leases of designated or Land Code land to First Nation members. However, long-term, pre-paid, fully transferable leases of land to members can allow First Nation members to access financing for home construction or improvement. Section 89(1.1) of the *Indian Act* makes clear that "Indians" can mortgage their leasehold interest in designated reserve land and this has happened in practice. We are not convinced that simply creating either fee simple titles or long term leases will automatically create a housing market and allow for home equity sufficient to enable individuals to access credit, but long-term leases are an option and, as citied above, have the advantage of potentially generating equity without putting reserves at risk of being broken up forever.

3. Non-status member ownership of reserve land

It has been widely recognized that Indian Act rules in respect of Indian status are resulting in reduced populations of "registered Indians". This is due to the increasing number of 'marrying out' and status Indians marrying non-status or non-First Nation partners. Proponents of FNPO argue that these rules can also leave CP-holders with no heirs for their property, and that FNPO provides a possible option for First Nation communities wishing to allow property to be transferred to non-status members.[3] We disagree with this interpretation.

[3] "Who Should Own Reserve Lands?" cited above, at page 9

Section 24 of the *Indian Act* already allows the transfer of property interests (e.g., a certificate of possession) to any member, whether or not that member has Indian status. First Nations can create membership rules which allow non-status individuals to be First Nation members who are entitled to possess reserve property.

4. Existing Land Registries

We agree that a Torrens-style registry would be better than the existing notice registry system in managed under the *Indian Act* and Land Codes. It would provide certainty and reduce legal and transaction costs that make development of reserve land more expensive. However, we would like to make three observations about the potential for existing registries.

1. Fee simple ownership is not a pre-requisite for implementing a Torrens-style land registration system. It is entirely possible to create a Torrens-style registry for interests on reserve.
2. The FNLMA legislation enables First Nations to create their own registries. First Nations could create a Torrens-style registry for Land Code interests if they wished to do so and if there were clear benefits from doing so.
3. First Nations that complete Treaties have the option of registering interests in their Treaty Settlement Land in the provincial Land Title Office. First Nations such as Tsawwassen have created their own unique forms of restricted fee simple titles that are fully registerable in the LTO but which cannot be transferred to non-members. Tsawwassen and Nisga'a also have other unrestricted fee simple lands which are fully registerable and transferable in the provincial LTO.

5. Land Management and Creation of Equity Under FNLMA

First Nations who participate in the *First Nations Land Management Act* (FNLMA) are able to opt out of the land management provisions of the *Indian Act*, enact their own Land Code, and, through the process established by their Land Code, enact other land-related laws.

This option provides:

- Full First Nation jurisdiction over lands and laws relating to lands;
- Ability for members to secure mortgages against their land without the need for a ministerial or Band guarantee;
- Speedy approval of developments;
- Speedy registration of land transactions; and
- The ability for non-status First Nation members to hold land and to pass it on to their heirs.

It appears that the only practical differences between the Land Code option and FNPO are that Land Codes under the FNLMA do not provide for full fee simple (the transactions are based on long-term leases) and the registration is in the FNLRS rather than a Torrens system. In the experience of a number of First Nations, and from the perspective of generating economic development and generating equity, these differences have been marginal.

There are several examples of FNLMA First Nations in British Columbia that have secured financing and partners for major multi-million dollar projects on their reserves. They have done this very quickly and efficiently under their own Land Codes. The Vancouver Sun recently reported that a KPMG study says the FNLMA program generated $101 million in investment and about 2,000 jobs on a sample of 17 First Nations that now independently manage their land under the system.[4]

First Nations that opt into the *First Nations Fiscal and Statistical Management Act* are also able to impose real property assessment and taxation laws, development cost charge laws, and business licensing laws through the First Nations Tax Commission and without the involvement of Indian Affairs.

[4] "First nations say foot-dragging holding back development", By Richard Foot, Postmedia News, October 16, 2010: http://www.vancouversun.com/business/First+nations+foot+dragging+holding+back+development/3682395/story.html

5. Creation of Fee Simple Options and Wealth and Equity via Treaty

A First Nation that completes a modern Treaty has extensive options for creating fee simple interests and other unique interests within their Treaty Settlement Lands. First Nations may create regular fee simple interests, which is being pursued by the Nisga'a First Nation. However, First Nations also have the opportunity to create unique fee simple interests such as 'restricted' fee simples which are fully registerable in the provincial Land Title Office but only transferable to members of the First Nation. Tsawwassen First Nation is pioneering the latter approach. First Nations with modern Treaties have the full legal authority to create interests on Treaty Settlement Land and a sufficient land base to protect some of their lands as a stable base for their community and members while designating other parts of their land base for open sale and full transferability.

It is unfortunate the current federal and provincial government mandates make Treaty a non-viable option for so many First Nations. However, there is no magic to Treaties as the vehicle to achieve First Nation ownership over lands and First Nation jurisdiction over the creation of fee simple and other interests. To the extent that the FNPO initiative achieves these objectives, it would be like a mini-Treaty, perhaps without some of the other Treaty baggage. However, if the federal and provincial government were willing, the same objectives could be achieved through reconciliation agreements or other processes backed by legislation.

6. Creation of Interests and Wealth Via Aboriginal Title

Aboriginal title gives 'a right to the land itself'. The courts have stated that aboriginal title land has 'an inescapable economic component' and that the land may be used 'for a variety of activities, none of which need be individually protected as aboriginal rights under s.35(1)'.[5] The only limit on the development of aboriginal title land is that it cannot be sold to non-members without first being surrendered to the Crown. In our view there are no legal barriers to First Nations creating all manner of legal interests in aboriginal title lands including leases and restricted fee simple interest. Provided that financial institutions and investors are educated about the legal realities of aboriginal title, there are extensive possibilities to use aboriginal title lands to generate wealth for First Nations and equity for First Nation members.

As we write this article the *Tsilqhot'in* aboriginal title case is being appealed by the federal and provincial Crown. It is unfortunate that the federal and provincial government are spending all of their time and energy fighting against aboriginal title rather than working with First Nations to explore creative ways in which aboriginal title could be recognized and implemented in a manner that coordinates with federal and provincial jurisdiction and creates wealth for First Nations and their members.

7. Concerns about Negative Impacts on Additions to Reserve and Implementation of the FNLMA

Many First Nations have their applications for Additions to Reserve and for access into the Land Code process stuck in a federal logjam. It can take years or decades for First Nations to add lands to their reserves, even if they already own the lands in fee simple.

An ongoing problem for many of our clients is that the federal Department of Indian and Northern Affairs is obstructing First Nations wishing to enact their own Land Codes. There is a significant lack of resources for the FNLMA program. Currently there are 74 First Nations on a waitlist, waiting to joint to FNLMA.[6] It appears that INAC has provided close to $1 million in funding to the FNPO initiative. We are concerned that by throwing its support behind the FNPO initiative to the detriment of the Additions to Reserve and the FNLMA, the federal government may be denying First Nations the opportunity to create wealth on reserve lands and to manage their lands and create wealth and equity through their own Land Code and land management laws.

[5] *Delgamu'ukw* v. *British Columbia* [1997] 3 S.C.R. 1010.

[6] Ibid., note 2

Conclusion

It is our view that FNPO is an interesting initiative that is definitely worth exploring. However, FNPO shares many of the same challenges as Treaty negotiations and implementing aboriginal title. It is a long term prospect. Even if comes to fruition FNPO will not automatically overcome First Nation poverty and lack of access to capital and opportunities to generate equity and wealth. In our view, there are many factors that trap First Nations in a cycle of poverty including lack of land, lack of land in or near to urban centres, lack of capacity, lack of infrastructure, etc. A rapid transition to fee simple ownership is more likely to create a bonanza for a few non-First Nation developers than to create wide-spread wealth for First Nations and their members.

In our experience and observation, the tools and options currently available are much more likely to lead to the development of First Nation capacity and the creation of wealth and equity in the short term. This process could be greatly enhanced and accelerated in the short term by opening up Additions to Reserve and the FNMLA process, and in the longer term by exploring reconciliation agreements and implementation of aboriginal title.

Of course, all of these decisions must be left to First Nations themselves. If the federal and provincial governments become sincerely committed to reducing poverty and opening up space for First Nations to develop their capacity and create wealth and equity for themselves, First Nations will have a real choice. We have every confidence that each First Nation will know which options work best for their community and their Nation.

We welcome the opportunity to have further dialogue with First Nations, and with the legal, business and lending communities, on the relative advantages of FNPO and the existing available tools in creating markets and supporting economic development on First Nation lands.