SASKATCHEWAN LAW REVIEW

Real Property Security Interests on First Nations Reserved Lands†

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I. INTRODUCTION: POVERTY AND CREDIT ON FIRST NATIONS RESERVED LANDS

First Nations reserved lands are among the most impoverished places in Canada.[1] The state of housing is dismal.[2] Many First Nations people living on reserved lands are living below the national poverty line, and the opportunity to stimulate economic development is low. An aspect of the problem facing First Nations people and businesses situated on reserved lands is the difficulty encountered in accessing secured financing.[3] This in turn is caused by the federal legislative regime applied to First Nations reserved lands. In particular, certain provisions of the *Indian Act*[4] limit rights to use real property[5] located on reserved lands as collateral in secured financing transactions.

The legal frameworks that inhibit First Nations people and businesses located on reserved land from acquiring secured financing using real property as collateral can be generalized into three categories. One system exists for First Nations reserved lands that are under the auspices of the *Indian Act*. That system creates the most difficulty for

† "Reserved Lands" is terminology adopted from Sharon H Venne, "Treaties Made in Good Faith" in John W DePasquale, ed, *Natives and Settlers, Now and Then: Historical Issues and Current Perspectives on Treaties and Land Claims in Canada* (Edmonton: University of Alberta Press, 2007) 1.

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1 See e.g. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: TRC, 2015) at 194, online: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf/>, archived: <https://perma.cc/62YZ-NGR6>. See also Pamela D Palmater, "Stretched Beyond Human Limits: Death By Poverty in First Nations" (2011) 65-66 Can Rev Social Policy 112 at 113-15.

2 Palmater, *ibid*.

3 Thomas Isaac, "*First Nations Land Management Act* and Third Party Interests" (2005) 42:4 Alta L Rev 1047 at 1048 [Isaac, "Third Party Interests"]. For discussion of the impact of property rights, see generally Fernando M Aragón, "Do Better Property Rights Improve Local Income?: Evidence from First Nations' Treaties" (2015) 116 J Development Economics 43.

4 RSC 1985, c I-5.

5 The provisions also limit the ability to use personal property as collateral in a secured financing transaction, but that is beyond the scope of this article.

both First Nations people and businesses located on reserved lands to use real property as collateral.[6] A separate but related system applies to First Nations that have opted into the provisions of the *First Nations Land Management Act*.[7] This regime was created in an attempt to allow First Nations to remove themselves from some of the restrictive provisions of the *Indian Act*, and is a relatively new system that has only been widely applicable to First Nations reserved lands in Canada since 2006. Another system exists where First Nations have enacted modern treaties.[8] This article focuses on the approaches implemented by the *Indian Act* and the *FNLMA*.

The degree of difficulty that people and businesses located on First Nation reserved lands face in acquiring secured financing varies depending on which system is in place on a given First Nation's reserved lands. No system currently exists for First Nations covered by historical treaties[9] to acquire financing secured by an interest in real property in the same way available to individuals not located on reserved lands. First Nations under both the *Indian Act* and the *FNLMA* are limited to using leasehold interests as collateral. As a result, entering secured financing transactions is a challenge for all individuals located on reserved lands. This ought not to be the case, considering the positive effect that access to secured financing could have on impoverished First Nations people and the associated economic development opportunities for businesses located on reserved lands.

This article argues that the current legal regimes that regulate interests in land on First Nations reserved lands inhibit the ability of First Nations to access secured financing by, *inter alia*, limiting the ability to use real property as collateral. The effects are that First Nations businesses located on reserved land are at a competitive disadvantage due to the inability of the businesses to access secured funding, and that housing conditions on reserved lands are suffering

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6 This is both in terms of personal mortgage financing for themselves to build, renovate, or upgrade their homes; and in terms of commercial mortgage financing for businesses to construct commercial property or acquire financing for commercial purposes.

7 SC 1999, c 24 [*FNLMA*].

8 See e.g. *Nisga'a Final Agreement* (27 April 1999), online: <http://www.nnkn.ca/files/u28/nis-eng.pdf>, archived: <https://perma.cc/NJ6A-MFUP>.

9 For the purposes of this paper, I place into the category of historical treaty, any treaty that existed prior to the Supreme Court decision in *Calder v. Attorney-General of B.C.* ([1973] SCR 313, 34 DLR (3d) 145 [*Calder*]), since the First Nations involved in those treaty negotiations did not have the sophisticated legal representation present in post-*Calder* treaties. While all treaties in which Aboriginal title is ceded to the Crown result in the First Nation involved in the treaty becoming subject to federal legislation, the effects of those federal legislative frameworks can be circumvented in the terms of a modern treaty.

because First Nations people cannot access loans to construct new housing and update existing structures.

This article is divided into three sections. The first section sets out the general legal structure of secured financing of real property, within the overall context of secured lending. It also briefly touches on the positive relationship between access to credit and poverty alleviation. The second section describes the types of interests in land that are available to people residing on, and businesses located on, lands reserved for First Nations peoples. These interests are contained within the provisions of the *Indian Act* and the *FNLMA*. Included in this part will be an analysis of why the various interests are of limited value as collateral in a secured lending transaction. The third section sets out the various funding structures put in place by the federal government to circumvent the negative implications of the restrictive interests afforded to people residing on lands reserved for First Nations peoples, and to allow those people and businesses residing on reserved lands access to secured financing.

II. REAL PROPERTY SECURITY INTERESTS

Secured lending is important in the developing world, as the economies of developed countries largely operate on an underlying system of credit. People, businesses, and governments in developed economies regularly purchase goods and acquire services based on credit. The thread that connects all types of credit transactions is the obligation to pay that arises when debt is owed to one entity from another. The vendor is owed a debt by the purchaser who is under an obligation to pay the purchase price, or the financier is owed a debt by the debtor who is obliged to repay the loan. The form that a credit transaction can take varies widely, from a simple sale of goods with a promise to pay at a later date, to a complex mortgage transaction involving multiple advancements and a revolving line of credit.

All credit transactions have a binary nature in the sense that the transaction can either be secured or unsecured. The essential difference between secured and unsecured credit is the ability of the creditor to look to the property of the debtor to obtain total or partial payment of the debt that is owed if the debtor fails to meet the claims of the creditor.[10] When debt is unsecured, the creditor has no legal recourse to enforce the debt obligation other than beginning an action to enforce the promise to pay. This is an onerous process as it requires the creditor to not only go to court but, upon receiving a judgment

10 Louise Gullifer, ed, *Goode on Legal Problems of Credit and Security*, 5th ed (London, UK: Sweet & Maxwell, 2013) at 1-11.

in its favour, begin judgment enforcement against the debtor.[11] In such a case, it is possible that the debtor simply will not have funds or property sufficient to meet the debt that is owed. Since the creditor does not have rights to the debtor's property in place of payment, the loan could remain unpaid. The result is that the debt held by the creditor is unrecoverable.

In contrast, secured credit has the additional assurance of an agreement between the debtor and the creditor that the debtor will provide an alternative source of payment that the creditor can rely upon if the debtor fails to fulfill its obligation.[12] The most common alternative involves a grant by the debtor in favour of the creditor of a right in the property of the debtor. Thus, when a debt is secured, the creditor has a legally enforceable interest in the real or personal property of the debtor that can be conditionally acted upon if the debtor defaults by, for instance, failing to pay the loan obligation.[13]

The interest granted by the debtor typically allows the creditor to take possession of the property of the debtor in satisfaction of the debt obligation. A creditor that is granted a security interest in property of the debtor retains the right to enforce the debtor's promise to pay and is given the additional right to take possession of, and often to dispose of, the property of the debtor. So, when a debtor fails to pay in a secured credit transaction, the creditor can look to the property of the debtor to satisfy the debt obligation, thereby relieving the possibility of being left with an unrecoverable debt. Creditors are more willing to engage in lending and extend credit to people and businesses when that credit is capable of being secured. The decreased risk involved in secured credit transactions alleviates the fear that the creditor will be left with unrecoverable debt.

Saskatchewan law regulating the use of real property as collateral in secured financing transactions has its roots in the law of the United Kingdom.[14] Historically, when an owner of real property

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11 In many jurisdictions, the law of judgment enforcement is scattered and complicated. In Saskatchewan, however, the judgment enforcement regime is among the most sophisticated in the world and allows the judgment creditor to use the system to secure a claim in the property of the debtor. See *The Enforcement of Money Judgments Act*, SS 2010, c E-9.22.

12 Otherwise known as defaulting on the obligation.

13 Or when certain other conditions are not fulfilled. A debtor can default on a loan obligation by failing to fulfill any number of conditions in the debtor-creditor agreement, and it is the act of default that allows the secured creditor to take the property of the debtor, or realize whatever other form of security has been provided.

14 Ronald CC Cuming, *Overview of Saskatchewan Real Property Security Law* (Regina: Queen's Printer, 2016) at 1-8.

sought to use their land as collateral in a loan, the owner was required to convey title to their land to the creditor. Under this system, the creditor became the legal owner of the land and the debtor became the equitable owner. As equitable owner, the debtor retained the right of redemption, which enabled the debtor to have title re-conveyed once the loan obligation was fulfilled. The legal regime regulating real property security interests in Saskatchewan rejects the conveyance model, opting instead for a Torrens-style land title system.[15]

The major distinction between the systems is that when a debtor seeks to use their real property as collateral in a land titles system, the debtor remains the legal owner of the land and the creditor is given a charge that can be registered against the title of the debtor. If the debtor defaults on the loan obligation, the land titles system provides measures that enable the charge-holder to enforce against the debtor's property. The charge-holder can use a variety of methods to enforce their charge. In Saskatchewan, the ways that a creditor can enforce include a foreclosure, a judicial sale, a right of distress, and the appointment of a receiver.[16]

A. THE ROLE OF CREDIT IN POVERTY ALLEVIATION

Increasing access to financial services, particularly access to credit, has been identified as a key objective of the United Nations Development Programme because of the profound impact that an increase in credit has on poverty alleviation.[17] An indication of this is the conferring of the 2006 Nobel Peace Prize on Muhammad Yunus, an economist from Bangladesh and founder of Grameen bank, as recognition for his work in establishing an institution that brought a form of secured credit financing to the most impoverished people

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15 The key features of the system are contained primarily in *The Land Titles Act, 2000* (SS 2000, c L-5.1 [*LTA, 2000*]). For comparable legislation implementing a land titles system in other Canadian jurisdictions, see Alberta, *Land Titles Act*, RSA 2000, c L-4; British Columbia, *Land Title Act*, RSBC 1996, c 250; Yukon, *Land Titles Act, 2015*, SY 2015, c 10; New Brunswick, *Land Titles Act*, SNB 1981, c L-1.1; Ontario, *Land Titles Act*, RSO 1990, c L.5; Northwest Territories, *Land Titles Act*, RSNWT 1988, c 8 (Supp); Nunavut, *Land Titles Act*, RSNWT 1988, c 8 (Supp), as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28.

16 See generally Cuming, *supra* note 14.

17 United Nations Development Programme, *The Role of Economic Policies in Poverty Reduction* (September 2003) at 8, online: <http://www.undp.org/content/undp/en/home/librarypage/poverty-reduction/the-role-of-economic-policies-in-poverty-reduction.html>, archived: <https://perma.cc/L8C7-W22T>; United Nations Development Programme, *UNDP Microfinance Policy*, online: <http://uncdf.org/sites/default/files/Download/undp_microfinance_policy_0.pdf>, archived: <https://perma.cc/AHF3-UA4T>. See generally UNCDF, online: <http://www.uncdf.org>, archived: <https://perma.cc/Z7CF-4H9T>.

around the world.[18] Enhancing access to credit allows people and commercial enterprises access to capital that would otherwise be unavailable to them.

This increased access to capital in turn allows those entities to engage in ventures that they were otherwise unable to. For instance, they may engage in entrepreneurial enterprise, or build or renovate their homes. The ability to undertake such projects creates a marked increase on the overall quality of life in impoverished regions. It is for this reason that there has been an effort to increase access to financial mechanisms, particularly in the form of secured credit, in the world's most impoverished regions. Similarly, an increase in the availability of credit to people and businesses located on First Nations reserved lands could assist in alleviating the poverty that is found among First Nations across Canada.

III. REAL PROPERTY SECURITY INTERESTS IN FIRST NATIONS RESERVED LANDS

There is no overarching philosophy behind secured transactions on First Nations reserved lands. An attempt to analyze the complex, *ad hoc* frameworks implemented by the federal government will lead to frustration. Further complicating the analysis, much of the literature that touches on the nature of secured financing of reserved lands is superficial. The starting point in this discussion is to provide an understanding of the statutory regimes applicable to reserved lands that regulate, *inter alia*, who can own reserved lands, what rights can be associated with reserved lands, and how those rights can be granted to First Nations members and to third parties. It is also necessary to distinguish between the various types of First Nations reserved lands: those to which the provisions of the *Indian Act* apply, those subject to a First Nations Land Management Code in accordance with the *FNLMA*, those that are on unceded land, those held through Aboriginal title, and those under modern treaty agreements. The focus of this paper will be on First Nations to which the *Indian Act* and the *FNLMA* apply because those Acts apply to the clear majority of First Nations located within the provincial boundaries of Saskatchewan.[19]

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18 Although the security in this case was the guarantee of other members of the community rather than property of the debtor, the concept holds that increasing access to credit plays an important role in poverty alleviation efforts. For more, see Muhammad Yunus, *Banker to the Poor: Micro-lending and the Battle Against World Poverty* (New York: Public Affairs, 2007).

19 An important point to note is that the number of First Nations opting in to the system implemented by the *FNLMA* is increasing, as more First Nations seek to gain more control over reserved lands than is provided for under the *Indian Act*.

An important distinction between First Nations under the *Indian Act* and those that have taken advantage of the *FNLMA* is the degree of control that a First Nation exerts over reserved lands.[20] The greater degree of control implemented in the *FNLMA* facilitates transactions in which an interest in reserved land is provided as collateral in a secured financing arrangement. A shared aspect of importance under both the *Indian Act* and the *FNLMA* is that the interests in reserved land that can be granted to third parties are interests less than fee simple. This is because neither statutory regime enables First Nations to acquire or hold legal title to the land.[21] The processes by which First Nations grant interests in land under the different regimes, however, are distinct. First Nations that are wholly under the *Indian Act* are subject to the control of the Minister responsible for First Nations,[22] who has a great degree of power over the land, whereas First Nations that are under the *FNLMA* are granted more control over their land.[23]

In both contexts, the legal framework that surrounds the acquisition of an interest in First Nations reserved lands for the sake of its use as collateral in a loan obligation is problematic. While the law regarding the acquisition and enforcement of mortgage interests is relatively clear and capable of achieving certainty on non-reserved lands,[24] the applicable law regulating the provision of reserved lands as security is unclear, resulting in uncertainty.[25] A consequence of this legal uncertainty is that people living on reserved lands do not have the same quality of life as Canadians not living on reserved lands.[26] The inability of First Nations people living on reserved lands to access sources of secured lending has contributed to poor housing and economic conditions.[27]

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20 Under the *Indian Act*, the granting of any interest in land must be consented to by the Minister responsible for matters relating to First Nations, whereas under the *FNLMA* a First Nation need not consult the Minister when granting interests in reserved lands.

21 *Indian Act*, *supra* note 4, s 18; *FNLMA*, *supra* note 7, s 5.

22 Currently the Minister of Indigenous and Northern Affairs. Hereafter, referred to as "the Minister."

23 Isaac, "Third Party Interests", *supra* note 3 at 1048.

24 See generally Cuming, *supra* note 14.

25 *Ibid* at 3-13 to 3-16.

26 *McDiarmid Lumber Ltd. v God's Lake First Nation*, 2006 SCC 58 at paras 42, 50-56, [2006] 2 SCR 846 [*McDiarmid Lumber*]; Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship* (Ottawa: RCAP, 1996) at 906-931, online: <http://publications.gc.ca/collections/collection_2016/bcp-pco/Z1-1991-1-2-2-eng.pdf>.

27 Senate, Standing Senate Committee on Aboriginal Peoples, *On-Reserve Housing and Infrastructure: Recommendations for Change* (June 2015) (Chair: The Honourable Dennis Glen Patterson); Isaac, "Third Party Interests", *supra* note 3 at 1048;

The state of residential housing on reserved land is abysmal on many First Nations reserved lands. A prominent and recent example of this is the situation faced by the Attawapiskat First Nation.[28] There, the state of residential housing on the lands reserved for the Attawapiskat was so poor that the leaders of the First Nation were concerned that people would not survive the winter. Many First Nations across Canada supported the October 2011 state of emergency declaration by the Attawapiskat leadership because the conditions they faced were similar. The controversy grew because the Attawapiskat First Nation was calling on the federal government to provide Attawapiskat with more funding to construct new homes and renovate existing ones. As is the situation for many First Nations, the people of Attawapiskat were left with little choice other than to obtain funding from the federal government, in part because the applicable provisions of the *Indian Act* restricted their ability to obtain financing from private lending institutions such as banks and credit unions.

The negative effects are not limited to residential housing. They also make it more difficult for First Nations to engage in economic development opportunities.[29] It is a truism that business entities in Canada rely on obtaining some form of financing to be successful. Such financing can take the form of short-term loans, revolving lines of credit, or long-term loans. Under each form, the business enterprise incurs a debt obligation. In most situations, a lending institution such as a bank or a credit union would prefer not to provide unsecured financing to the business. Instead, lending institutions prefer that the business grant an interest in property owned by the business, to act as collateral that the lending institution can take in satisfaction of the debt obligation. Often, the collateral that secures the loan obligation is provided by granting an interest in real property of the business, from which the lending institution can satisfy the debt obligation, by means of foreclosure or sale of the land owned by the business, if default occurs. However, when a business is located on reserved lands, the law does not allow the business to directly own the land,

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Christopher Alcantara, "Certificates of Possession and First Nations Housing: A Case Study of the Six Nations Housing Program" (2005) 20:2 CJLS 183 [Alcantara, "Six Nations Housing"]; "Indian Act Inhibits Business, Mohawks tell Royal Commission", *Windspeaker* 11:5 (24 May 1993).

28 Thandi Fletcher, "Attawapiskat's 'dire' conditions are deeply concerning: UN human rights official", *National Post* (20 December 2011), online: <http://news.nationalpost.com/news/canada/attawapiskats-dire-conditions-are-deeply-concerning-un-human-rights-official>, archived: <https://perma.cc/GF3Y-53GH>.

29 Isaac, "Third Party Interests", *supra* note 3 at 1048; Royal Commission on Aboriginal Peoples, *supra* note 26 at 906-931; *McDiarmid Lumber*, *supra* note 26 at para 42.

resulting in the business being unable to provide collateral to secure the loan obligation that it would otherwise obtain from a lending institution.

An additional layer in the problematic structure governing land interests on reserved lands is the potentially wide variance of legal structures that apply to the governance of First Nations reserved lands. As mentioned above, some First Nations are governed by the provisions of the *Indian Act*, which restricts land use on a First Nation to only a few variants. However, even when First Nations have taken advantage of the provisions of the *FNLMA*, they are limited in the land rights available in reserved lands. While the land rights among First Nations which are under the *Indian Act* are similar across Canada, the land rights devolved to First Nations under the *FNLMA* can themselves take on a wide variety of forms, depending on the unique structure of the land code that has been enacted by the individual First Nation. This places a requirement on financiers to take an in-depth look at the legal frameworks applicable to the lands of each First Nation, which causes additional uncertainty in the provision of secured loans.

This section will outline the general principles that underlie the application of federal and provincial laws on lands reserved for First Nations and demonstrate how provincial laws regulating debt enforcement conflict with federal laws regulating reserved lands. It will then describe the different types of interests that can be granted in reserved lands under both the *Indian Act* and the *FNLMA*, and the problems related to the acquisition and enforcement of real property security interests granted in reserved lands.

A. APPLICATION OF FEDERAL AND PROVINCIAL LAWS ON FIRST NATIONS RESERVED LANDS

The constitutional division of powers places exclusive jurisdiction over "property and civil rights" in the provinces.[30] Provincial legislatures have exercised their constitutional authority in the area to implement statutory debt enforcement regimes that regulate the rights of creditors in relation to the collateral property of the debtor. In Saskatchewan, statutes unique to the province place limitations on the ability of a creditor to enforce against the collateral provided as security by the debtor,[31] and create additional procedures that must be followed before the creditor is able to fully enforce on its security.[32] However, most of the debt enforcement statutes enable the creditor to realize on the debtor's collateral by allowing the creditor to, *inter alia*,

30 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92(13), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*].

31 *The Limitation of Civil Rights Act*, RSS 1978, c L-16.

32 *The Land Contracts (Actions) Act*, RSS 1978, c L-3.

enforce upon and sell the personal[33] or real property of the debtor.[34] As discussed above, the reassurance that these laws provide to creditors is important in a secured credit transaction, by creating confidence to extend credit as the risk involved in the transaction is reduced.

Subsection 91(24) of the *Constitution Act, 1867*[35] grants exclusive legislative authority over "Indians, and Lands reserved for the Indians" to Parliament.[36] The federal government exercises its constitutional legislative authority in the area through a number of statutes regulating the affairs of First Nations, the most important of which for the purposes of this discussion are the *Indian Act* and the *FNLMA*. Sections 29 and 89 of the *Indian Act* regulate the ability of creditors to take real property located on reserved lands as security for a loan obligation. Section 29 provides that "reserve lands are not subject to seizure under legal process."[37] Subsection 89(1) states that real property on reserved lands "is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour of or at the instance of any person other than"[38] a First Nations person with legal status under the *Indian Act*[39] or a First Nations band council.

The effect of these provisions is that provincial debt enforcement regimes are inoperative on reserved lands to the extent that there is an operational conflict between the provincial debt enforcement legislation and the *Indian Act*.[40] The conflict between provincial debt

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33 *The Personal Property Security Act, 1993*, SS 1993, c P-6.2. For similar debt-enforcement regimes for personal property in Canadian jurisdictions, see Alberta, *Personal Property Security Act*, RSA 2000, c P-7; British Columbia, *Personal Property Security Act*, RSBC 1996, c 359; Nova Scotia, *Personal Property Security Act*, SNS 1995-96, c 13; Prince Edward Island, *Personal Property Security Act*, RSPEI 1988, c P-3.1; Newfoundland, *Personal Property Security Act*, SNL 1998, c P-7.1; Manitoba, *The Personal Property Security Act*, CCSM, c P35; New Brunswick, *Personal Property Security Act*, SNB 1993, c P-7.1; Yukon, *Personal Property Security Act*, RSY 2002, c 169; Nunavut, *Personal Property Security Act*, SNWT 1994, c 8, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28; Northwest Territories, *Personal Property Security Act*, SNWT 1994, c 8.

34 *LTA, 2000*, *supra* note 15, s 132. See also similar legislation from Canadian jurisdictions, *supra* note 15.

35 *Supra* note 30.

36 *Ibid*, s 91(24).

37 *Indian Act*, *supra* note 4, s 29.

38 *Ibid*, s 89.

39 A note on the language used in this article: because of the negative connotations involved with using the word "Indian" to refer to a First Nation, Métis, or Inuit person, I refrain from doing so in this article. Where the *Indian Act* refers to an "Indian" as defined in s. 2(1), this article refers to a First Nations person with legal status under the Act.

40 *Simpson v Ziprick* (1995), 126 DLR (4th) 754 at para 22, 10 BCLR (3d) 41 (SC); *Derrickson v Derrickson*, [1986] 1 SCR 285 at 296, 304-305, 26 DLR (4th) 196. For a discussion of operational conflict, see generally *Multiple Access v McCutcheon*, [1982] 2 SCR 161 at 191, 138 DLR (3d) 1. Note that the same analysis applies when considering the provisions of the *FNLMA*.

enforcement regimes and the *Indian Act* is that provincial debt enforcement regimes provide secured creditors with the right to charge real property with a security interest, as well as to enforce upon and sell property of the debtor as a remedy for non-payment, whereas the *Indian Act* prohibits enforcement against real property located on reserved lands[41] and prohibits non-First Nations creditors from holding a valid charge on real property.[42] Therefore, the portions of the provincial real property debt enforcement regimes that allow creditors to hold a valid charge and to enforce upon real property are inapplicable because of the conflict that arises between their operation and the operation of ss. 29 and 89 of the *Indian Act*. This is a significant problem for First Nations people and businesses located on reserved lands because it eliminates the ability to enter the same low-risk credit transactions as people and businesses not located on reserved lands. The remedies provided in provincial regimes are simply made inapplicable by the *Indian Act*.

However, the *Indian Act* contains exceptions that allow interests in real property located on reserved lands to be subject to enforcement measures by a creditor where operational conflict with provincial debt enforcement regimes may not arise. One exception is found in s. 89(1), which allows real property to be subject to a charge if the charge is in favour of "an Indian or a band."[43] The effect of this provision is that it allows a person with registered status under the *Indian Act* or a First Nations band to hold a valid charge on an interest in real property located on reserved lands.[44] It therefore allows the First Nations mortgagee, whether they are an individual or a band, to use provincial debt enforcement regimes to validly enforce its charge upon the real property, regardless of the fact that it is situated on reserved lands.

The other exception is found in s. 89(1.1), which allows a valid charge to be held against leasehold interests on designated reserved lands. Importantly, the limitation that the creditor is a First Nations person or band council is lifted in regards to charges on these types of leasehold interests. The provincial debt enforcement regimes would not be in operational conflict when applied to a charge on a leasehold interest of designated lands, thereby allowing creditors to enforce against the lease as they would against any other lease that is

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41 *Supra* note 4, s 29.

42 Section 89(1) of the *Indian Act* allows charges to be held by either a First Nations person with legal status under the Act or a First Nations band (*ibid*, s 89(1)).

43 *Ibid*.

44 However, as set out in more detail in the sections below, the interests in real property that can be granted on reserved lands are limited. As well, any interest is also limited by s. 29 of the *Indian Act*, which protects reserved lands from enforcement.

subject to a charge. This allows First Nations people and businesses to use leases of designated land as collateral and therefore allows them to access secured credit.

B. *INDIAN ACT* INTERESTS IN RESERVED LANDS

The *Indian Act* places restrictions on the type of interests that a person[45] can obtain in reserved lands.[46] None of the interests provided for in the *Indian Act* are equivalent to the fee simple interests held in land not reserved for First Nations. Moreover, the reserved lands that First Nations inhabit are not owned by the First Nations; instead, legal title to the lands is held by the Crown, which holds the land for the benefit of the First Nation that inhabits it. An explanation offered for this arrangement is that the Crown is honour-bound to protect the land of First Nations, and therefore cannot allow it to be treated in the same way as other land.[47] That is, the honour of the Crown compels the Crown to ensure that First Nations land is not enforced upon, sold, or otherwise disposed of, and is instead held for the benefit of the First Nation.

While this explanation may have protected First Nations from being unfairly dispossessed of reserved lands when treaties were first struck, the arrangement now inhibits First Nations from fully engaging in development of the reserved lands they occupy, either for economic or personal purposes.[48] As early as 2009,[49] the federal government considered proposing a *First Nations Property Ownership Act* ("*FNPOA*"), which would have, among other things, transferred fee simple title in reserved lands to associated First Nations.[50] The

45 Including a business entity. See e.g. *The Business Corporations Act*, RSS 1978, c B-10, s 15(1).

46 See e.g. *supra* note 4, ss 20, 28(1).

47 *McDiarmid Lumber*, *supra* note 26 at para 50; Thomas Isaac, *Aboriginal Law: Commentary and Analysis* (Saskatoon: Purich Publishing, 2012) at 191-92 [Isaac, *Aboriginal Law*].

48 *McDiarmid Lumber*, *ibid* at para 42, citing Royal Commission on Aboriginal Peoples, *supra* note 26 at 906-907.

49 House of Commons, Standing Committee on Finance, *Evidence*, 40th Parl, 2nd Sess, No 39 (15 September 2009) at 3-4 (Manny Jules), online: <http://www.parl.gc.ca/content/hoc/Committee/402/FINA/Evidence/EV4099400/FINAEV39-E.PDF>, archived: <https://perma.cc/P765-SVW2>. It was also committed to in 2012. See House of Commons, Minister of Finance, *Jobs, Growth, and Long-Term Prosperity: Economic Action Plan, 2012* (29 March 2012) at 171, online: <http://www.budget.gc.ca/2012/plan/pdf/Plan2012-eng.pdf>, archived: <https://perma.cc/FU25-D94E>.

50 A draft of the proposed Act was not presented to a parliamentary committee or to Parliament, so the exact details of the legislation remain speculative. The essence of the Act, however, would have been to allow First Nations to have fee simple title over reserved lands (Standing Committee on Finance, *ibid*). See also John W Gailus, "Legislative Developments Related to Reserve Land" (Paper delivered at the Aboriginal Law: Current Issues Conference of the Pacific Business & Law Institute, Vancouver, 7 May 2013) at 16-18, online: <http://www.dgwlaw.ca/

proposal received a mixed response,[51] with some comparing it to the 1969 White Paper, claiming that it would undermine Aboriginal rights. Others championed the proposed legislation, arguing that it would allow First Nations to own their lands and to mortgage those lands in the same way that non-reserved lands can be mortgaged. However, the *FNPOA* has not become law. Thus, title to reserved lands remains with the Crown, and most lands[52] remain subject to the *Indian Act* and the *FNLMA*.

1. *Indian Act* Interests in Reserved Lands: Certificates of Possession

The *Indian Act* allows individual band members to enter into lawful possession of lands reserved for First Nations.[53] A band member must be granted an allotment of land to have lawful possession of reserved lands. Along with the allotment, the band member is granted a certificate of possession which evidences their claim to the allotment. When a certificate of possession is granted, the person to whom it was granted can remain in lawful possession for life, and can transfer the certificate through their estate. The process by which a certificate of possession is granted, like all processes under the *Indian Act*, is arduous and involves layers of approval. Any allotment that is made to a band member must first be approved by the First Nations band council in question.[54] The allotment must also be approved by the Minister.[55]

The factors upon which the Minister can base approval or rejection of a request to make an allotment are not well documented. They cannot be found in the *Indian Act* or its accompanying regulations. However, where the Minister withholds approval to grant the

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wp-content/uploads/2014/12/Reserve_Land_JWG2013.pdf>, archived: <https://perma.cc/8YTF-273G>.

51 See Kanatase Horn, *Reconfiguring Assimilation: Understanding the First Nations Property Ownership Act in Historical Context* (MA Thesis: Carleton University, 2013) [unpublished] (comparing the FNPOA to the 1969 White Paper); Lindsay Monk, *Decolonizing Home: A Re-conceptualization of First Nations' Housing in Canada* (MA Thesis: University of Victoria, 2013) [unpublished] (for the arguments against the *FNPOA*); First Nations Tax Commission, "Background on the First Nations Property Ownership Initiative" (1 July 2012), online: <http://fntc.ca/background-on-the-first-nations-property-ownership-initiative/>, archived: <https://perma.cc/9LDM-TENZ>; Indigenous Land Title Initiative, "Indigenous Land Title Initiative (ILTI) Proposal: In Summary" (2012) (for the arguments in favour of the proposal), online: <http://ilti.ca/en/proposal/>, archived: <https://perma.cc/Y5FG-DA5B>.

52 Except for lands where Aboriginal title has been or may be proven.

53 *Supra* note 4, s 20(1).

54 *Ibid*.

55 *Ibid*.

allotment, the Minister may authorize the individual band member to temporarily occupy the land and may prescribe conditions as to the use and settlement that the individual band member must fulfill.[56] This type of temporary possession is accompanied by a certificate of occupation rather than a certificate of possession. A certificate of occupation grants the individual band member the right to occupy the land[57] for a maximum of two years from the date that the certificate is granted[58] unless the Minister decides to extend the term.[59]

Where the Minister approves the allotment, the Minister will issue a certificate of possession to the individual band member, which indicates that the band member is lawfully in possession of the land described in the allotment.[60] Every certificate of possession and certificate of occupation is registered in the Reserve Land Register, along with any other transaction that occurs respecting real property on reserved land.[61] When an individual band member has a certificate of occupation, they have the same rights to occupy the land as a band member who has obtained a certificate of possession. The difference lies in the fact that a certificate of possession grants the individual band member the right to lawfully possess the land for an indeterminate period. In comparison, a certificate of occupation expires upon the passing of two years,[62] unless the Minister has granted an extension or has decided to approve the allotment and issue a certificate of possession in place of the certificate of occupation.[63]

The rights that an individual band member can exercise in relation to the reserved land allotted to them through a certificate of possession or a certificate of occupation are limited. An important restriction is that the *Indian Act* makes void any deed, lease, contract, instrument, document, or agreement of any kind under which the person who has the certificate of possession or occupation purports to permit a person other than a member of that band to occupy or use the land, or exercise any rights on the land.[64] If a band member wishes to encumber their land in any of those ways, they must get approval from the Minister. The Minister will then issue a permit allowing a

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56 *Ibid*, s 20(4).
57 In accordance with the conditions set out by the Minister (*ibid*).
58 *Ibid*, s 20(5).
59 *Ibid*, s 20(6).
60 *Ibid*, s 20(2).
61 *Ibid*, s 21. However, it is important to note that the Reserve Land Register does not operate in the same way the Land Titles Registry operates in Saskatchewan or other Canadian jurisdictions that have adopted a land titles system.
62 *Ibid*, s 20(5).
63 *Ibid*, s 20(6).
64 *Ibid*, s 28(1).

person who is not a member of the band to occupy, use, reside on, or otherwise exercise any rights on the reserved land for a period not exceeding one year.[65] The Minister may extend the period of time in the permit beyond one year with the consent of the council of the band. The most important restriction that is placed on land that is allotted to an individual band member through a certificate of possession is that the allotted land, like all reserved land, is not subject to enforcement under legal processes.[66]

In an article involving a case-study examination of certificates of possession in Ontario, Christopher Alcantara discusses how a certificate of possession can afford the First Nations member adequate security of tenure to the allotted land to acquire secured financing.[67] After the long process of acquiring a certificate of possession, a First Nations band member has the right under the *Indian Act* to transfer the certificate of possession,[68] or to have the interest under the certificate divided, with the different parts of the allotment transferred.[69] In addition, it is difficult for the First Nation to regain control of the land once a First Nations band member has been granted a certificate of possession.[70] The only ways that this can happen are if the person in possession of the allotted land ceases to reside on reserved land, or ceases to be entitled to reside on the reserved land. At that point, the land reverts to the First Nation if no transfer has been made prior to the act that would have brought about the reversion.[71] Thus, when a certificate of possession has been granted, the interest held by the First Nations person to whom the land has been allotted cannot be easily eliminated; a quality that is shared by fee simple interests in land. This security of tenure, Alcantara argues, ought to be enough to allow First Nations members who have certificates of possession to acquire secured credit using the allotted land as collateral.

However, regardless of the inherent security of tenure in an allotment, the restrictions placed on reserved land allotted to a member of a First Nation inhibit the ability of that person to access

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65 *Ibid*, s 28(2).
66 *Ibid*, ss 29, 89(1).
67 "Six Nations Housing", *supra* note 27.
68 *Supra* note 4, s 24.
69 Alcantara, "Six Nations Housing", *supra* note 27 at 188. A person who has been allotted land may wish to divide the interest and transfer it to others in a situation where the person who had been granted possession has decided to move off reserve. In that case, without transferring the certificate of possession, the land would revert to the First Nation and be held communally (see *Indian Act*, *supra* note 4, s 25(2)).
70 Alcantara, "Six Nations Housing", *ibid*.
71 *Indian Act*, *supra* note 4, s 25(2).

capital using the allotment as security. In effect, the restrictions eliminate the possibility that the land could be used as collateral in a loan obligation in a traditional transaction. The objective of creditors in requiring that the debt obligation that they are owed is secured by property of the debtor is that the creditor can take possession of the debtor's property in satisfaction of the debt if the debtor defaults on the loan obligation. Since the land allotted cannot be held by anyone but a band member,[72] the creditor cannot engage in the type of enforcement procedures against an interest in land allotted under a certificate of possession that are necessary to reduce the risk to a satisfactory level.

Therefore, the examples put forward by Alcantara are applicable only where the creditor has legal status under the *Indian Act* or is a First Nations band. In that case, the First Nations creditor would be able to enforce against the certificate of possession. Unless the creditor has legal status under the *Indian Act*, either as a First Nations person[73] or as a First Nations band council,[74] the creditor is unable to be in lawful possession of the allotted land, thereby rendering useless any applicable enforcement procedure. The result is that the creditor is left with an unsecured debt. As such, creditors are reluctant to engage in financial transactions in which their only security is a certificate of possession.

2. *Indian Act* Interests in Reserved Lands: Crown Surrender

Subsection 38(1) of the *Indian Act* provides a process by which the First Nation is able to surrender its reserved land.[75] A Crown surrender is not useful for First Nations that wish to use the lands reserved for them as collateral in a loan obligation, because the land that is surrendered ceases to be reserved land. Any surrender of reserved land can only be made to the Crown.[76] Prior to amendments made to the *Indian Act* in 1988, a surrender of reserved land was the only

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72 Defined as an "Indian" under the Act. See *ibid*, ss 2(1), 20(1)-(2).

73 *Ibid*.

74 *Ibid*. See also Alcantara, "Six Nations Housing", *supra* note 27, for an analysis of the use of a First Nation-run "revolving loan fund," which provides the services that would otherwise be offered by traditional lending institutions. Essentially, the First Nation has a fund which it uses to grant mortgage financing to members of the First Nation. The financing is secured by the allotted land and the dwelling that is constructed on the land. If the First Nation debtor defaults on the loan provided by the First Nation through the fund, the First Nation can enforce against the allotted land.

75 *Supra* note 4.

76 *Ibid*, s 37(1).

option available to First Nations eager to move beyond certificates of possession or that did not consent to leases of uncultivated or unused land.[77]

There are two types of surrenders available under the *Indian Act*: unconditional surrender and conditional surrender. An unconditional surrender involves a transfer of all the rights and interests of the band and its members in the reserved land to the Crown. Land that is subject to an unconditional surrender ceases to be reserved land and can then be sold, and title to the land can be conveyed,[78] as though the land had never been subject to the restrictive provisions of the *Indian Act*.[79] A conditional surrender also involves the First Nation surrendering its land to the Crown, but allows the First Nation to retain some rights with respect to the land.[80] For instance, if a First Nation agrees to surrender its land to the Crown on the condition that any consequent lease will contain certain specified terms, the Crown is obligated to ensure that those specified terms are followed in the lease.[81]

If a surrender is followed by a disposition of the land by the Crown, then the land is no longer subject to the fiduciary obligations owed by the Crown to the First Nation. The result is that the land is no longer subject to any of the provisions of the *Indian Act*. If the land is surrendered to the Crown, and the Crown then leases the land, the Crown must continue to hold the land for the benefit of the First Nation that surrendered it.[82] Whether any particular surrender of reserved land will remain subject to the provisions of the *Indian Act* depends on the true intentions of the First Nation when it surrendered the land.[83] If the true intention of the surrender is to allow a long-term lease to come into existence with respect to the land without being burdened by inhibitive provisions of the *Indian Act*, then the Crown is under a fiduciary obligation to hold the land on behalf of the First Nation. If the true intention of the surrender is to allow the Crown to dispose of the land, then the land can be sold and encumbered.

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77 Isaac, *Aboriginal Law*, *supra* note 47 at 249. An explanation of leases of uncultivated land is found in Part III-B-4: Leases and Permits, below.

78 *Indian Act*, *supra* note 4, s 37(1).

79 *Guerin v The Queen*, [1984] 2 SCR 335 at 365, 13 DLR (4th) 321 [*Guerin*].

80 *Ibid*.

81 See generally *Guerin*, *supra* note 79. The Crown is required to do this because of the fiduciary obligation owed by the Crown to Indigenous people.

82 See generally *Guerin*, *ibid*. Isaac, *Aboriginal Law*, *supra* note 47 at 247-49.

83 *St. Mary's Indian Band v Cranbrook (City)*, [1997] 2 SCR 657 at 672-74, 147 DLR (4th) 385.

3. *Indian Act* Interests in Reserved Lands: Crown Designation

Subsection 38(2) creates the option for a First Nation to designate its reserved lands to the Crown.[84] The option to designate reserved lands was not available until the late 1980s.[85] This subsection was added to allow First Nations more flexibility to grant interests in reserved lands without being required to surrender those lands to the Crown, which creates a risk that the formerly-reserved lands would be sold.[86] In addition, s. 89(1.1) was created, which allows leasehold interests in designated reserved lands to be subject to a charge in favour of a non-First Nations creditor.

Under a land designation, rather than a surrender of all rights associated with the reserved lands to the Crown, the First Nation simply designates the reserved lands to the Crown. This allows the First Nation to retain the lands as reserved lands while creating a less complicated method for the First Nation to negotiate leases with third parties. A typical Crown designation adopts a format similar to the following general example. A First Nation will enter into an agreement with the Crown whereby the First Nation agrees to designate certain lands to the Crown. In some instances, the designation will include the entirety of the reserved lands set aside for the First Nation. In other cases, the First Nation will only designate some of its reserved lands. Whatever land is subject to the agreement is then designated to the Crown. The First Nation will typically then enter a lease arrangement with the Crown whereby the First Nation leases the designated land back from the Crown at a nominal rate.

When a designation follows this process, the Crown becomes the lessor under a head lease with the First Nation lessee whose reserved land is the subject of the lease.[87] The First Nation is then able to sublease its reserved land without obtaining the Ministerial approvals that would be required if the First Nation were to grant a certificate of possession or consent to a lease of unused or uncultivated lands.[88]

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84 *Indian Act*, *supra* note 4.

85 Isaac, *Aboriginal Law*, *supra* note 47 at 249-250.

86 Part III-B-2: Crown Surrender, above, discussed that the true intent of the surrender must be ascertained to determine whether the land could be sold or leased. However, such a determination is likely to occur only after the issue has been litigated because one of the parties involved has taken the issue to court. Implementing a regime that allows more clarity to be present throughout the process of dealing with interests to reserve land, as was achieved through the implementation of Crown Designations, assists in resolving issues of reserve land out of court. See also Isaac, *Aboriginal Law*, *ibid* at 249.

87 The following information was obtained through conversations and interviews with Mr. Chris LaFleur, interim director of the Native Law Centre at the University of Saskatchewan, College of Law (October 2016).

88 See Part III-B-4: Leases and Permits, below.

It is not uncommon for this process to be followed when a First Nation is attempting to engage in economic development or seeking the acquisition of new housing for the people living on reserved lands. Often, a First Nation will provide a sublease of some or all the reserved lands to a First Nations corporation. That First Nations corporation will then provide a sub-sublease to a property developer or corporate entity seeking to do business on lands reserved for First Nations. In the case of a property developer, after successfully constructing housing on reserved lands, the developer would then enter a sub-sub-sublease with members of the First Nation or anyone else who is interested in living on the reserved lands.

When a structure of leases and subleases like this is put in place on reserved land designated to the Crown, each lease falls within the narrow exception found in s. 89(1.1) of the *Indian Act*, allowing the lessee to grant a charge in the form of a mortgage on their lease. Often when these lease structures are put in place, each lease and sublease will be used as security in a mortgage loan.[89] Thus, the First Nation would provide its interest under the head lease with the Crown as security; the First Nation corporation would provide its interest under the sublease as security; the property developer would provide its interest under the sub-sublease as security; and the member of the First Nation or other First Nation resident could provide his or her interest under the sub-sub-sublease as security. Each of these interests would be based on the individual contract that was struck between the lessor and the lessee.

The situation can quickly become complicated if a lessee defaults on the mortgage obligation. For instance, it is not an uncommon occurrence that a lease agreement will contain a default clause providing that the lessee will be in default if either a rent payment is missed or the lessee defaults under any other obligation that may be attached to the lease. If this clause exists in a lease agreement near the top of the chain of leases, each sub-lease that is dependent on the existence of the higher lease would be in jeopardy if that lessee fails to fulfill the obligations under the lease or under the mortgage contract. Whatever security interest may exist in the sub-leases would also be in jeopardy, because if the original lessor ceases to be the lessor, the lessees and sub-lessees lose the right to lease the land. This, in turn, would cause the interest secured by a charge to cease to exist, leaving the financier without collateral to enforce against.

A separate problem is encountered if the lessee or sub-lessees default on the obligation to pay the mortgage loan secured by the lease or sub-lease. In that case, the mortgagee would seek to enforce

89 *Supra* note 87.

the mortgage charge by exercising one of the options available under *The Land Titles Act, 2000*.[90] The effect that an enforcement measure could have on the structure of leases is unpredictable. It is possible that a mortgagee who exercises the legal remedies available to it, such as a foreclosure, could cause the entire structure of leases and subleases to collapse. If the mortgagee forecloses on a sub-lease, for instance, that may trigger a clause in the head lease that causes the foreclosed sub-lease to come to an end. This would result in any further sub-lease on the sub-lease ceasing to exist, resulting in the mortgagee of that sub-sub-lease losing the collateral that was securing the loan obligation owed to it by the sub-sub-lessor. It may also result in the lessor being unable to pay the loan obligation that it owes to the mortgagee on the mortgage charge on the lease, resulting in a possible enforcement action upon that lease. Even though s. 89(1.1) of the *Indian Act* allows leasehold interests of designated reserved lands to become subject to a valid charge, the security inherent in the interests granted in reserved lands does not match the security that is available in non-reserved lands.

4. *Indian Act* Interests in Reserved Lands: Leases and Permits

Under s. 28(2) of the *Indian Act*, the Minister can grant a permit to occupy and use reserved land to a third party who is not a member of the First Nation.[91] The permit granted by the Minister has a limited term of one year unless the First Nation band council consents to the permit exceeding the one-year term.[92] In order for the permit to be valid, the term must be fixed to a specific date or provide reference to a certain period of time.[93] The permit granted in accordance with s. 28(2) does not provide the grantee an interest in land in the same

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90 *Supra* note 15, s 132. For enforcement mechanisms in other Canadian jurisdictions that have adopted a land titles system, see e.g. Alberta, *Law of Property Act*, RSA 2000, c L-7, ss 37-50.1; British Columbia, *Property Law Act*, RSBC 1996, c 377, ss 13, 13.1, 15, 32; Ontario, *Mortgages Act*, RSO 1990, c M.40, ss 20, 21, 24; Nova Scotia, *Real Property Act*, RSNS 1989, c 385, ss 15-27.

91 *Supra* note 4, s 28(2).

92 *Ibid*.

93 Isaac, *Aboriginal Law*, *supra* note 47 at 247. See also *Opetchesaht Indian Band v Canada*, [1997] 2 SCR 119, 147 DLR (4th) 1. In that case, the Court held that a grant by the Minister to BC Hydro, which was an easement on First Nations reserve land, was valid despite it not containing a date upon which the grant would cease to be in effect. Instead, the end point of the grant made by the Minister was when the easement was no longer required for BC Hydro to fulfill its purpose, which was to transmit power (*ibid* at paras 8, 16, 29). The Court held that "[b]ecause the duration of the [easement] is a bounded and ascertainable event, that duration is a period" (*ibid* at para 16).

way that a lease provides an interest in land.[94] For example, a lease interest can become subject to a charge under the land titles system.[95] All legislation that applies to reserved lands, including the provisions of the *Indian Act* that inhibit reserved lands from serving as collateral for a loan obligation, continue to apply on land subject to a permit granted under s. 28(2).[96] A permit granted under s. 28(2) bears a similarity at law to a certificate of possession. The same difficulties that a holder of a certificate of possession encounters in using the certificate as collateral are encountered by a third party who has obtained a permit, with the added difficulty of the time limits imposed by the *Indian Act*.

Under certain circumstances, the Minister can grant a leasehold interest in reserved land. Subsection 58(1) of the *Indian Act* provides that where reserved land is uncultivated or unused, the Minister may: "improve or cultivate that land...and authorize and direct the expenditure of...the capital funds of the band as [the Minister] considers necessary";[97] grant a lease of land, for any purpose, that has been allotted to a First Nations member, for the benefit of the member;[98] or grant a lease of land for the benefit of the band, for an agricultural or grazing purpose, that has not been allotted to any First Nations member.[99] Any of these options must be exercised with the consent of the applicable First Nation band council.[100] A lease granted by the Minister is an interest in reserved land.[101] However, unless the lease is granted on land that has already been subject to a designation,[102] it would not fall in the narrow exception granted in s. 89(1.1), which allows a leasehold interest to be subject to a charge to a creditor other than a First Nations creditor.[103]

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94 Isaac, *Aboriginal Law*, *ibid*.

95 *LTA, 2000*, *supra* note 15, ss 2(1)(s), 50(1). See also Alberta, *Land Titles Act*, *supra* note 15, s 1(m); British Columbia, *Land Title Act*, *supra* note 15, s 1; Ontario, *Land Title Act*, *supra* note 15, s 1; Yukon, *Land Titles Act, 2015*, *supra* note 15, s 1; New Brunswick, *Land Titles Act*, *supra* note 15, s 3; Nunavut, *Land Titles Act*, *supra* note 15, s 1; Northwest Territories, *Land Titles Act*, *supra* note 15, s 1; Manitoba, *The Real Property Act*, CCSM, c R30, s 1. Unless, as Alcantara demonstrates, the creditor has legal status under the *Indian Act* or is a First Nations band ("Six Nations Housing", *supra* note 27 at 190-96).

96 Isaac, *Aboriginal Law*, *supra* note 47 at 247.

97 *Supra* note 4, s 58(1)(a).

98 *Ibid*, s 58(1)(b).

99 *Ibid*, s 58(1)(c).

100 *Ibid*, s 58(1).

101 Isaac, *Aboriginal Law*, *supra* note 47 at 247.

102 See Part III-B-3: Crown Designation, above.

103 *Indian Act*, *supra* note 4, s 89(1.1).

C. THE FIRST NATIONS LAND MANAGEMENT REGIME

The *FNLMA* provides legal mechanisms through which First Nations can extricate themselves from the land management provisions of the *Indian Act*. Importantly, however, the *FNLMA* does not provide superior title to reserved lands than exists under the *Indian Act*.[104] Title to the reserved lands of a First Nation that has brought itself under the *FNLMA* remains with the Crown.[105] The process through which the *FNLMA* was developed began as an arrangement between the federal government and a group of fourteen First Nations that were frustrated by the restrictive provisions of the *Indian Act*.[106] The original arrangement between the First Nations and the government was officially known as the Framework Agreement on First Nations Land Management.[107] The only First Nations that could avail themselves of the benefits of the agreement were the original fourteen First Nations involved in its development. The Framework Agreement granted those First Nations the power to establish their own land management regimes by enacting a land code applicable to the reserved lands of their First Nation.

The federal government enacted the *FNLMA* in 1999 to officially ratify the Framework Agreement, to ensure that the most important provisions of the Framework agreement were codified in statute, and to allow the benefits to flow to any First Nation in Canada that decided to enact a land code.[108] There are currently six First Nations in Saskatchewan that have successfully enacted a land code.[109]

1. *FNLMA*: The Process of Enacting a Land Code

The process by which a First Nation can establish a land management regime and create the legislation that sets out the rules for managing its reserved land is outlined in the *FNLMA*[110] and on the Indigenous and Northern Affairs Canada website.[111] Essentially, there are four steps that are involved in the process. The first step requires the interested First Nation to enter into an agreement with the Minister that sufficiently identifies the lands to be covered by the land

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104 *FNLMA*, *supra* note 7, s 5.
105 *Ibid*.
106 Isaac, "Third Party Interests", *supra* note 3 at 1048.
107 *Ibid*.
108 *Ibid* at 1048-49.
109 *FNLMA*, *supra* note 7, Schedule. Note that the number provided in this article might be out of date at the time of print.
110 *Ibid*, ss 6-16.
111 Indigenous and Northern Affairs Canada, "First Nations Land Management Regime" (22 September 2016), online: <https://www.aadnc-aandc.gc.ca/eng/1327090675492/1327090738973>, archived: <https://perma.cc/2M7T-WHSR>.

code.[112] The agreement must also provide the terms of the transfer of the administration of the land;[113] a description of the interests, rights, or licences in existence that are applicable to the land at the time of the transfer;[114] and the process of environmental assessment that will be applicable to projects that take place on the land until such time as the First Nation has enacted its own environmental assessment by-laws.[115] The First Nation and the Minister must then appoint a "verifier" who is chosen from a list "established in accordance with the Framework Agreement."[116] The verifier determines whether the proposed land code, the proposed process for approval of the land code, and the individual agreement are in accordance with both the Framework Agreement and the *FNLMA*. If so, the verifier then confirms the proposed processes and the agreement between the First Nation and the Minister.[117]

When the proposed code has been verified in accordance with s. 8(1)(a) of the *FNLMA*, the First Nation band council may then submit the land code proposal and the individual agreement with the Minister to the members of the First Nation for approval. The extent of the approval that must be ascertained is not made entirely clear in the Act.[118] In some cases, it may be that a First Nation band council receives the approval of all members of the First Nation in a referendum-style vote, or it may be that the First Nation band council simply receives approval from a select group of members of the First Nation. The *FNLMA* and the corresponding regulations are insufficiently clear regarding the level of approval that is needed from a First Nation to satisfy the requirements of s. 8(1)(b) with certainty. This is potentially troublesome because the Act does not limit the right of any member of the First Nation to make a specific claim against the government or the First Nation that has complied with one of the voting methods outlined. A specific claim is a claim made by an Indigenous person with legal status, alleging that there has been a breach of the government's obligations relating to "the administration of land and other [First Nations] assets and to the fulfilment of [First Nations] treaties."[119]

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112 *FNLMA*, *supra* note 7, s 6(3).
113 *Ibid*, s 6(3)(a).
114 *Ibid*, s 6(3)(b).
115 *Ibid*, s 6(3)(c).
116 *Ibid*, s 8(1).
117 *Ibid*, s 8(1)(a).
118 *Ibid*, s 12. Consider the effect of paragraph 12(1)(c): "A proposed land code and an individual agreement that have been submitted for community approval are approved if… they are approved by the community in any other manner agreed on by the First Nation and the Minister."
119 Isaac, *Aboriginal Law*, *supra* note 47 at 132-33; Canada, *Outstanding Business: A Native Claims Policy* (Ottawa: Ministry of Indian Affairs and Northern Development, 1982) at 19.

Though it has yet to be litigated, it is possible that a First Nations person would be able to launch a specific claim based on the process of instituting a land code. To have a valid specific claim, a First Nations person must show, for example, that their treaty right has been negatively affected. It is possible to imagine a situation wherein a treaty right may be negatively affected by implementing a land code without having received what a First Nations person perceives to have been necessary approval of that land code from the First Nation. A valid specific claim could take years to settle, perhaps requiring the involvement of a tribunal set up by the Specific Claims Tribunal,[120] creating uncertainty around the interests created under the land code. This uncertainty may make creditors hesitant to extend secured financing on reserved lands and undercut the purpose of implementing a land code. It is important to note that this problem also exists for a land designation made in accordance with *Indian Act* provisions.

If no specific claims are made, the band council is required to provide notification to all third parties that have an interest in the land that will be subject to the proposed land code. This notification must be given within a reasonable time prior to the vote of approval.[121] If the land code and the individual agreement receive approval from the First Nation, the verifier is required by the *FNLMA* to certify the validity of the land code regime. The land code then comes into force on the date of certification by the verifier, unless an alternative date for its coming into force has been specified in the land code.[122] Upon the coming into force of the land code, any interest that is granted under the land code acquires legal standing and will be recognized as a valid interest by Canadian courts.[123]

2. *FNLMA*: Devolution of Power Over Land Management & Granting Interests

After a land code has come into force, the power to regulate and control land use on reserved lands is devolved from the Minister to the First Nation band council. Upon the land code's enactment, the First Nation has, subject to the code's provisions, the sole authority to grant interests, rights, or licences with regard to the reserved land, in accordance with the land code.[124] A limitation on this is a requirement

120 See *Specific Claims Tribunal Act*, SC 2008, c 22.
121 *FNLMA*, *supra* note 7, s 10.
122 *Ibid*, ss 14-16.
123 Christopher Alcantara, "Reduce Transaction Costs? Yes. Strengthen Property Rights? Maybe: The First Nations Land Management Act and Economic Development on Canadian Indian Reserves" (2007) 132:3-4 Public Choice 421 at 426.
124 *FNLMA*, *supra* note 7, s 16.

found in the *FNLMA* that any existing interest, right, or licence that was in existence prior to the land code coming into effect continues in accordance with the terms and conditions of the interest, right, or licence. A further limitation, as mentioned above, is that the First Nation does not have title to the reserved land, which remains with the Crown. Therefore, the interest that a First Nation can grant under the *FNLMA* that is most similar to an interest in fee simple, in order to facilitate access to secured credit for First Nations members, is a leasehold interest. Importantly, however, these leasehold interests are not subject to limitations that prohibit them from becoming subject to a charge in the form of a mortgage. Thus, any First Nation that has enacted a land code through the *FNLMA* is able to grant leases to third parties, as well as to First Nations members, with no legal barrier to those leases becoming collateral in a loan obligation. The only limitations are those inherent in the utilization of a lease as security.[125]

The *FNLMA* does grant power to manage and enact laws for reserved lands to a First Nation that has enacted a land code. Subject to the Framework Agreement and to the *FNLMA*, a First Nation may exercise the powers, rights, and privileges of an owner in relation to the land;[126] grant interests, rights, and licences in relation to the land;[127] and receive and use all moneys acquired by or on behalf of the First Nation under its land code.[128] In addition, the First Nation is able to enact laws respecting interests, rights, and licences in relation to its lands, as well as the development, management, use, and possession of its lands.[129] The powers granted to First Nations under these provisions are greatly expanded when compared to the powers of First Nations under the *Indian Act*.[130] Importantly, the degree to which a First Nation must rely on the Minister to secure arrangements with third parties is drastically reduced.

After a First Nation has enacted a land code, the First Nation is no longer required to seek Ministerial approval before entering into agreements with third parties.

While the type of interest that a First Nation can grant may not have been expanded under the *FNLMA*, the structure within which a leasehold interest is granted could be greatly simplified. This is because the First Nation itself can enter into leases with commercial developers, property developers, and any other interested third party,

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125 As mentioned in Part III-B-3: Crown Designation, above, this limitation is simply that the lease could cease to exist.
126 *Supra* note 7, s 18(1)(a).
127 *Ibid*, ss 18(1)(b).
128 *Ibid*, s 18(1)(d).
129 *Ibid*, s 20(1).
130 See generally Isaac, "Third Party Interests", *supra* note 3.

without obtaining approval from the federal government. No longer must there be a designation, followed by a head lease, and so on. In addition, when a land code has been enacted, the only way that a third party can acquire a new interest in real property situated on the First Nation's reserved lands is by following the processes and procedures outlined in the land code. Whereas under the *Indian Act* the Minister could grant interests in reserved lands without consulting the First Nation, when a land code has been put in place any interest holder granted an interest in the reserved lands of a First Nation must obey the laws set out by that First Nation. All of this is to say that a First Nation that has enacted a land code has a greater degree of control over its lands than a First Nation subject to the *Indian Act*.

However, a question can be raised regarding the substance of the interests that a First Nation can grant in reserved lands governed by a land code. While it is true that the *FNLMA* states that title to reserved lands remains unchanged because of the legislation,[131] some provisions seem to grant First Nations more power over their lands than is possible for a non-title-holding First Nation. For instance, what is the effectual meaning of s. 18(1)(a), which grants a First Nation the power to "exercise the powers, rights and privileges of an owner"[132] in relation to its reserved lands? There have been no reported cases in which the meaning of the section has been analyzed, so there is no judicial authority on the meaning of the section.

Under the Saskatchewan land titles system, the powers, rights, and privileges of an owner are such that the owner of the land can dispose of the land,[133] or can grant a charge in the form of a real property security interest on the land to an interest holder, such as a creditor in a loan obligation, who can then enforce upon and dispose of the land.[134] Is s. 18(1)(a) of the *FNLMA* intended to give a First Nation the same rights as an owner of land under the *LTA, 2000*? If that is not the intent of the provision, is it an unintended effect? Something that may render this possible, but unintended, effect meaningless is that while the *FNLMA* explicitly provides that certain sections of the *Indian Act* cease to apply when a First Nation has successfully brought a land code into force,[135] it does not state that the section of the

131 *Supra* note 7, s 5(a). This means that title to the land remains with the Crown. The effect of this is that the First Nation can only grant leasehold interests in its land. So, while the First Nation is able to be in a greater position of power vis-á-vis deciding who is able to get an interest in the reserve lands of the First Nation, the First Nation is still limited to granting leases, as was the case under the *Indian Act*.

132 *Ibid*, s 18(1)(a).

133 *LTA, 2000*, *supra* note 15, s 13; Cuming, *supra* note 14 at 8-33 to 8-36.

134 *LTA, 2000*, *ibid*, ss 52-54; Cuming, *ibid* at 7-1 to 7-5.

135 *FNMLA*, *supra* note 7, s 38(1).

Indian Act that denies enforcement against property on reserved lands[136] is one of the sections that ceases to apply.

Yet the *FNLMA* also states that the Act prevails in the event of any inconsistency or conflict between the *FNLMA* and any other federal law.[137] Consider a situation in which a First Nation has enacted a land code containing provisions that allow the members of the First Nation to grant a charge on reserved lands, and allows for those charges to be enforced upon in accordance with provincial debt enforcement legislation. Are those land code provisions valid? Paragraph 18(1)(a) grants the First Nation the legal capacity to exercise the powers, rights, and privileges of an owner, which must include the right to dispose of the land by allowing it to be enforced upon. Moreover, s. 20(3) provides that a land code enacted by a First Nation "may provide for enforcement measures, consistent with federal laws."[138] Subsection 15(1) of the *FNLMA* gives those land code provisions the force of law. A conflict arises in that those provisions would contradict s. 29 of the *Indian Act*, which prohibits reserved lands from being subject to enforcement measures under provincial debt enforcement regimes.[139] Section 37 of the *FNLMA* resolves this conflict by making the provisions of the *FNLMA* prevail over the provisions of the *Indian Act*.[140]

Hypothetically, then, it is possible under the *FNLMA* for a creditor to enforce against First Nations reserved lands, if the land code allows for such enforcement to take place. Any law that stands in the way of the creditor is made inapplicable by s. 37 of the *FNLMA*. If enforcement could take place in this manner, and be in accordance with the remedies outlined in s. 132 of the *LTA, 2000*, creditors would face less risk in providing secured financing to people and businesses on reserved lands. This would create the potential for access to financing in a way that is currently unavailable to many First Nations in Canada. The primary factor that motivates creditors entering a loan agreement is an assurance that the creditor will be able to receive its money back in one way or another.

IV. GOVERNMENT GUARANTEES FOR FIRST NATIONS LAND ARRANGEMENTS

Another factor to consider when analyzing the securitization of interests in reserved lands is guarantees by the federal government or its agencies. In some cases, the federal government has created funds

136 *Indian Act*, *supra* note 4, s 89.
137 *Supra* note 7, s 37.
138 *Ibid*, s 20(3).
139 *Supra* note 4, s 29.
140 *Supra* note 7, s 37.

that are specifically designed to address the fact that First Nations reserved lands cannot be directly used as security for a mortgage loan. Thus, government guarantees operate as an alternative source of security that creditors can look to in an attempt to reduce the risk involved when lending to First Nations band councils, First Nations people, or any other party interested in constructing or renovating houses, or constructions or renovations for commercial purposes.

A. FIRST NATIONS MARKET HOUSING FUND

One such fund is the First Nations Market Housing Fund ("FNMHF"),[141] a $300 million fund created by the federal government in 2007 to facilitate increased home ownership on reserved lands. The fund guarantees 10 per cent of the debt incurred by way of a mortgage loan. To access the fund, a First Nation must meet criteria that include a certain degree of fiscal management,[142] good governance,[143] and community demand for housing.[144] As well, the First Nation must provide assistance to its members by helping them to obtain mortgage loans, and the First Nation itself must provide a guarantee on the mortgage loans obtained by its members.[145] When a First Nation meets the criteria, the FNMHF provides credit enhancement guarantees to the loans secured by the First Nations members. The credit enhancement guarantees have a maximum value of 10 per cent of the principal value of the housing loan secured by the mortgage charge.[146] The creditor can access the fund if the debtor defaults on the mortgage loan obligation and if the First Nation fails to honour its guarantee by remedying the default of the First Nations debtor. The FNMHF will then provide the lender with a maximum of 10 per cent of the value of the loan obligation that is in arrears.[147]

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141 For more information on the fund, see First Nations Market Housing Fund, online: <http://www.fnmhf.ca>, archived: <https://perma.cc/6DVK-A7HY>.

142 For instance, the First Nation must have evidence of audited financial statements, qualified and/or certified individuals responsible for financial and loan management, a history of debt repayment, and financial flexibility (First Nations Market Housing Fund, "FNMHF Elements: Access Criteria" (2017), online: <http://www.fnmhf.ca/english/elements/access_criteria.html>, archived: <https://perma.cc/6J6U-SMUF>).

143 This can take the form of the development and approval of a housing policy, demonstrated implementation of effective housing management, and security of land tenure (*ibid*).

144 *Ibid*.

145 First Nations Market Housing Fund, "FNMHF Elements: Credit Enhancement" (2017), online: <http://www.fnmhf.ca/english/elements/credit.html>, archived: <https://perma.cc/DD86-VFFT>.

146 *Ibid*.

147 *Ibid*.

B. MINISTERIAL LOAN GUARANTEES

The Government of Canada directly supports mortgage financing of real property on reserved lands through the provision of Ministerial loan guarantees.[148] These guarantees are provided by the Department of Indigenous and Northern Affairs Canada, where the government is the guarantor of the loan obligation secured by a mortgage in reserved lands. The guarantee provides the creditor an alternative source of security if the First Nations debtor defaults on the loan obligation. As of October 28, 2015, the Department of Indigenous and Northern Affairs had provided guarantees on loan obligations that value $2.2 billion.[149] In order to obtain a Ministerial loan guarantee, a First Nations band council must make a submission in writing to the Minister affirming that the loan will provide housing or housing improvements for First Nations peoples on reserved lands, that an environmental assessment has been carried out on the property that will be subject to the mortgage charge, and that the First Nations band council consents to the expenditure of the band's revenues for the purpose of reimbursing the fund for payments made under the Ministerial loan guarantee program.[150] As well, the First Nations band council must confirm in writing that it is satisfied with the reputation and financial responsibility of the individual for whom the loan is being obtained, that the First Nation will be liable for repayment of the loan paid out by the Minister, and that the individual receiving the loan has provided written consent that they will initiate the transfer of any certificate of possession or occupation or any other documentation held by the individual and will vacate the property upon default.[151]

Importantly, Ministerial loan guarantees are not provided to First Nations that have entered into a land designation with the Crown. The official government position for this is that s. 89(1) of the *Indian Act* does not apply to leasehold interests on designated reserved lands.[152] Consequently, there is "no risk"[153] to lenders who provide financing where the collateral securing the loan obligation is a lease

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148 Indigenous and Northern Affairs Canada, "Ministerial Loan Guarantees", online: <https://www.aadnc-aandc.gc.ca/eng/1100100010759/1100100010763>, archived: <https://perma.cc/33CC-YQT8>.

149 *Ibid*.

150 Aboriginal Affairs and Northern Development Canada, *Ministerial Loan Guarantee Manual*, (Gatineau, Que: AANDC, 2011) at Part 4.1, online: <https://www.aadnc-aandc.gc.ca/eng/1322577517724/1322577612503>, archived: <https://perma.cc/6DUK-TLEZ>.

151 *Ibid* at Appendix E – Ministerial Loan Guarantee Terms and Conditions.

152 *Ibid* at Part 1.3.

153 *Ibid*.

on designated land. As well, Ministerial loan guarantees are only available for loans obtained to construct, renovate, or acquire housing on reserved lands.[154] They are not available for development that has a commercial purpose.

C. CANADA MORTGAGE AND HOUSING CORPORATION INSURANCE

The *Bank Act*[155] requires that any mortgage securing a loan, the value of which exceeds 80 per cent of the value of the property at the time of the loan, must be backed by loan insurance.[156] The clear majority of mortgages on non-reserved lands obtain this insurance from the Canada Mortgage and Housing Corporation ("CMHC"). If certain criteria are met, the CMHC will also provide housing loan insurance for mortgage charges secured by an interest in reserved land. For CHMC insurance to cover mortgages on reserved land, the loan must be one which meets one of three criteria outlined by the CMHC.[157] Two of these conditions are met if the mortgage has been guaranteed by one of the two guarantees described above: a Ministerial loan guarantee, or if the creditor of the loan can access the FNMHF. A distinct criterion exists for reserved land that has been designated to the Crown. If the First Nations debtor can provide a minimum 10 per cent down payment on the value of the property at the time that the loan is given, and the debtor can demonstrate that the down payment has been saved over a period or is the result of a sale of another property, then the CMHC will insure up to 90 per cent of the value of a loan secured by the mortgage charge.

D. EFFECT OF GUARANTEES AND CMHC INSURANCE

In effect, it is possible that the First Nations debtor will not be liable for the debt if they default on the loan obligation. Because a mortgage charge secured by an interest in reserved land can either be backed by a guarantee or by CMHC insurance, it is also possible that no enforcement measures need to be taken by the secured creditor who has provided the financing. If the loan is secured by a lease on land that was designated by the First Nation to the Crown, the mortgagee is able to access the value of principal amount owing[158] from the CMHC

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154 *Ibid*.

155 SC 1991, c 46.

156 *Ibid*, ss 418(1), 418(2)(b).

157 Canada Mortgage and Housing Corporation, "CMHC Loan Insurance On-Reserve" (2010), online: <https://www.cmhc-schl.gc.ca/en/first-nation/financial-assistance/upload/loan-insurance-first-nation.pdf>, archived: <https://perma.cc/JY95-5KUN>.

158 Up to 90%, including the down payment, would cover any principal amount owing.

if default occurs. If the loan was secured by a certificate of possession or occupation, then the First Nations debtor can avail themselves of either a Ministerial loan guarantee, the credit enhancement measures provided by the FNMHF, or both. In that case, if the debtor defaults on the mortgage obligation, the creditor need only look to the guarantors to recover the amount that is in arrears.

It is possible, therefore, that the issue of whether the creditor can begin an action for foreclosure or judicial sale, exercise the right of distress, or appoint a receiver to recover the mortgage debt owed by a defaulting First Nations debtor, simply will not arise. Rather than creating a modernized system within which people or businesses located on First Nations reserved lands can use those lands as security for loan obligations, the response of the federal government to the inability of First Nations peoples under the *Indian Act* to enter secured financing arrangements has been piecemeal. It involves many layers of approvals, consents, and guarantees. The effect is that any such arrangement is unnecessarily complex, causing creditors to be hesitant to advance funding where it is needed the most.

E. DEPENDENCE ON GOVERNMENT GUARANTEES

It is important that First Nations should eventually become independent actors in the financial market that do not require guarantees by the federal government. An argument in favour of this independence is that each of the aforementioned forms of governmental guarantee is capped at a particular value. Since the federal government can only provide a set number of guarantees, this limits the extent that First Nations can access secured financing, even with government support. If a First Nation is dependent on a governmental guarantee to access secured financing transactions, then the credit extended to a First Nation is limited by the sum that the government is willing to provide in guarantees. Currently, First Nations that depend on governmental guarantees to access financing only do so because they are limited in the types of interests that they may grant in their land. A fair system would be one in which First Nations can freely access secured financing without requiring guarantees by the federal government.

V. CONCLUSION

The negative effects imposed on First Nations people and businesses located on reserved lands by the legal frameworks that govern the use of reserved lands as collateral are two-fold. One is that those frameworks inhibit First Nations from obtaining capital through secured financing transactions and hobble opportunities to create economic growth. The other is that the frameworks limit First Nations' ability to build quality housing. The evolution of law applicable to

First Nations reserved lands ought to continue, with an improved focus on removing the barriers that keep First Nations people and business from having valuable access to secured credit. Whatever structure a future legal framework takes, it ought to ensure that people and businesses located on reserved lands are not limited in their attempts to access secured credit. It also ought to safeguard First Nations reserved lands by ensuring that they remain an area over which a First Nation maintains a degree of sovereignty. This latter point is particularly salient when changes to the legal frameworks are considered in the context of the calls to action on reconciliation in Canada. Part of reconciliation will involve bringing together the legal frameworks regulating secured financing of real property and the interests of First Nations with regard to reserved lands. Likewise, the goals of reconciliation will be furthered when First Nations no longer face legal impediments to gaining economic independence while maintaining jurisdiction over their lands.

A solution must be found in which First Nations enjoy the fiscal benefits of using land as collateral in loan obligations and have the land retain its character. The objective should be to not continue with a system that forces First Nations that wish to allow people and businesses located on reserved lands to access the benefits of secured financing to navigate an unnecessarily complex system. Rather, a refined legislative framework should provide for a system that allows First Nations to take advantage of secured financing efficiently and with certainty while allowing the reserved lands to retain their character. Enhancing access to credit for First Nations people and businesses will not only further the goals of reconciliation, but can help to improve housing conditions, support economic development, and contribute to reducing poverty.