

CLEARING THE PATH

FIRST NATIONS TAX COMMISSION

SPECIAL EDITION

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First Nation Property Ownership Initiative

The First Nations Tax Commission is leading an initiative which will allow First Nations to own their property. This special edition of Clearing the Path discusses the First Nation Property Ownership Initiative (FNPOI).

An Interview with C.T. (Manny) Jules about FNPOI



Chief Commissioner C.T. (Manny) Jules has been a tireless advocate for advancing First Nation jurisdiction. Throughout his career he has been outspoken about First Nations' ownership of their lands and has now turned his attention to providing a new legal basis for First Nation property ownership.

on these lands. The property ownership concept is inspired by the work of the Nisga'a Nation. Because the Nisga'a secured permanent ownership they created their own land title system. In November 2009, the world changed - the Nisga'a issued fee simple title to their members on a portion of their lands.

This creation of title instantly provided security, home equity, wealth and business opportunities for their members.

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Clearing the Path (CTP): In 1988, you led an historic amendment to the Indian Act making it possible for First Nations to assume tax jurisdiction and in 2005 you led an initiative to create the FSMA. You are now leading FNPOI. Can you explain why you are leading this initiative?

Ten years ago the Nisga'a signed a treaty which created the concept of Nisga'a lands that would remain so no matter who resided

International Perspectives

The First Nation Property Ownership Initiative (FNPOI) is well supported by experts. Since 1990, the World Bank has approved 103 projects in developing countries where the primary goal was classified as the improvement of personal property rights. This is the same goal as FNPOI. It is no coincidence that two of the most recognized property right experts in the world have pledged their personal support to FNPOI.

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I believe the Nisga'a option should be available for any First Nation that so chooses. I believe that this can be accomplished by mirroring their excellent work. It will require, however, federal legislation and possible provincial agreement or even legislation. That is why I am seeking support for this initiative.

CTP: Why is there a need to deal with property ownership?

I am supporting this initiative for a number of reasons:

We have land but it is undervalued. This initiative will allow us to provide our members with the ability to own their property. This will create wealth and opportunities for individuals. It will help our youth realize their potential and it will bring us into the market economy. First Nation property ownership will formally bring our governments into the Canadian federation by recognizing our underlying title and allowing us access to the same 21st century property rights as other Canadians.

The *Indian Act* reserve system substantially reduces land value and promotes low value land use. It prevents us from accessing the equity in our lands, raises our costs of doing business and discourages investment. I know from experience how hard it is to build an economy on reserve land. In Kamloops, we have to be able to compete for business with other governments but our form of land tenure holds us back. This approach to land ownership will allow us to obtain the full value and benefit of our lands by attracting investment. We need to make maximum use of the current expansion of the reserve land base that is taking place through the settlement of land claims and treaty land entitlements.

In 1968 my dad, Chief Clarence Jules, told

the government that to be successful we need to be able to do land transactions "at the speed of business". Here we are forty years later and we still haven't dealt with the issue. This approach will replace outdated and insufficient band council powers over reserve land under the *Indian Act* with new law making powers so that we will be enabled to effectively govern, manage and control development of our reserve lands, regardless of who holds fee simple title.

CTP: How does this mesh with the work of the First Nations Tax Commission?

Property ownership is central to economic development for First Nations. I have been working on the issue of property rights certainty for the last 35 years. I was inspired by my father who summed up the plight of our community when he said in 1968 that "we don't even own our own land."

Without property rights certainty we cannot compete for the type of business and investment that we need to be part of the economy. Our lack of property rights has meant that our lands have lower market values and we have to spend a great deal of time and money establishing investor certainty. It has meant that our ability to grow our tax bases has been limited.

The purposes of the Tax Commission include growing First Nation economies and expanding their potential to raise local revenues. Creating certainty about individual property ownership and our governments' jurisdictions through this initiative serves these purposes. My goal in this initiative is to create a Torrens registry system for First Nations that would serve First Nations and significantly enhance the administration, management and enforcement of the First Nation property tax system.

CTP: A growing number of First Nations have achieved economic success within the Indian Act reserve land system, combined with the recent “work around” legislation. Why is this not sufficient?

The “work around” approach you describe isn’t really getting us where we want to be. We need to deal with the issue directly. Yes, there are communities where, because of location, demand overcomes the inadequacy of the system. In some cases, values can be raised but most of our population remains in poverty because they cannot convert their asset (land) into capital (value).

The need for clarity and security of property rights is fundamental. There are a number of reasons why the *Indian Act* reserve system should not be the sole available foundation for the future of economic development on reserve land. First of all, First Nations wishing to take possession of the title to their reserve lands should be able to do so. First Nations wishing to give individuals fee simple title to their own homes and real property should be able to do so.

Second, the current lack of private property rights promotes an extraordinary dependence on Band Council management and entrepreneurship to develop community assets. Private property rights, on the other hand, support individual entrepreneurship, broadening the base of economic activity and enabling individuals to make an end to their own poverty without depending on the Band Council. There can be no long term solution to the housing problem on reserves without the use of private home ownership to facilitate financing and the development of personal home equity.

Third, we are faced with building an economy that is dependent on leasehold tenure. Few high quality large scale developments are

being built on the basis of relatively short term leases (less than 50 years). Long term tenure is essential when significant investments are being made. Leases complicate acquisition of interests in land as well as financing. Banks and other lenders require legal review of documents, which substantially raises transaction costs and, in their minds, risks. This convoluted approach to securing tenure greatly limits investment. And, even after a lease is signed, it is complex to manage with potential future conflicts and challenges, leading to a loss of value. Long term leases raise underlying questions of de facto alienation. Yet, under the current *Indian Act* system (including recent legislation), leasehold development is the sole option.

CTP: Doesn’t the Indian Lands Registry secure the interest of leasehold tenants and protect the land title for First Nations, their members and investors?

The Indian Lands Registry is a simple repository of information on property interests in reserve lands. It is difficult to access and it is incomplete. It is not underpinned by a well developed legislative base. It provides no legal certainty as to title. There are no priorities of interests allowed for. Developers use the Registry at their own risk. Persons involved in transactions relying on the Registry must review all the historical documents in order to get a degree of certainty which, at the end of the day, still has a measure of risk. Compare this with the proposal where a simple search of the registered title would be all that is required to obtain absolute certainty that title is clear. First Nation developments face the highest transaction costs in the country. Despite the benefits of recent legislative reforms, the costs of doing business on reserve land remain many times higher than off reserve.

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The Economic Impact of FNPOI

FNPOI will raise real estate values. It will create employment. It will lead to more housing. It will raise tax revenues. It will build infrastructure and it will reduce costs associated with First Nation poverty such as social assistance and health care.

To estimate the economic impacts of FNPOI consider the following illustration. It shows development near a First Nation compared to the lack of development on a First Nation. The reasons for lack of development on reserves are mainly a lack of competitive infrastructure, governance systems that do not support investment and inadequate property rights.

The FNTC is working to reduce all these barriers to development on First Nation lands. The *First Nations Fiscal and Statistical Management Act* provides access to the financing tools for infrastructure. The Tulo Centre of Indigenous Economics Certificate in Applied Economics teaches interested First Nations how to establish investor ready governance systems. FNPOI would help address the inadequate property rights element of these barriers.



The methodology for estimating the economic impacts from FNPOI assumes that First Nations will adopt FNPOI and more investor friendly governance systems over the next 15 years. It is assumed that during this time First Nation lands will approach the current level of development of the adjacent non-First Nation lands. To provide a benchmark, it is assumed that 20% of First Nation lands will be developed in the absence of FNPOI and that FNPOI will generate 40% more development during the next 15 years.

The estimates presented in the table represent the total benefits for 68 First Nations in BC at the end of this fifteen year period. The last column explains why these estimates should be considered conservative.

Estimated Benefits (over 15 years)

Benefit	Quantified	Conservative Assumption
Increase in Real Estate Values	\$3.8 billion	Estimate only applies to 68 First Nations in BC – This estimate has not been extrapolated for whole country. In many cases (when First Nation reserves are more than 2 km away from an incorporated jurisdiction) it was assumed that the level of development will approach the current low levels of development in regional districts as opposed to higher development levels in nearby municipalities.
New Employment 27,000 FTEs	\$410 million	This only includes direct construction and commercial jobs. It does not include the substantial indirect employment created. Only 40% of First Nation lands in sample will be developed to comparable current regional standards.
Increase in Residential Housing	2,750 units	The trend to higher density residential developments is not considered. For example, it is known that just one of the First Nations in this sample is proposing a 2000 unit development over the next 10 years.
Increase in Property Tax and Sales Revenues	\$242 million	Average current tax rates are used and over 70% of the 68 First Nations in the sample are from rural areas of BC. This leads to a conservative estimate for two reasons: 1) property tax rates are lower in rural areas, and 2) the development potential of urban areas is much higher. The sales tax estimate used the simplified FNGST estimation method (population based). The detailed estimation method (revenue based) would produce much higher results where commercial development occurs. Other sales taxes are not included.
Increase in Infrastructure	\$156 million	This is based on financing infrastructure only with property taxes at the end of the fifteen years and not the infrastructure that could be financed by all sources of revenues.
Reduced cost of poverty	\$1.1 billion	This estimate is limited to the reduction in poverty only in these sample communities and other First Nation individuals outside of these communities would certainly benefit from development in the sample communities. The number of jobs created is significantly greater than the number of individuals impacted by poverty in the sample communities.
TOTAL	\$5.7 billion	

In summary, FNPOI represents an incredible economic opportunity for every First Nation, especially those adding lands through land claims, treaties, and treaty land entitlements.

Interview

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Replacing the Indian Lands Registry is a major step to addressing this disparity. These costs are substantially reduced by this initiative for several reasons: Torrens title systems are easier to search and much more secure; First Nation government charges and other liens and interests would be identifiable; a First Nation Torrens system can be easily linked to real estate and tax assessment data bases, making it much easier to establish property values; and it is much easier to negotiate financing based on fee simple title, clarity of seizure procedures, and linkage with other related legislation.

Consider that it takes an average of 1 to 2 days for registration of a mortgage in BC compared to 180 days to complete an equivalent registration under the Indian Lands Registry. A recent study found 23 points of transaction costs which would be reduced by a shift to this proposal.

CTP: Some will say that despite all its flaws, the Indian Act reserve system has preserved a land base for First Nation communities. By permitting individual ownership and even the possibility of sale of parcels of reserve land to non-First Nation parties, will FNPOI not lead, inevitably, to the erosion of the reserve land base? What do you say to this view?

I am not advocating the erosion of First Nations jurisdiction over its land. I am talking about strengthening our title by giving First Nations the right to own their own land. This is a critical question and I want to take the time to go through this so there is no misunderstanding:

As a result of this proposal we would maintain our governance over the land and retain the power to make laws related to the use of our land regardless of who is resident, including the power to tax any interest in the land. Through the exercise of permanent and extensive jurisdiction we will continue to obtain the benefit of the land and the land will continue to serve as the basis for the evolution of our community and culture.

We would address the permanence of reversionary interest in the event that individual reserve land holders, whether First Nation persons or not, die intestate and without heirs, title to that land would revert to the First Nation. Reversionary rights could also be exercised through enforcement of First Nation taxation powers.

First Nations will obtain clearly defined powers of expropriation for public purposes as is common to all other governments in Canada. The courts will be available to ensure that expropriation powers are used properly.

Similar protections in democratic process terms would be used as are used today to protect *Indian Act* reserve land. Before First Nations could use this proposal the consent of a majority of members would also be required.

First Nations would also need to have the option of establishing special protections of their own design, such as setting aside certain lands to remain inalienable, or limiting the sale of certain lands to First Nation members, etc.

CTP: How does the FNPOI system of land tenure compare with leasehold tenure, certificates of possession and the impact of the loss of entitlement to heirs?

When we look at leasehold transfers there are many long term leasehold developments

on reserve land today, such as major commercial, industrial and residential developments. In substance these represent a transfer of reserve land into non-First Nation hands. The benefit of the use of the lands flows to our communities through the lease (often paid up-front), through property taxation and, in some cases, through land management authority. In other words, the risk of erosion of the reserve land base already exists and is considered to be acceptable due to the ongoing indirect benefits from the land that continue to flow to the First Nation.

Certificates of possession create a limited type of private ownership. Much *Indian Act* reserve land has already been converted from communal ownership to Certificates of Possession (CPs) or similar instruments (there are approx. 50,000 CPs registered). The transition from communal possession to private possession is, therefore, already well advanced. However, under the *Indian Act* system, the benefits of private possession are severely restricted. Thus, while the community has lost the direct use and benefit of the land and retains only indirect benefits, the individual CP holder has not obtained the full value of the land in his or her possession.

Our future is with our children and I am concerned about the current system which can lead to a loss of entitlements to our heirs. There is a complicated formula for determining legal status as an Indian. As a result of this formula, it is possible, through marriage, for a First Nation member's heirs to become non-status. In the current system, this means that they could not legally bequeath their certificate of possession to their children. This proposal would address this failing and ensure that our children have access to the same wealth creation cycle that other Canadians take for granted and the long term survival of our communities.

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FNPOI Leads to Higher Property Values

The First Nation Property Ownership Initiative will significantly raise property values on First Nation lands. Here are two examples:

1. In 1996, it cost \$8000 an acre to purchase land at Sun Rivers on the Kamloops Indian reserve. Today, because Sun Rivers has secure 99 year property rights, quality infrastructure and excellent local services that same acre costs about \$540,000. Secure property rights helped to raise these property values by over 6700% in 13 years.
2. In 1990, it cost \$10,000 per acre to purchase land along Highway 97 of the Westbank First Nation. Today, as a result of secure property rights created through self government legislation, that same acre of land costs about \$750,000 or an increase of 7500% in 19 years.

It took Sun Rivers 4 years to develop the necessary legal and administrative framework. In Westbank, it took 15 years of negotiations. The cost of both of these processes is estimated at close to \$10 million.

Even if 10% of all First Nations started working on the Kamloops and Westbank solutions today, using current tools, and a further 10% joined every 3 years, it would take 50 years and cost over one billion dollars for all First Nations to create secure property rights.

FNPOI will save First Nations, the federal government, and investors hundreds of millions of dollars in development costs and time. Moreover, it will create a Torrens land title registry system which will reduce the transaction costs associated with the current Indian Land Registry by a factor of 45. These reduced transaction costs coupled with the potential for guaranteed property ownership will mean that First Nation property values, whether they are rural or urban, should be the same as the adjacent non-First Nation lands.

International Perspectives

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Terry Anderson is the co-author of The Not So Wild, Wild West: Property Rights on the Frontier and the Executive Director of the Political Economy Research Center in Bozeman, Montana. He

is widely recognized as the leading expert on Native American property rights. Mr. Anderson wrote the following in the Wall Street Journal: "The effect of insecure property rights is evident on a drive through any western reservation. When you see 160 acres overgrazed and a house unfit for occupancy, you can be sure the title to the land is held by the federal government bureaucracy. In contrast, when you see irrigated land in cultivation with farm implements, a barn, and well-kept house, you can be sure the land is held in fee simple, whether by an Indian or non-Indian." Mr. Anderson pledged his support to FNPOI in February 2009.



Hernando de Soto is the author of The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else and the President of The Institute for Liberty and Democracy (ILD) in

Lima, Peru. The ILD was named the second most influential think tank in the world by the Economist magazine and Bill Clinton called Hernando de Soto the world's greatest living economist. On June 1, 2009, Mr. de Soto compared dead capital in developing countries to the situation on First Nations reserves in Canada. "You don't have to travel to Zambia or Peru to see dead capital. Go see your own Indian reserves. That's dead capital. You've got people there who own a whole bunch of things, but they can't convert these assets to capital. These assets are frozen into an *Indian Act* of the 1870s." In July 2009, the ILD signed an memorandum of understanding with the FNTC to support the development of FNPOI.

CTP: What are the implications for the existing Indian Lands Registry by creating a new Torrens registry?

FNPOI would establish the legal basis for a First Nation Torrens registry system. In the Torrens system, registered title is legally guaranteed, accompanied by an up to date survey, and fraudulent activities are settled through the use of an assurance fund. This new system would permit the migration, over time, of reserve land from the Indian Lands Registry to the new Torrens registry.

CTP: What are the next steps?

I am currently seeking interested First Nation communities and individuals to support this initiative. This is the approach I have used for all the past initiatives I have led.

As a first step, we have developed a concept paper on the subject which I will be releasing on March 17th. Second, we will seek support for the concept. Third, we will combine the support and concept with operational requirements and develop some legislative options. Then we will work with Canada to develop the legislative changes to implement this option for interested communities.

You can read more about our proposal at our FNPOI website at www.FNPO.ca. I would also be pleased to make presentations to any community that is interested.



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