A Path Forward?

Community Perspectives on the First Nations Land Management Regime in the Context of Renewable Energy Planning

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ABSTRACT

The First Nations Land Management Regime ("FNLMR") allows communities to develop a Land Code establishing local law-making powers for a variety of land use planning and environmental matters. The FNLMR draws authority from the *Framework Agreement on First Nations Land Management* signed between the Federal Government and various First Nations. The *Framework Agreement* was ratified under the federal *First Nations Land Management Act.* This paper seeks to answer two questions: (1) What are the purposes of enacting an FNLMR Land Code from the First Nation perspective? and (2) Do the benefits of Land Codes to communities outweigh the negative impacts, with respect to self-government, economic development, and energy independence?

Analysis will draw on a literature review and case studies of three communities who have an FNLMR Land Code and have used it for developing renewable energy projects. The literature reviewed regards the FNLMR and similar bilateral governance agreements from the perspectives of (1) Indigenous Legal Rights (2) Commercialism (3) Resurgentism and (4) Energy Planning. The case study included the participation of M'Chigeeng First Nation, T'Sou-ke First Nation and Henvey Inlet First Nation. All three provided interviews via a representative who was involved in the development of the Land Code and renewable energy project.

Results indicate that participant communities developed Land Codes for a variety of reasons, but, most significantly, to achieve stronger local governance and independence from the Federal Government. Communities were unanimous that the FNLMR helped to achieve that as well as other objectives. They were also unanimous that the positive implications of FNLMR vastly outweighed the negatives. This gives reason to conclude that the FNLMR can be an effective way of strengthening local governance on First Nations and filling regulatory gaps that exist on reserve.

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Foreword

This major research paper was part of my Plan of Study ("**POS**") for the Masters of Environmental Studies at York University. My POS's Area of Concentration was 'Indigenous Governance over Resource Planning'. Learning objectives under this POS were initially divided into three main categories: (1) human ecology, (2) reconciliation, (3) land use planning. Each of these categories had three learning objectives, which together informed the majority of my course selection and summer work opportunities during my four-year JD/MES program.

This major research paper was designed to fit all nine of the learning objectives under these three categories. It connected to Human Ecology by investigating the environmental motivations and results of communities who created Land Codes. It connected to Reconciliation by looking at how governance agreements like the FNLMR can potentially reconcile tensions in relationships between Indigenous and state governments. In the course of study, I gained a much better appreciation for how loaded a term 'reconciliation' is, and for the significance of self-government and sovereignty on a community level. The paper connected to land-use planning because FNLMR Land Codes encompass a vast array of land-use planning powers including zoning, property rights regimes, expropriation, public works creation, resource royalties and environmental assessment.

PART I: INTRODUCTION

Across Canada, Indigenous governance is being re-asserted over lands and resources. In the wake of the oppressive and homogenizing *Indian Act* regime, Indigenous communities diverse in culture, history, geography, and economics are finding distinctive ways to manage their territories, balancing their traditions with their modern contexts. At the intersection of self-government, commerce and natural resource management is the issue of energy production. For some communities, planning for local energy independence and security has been incidental to the broader pursuit of self-governance.

The First Nations Land Management Regime ("**FNLMR**") has been touted as one such route towards self-government and energy development. The FNLMR stems from a 1996 bilateral *Framework Agreement* ("**FA**") between the Federal Government's Indigenous and Northern Affairs Canada ("**INAC**") and fourteen First Nations. The FA allows First Nations to draft their own unique Land Codes, with INAC approval, exempt themselves from over 30 sections of the *Indian Act* related to land management. These Land Codes only apply to reserve lands and not to traditional Indigenous territories more broadly.

This transfer of legislative and bureaucratic authority seems, by definition, a means of expanding local governance; however, in the shadow of colonial history, there are potential concerns for communities in the implementation of the FNLMR. For instance, the transfer of power involves a lot of oversight, strict timelines and conditional approvals from INAC. Furthermore, the FNLMR process may benefit INAC more than it does communities through a transfer of liability and reduction in long-term government expenditure. This all raises the

question: is it a process that is beneficial for communities or is it a continuation of one-sided, top-down colonial policy?

Scholarship is polarized on the FNLMR and other governance agreements. Some see in these agreements the perpetual abrogation of Indigenous sovereignty by colonial legal orders and capitalist hegemony. Others see the opposite: a chance to assert inherent rights to self-government or to participate more fluidly in Canada's commercial economy. Because Indigenous self-government processes, and accordingly the FNLMR, have such pivotal implications and such indefinite parameters, there is arguably a tendency for scholars to project their own ideological objectives and agendas into the ambiguity.

Considering the wide-ranging academic perspectives, this paper seeks a First Nations community perspective on FNLMR. With over 600 First Nations across Canada, the 'community perspective' is extremely diverse and cannot be homogenized. Given the limited scope of this study, I have conducted a case study of three participant First Nations to investigate the potential benefits and concerns of the FNLMR from their point of view. Participants include: M'Chigeeng First Nation, Henvey Inlet First Nation and T'Sou-ke First Nation. These communities were selected based both on their participation in the FNLMR process and their use of the FNLMR to facilitate local energy generation projects.

The central questions that this paper sought to answer are as follows:

1. What are the purposes of enacting an FNLMR Land Code from the First Nation perspective?

2. Do the benefits of Land Codes to communities outweigh the negative impacts, with respect to self-government, economic development, and energy independence?

The paper has four main parts:

1. **Part II: Background** on Indigenous Land Management, the *Indian Act* and the FNLMR,
2. **Part III: Literature Review** of scholarship on self-government in general and on the FNLMR in particular,
3. **Part IV: Inquiry** in the form of a case study of three participant First Nations who have entered the FNLMR process to facilitate renewable energy projects.
4. **Part V: Discussion** of community responses and their relation to the academic commentary

PART II: BACKGROUND

1) HISTORY OF INDIGENOUS LAND MANAGEMENT

From pre-contact Indigenous societies to the present colonial era, Indigenous people have been managing their own lands and resources. Early British colonizers explicitly recognized Indigenous sovereignty over lands and engaged in nation-to-nation treaty-making during their expansion. Even under the hegemony of colonization, residential schools and the *Indian Act*, traditional land use and management has continued in many Indigenous communities. To properly appreciate the significance of the FNLMR, it is important to understand that self-government it is not merely about dismantling of the *Indian Act*; it is about reclaiming the state of self-determination that predated colonization.

a) From Time Immemorial to British Assertions of Sovereignty

Indigenous people have subsisted from the land now known as Canada since time immemorial. In fact, according to many Indigenous spiritual traditions, occupation of Canada began at creation. From the Gitksan and Saalish of the west coast, to the Athapaskan and Inuit of the north, to the Anishinaabe and Iroquois of the East, Indigenous creation stories often tell of humans originating from the land, sea or sky itself.[1] Archaeological evidence shows that humans were present in the Americas at least 17 000 years ago, and perhaps even 50 000 years ago, or more.[2] However long ago Indigenous presence in Canada began, it is not

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[1] Olive Dickason and William Newbigging, *A Concise History of Canada's First Nations,* 2nd Edition. (Toronto: Oxford University Press, 2010) at 1 print.

[2] Dickason, *supra* note 1, at 1.

disputed that the land itself has been the foundation of Indigenous culture and subsistence ever since.[3]

Living off the land continued after European colonists first arrived in Canada in the 16th Century with the voyages of Jacques Cartier and, later, Samuel de Champlain. Champlain interacted primarily with Mi'kmaq, Iroquoian and Algonquian people along the St Lawrence and Ottawa Rivers.[4] His earliest accounts, as corroborated by local oral traditions, describe Indigenous people as having intimate familiarity with the land around them. In fact, the colonial fur trade which would span the following centuries was wholly dependant on the guidance of Indigenous land knowledge and the products of Indigenous natural resource economies.[5]

For the next two centuries, the fur trade shaped the character of Indigenous-settler relations as did violence between the British and French colonies. The two nations vied for control over Eastern Canada, either allying, warring or trading with varieties of Indigenous groups.[6] The French were finally defeated by the English in the Seven Years War fought between 1756 and 1763 which left the British occupation of Canada uncontested by other European forces.

British dominion, however, was contested at the time by Indigenous people. Ojibwa chief Minweweh was quoted at the end of the Seven Years War as saying:

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3 John Borrows, *Crown and Aboriginal Occupations of land: a history & comparison.* (Toronto: Ipperwash Inquiry, 2008) at 3 electronic.

4 Dickason, *supra* note 1, at 44-47.

5 John Borrows, "Indigenous Legal Traditions in Canada" (2006) 19 *Wash U JL & Pol'y* 167. at 180; Arthur J. Ray and Donald B. Freeman, *'Give Us Good Measure': An Economic Analysis of Relations between the Indians and the Hudson's Bay Company before 1763* (Toronto: University of Toronto Press, 1978).

6 Dickason, *supra* note 1, at 104.

"Although you have conquered the French, you have not conquered us. We are not your slaves. These lakes, these woods and mountains were left us by our ancestors. They are our inheritance, and we will part with them to none."[7]

Aware of Indigenous resistance to colonization, Britain acknowledged Indigenous territorial rights when they first asserted their sovereignty in the *Royal Proclamation of 1763*. Though the *Royal Proclamation* laid claim to much of what is now Southeastern Ontario and Southern Quebec, it also delineated 'Indian Territory' across the remainder of the country. The *Proclamation* declared that 'Indian' territorial rights could only be extinguished by explicit consensual surrender and accordingly laid out a detailed protocol for making treaties. The Royal Proclamation's acknowledgement of inherent Indigenous rights to lands has persisted into to present law, embedded in the *Charter of Rights and Freedoms*, section 25 (a).[8]

The *Royal Proclamation* was immediately followed by the *Treaty of Niagara*,[9] which contemplated a nation-to-nation relationship between Indigenous and colonial governments. This agreement is recalled in Indigenous oral history by the *'Two-Row Wampum'*. The *Two Row Wampum* contemplates the relationship between Britain and Indigenous peoples as being two nations moving into the future alongside each other in two equal but separate paths.[10]

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7 John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 *UBC L Rev* 1 at 12.
8 *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 25(a)
9 Borrows, *supra* note 7.
10 *Ibid.*

Treaty-making throughout the ensuing century-and-a-half adhered to the protocol found in the *Royal Proclamation.* The very fact that Britain engaged in this treaty process further reflected Britain's acknowledgement of Indian sovereignty.[11]

b) The 19th and 20th Centuries: Treaties, Genocide and the Indian Act

In the 19th and 20th Century, Britain's colonial expansion became more aggressive. As they spread, they seized control over Indigenous lands, resources, rights and identities in what culminated in cultural genocide.

Throughout the 18th century, Britain's explicitly-stated priority was to expand their colonial territory. At that time, most of what is now Canada was 'Indian' land, according to the parameters of the *Royal Proclamation,* or Rupert's Land owned by the Hudson's Bay Company. The primary means of expansion, therefore, was acquiring rights from HBC or the 'Indians' and accordingly, the primary mandate of their 'Indian' Administration was to acquire land and resources by signing treaties over vast reaches of land with Indigenous regional leaders.[12]

This form of treaty-making continued through the 19th century and beyond confederation up to the present day, resulting in an mass extinguishment of Indigenous land rights. Though these treaties set aside 'reserve' lands for exclusive Indigenous occupation and protected subsistence rights such as hunting and fishing, they had clauses allowing the

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[11] Borrows, *supra* note 7.
[12] Dickason, *supra* note 1, 165.

Crown to 'take up lands' from 'time to time'. These clauses typically looked something like the following, taken from *Treaty 3:*

> *"… they, the said Indians, shall have the right to pursue their avocations of hunting and fishing throughout the said tract surrendered and herein before described… saving and excepting said tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof, duly authorized therefore by the said Government."*[13]

These treaties did not define the scale of the 'tracts', nor the frequency of 'from time to time'. They provided any other procedures or safeguards for exercising this Crown power. It quickly became apparent that Indigenous people and colonial powers had very different interpretations of what these treaties meant. Indigenous people saw it as a holistic relationship-based agreement to share land harmoniously and consensually, in the spirit of the *Two-row Wampum* and the *Treaty of Niagara*. Colonial powers, meanwhile, treated the broad language as a 'blank cheque' to use and occupy land as they saw fit. Over 19th and 20th centuries, as settlement and resource extraction intensified, these treaties were used by the Crown to maximize their rights to lands and resources while diminishing those Indigenous rights to their bare minimum: reserve land occupation and subsistence harvesting.[14]

But the British did not stop at asserting control over Indigenous lands. Addled by a scientifically and morally abhorrent philosophy of social Darwinism, they asserted control

[13] *Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions* (1873) at 6.

[14] Dickason, *supra* note 1, at 170-171.; John Borrows, *Seven Generations, Seven Teachings: Ending the Indian Act* (2008) National Centre for First Nations Governance.

over Indigenous culture and identity. Late 19th century correspondence between Federal politicians and bureaucrats explicitly refer to Indigenous people as biologically inferior and as a ‘problem’ that needs to be fixed. Accordingly, they implemented policies of forcible assimilation.

In the mid-18th-Century, for example, the government decided it was necessary to define who exactly was ‘Indian’. They created criteria – without the input of any Indigenous people – based on patriarchal blood-lines and marriage to determine who had Indian status. These provisions made an explicit distinction between Status and Non-Status Indians.[15] Later, following Confederation, they would add a blood quantum threshold to their definition of Status Indian. As the century progressed, the government created various incentives to ‘disenfranchise’ (revoke one’s Indian status).

In 1867, the British confederated the Dominion of Canada[16], passing the *British North America Act (*a.k.a the *Constitution Act, 1867*[17] (or, the “**Constitution**”) and establishing a Federal Government and four Provinces. Under the Constitution section 91(24), the Federal government asserted responsibility for ‘Indians and lands reserved for Indians’. This established a state of wardship, where Canada had asserted jurisdiction over Indigenous peoples and their lands, including reserves as set out by treaty. [18]

The *Indian Act*, which is still in force at the time of this paper, was made law in 1876. It consolidated and revised earlier Indian Administration provisions into a singular national framework. The overarching purpose of the *Indian Act* was to control and assimilate and

[15] Dickason, *supra* note 1, at 169.
[16] Dickason, *supra* note 1, at 173.
[17] *The Constitution Act, 1867*, 30 & 31 Vict, c 3.
[18] Dickason, *supra* note 1, at 173.

involved no input from Indigenous people at the time. In the words of John A MacDonald himself, speaking in 1884:

> *"The great aim of [the Indian Act] has been to do away with the tribal system and assimilate the Indian people in all respects with the other inhabitants of the Dominion as speedily as they are fit to change."*[19]

Similarly, then-Deputy Minister of Indian Affairs Duncan Campbell Scott, stated that the explicit goal of the *Indian Act* was:

> *"to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department that is the whole object of this Bill".*[20]

The original *Indian Act* asserted a definition of 'band', 'member of a band' and 'reserve'.[21] It entrenched the reserve system based on lands set aside by treaty and instituted an electoral system to homogenize band elections across the country and to eliminate traditional Indigenous systems of determining leadership. Indian Affairs imposed short term limits on leaders, restricted political organization and reserved the right to revoke leadership

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[19] Canada, Parliamentary Research Branch, *Aboriginal People - history of discriminatory laws* (Ottawa: Library of Parliament 1991) Prepared by: Wendy Moss and Elaine Gardner-O'Toole.

[20] 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,* (2015) at 54 online: <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf>

[21] Note**:** 'According to the 1876 *Indian Act*: Band was a body of Indians for whom the government has set aside land or money for their common use and benefit, or whom has been declared a band by the government. A 'member of a band' is a person whose name appears on a band list and a 'reserve' is a tract of land that the Crown has set aside for the use and benefit of a band.: Dickason, *supra* note 1, at 198.

for 'dishonesty, intemperance or immorality'.[22] The *Indian Act* framework also initiated and facilitated residential school policies. It imposed various restrictions on the use of reserve land (such as requiring farming practices instead of traditional hunting) and created incentives for Status Indians to renounce their status. It also restricted First Nations members from leaving reserves without permission of the Federal Indian Agent, prohibited or restricted sale of various commodities and allowed Federal expropriation of reserve land.[23]

Though the *Indian Act* has been amended several times since 1876 and is no longer as flagrantly assimilatory, it has its roots in Canada's most insidious racist policies. Unfortunately, it is the inherently paternalistic nature of the *Indian Act,* coupled with unilateral Treaty interpretation, that has defined Canada's approach to Indigenous lands management from the early 18th-century to the present.

c) Current Circumstances of First Nations in Canada

There are 617 First Nations communities in Canada with a collective population of 473 953 living on reserves that correspond with the treaty-defined, *Indian Act* reserve lands delineated in the 19th century.[24] These communities are culturally and linguistically diverse, with 70 different Indigenous languages spoken across Canada.[25]

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[22] Dickason, *supra* note 1, at 198.

[23] Canada, *supra* note 19.

[24] Canada, Indigenous and Northern Affairs Canada, *First Nations People in Canada*, (2014) <https://www.aadnc-aandc.gc.ca/eng/1303134042666/1303134337338>

[25] Canada, Statistics Canada, *Census in Brief: The Aboriginal Languages of First Nations people, Metis and Inuit, Census of Population 2016* (2017).

The marginalization and oppression of Indigenous communities in Canada has taken an enormous toll. Indigenous communities in Canada experience poorer health outcomes, lower school graduation and attendance rates, housing shortages, water quality crises, lower income and employment rates, high incarceration rates and extremely high suicide rates.[26] These negative circumstances are plainly evident in the Canadian Census but have also been acknowledged by the report of the *Royal Commission for Aboriginal Peoples* ("***RCAP"***), published in 1996,[27] the report of the *UN Special Rapporteur on the Rights of Indigenous People*s in 2014,[28] and the Report of the *Truth and Reconciliation Commission* ("**TRC**"), published in 2015 to address the history and legacy of residential schools.[29]

Both the RCAP and TRC investigated and summarized the history and current issues affecting Indigenous communities. RCAP proposed a 20-year plan for improving the circumstances of these communities and restoring self-government and self-determination. TRC listed a number of 'Calls to Action' for improving the lives of Indigenous people and pursuing reconciliation between Indigenous people and colonial society. Both reports suggest that the Federal and Provincial governments seek to facilitate the restoration of Indigenous sovereignty over lands and resources.

[26] Canada, Statistics Canada, *Juristat: Adult Correctional statistics in Canada, 2015/2016* (2017); National Aboriginal Economic Development Board, *The Aboriginal Economic Progress Report* (2015) <http://www.naedb-cndea.com/reports/NAEDB-progress-report-june-2015.pdf>.

[27] Canada, Indigenous and Northern Affairs Canada, *Highlights from the Report of the Royal Commission on Aboriginal Peoples*, (1996) <http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637#chp3>.

[28] United Nations, Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples (*2016).

[29] Truth and Reconciliation Commission of Canada, *Calls to Action* (2015) at 54 <http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf> accessed 25 November 2017.

The overall historical context shows us that Indigenous people have been managing lands for at least thousands of years prior to European colonization. Britain and Canada have acknowledged inherent Indigenous sovereignty to lands through Proclamation and treaty-making, but have also inflicted severe damage on both Indigenous governing practices and their broader capacity to govern. Despite this, many Indigenous land management practices persisted through the turbulence of colonial hegemony. In recent years, the recognition by RCAP, TRC and the UN of Indigenous right to govern themselves and their lands sets the historical stage for more a robust and reconciliatory acknowledgement of Indigenous land management rights going forward.

2) LEGAL CONTEXT OF INDIGENOUS LAND MANAGEMENT

From a common law perspective, recent developments have possibly set the stage for establishing inherent Indigenous rights to govern land. Constitutional jurisprudence under s. 35(1) of the *Constitution Act, 1982*[30] is perhaps closer than ever to encompassing some right to self-government though it can still not be said that such a right will be recognized imminently. With the status quo colonial model for Indigenous governance, the *Indian Act*,[31] woefully inadequate to address the diverse and pressing needs of individual communities, there is a conspicuous imperative for a new paradigm.

The *First Nations Land Management Act,* S.C 1999, c. 24 ("**FNLMA**") is touted as a step away from the *Indian Act* model and towards local community-based governance. The FNLMA nullifies 30 sections of *Indian Act* as they apply to the signatory First Nation and

[30] Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[31] R.S.C. 1985, c. I-5

transfers substantial legislative and bureaucratic authority away from INAC. The authority transferred to the First Nations is substantial, encompassing, land-use planning, individual property rights, natural resource royalties, species protection and environmental assessment, to name a few. These powers are analogous to those held by Federal and Provincial divisions of power under s. 91 and s. 92 of the *Constitution Act, 1867.*[32] On paper, the FNLMA appears to instill in First Nations wide-reaching authority. Though it may not single-handedly establish meaningful rights-based self-government, it may be in line with a transition towards it.

a) Constitutional Rights: *Constitution Act, 1867* and *1982*

Neither the Canadian Constitution nor the jurisprudence interpreting it have expressly protected the Indigenous right to self-government. However, the right to self-government may warrant constitutional protection in several ways: as a right incidental to Aboriginal title, as a right conceded by Federal government legal positions through negotiation and potentially as a right recognized by the Supreme Court, if a suitable case were to emerge.

Section 91(24) of Canada's founding document, the *Constitution Act, 1867* declares that the Federal government has authority over "*Indians and lands reserved for the Indians*".[33] Section 35(1) of the 1982 constitutional amendment says:

> *"35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."*[34]

[32] *The Constitution Act, 1867*, *supra* note 17, s. 92.
[33] *The Constitution Act, 1867*, *supra* note 17, s. 91(24).
[34] *The Constitution Act, 1982*, *supra* note 30, s. 35(1).

The Supreme Court of Canada has ruled that section 35 and section 91(24) enshrine a constitutional obligation of the Federal government to act as a fiduciary to Indigenous people. This is a *sui generis*[35] obligation guided by the principle of the 'Honour of the Crown', which imposes a number of duties on the Crown including the Duty to Consult and Accommodate Aboriginal peoples where an infringement of Aboriginal rights may occur from government conduct.

Section 35(1) protects a variety of Aboriginal rights including Aboriginal title and harvesting rights for subsistence and commercial purposes, and any other practices that are demonstrably "*integral to the distinctive culture of Aboriginal peoples*", according to the test from *R v Van der Peet*.[36] The *Van der Peet* test has been criticized for pigeon-holing Aboriginal rights and freezing them in practices from the distant past. Such a piecemeal approach has made it difficult for Indigenous groups to assert a more broad and holistic right, such as the right to self-government.[37]

Under Canadian common law, Aboriginal title is a fundamental Indigenous right to exclusively use and occupy land.[38] Aboriginal title is *sui generis* – it is unlike fee simple or any other common law land right. It is a collective right vested in a group of Aboriginal people rather than any individual. Furthermore, it cannot be alienated to any entity outside the collective, except the Crown and, even then, it must be explicitly extinguished through a valid government-to-government treaty-making process. Aboriginal title is that it also defined

[35] Note: Sui generis is "unique", see *Guerin v. The Queen*, [1984] 2 SCR 335 for details.
[36] [1996] 2 S.C.R. 507.
[37] Kent McNeil, "The Inherent Right of Indigenous Governance" (2017) *Osgoode Digital Commons:All Papers,* 319. 17). Online: <http://digitalcommons.osgoode.yorku.ca/all_papers/319>.
[38] *Delgamuukw v British Columbia*, [1997] 3 S.C.R. 1010, at para 15.

by an *inherent limit*, meaning it cannot be used for any purpose that would prevent the land from being despoiled or encumbered in ways that would preclude future generations from using and enjoying the land.[39]

It has also been argued that the right to self-government is implicit within the very nature of Aboriginal title because the right to collectively use and manage lands obviates some form of governing structure.[40] In the SCC's *Tsilhqot'in Nation* v *British Columbia*[41] decision, the court did not rule directly on self-government; however, they detail the rights incidental to Aboriginal title as follows, at para 73:

> *"the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land"* [42]

Although the court does not expressly characterize this as a right to self-government, it nevertheless describes a set of rights that, together, sound like compendious governing authority. Because this is a right held collectively by the band and managed by their government, and *Tsilhqot'in* is in part a ruling on division of powers, many scholars agree[43] that it is, in effect, an incidental right to self-government.

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39 Brian Slattery. "The Constitutional Dimensions of Aboriginal Title" 71 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 3 (2015) Online: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1305&context=sclr>
40 Slattery, *ibid*.
41 2014 SCC 44, [2014] 2 SCR 256.
42 *Tsilhqot'in*, *ibid*, at para 73.
43 Slattery, *supra* note 39; McNeil, *supra* note 37.

Although reserve lands contemplated by the FNLMR are not, strictly speaking, Aboriginal title, reserve lands share many of the defining features of Aboriginal title, including collective ownership and inalienability,[44] so it is instructive to consider Aboriginal title in a discussion of Indigenous land rights in general. It is arguable that the same self-government-*esque* rights that were incidental to Aboriginal title in *Tsilhqot'in,* should also be incidental to reserve title. As will be discussed later, the FNLMR may facilitate a scope of rights that are similar in effect to Aboriginal title with respect to reserve lands.

Independent of its incidental connection to Aboriginal title, the existence of an inherent constitutional right to self-government is an unfolding legal question. The SCC has not ruled definitively on the scope or existence of the right to self-government under section 35(1); however, some rulings have provided hints as to the potential legal status of the right to self-govern. In *R v Pamajewon,*[45] the appellants were members of Shawanaga First Nation who ran a casino on reserve were found guilty of keeping an illegal gaming house under the *Criminal Code of Canada.* On appeal, they claimed that s. 201 infringed on their inherent right to self-government as protected by s. 35 of the *Constitution Act, 1982*. The SCC dismissed the appeal of the Shawanaga members, ruling that gambling was not a practice protected within the ambit of s. 35. The court also rejected the right to self-government in this case, as it was characterized too broadly.[46] However, both the majority judgement and the concurring minority judgement wrote in *obiter dicta* that a right to self-government could be protected if the claim provided evidence of a supporting historical context.

[44] *Delgamuukw v British Columbia, supra* note 38*,* at para 120-121.
[45] [1996] 2 S.C.R. 821.
[46] Note: The appellants characterized their right as 'a broad right to manage the use of their reserve lands' (see *Pamajewon, ibid,* at para 27).

The state of the law is such that there is broad uncertainty about the scope of the legal right to Indigenous self-government of land; however, there appears to be ample reason to believe that the right is waiting to be recognized and delineated. It has already received indirect recognition through Aboriginal title, through modern treaties and arguably through the existence of the FNLMR and *Framework Agreement* itself. As is discussed in the literature review, the Federal Government has already conceded the position that the right to self-government exists.

b) The *Indian Act*

The *Indian Act* is a Federal Statute whose authority flows from jurisdiction over "*Indians and Indian Lands*" under section 91(24) of the *Constitution Act, 1867*. The modern *Indian Act* has changed significantly since its horrific inception. The modern *Indian Act* is not as flagrantly assimilatory as its predecessor; but it is still the predominant means of federal control over First Nations and is roundly criticized for a variety of negative impacts it imposes.

The 122 sections and 26 regulations of the *Indian Act* establish a far-reaching scope, covering things ordinarily under federal jurisdiction like taxation but also <u>covering</u> a number of normally Provincial powers like land-use planning, resource extraction and trading, individual property rights and schools. See Table 1 below for an overview of the *Indian Act* and its regulations.

Table 1: Contents of the *Indian Act* and its regulations

MAIN CATEGORIES[47]	ACT		SELECTED REGULATIONS[48]
	SECTIONS	CONTENTS[49]	
Introductory Provisions	1-4.1	• Title • Interpretation, including Definitions • Administration • Application of the Act	-none-
Definition and Registration of Indian Status	5-17	• Indian Register • Band Lists • New Bands	
Reserve Lands and Infrastructure	18-41	• Reserves • Possession of Lands in Reserves • Trespass on Reserve • Sale or Barter of Produce • Roads and Bridges • Lands Taken for Public Purposes • Special Reserves • Surrenders and Designations	• *Indian Reserve Traffic Regulations* (C.R.C., c. 959) • *Indian Reserve Waste Disposal Regulations* (C.R.C., c. 960) • *Property Assessment and Taxation (Railway Right-of-Way) Regulations* (SOR/2001-493)
Property Inheritance and Guardianship	42-52.5	• Descent of Property • Wills • Appeals • Distribution of Property on Intestacy • Mentally incompetent Indians • Guardianship • Money of Infant Children	• *Disposal of Forfeited Goods and Chattels Regulations* (C.R.C., c. 948) • *Indian Estates Regulations* (C.R.C., c. 954)
Land Management	53-60	• Management of Reserves and Surrendered and Designated Lands	-none-

[47] Note**:** These categories in this column are determined by the author based on my reading of the *Indian Act* and may not be the ideal way to divide up the provisions of the Act.
[48] Note**:** Excluding regulations that are specific to an individual First Nation
[49] Note**:** These are the actual subheadings taken from the *Indian Act*

Financial Management	61-72	• Management of Indian Moneys • Loans to Indians • Farms • Treaty Money	• *Calculation of Interest Regulations* (SOR/87-631) • *Indian Band Council Borrowing Regulations* (C.R.C., c. 949) • *Indian Bands Revenue Moneys Regulations* (C.R.C., c. 953)
Regulation-making	73	• Regulations	-none-
Band Elections and Governments	74-86	• Elections of Chiefs and Band Councils • Powers of the Council	• *Indian Bands Council Elections Order* (SOR/97-138) • *Indian Bands Council Method of Election Regulations* (SOR/90-46) • *Indian Referendum Regulations* (C.R.C., c. 957
Taxation	87	• Property Exempt from Taxation	-none-
Collective Legal Rights	88-90	• s. 88- Application of Provincial Laws • s. 89- Restriction on mortgage, seizure etc • s. 90- Property deemed situated on reserve	-none-
Commercial Trading	91-100	• Trading with Indians • Removal of Materials from Reserves	• *Indian Mining Regulations* (C.R.C., c. 956) • *Indian Timber Harvesting Regulations* (SOR/2002-109) • *Indian Timber Regulations* (C.R.C., c. 961)
Law Enforcement	101-113	• Offences, Punishment and Enforcement	-none-
Schools	114-122	• Schools	-none-

As seen in Table 1, a large fraction of the *Indian Act* covers land management. Under the *Indian Act,* land is governed by a quasi-municipal structure, standardized across First Nations and providing for elections of a single Chief and Council who are empowered to pass

resolutions and bylaws.[50] There are also enforcement provisions, allowing bands to appoint justices of the peace, prosecutors and by-law officers to enforce bylaw offences.[51] There are also provisions for public works and expropriation by the First Nation.[52]

One of the most important and complex functions of the *Indian Act* is its protection of collective Indigenous land rights. As mentioned in the previous section, Indigenous lands rights (including Aboriginal title) differ from common law land rights in several important ways. Section 89 of the *Indian Act* protects the unique nature of Indigenous land rights by restricting alienation of reserve land and requiring band referendums for certain land uses and transactions.

As land use and commerce often require alienable land to secure loans and divide up property rights among individuals, the *Indian Act* provides for land leasing arrangements, such as Certificates of Possession ("**CPs**"), which grant exclusive use and occupation rights to CP holders while vesting the underlying land title permanently to the band. These leases or CPs can be sometimes be given to non-members of the band, pending band approval. Longer leases can be sufficient to secure large loans. The CP system has often been criticized for inhibiting economic development opportunities because investors want to secure their loans with permanent land rights, not fixed-term leases.[53]

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[50] Borrows, *supra* note 7.
[51] *Indian Act, supra* note 31, s. 101-113.
[52] *Indian Act, supra* note 31, s. 34-35.
[53] Canada, House of Commons, Standing Committee on Aboriginal Affairs and Northern Development (AANO), *Study Of Land Management And Sustainable Economic Development On First Nations Reserve Lands*, 2nd Session, 41st Parliament, March 2014, (Chris Warkentin, Chairman) at 17.

One of the central features of the *Indian Act* is INAC oversight, something that First Nations almost universally criticize.[54] Transactions involving CPs and leases must be approved by INAC which means often First Nations experience substantial delays with many stages of approval for commercial projects. Communities complain that these delays lead to loss of opportunities for investment and other activity.[55]

Communities also complain about the lack of environmental oversight in the *Indian Act*, leaving First Nations caught between the fractured environmental jurisdiction of Federal and Provincial parliaments.[56] Many First Nations feel that it fails to recognize Indigenous cultural methods of governing lands and resources.[57]

c) The First Nations Land Management Regime

i) Background

In 1991, a group of 14 First Nations Chiefs approached the Government of Canada with a proposal to opt out of 32 *Indian Act*[58] provisions that govern lands and resources. They began negotiating the *Framework Agreement on First Nation Land Management*[59]

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54 House of Commons, *ibid*, at 23.
55 House of Commons, *ibid*, at 23.
56 House of Commons, *ibid*, at 23.
57 House of Commons, *ibid*, at 24.
58 *Supra* note 31.
59 *Framework Agreement on First Nation Land Management between First Nations and Her Majesty the Queen in Right of Canada* (1996).

(“***Framework Agreement***”) which was signed in 1996 by the Government of Canada and the First Nations group.[60]

The *Framework Agreement* was given legislative force as the *First Nations Land Management Act*[61] (“***FNLMA***”), was introduced to Federal Parliament as Bill C-49 in 1998 and was given Royal Assent on June 17 1999.[62] As of November 2017, there were 148 First Nation Signatories to the *Framework Agreement*[63]

The *Framework Agreement* established a First Nations Lands Advisory Board (“**LAB**”), whose 13 directors are determined by councils of certain signatory First Nations from three discrete regions: British Columbia, Prairies and Eastern. LAB lobbies INAC on behalf of First Nations and oversees the First Nations Land Management Resource Centre (“**LABRC**”), an administrative body that aims to assist First Nations with the technical and administrative responsibilities of the Land Code process.[64]

ii) Land Codes

[60] Note**:** The original 14 signatory First Nations included: Westbank, Musqueam, Lheidli T’enneh, N’Quatqua, Squamish, Siksika, Muskoday, Cowessess, Opaskwayak, Nipissing, Mississaugas of Scugog, Chippewas of Mnkikaning, Chippewas of Georgina Island, Saint Mary’s.

[61] S.C. 1999, c. 24.

[62] Lands Advisory Board, *Framework Agreement on First Nation Land Management: Executive Summmary* (2017) <https://labrc.com/wp-content/uploads/2017/08/FA-Exec-Summary-Aug-28-2017-v2.pdf>.

[63] Lands Advisory Board, *Member Conmunities* (2018) <https://labrc.com/wp-content/uploads/2017/08/FA-Exec-Summary-Aug-28-2017-v2.pdf>.

[64] Lands Advisory Board, *About Us* (2018) <https://labrc.com/about-us/>.

The *Framework Agreement* empowers First Nations to opt out of 32 sections of the *Indian Act* that relate to land management,[65] replacing them with an individually-drafted Land Code. The Land Code provides Chief and Council with powers and procedures to pass laws for land and resource management and to manage royalties collected from those lands and resources. Land Codes only apply to reserve lands under the *Indian Act*, not to traditional territories or treaty lands more broadly.

Land Codes and laws passed under them vary between FA signatories but can cover a wide jurisdiction, including the following subjects:

- *Land Use Planning*: like municipalities, First Nations have powers to zone, subdivide and restrict use of land to specified purposes
- *Environmental Protection:* First Nations can develop their own environmental assessment, protection and conservation laws
- *Public Works:* First Nations can handle local infrastructure such as roads, energy, bridges and ditches and can expropriate land
- *Matrimonial Property:* Marriage breakdown is not covered by the *Indian Act* but Land Codes can cover the rights of spouses in the event of marital breakdown.
- *Land Rights*: Land Codes preserve collective land rights protected by s. 35 and *Indian Act* s. 89, however they grant First Nations control over property rights for band members and non-members, allowing flexibility in CP and leasing processes and freedom from INAC approvals

[65] Note: According to *Framework Agreement, supra* note 57, s. 21, inapplicable sections of the *Indian Act* include sections 18-20, 22-28, 30-35, 37-41, 49, 50(4), 53-60, 66, 69, 71, 93 as well as regulations made under *Indian Act* section 42, 57 and 73.

- *Enforcement and Dispute Resolution*: First Nations with Land Codes can enforce their land and environmental laws by appointing Justices of the Peace, prosecutors and bylaw officers. They can also set up processes for resolving lands-related disputes like mediation and arbitration.
- *Collect and Manage Royalties:* First Nations can collect royalties for natural resources extraction and manage them independently of INAC

These are very significant powers, typically in the scope of Provincial and municipal jurisdictions (See Part III, Section 2, Table 2). One reasons for this transfer of jurisdiction is close the regulatory gap that exists on reserves, due to the cross-over of federal and provincial jurisdiction on reserve lands. By taking on law-making authority under the FNLMR, First Nations can make environmental rules that bridge this gap as needed in their regulatory context.[66]

Once a Land Code is enacted, land laws, licenses, transfers and instruments can be administered and altered without need for INAC approval. It also exempts First Nations from Federal expropriation rights under the *Indian Act.*[67] The *Framework Agreement* is not considered a treaty and does not affect any existing treaty or constitutional rights of any First Nations.[68]

A mandatory requirement of the *Framework Agreement* is a provision that transfers liability from Canada to First Nations for land:

[66] Laura Edgar and John Graham, *Environmental Protection: Challenges and Prospects for First Nations under the First Nations Land Management Act.* Institute for Governance (Ottawa: 2008)
[67] *Framework Agreement, supra* note 59, s.13.3.
[68] *Framework Agreement,supra* note 59, s. 1.3-1.6.

50.2 Canada will not be liable for acts or omissions of the First Nation or any person or entity authorized by the First Nation to act in relation to First Nation land that occur after the First Nation's land code takes effect.[69]

This is a very significant provision. First Nations are taking on powers comparable in jurisdictional scope to provinces and large municipalities; however, despite their relatively small sizes and budgets, they are also taking on Crown-*esque* levels of liability.

iii) Opt-in Procedures: Developmental and Operational Phases

The combination of *Framework and Individual Agreements, Land Codes* and the *First Nations Land Management Act* is referred to in this paper as the First Nations Land Management Regime ("**FNLMR**").

The FNLMR process has two main phases: Developmental and Operational.[70] A First Nation wishing to 'opt in' to the FNLMR process begins by passing a Band Council Resolution to begin developing a Land Code and applying for INAC Developmental funding. This initiates the 'Developmental Phase'.[71]

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69 Framework agreement, *supra* note 59, 50.2.
70 Framework Agreement, *supra* note 59, s. 29,30.
71 Lands Advisory Board, *Framework Agreement Developmental Phase,* (Infographic, accessed 2018) <https://labrc.com/public/userfiles/files/Developmental%20Phase%20Chart%20v_March%202012.png>

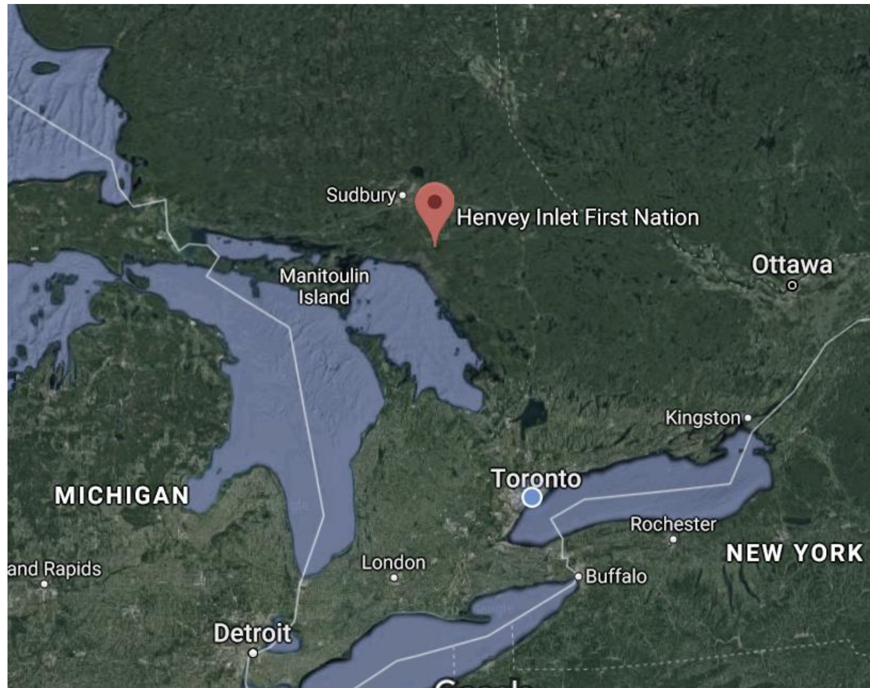
The Developmental phase is intended to be two years long and is centered around drafting and ratifying a Land Code and an Individual Agreement (which is generally similar to the Framework Agreement).[72] INAC funding for the Developmental covers the hiring of a project coordinator, land committee, lawyer and ratification officer. These personnel begin developing and drafting a community Land Code and implementing a community ratification process. The funding for this process sets a two-year timeline on the Developmental Phase. If the ratification vote achieves a minimum of 25% community participation with a majority in favour, the Land Code is certified and INAC can approve the Individual Agreement. A date is set for the Land Code to come into effect which marks the beginning of the 'Operational Phase'. If the ratification fails, the *Indian Act* sections remain in force and the Development Phase must start over again.

The 'Operational Phase' begins when the Land Code comes into force. INAC provides operational funding for First Nations to set up a 'Land Office', along with administrative procedures, instruments, and systems. The band has 1 year to pass a Matrimonial Real Property Law under the standard Land Code. The community is also required by the standard Land Code to create and implement a Land Use Plan. The 'Operational Phase' continues indefinitely as land bylaws are presumably passed by the Band Council and administered by the Lands Office.[73]

3) PARTICIPANT COMMUNITY PROFILES

a) Henvey Inlet First Nation

72 Lands Advisory Board, *supra* note 71.
73 *Ibid.*



i) General

Henvey Inlet is located in Southern Ontario, near where the French River empties into Lake Huron. The people of Henvey Inlet are Anishinabek and people of the Beaver Clan ("Amikwa"). They belong to Algonguin linguistic group who have occupied the French River and Eastern Lake Huron region since time immemorial. Their ancestors, the Amikwa, were among the first contacted by Samuel de Champlain during the early 1600's.[74]

Henvey Inlet has a population of 150 on-reserve members and 450 off-reserve. The main village (A.K.A French River Reserve No. 13) has roughly 50 homes, a commercial building containing the Band Office and other businesses and a Public Works building containing facilities for firefighters and first responders and a facility for community events. In addition to the main village, there are two additional smaller reserves: Henvey Inlet

[74] Henvey Inlet First Nation, *Emerging History,* (Accessed 2018) <http://s98611120.onlinehome.us/hifn2011/?page_id=295>

Reserve No. 2, which contains about 12 members and Cantin Island Reserve No. 13 which is used for seasonal camping and recreational cottages.[75]

Henvey Inlet is signatory to the *Williams Treaty* of 1923 and is a member of the Waabnoong Bemjiwang Association of First Nations, a tribal council in the Georgian Bay region of Ontario.

ii) Land Code

In 2006, Henvey Inlet passed a Community Action Plan to begin creation and implementation of a Land Code. Their process lasted until 2009 and involved community consultation, thorough environmental assessment, and legislative drafting.[76] The Land Code was ultimately ratified by community referendum in December 2009, amended in November 2012 and amended again in 2015 with Land laws 2015/16-001 and 2015/16-002.[77]

iii) Energy Projects

[75] Henvey Inlet First Nation, *Community Profile,* (Accessed 2018) <http://www.hifn.ca/?page_id=293>
[76] Henvey Inlet First Nation, *Introduction to the Developmental Phase from 2006-2009* (Accessed 2018) <http://www.hifn.ca/?page_id=82>
[77] *Henvey Inlet First Nation Land Code,* enacted by community ratification in 2009, amended in 2012 and 2015 by land laws 2015/16-001 and 2015/16-002.

The Henvey Inlet Wind Energy Centre ("**HIWEC**") is a 300 MW wind generation operation that is located entirely on Henvey Inlet Reserve Lands.[78] HIWEC is the result of a partnership between Nigig Power Corporation , a corporation wholly-owned by Henvey Inlet, and Pattern Development, a power company specializing in wind and solar.[79] The center is supported by a Feed-in-Tariff ("**FIT**") contract from Ontario Power Authority ("**OPA**"). The website jointly operated by Nigig and Pattern promises benefits in the form of revenue, which the band can by the band for "possibilities" such as expanded band services, reinvestment in local business, dividends to band members and subsidized hydro bills.[80]

At the time of researching and drafting this paper, construction of HIWEC had not begun, but the key financial transaction to support the wind farm had a 'closing' date in mid-December, at which point the band will receive its funding and can begin construction, a process which will take 18-24 months.[81]

Since being awarded the FIT contract in 2011,[82] HIWEC has undergone rigorous planning, environmental assessment and permitting processes, which were done under Henvey Inlet law, by way of their Land Code.[83] HIWEC also required review by OPA to connect the electricity generated to the grid.[84]

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78 Nigig Power Corporation and Pattern Development, *Henvey Inlet Wind*, (Accessed 2018) <http://henveyinletwind.com/>

79 *Ibid.*

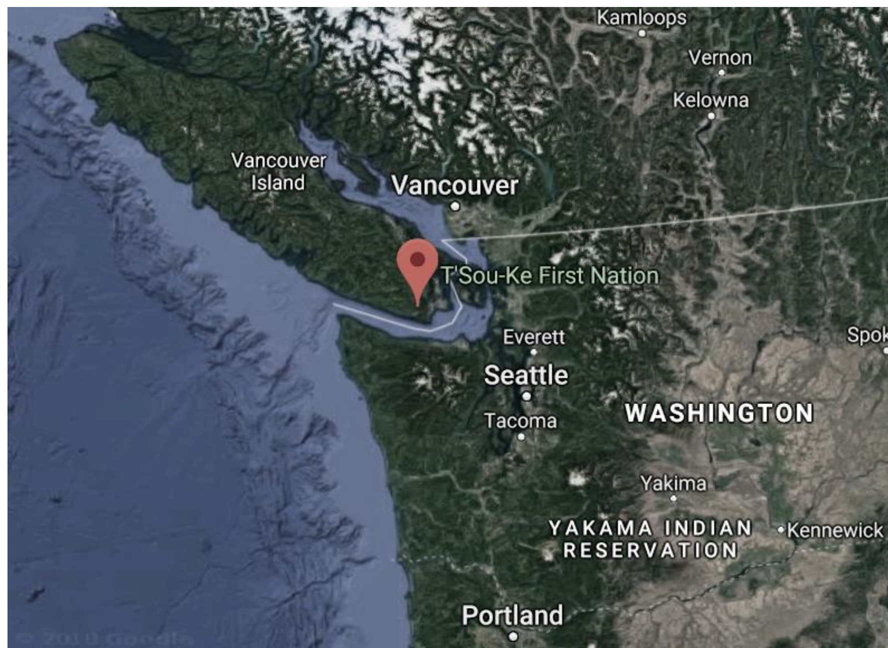
80 Nigig Power Corporation and Pattern Development, *Economic Benefits*, (Accessed 2018) <http://henveyinletwind.com/economic-benefits/>

81 Pattern Energy Group LP. *Pattern Development and Henvey Inlet First Nation Complete C$1 Billion Financing and Start Construction of Largest First Nation Wind Project in Canada.* (26 Dec 2017) Cision <https://www.newswire.ca/news-releases/pattern-development-and-henvey-inlet-first-nation-complete-c1-billion-financing-and-start-construction-of-largest-first-nation-wind-project-in-canada-666584733.html>

82 Indian Country Today, *Henvey Inlet First Nation Snags Major Energy Contract* (26 Feb 2011) <https://indiancountrymedianetwork.com/news/henvey-inlet-first-nation-snags-major-energy-contract/>

83 *Henvey Inlet First Nation Land Law 2015/16-012*: *Environmental Permit* Online: <http://henveyinletwind.com/files/5114/6366/6974/Land_Law_2015-16-

b) T'Sou-ke First Nation



i) General

T'Sou-ke First Nation is located on the southern coast of Vancouver Island, British Columbia where the mouth of the Sooke River flows into the Pacific Ocean. The people of T'Sou-ke are Saanich Coast Saalish and have occupied their territory since time immemorial. As of February 2013, T'Sou-ke had 225 registered members, 132 of which were living on reserve.[85] This population is divided between two reserves which are both located around Sooke Bay in BC. One reserve is 26 hectares and the other is 41 hectares.[86]

012_HIFN_Environmental_Permit.pdf>; Henvey Inlet Wind Energy Centre *Volume A: Environmental Assessment* (2016) Online: <http://henveyinletwind.com/files/5014/5222/8717/A_Volume_A_Final_Environmental_Assessment_Report.pdf>

[84] Henvey Inlet Wind LP. *Application to Ontario Energy Board for Leave to Construct*. Online: <http://henveyinletwind.com/files/9014/8431/9508/HIW_APPL_Leave_to_Construct_PUBLIC_20161130.pdf>

[85] Canada, Indigenous and northern Affairs Canada, *T'souke First Nation - Connectivity Profile* (Accessed Nov 25 2017) Online:<http://www.aadnc-aandc.gc.ca/eng/1357840941848/1360161157368>

[86] T'Sou-ke First Nation. *Lands, Environment and Housing* (Accessed Dec 10 2017) Online: <http://www.tsoukenation.com/lands-environment-housing/>

ii) Land Code

T'Sou-ke first began the Developmental Phase of their Land Code in 2004 and began a process of community consultation and consensus-building. In April 2006, their Land Code was brought into force after a successful referendum.[87]

iii) Energy Projects

T'Sou-ke First Nation has a suite of solar energy operations, both with electricity generation from photovoltaic panels and direct use of the sun's energy through water heating and greenhouse agriculture.[88]

The photovoltaic operation has 75 kilowatts of generation which is very small relative to industrial-scale solar projects, but very substantial for a community of 250. The system provides battery backup to the band offices, supplies energy to community and sells excess generation to the BC Hydro grid during peak months providing revenue to T'Sou-ke.[89] The band office expects the project's solar generation to off-set community electricity consumption once conservation and efficiency measures are implemented.[90] More recently, the band installed electric vehicle charging stations that are entirely solar powered. These stations are for use by anyone on or off reserve.[91]

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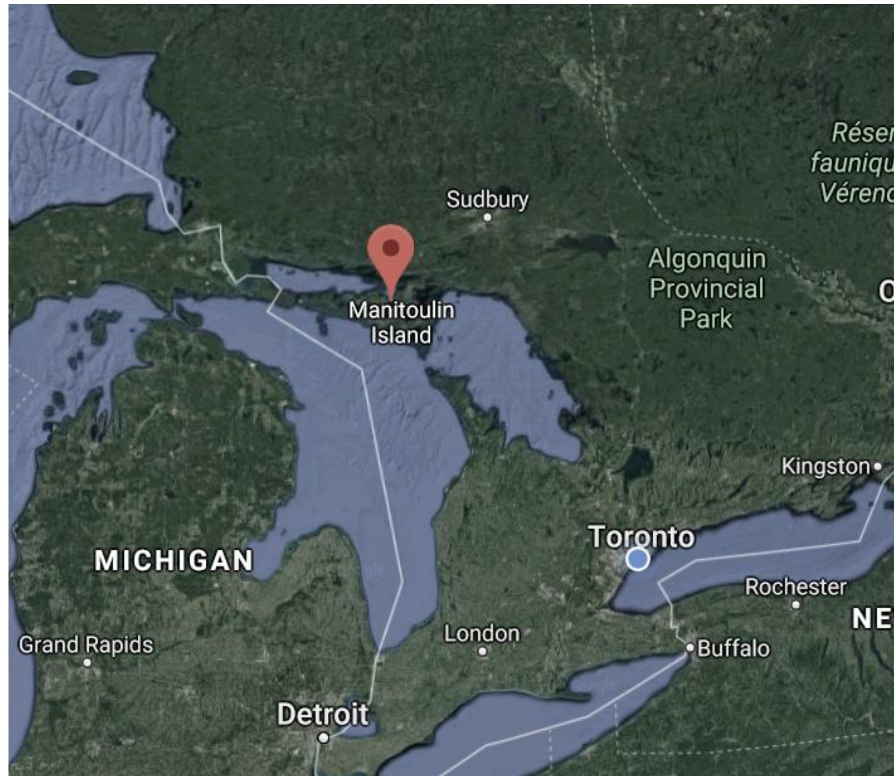
[87] *T'Sou-ke First Nation Land Code*, enacted by community ratification in 2006.
[88] T'sou-ke First Nation. *First Nation Takes Lead on Solar Power*. (undated) Online: <http://www.tsoukenation.com/first-nation-takes-lead-on-solar-power/>
[89] T'sou-ke First Nation, *ibid*.
[90] T'sou-ke First Nation, *ibid*.
[91] T'Sou-ke First Nation. *T'Sou-ke Shines in another Solar First* (Accessed Dec 20 2017) Online: <http://www.tsoukenation.com/355-2/>

In addition to the photovoltaic generation, the band has solar water-heating systems that provide hot water for 25 private residences (which 61 more household systems expected to be installed).[92] The community also has a community garden and is developing a commercial greenhouse to sell organic wasabi to international markets.[93]

The project took several years to implement. In 2007, T'Sou-ke Nation hired an external non-member project director and began a series of "visioning" sessions with local community members to imagine the project. The solar operation was installed in 2009, a year after the land code came into force.[94]

c) M'Chigeeng First Nation

92 T'sou-ke First Nation, *supra* note 88.
93 T'Sou-ke First Nation. *Sun Keeps Shining on T'sou-ke* (Accessed Dec 20 2017) Online: <http://www.tsoukenation.com/sun-keeps-shining-on-tsou-ke/>
94 T'sou-ke First Nation, *supra* note 88.



i) General

M'Chigeeng First Nation is located in the center of Manitoulin Island on Lake Huron in Ontario. The people of M'Chigeeng are Anishinaabek. Their reserve is on land that was traditionally uninhabited for spiritual reasons, but was settled by Anishinaabek of the North Shore of Lake Huron in the mid 19th century in response to European settlement. [95] M'Chigeeng is a part of the United Chiefs and Councils of Mnidoo Mnising (UCCMM) and the home of the Three Fires Confederacy (Odawa, Ojibway and Pottawattomi Nations).[96] The First Nation has a single reserve territory that is over 3000 hectares.[97] They have 934 on reserve and 2613 total members.

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95 M'Chigeeng First Nation. *About Us* (Accessed Nov 25 2017) Online: <http://www.mchigeeng.ca/about-us.html>

96 M'Chigeeng First Nation, *ibid.*

97 Canada, Indigenous and Northern Affairs. *Reserves/Settlements/Villages*: *M'Chigeeng First Nation* Online: <http://fnp-ppn.aandc-aadnc.gc.ca/fnp/Main/Search/FNReserves.aspx?BAND_NUMBER=181&lang=eng>

M’Chigeeng’s values and beliefs are rooted in their seven Grandfather Teachings, which have been passed on by oral tradition:

1. *To cherish knowledge is to know WISDOM*
2. *To know LOVE is to know peace*
3. *To honour all of creation is to have RESPECT*
4. *BRAVERY is to face the foe with integrity*
5. *HONESTY in facing a situation is to be brave*
6. *HUMILITY is to know yourself as a sacred part of creation*
7. *TRUTH is to know all of these things*

In Fall of 2017, at the time of researching and drafting of this paper, M’Chigeeng First Nation was in a state of political uncertainty due to an electoral crisis. After a revision of M’Chigeeng’s membership code, there was uncertainty about band membership, and therefore about the eligibility of votes. An appeal of the election results was filed and an appeals committee overturned the election results in October 2017. A judicial review of the appeals committee decision was filed and now the entire election is being postponed, leaving the community temporarily without a sitting Chief and Council.[98] The membership uncertainty and subsequent electoral crisis has also delayed the vote to ratify the Land Code and move from the Developmental Phase to the Operational Phase.[99]

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[98] Manitoulin Expositor. *M’Chigeeng election is overturned by appeals committee*. (2017 Oct 11) Online:<http://www.manitoulin.ca/2017/10/11/mchigeeng-election-overturned-appeals-committee/>

[99] M’Chigeeng First Nation.”Land Code Development Update.” *Newsletter: Vol 4* (March 2017) Online: <http://www.mchigeeng.ca/uploads/2/6/6/7/26674654/mfn_land_code_newsletter.vol4_mar.2017.pdf>; Letter: http://www.mchigeeng.ca/uploads/2/6/6/7/26674654/letter_to_chief.pdf

ii) Land Code

M'Chigeeng First Nation began the Land Code process around 2009.[100] In 2013, they officially accepted the signing of the Framework Agreement, and set the the developmental phase of the Land Code process to begin in September 2014.[101] They conducted community consultations and developed the land code in the 24 month Developmental Phase, with a community referendum scheduled for September 2016.[102] If community approval is secured through referendum, the Land Code process would move into the Operational Phase.

Due to a 2016 review of the M'Chigeeng Band Membership Code which would have determined the number of eligible voters, the September 2016 Land Code referendum was delayed until September 2017.[103] Following the related electoral crisis of fall 2017, the Land Code referendum has been further delayed until 2019.[104]

iii) Energy Projects

In June 2011, M'Chigeeng First Nation broke ground on the M'Chigeeng Wind Farm, a $12.5 million project to construct a pair of grid-connected wind turbines that provide 4 MW

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[100] M'Chigeeng First Nation interview, below, Table 4.
[101] In BCR #4052 according to 2015 Annual Report http://www.mchigeeng.ca/uploads/2/6/6/7/26674654/2014-2015_fye_annual_report_-_final3_oct_22_2015__1_.pdf
[102] *M'Chigeeng First Nation Land Code,* approved in March 2017 by Band Council Resolution #442 awaiting band ratification.
[103] M'Chigeeng First Nation."Land Code Development Update." *Newsletter: Vol 4* (March 2017) Online: <http://www.mchigeeng.ca/uploads/2/6/6/7/26674654/mfn_land_code_newsletter.vol4_mar.2017.pdf>; M'Chigeeng First Nation, "Re: Voters List of First Nation" *Letter from Membership Verifier to Chief.* (2017 April 13) Online: <http://www.mchigeeng.ca/uploads/2/6/6/7/26674654/letter_to_chief.pdf>.
[104] *M'Chigeeng Land Code, ibid.*

of generation.[105] The project is 100% owned by M'Chigeeng First Nation, by way of a wholly owned corporation called Mother Earth Renewable Energy Inc. The project produced $120 000 of surplus funds for the band in its first year of generation (Summer 2012- Summer 2013) and is expected projected to produce $300 000 per year in the first 14 years and $1.2 million per year for six years following.

Despite the success of the wind project, the representative of M'Chigeeng First Nation described significant delays in the process of developing the project due to INAC restrictions and approvals related to land management and licensing. He cited these delays as part of the motivation for implementing a Land Code.[106]

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105 M'Chigeeng First Nation."M'Chigeeng Economic Development Update." *Newsletter: Vol 1, Issue 3* (Oct 2011) Online: <http://www.mchigeeng.ca/uploads/2/6/6/7/26674654/_____mere_newsletter-october_2011.pdf>.

106 See M'Chigeeng First Nation Interview, Table 4, Question 7-8.

PART III: LITERATURE REVIEW

The FNLMR has broad implications and scholars can see in it a variety of implications for communities. This paper considers four broad academic perspectives through which the FNLMR can be viewed and evaluated. These four perspectives as well as their respective interpretations of the FNLMR are as follows:

1) **Indigenous Rights Perspective:** The FNLMR is a means of asserting self-government
2) **Commercialist Perspective:** The FNLMR is a beneficial driver of commercialism and economic development
3) **Resurgentist Perspective:** The FNLMR is a neo-colonial imposition on Indigenous communities
4) **Energy Planning Perspective:** The FNLMR is a facilitator of community energy planning

1) THE INDIGENOUS RIGHTS PERSPECTIVE

a) The Inherent Right to Self-Government at Common Law

The FNLMR is, at its core, a transfer of governance over lands from the federal government to individual First Nations. Therefore, the broader question of the Indigenous right to self-government has direct pertinence to the *FNLMR*. Many scholars have made a strong case for the fact that the inherent right to self-government exists. These scholars would view the FNLMR as an expression of these inherent rights.

Kent McNeil[107] summarizes the broad legal case for an inherent right to Indigenous self-governance. As mentioned in the previous section, there has been no explicit declaration by the SCC that a specific right to self-government exists; however, the court has recognized the potential for such a right in cases such as *Pamajewon* and *Tsil'qhotin*. McNeil points out that the Federal Government has publicly acknowledged the inherent right to self-government as far back as 1995. During negotiations leading up to the Charlottetown Accord in 1992, the Federal government conceded that self-government was indeed an Indigenous right.[108] However, in their current policy on self-government, the Federal government has framed it as a right that is contingent on the negotiation and agreement of the Crown.[109]

McNeil argues that this 'contingent' approach to Indigenous rights is inconsistent with section 35. Section 35, he argues, frames Aboriginal rights as pre-existing and integral to confederation itself. To suggest that they are contingent on the Crown's approval contradicts the inherent and *sui generis* nature of Aboriginal rights. To emphasize this point, McNeil raises the approach to the same issue taken by the Supreme Court of the United States, which has acknowledged 'Indian' 'tribal' rights to self-government as inherent, flowing from pre-colonial inherent sovereignty.[110]

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[107] McNeil 2017, *supra* note 37; McNeil, Kent, *The Inherent Right of Self-Government: Emerging Directions for Legal Research* (2004) Research Report for First Nations Governance Centre.

[108] McNeil 2004 *ibid*; Canada, Political and Social Affairs Division, *Aboriginal Self-Government*, (1996, revised in 1999) Online: <https://lop.parl.ca/content/lop/researchpublications/962-e.htm>; Canada, Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan,* (1997) Online: <http://www.ahf.ca/downloads/gathering-strength.pdf>.

[109] Canada, Indigenous and Northern Affairs Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government.* (2010), online: < https://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#inhrsg>.

[110] McNeil 2017, *supra* note 37.

John Borrows[111] argues that self-governance is an inherent right of First Nations that has never been legally abrogated. This is based primarily on occupation of the land since time immemorial and Indigenous forms of governance that pre-date European contact. Also, prior to Canadian confederation, British North American colonists recognized the inherent sovereignty of Indigenous people through the *Royal Proclamation*, the Treaty of Niagara and in the very act of nation-to-nation treaty-making throughout the 19th, 20th and 21st centuries.

b) The Legitimacy of Indigenous Legal Traditions

Borrows points out that there has been a continuing, inherent exercise of sovereignty all along in both pre- and post-colonial Indigenous societies. Even under the hegemony of the *Indian Act*, First Nations governments have acted on behalf of their communities by preserving traditional knowledge, language and education practices, by making decisions about religion, economics and lands and by entering treaties with foreign governments.

Borrows and Napolean also point out that Indigenous traditions are rich with applicable practicable legal principles. For thousands of years, the capacity to govern land use has existed in Indigenous communities. For many Indigenous people in Canada, relationships to traditional lands are central to economic, social and spiritual practices. Although these traditions predated modern technological impacts on lands and modern codified governance structures such as Land Codes, land boards and by-laws, the traditional perspective is the source of intimate knowledge of land dynamics and also provides legitimate Indigenous environmental law.

[111] Borrows, John, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" 30 *Osgoode Hall L. J.* 291, 354 (1992).

Val Napolean[112] and John Borrows have advocated for a recognition of the legitimacy of Indigenous laws found in the oral histories of various First Nations around Canada. Napolean describes how, under a broader definition of law, moral principles embedded and perpetuated in oral history can provide legal orders that can be applied to present-day challenges with land use, civil conflicts and human rights violations. Considering Napolean's perspectives, FNLMR Land Codes may provide an avenue for communities to restore traditional perspectives on land management.

c) Aboriginal title and Division of Powers

The jurisprudence and academic discourse around Aboriginal title also provides some guidance into the nature of self-government rights over land. Brian Slattery purports that a sort of 'Third Order of Government' within the Constitutional Division of Powers is contemplated by SCC jurisprudence on Aboriginal Title. In particular, *Tsilhqot'in* describes how Federal and Provincial powers are curbed when it comes to lands subject to Aboriginal Title. Under the force of s. 35, Provincial or Federal laws cannot abridge Aboriginal rights unless they can be justified by a 'compelling and substantial objective' and can be found to be consistent with the fiduciary Honour of the Crown. Aboriginal title lands are still subject to laws of general application by the Province and the SCC has ruled that the Crown vests underlying 'radical' title even to Aboriginal title lands; however, Prof. Slattery still characterizes Aboriginal title as a 'close cousin' of Provincial title.

[112] Napoleon, Val. *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Dissertation, University of Victoria, 2009) [unpublished]. Online: <http://dspace.library.uvic.ca>.

Leading constitutional scholar Peter Hogg[113] describes some of the challenges with establishing positive rights to Indigenous self-government. One major challenge is that self-government has only been established as a right incidental to other Indigenous rights, such as Aboriginal title. As such, Indigenous jurisdiction differs from the other Constitutional Divisions of Powers in that it is not enumerated.[114] The 'exhuastiveness doctrine' is a constitutional interpretation principle that assumes any jurisdictional question can be covered by either Federal or Provincial powers under section 91 and 92. This leaves little room for Aboriginal jurisdiction. The piecemeal approach to recognizing Indigenous rights and governing powers seen in *Pamajewan* and *Van der Peet*, coupled with the Euro-centric nature of the 'exhaustiveness doctrine', puts Indigenous self-government rights at a legal disadvantage in constitutional legal arguments. Hogg advocates for individual agreements between First Nations and Canadian governments as a remedy for the exhaustiveness doctrine and to address the specificity of community needs on a case-by-case basis.

d) Relevance to FNLMR

Under the views of Borrows, Napolean and McNeil, the *Indian Act* is an abrogation of the inherent right to self-government and, therefore, the FNLMR could be a reemergence of part of this inherent right. The FNLMR is reflective the approach advocated by Hogg of 'enumerating' and delineating Indigenous governance rights by forging individualized agreements between communities and the state. Furthermore, considering the regulatory gap between the provincial and federal government on reserve land,[115] strengthened, better-

[113] Hogg, Peter W. and Mary Ellen Turpel. "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" *Canadian Bar Review* 74.2 (1995): 187-224.
[114] As in Constitution Act, 1867, *supra* note 16, s. 91 and 92.
[115] Edgar and Graham, *supra* note 66.

defined local governance through the FNLMA may be a way to fill these gaps and clarify the parameters of jurisdiction for all parties involved.

2) THE COMMERCIALIST PERSPECTIVE

Some scholars view the FNLMR primarily as a means of achieving economic prosperity and independence on reserves.

a) INAC Bureaucracy and Commercial Development

Alcantara[116] argues that the FNLMR can improve economic conditions on reserve (1) by reducing delays on land transactions caused by INAC bureaucracy and (2) by enabling the alteration of reserve property rights in a way that facilitates commercial development. Alcantara is highly critical of the delays caused by *Indian Act* bureaucracy. As mentioned in Part II, Section. ? the *Indian Act* land management framework requires INAC of approval of any transactions involving CPs or *Indian Act* leases. Citing two land codes (Muskoday and Scugog Island First Nations), Alcantara argues that the FNLMR provides communities the ability to curtail costly INAC approval processes and reimagine their property rights, thus expediting and inviting commercial development.

[116] Alcantara, Christopher. "Reduce transaction costs? Yes. Strengthen property rights? Maybe: The first nations land management act and economic development on Canadian Indian reserves." 132(3-4) *Public Choice* 421-432 (2007).

Flanagan and Beauregard[117] attempt to objectively investigate factors that promote "prosperity" for First Nations, using the Community Well-being Index ("**CWB**") determined by INAC, as a metric. Among the factors examined for its influence on CWB was "entry into the First Nations Land Management Act. They conclude that entry into the FNLMR has a positive correlation with CWB and attribute this trend to stable governing structures and more economically viable property rights models.

A 2013 FNLMRC survey of 32 First Nations with operational Land Codes indicated that over 70% had experienced an increase in the speed of land management activities compared with the *Indian Act* process. Around 70% also stated that their Land Code protected community values and even the restoration of traditional values under the Land Code. A majority of communities reported a modest increase in the number of the jobs attributable to their Land Code.[118]

b) Controversy around the alienability of Indigenous property rights

Academic arguments in favour of economic development can be controversial insofar as they advocate the alteration of property rights away from inalienable collectively-held land rights and towards alienable privately-held land rights resembling fee simple.

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[117] Flanagan, Tom and Katrine Beauregard. *The Wealth of First Nations: An Exploratory Study*. Fraser Institute (2013) Online: <https://www.fraserinstitute.org/sites/default/files/wealth-of-first-nations.pdf>.

[118] KPMG LLP. *Framework Agreement on First Nation Land Management: Update Assessment of Socio-economic Development Benefits*. Lands Advisory Board Resource Centre (2014) Online: https://labrc.com/wp-content/uploads/2014/03/FNLM-Benefits-Review-Final-Report_Feb-27-2014.pdf>.

As mentioned in Part II, property rights to Indigenous lands are typically collectively held by all band members and held in trust for the use and benefit of present and future generations. The inalienability of collectively held land means that investors and corporate partners external to the reserve can not acquire land from the First Nation and can not use land to secure a loan in the same way that they can with common law fee simple lands.

Scholars like Flanagan[119] and Campbell[120] have argued that these collective land rights are a barrier to economic development and have proposed that FNLMR negotiations and modern treaties should pursue a shift to alienable privately-held land rights on reserve, similar to fee simple.

Many scholars, including Alcantara[121] (and, more recently, Flanagan[122]), staunchly disagree with this point of view. Collective property ownership, legally and culturally, are a cornerstone of Indigenous land rights. Privatization and alienability would likely lead to the erosion of Indigenous land base as well as Indigenous culture itself. Alcantara illustrates this danger by referring to the experience of American 'Indian' tribes, who experienced a marked increase in poverty after American federal government's imposition of fee simple through the *Dawes Act*.[123] Alcantara argues that, by eroding INAC bureaucracy over CPs and leases, commercial development on reserves can be facilitated without fundamentally altering collective land rights.

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[119] Flanagan, Tom. *First Nations? Second Thoughts*. (Montreal: McGill-Queen's University Press, 2000).

[120] Alcantara, Christopher. "Privatize Reserve Land? No. Improve Economic Development Conditions on Canadian Indian Reserves? Yes" *Wilfred Laurier University: Political Science Faculty Publications* (2008) Online: <http://scholars.wlu.ca/cgi/viewcontent.cgi?article=1004&context=poli_faculty>.

[121] Alcantara, *ibid*.

[122] Flanagan, Tom, Christopher Alcantara and Andrée Le Dressay. *Beyond the Indian Act: Restoring Aboriginal Property Rights*. (Montreal: McGill-Queen's University Press, 2010).

[123] Alcantara, *supra* note 116, citing Leonard Carlson (1981).

Lavoie and Lavoie[124] surveyed Land Codes under the FNLMR to summarize First Nations decision about the free alienability of their land. They highlight the tension between economic efficiency and individual autonomy on one hand and community cohesion and traditional culture on the other. They found there was wide variation in how First Nations Land Codes chose to alter their collective land rights (and community voting mechanisms). They identified trends in land rights decisions based on factors like demographics, location and economic pressures. They also acknowledge the importance of unquantifiable factors such as ideological and cultural values on decisions about property alienability.

3) THE RESURGENTIST PERSPECTIVE

The Resurgence movement contrasts with the previous two perspectives significantly. Resurgence thinkers emphasize the ongoing colonial nature of the relationship between Indigenous communities and the Canadian state and reject the current mandates of treaty-making and of defining enumerated Aboriginal rights. Instead, they favour of a resurgence of Indigenous traditions and natural community autonomy.

Alfred and Corntassel argue that, although colonial powers are not as overtly oppressive as in the past, they have not changed their essential objectives to distort, dehumanize and assimilate Indigenous people.[125] They argue that modern imperialism has

[124] Lavoie, Malcolm and Moira Lavoie. "Land Regime Choice in Close-Knit Communities: The Case of the First Nations Land Management Act." *Osgoode Legal Studies Research Paper No 33*. (2017).

[125] Alfred, Taiaiake. *Wasáse: Indigenous Pathways of Action and Freedom,* (Peterborough: Broadview Press, 2005)

‘shape-shifted’ into more subtle and manipulative methods of domination and delegitimizing Indigenous identity.

Alfred argues that Canada’s central motivations remain to gain control of lands from Indigenous people and achieve economic progress. He argues that any benefits to Indigenous communities are an afterthought to Canada and are contemplated on Canada’s industrial capitalist terms, rather than in a manner that is consistent with traditional Indigenous values.[126]

On one hand, resurgence thinkers would agree with other scholarly promoters of self-government (see Part III, Section 1) about the need to transfer governing powers to First Nations however, they would likely disagree with them on a number of fundamental issues. For example, resurgent thinkers decry the modern treaty-making process (as advocated by Peter Hogg) as a false and insidious attempt to undercut First Nations authority.[127] Alfred argues that consenting to the extinguishment of pre-existing Aboriginal title in favour of a formally-recognized, enumerated set of rights is an erosion of sovereignty and a complacency with neo-colonial methods of subversion. Alfred and Corntassel furthermore dismiss the broad legal characterization of ‘Aboriginal’ rights as a mistaken generalization that encourages ignorance of the cultural and political diversity of Indigenous peoples.[128]

Resurgence thinkers would also likely agree with promoters of economic development (See Part III, Section 2) about erasing the impositions INAC bureaucracy on

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[126] Alfred, Gerald Taiaiake. “Colonialism and State Dependency” 5(2) *International Journal of Indigenous Health* 42-60 (2009)
[127] Alfred, Taiaiake. *Deconstructing the British Columbia Treaty Process.* University of Victoria (2000) Online: <https://taiaiake.files.wordpress.com/2015/01/gta-bctreatyprocess.pdf>
[128] Alfred, *supra* note 125.

First Nations;[129] however, they would likely distrust the ideological motives of a mandate based on pursuing capitalist-industrial definitions of well-being, such as the CWB and other financial metrics. They argue that economic progress is used as a manipulative incentive for impoverished First Nations to assimilate and abrogate their sovereign rights.[130]

Resurgent thinkers would likely denounce the FNLMR as a top-down process akin to treaty-making processes. By negotiating and implementing Land Codes and seeking INAC approval at every step of the way, they might argue that First Nations are complying with and perpetuating an inherently colonial conception of land management.[131]

Corntassel argues that the path forward for communities seeking self-government should not prioritize the consent of the state. It should be based on decolonization, not simply 'reconciliation'. They argue that communities are best served by looking inward, restoring Indigenous knowledge and traditions and building sustainable relationship with traditional lands.[132]

4) THE ENERGY PLANNING PERSPECTIVE

Some scholars have lauded the FNLMR as a potentially progressive land use planning tool. When read in conjunction with scholars who advocate for a shift towards local community energy production, it may be argued that the FNLMR doubles as a potent energy

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[129] Alfred, Taiaiake. "For Indigenous nations to live, colonial mentalities must die" *Policy Options* (2017) Online: <http://policyoptions.irpp.org/magazines/october-2017/for-indigenous-nations-to-live-colonial-mentalities-must-die/>
[130] Alfred, *supra* note 127.
[131] Alfred, *supra* note 126.
[132] Corntassel, Jeff. "Re-envisioning resurgence: Indigenous pathways to decolonization and sustainable self-determination." *Decolonization:* 1(1) *Indigeneity, Education & Society* 86-101 (2012).

planning tool. Supported by the principle of subsidiarity, the FNLMR may be an example of how facilitating local control over energy resources can empower a community's self-sufficiency.

Millete[133] admonishes the colonial legacy of ill-fitting planning regimes that have consistently failed to consider community needs and are inappropriate for the cultural and political context of Indigenous communities. Booth and Muir[134] advocate for Indigenous planning schemes rather than top-down schemes imposed on them by colonizing governments. In theory, the FNLMR allows communities to reconsider their own land use planning strategies in a bottom-up fashion. It opens the door for communities to draft their own laws, assert their own land management methods and erode the centralized authority of the *Indian Act.*

The principle that local governments are in the best position to solve their own problems is known as the subsidiarity principle.[135] Alcantara[136] cites subsidiarity as an important guiding principle for negotiations between First Nations and the Federal government, including in FNLMR agreements. He sees the FNLMR as a model framework for moving towards subsidiarity. The self-reliance principles that comprise the concept of subsidiarity have direct overlap with the agenda of self-determination, cultural revitalization and decolonization that many Indigenous communities are striving for and that the *Truth and Reconciliation Commission* advises.[137]

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[133] Millette, Daniel M. "Land Use Planning on Indigenous Lands - Towards a New Model for Planning on Reserve Lands" 20(2) *Canadian Journal of Urban Research* 20-35 (2011).
[134] Booth, Annie L and Bruce R Muir. "Environmental and Land-Use Planning Approaches of Indigenous Groups in Canada: An Overview." 13(4) *Journal of Environmental Policy & Planning* 421-442 (2011).
[135] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* [2001] 2 S.C.R. 241, 2001 SCC 40.
[136] Alcantara, *supra* note 116.
[137] Truth and Reconciliation Commission. *What We Have Learned: Principles of Truth and Reconciliation*. 2015

It is arguable that local energy planning has a major role to play in the pursuit of community self-sufficiency and subsidiarity, especially due to the remoteness of many Indigenous communities and to recent technological developments in distributed renewable energy generation technologies such as solar, wind, geothermal and energy storage. Many remote Indigenous communities have traditionally relied on diesel generation to generate electricity[138], which causes a host of problems including dependency on expensive fuel transportation and storage, risks of fuel spillage and inevitability air pollution from fuel combustion (which diminishes air quality and contributes to climate change).[139] Transitioning to renewable energy can potentially remedy these problems, as illustrated by Poezler[140] in many instances around the world. Even for communities that are not off-grid, the ability to house electricity generation in communities has proven a source of revenue and independence that may facilitate self-government capacity[141].

Despite the many promises of renewable energy for promoting community development, there are many barriers and challenges to renewable energy development in Indigenous communities. Many scholars have identified the high capital cost of renewable energy development as its highest barrier, especially in the context of small-scale economies of communities[142]. Scholars also note the vast diversity in contexts of communities[143], and the corresponding diversity barriers to energy development.

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138 Poelzer, Greg, Gunhild Hoogensen Gjørv, Gwen Holdman, Noor Johnson, Bjarni Már Magnússen, Laura Sokka, Maria Tsyiachniouk & Stan Yu, *Developing Renewable Energy in Arctic and Sub-Arctic Regions and Communities: Working Recommendations of the Fulbright Arctic Initiative Energy Group,* (Saskatoon: University of Saskatchewan, 2016); Knowles, James, *Power Shift: Electricity for Canada's Remote Communities*, (Ottawa: The Conference Board of Canada, 2016.

139 Knowles, *ibid*; Canada, House of Commons, Standing Committee on Aboriginal Affairs and Northern Development (AANO), *Study Of Land Management And Sustainable Economic Development On First Nations Reserve Lands*, 2nd Session, 41st Parliament, March 2014, (Chris Warkentin, Chairman) at 17.

140 Poelzer, *supra* note 138.

141 Poelzer, *supra* note 138.

142 Poezler, *supra* note 138 and Knowles, *supra* note 138.

143 Poezler, *supra* note 138.

The FNLMR may help to circumvent these barriers. As Alcantara purported, the subsidiarity of the FNLMR likely empowers communities to plan lands and energy resources on their own terms. It frees communities from INAC bureaucratic oversight which expedites the approval process for renewable energy projects and give communities more freedom in negotiating with external proponents regarding use of their collectively owned land.[144] This may facilitate inter-community and community-proponent agreements, such as equity-sharing arrangements, for renewable energy projects. It has been argued that the influx of capital and capacity from local renewable energy projects, in turn, further promotes community subsidiarity, self-reliance and self-determination.[145] There is a case to be made that the FNLMR is a significant catalyst in that process of empowerment.

[144] Alcantara, *supra* note 116.
[145] Poelzer, *supra* note 138.

PART III: INQUIRY

1) RESEARCH DESIGN

a) Research questions

As seen in the four academic perspectives of Part II, scholars have opined about merits of the FNLMR specifically (or bilateral land management agreements in general). Thinkers from each of these perspectives see something different in the FNLMR: a path to self-government, a source of economic growth, a set of planning tools or an oppressive imposition of a neo-colonial agenda. This paper investigates the community perspective.

The central questions that this paper sought to answer are as follows:

3. What are the purposes of enacting an FNLMR Land Code from the First Nation perspective?
4. Do the benefits of Land Codes to communities outweigh the negative impacts, with respect to self-government, economic development, and energy independence?

b) Case Study Methodology

In order to answer these questions, I have chosen to conduct a case-study of three consenting participant communities:

- Henvey Inlet First Nation (Anishinaabek in Ontario)
- M'Chigeeng First Nation (Anishinaabek in Ontario)
- T'Sou-ke First Nation (Saanich Coast Salish in British Columbia)

These communities were chosen based on the following inclusion criteria:

1. First Nation communities in Canada
2. Have signed an FNLMA Individual Agreement and drafted a Land Code
3. Have used or plan to use their Land Code to facilitate on-reserve energy projects

The case study is informed by three main sources of data:

(1) the Land Codes of the participant communities[146]

(2) Public documents, news stories, census data, community websites, proponent websites and documents from the LABRC

(3) Interviews with community representatives who were involved in the development or implementation of their Land Code.[147]

Due to the subjective nature of interviews, it was important to ensure some reliability in community representativeness among interviewees. Interviewees were selected from each community based on meeting the following inclusion criteria:

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[146] See Appendix A for the community Land Codes.
[147] See Appendix B for full community transcripts.

1. Member of the participant First Nation
2. Knowledge of their community's Land Code through direct involvement in its development or operation
3. Standing to speak on behalf of the participant community, by currently or previously holding any one of the following roles:
    a. Elected member of Council (including Chief) during Land Code Developmental or operational phase
    b. Senior Administrator of First Nation Lands Department during Land Code operational phase
    c. Land Code Co-ordinator during Land Code developmental phase

Through Google searches and word-of-mouth, I located First Nations who fit the inclusion criteria and began reaching out to them via phone and e-mail. I spoke to multiple community representatives in each community before finding individuals who fit the individual inclusion criteria. This process resulted in three communities who were willing to be interviewed and researched as participants in the case study.

Interviews took place over the phone over the course of 45 minutes to one-hour conversations. Participant responses to questions were recorded in typed notes. Each interview was slightly different, with participants steering the conversation in varying directions and sometimes inadvertently answering questions in alternative orders. As such, the interviews did not always follow the exact same linear path described in Table 4. Although not completely verbatim, the exact words of participants were captured whenever possible and when not, the substance of their perspectives was documented. Sometimes it

was necessary to paraphrase responses, so participants were asked to review the documentation for accuracy before submission of this MRP.

c) Ethics and Consent[148]

This study was relatively low-risk for the participants in that it did not involve any physical disturbance of any people, lands or cultural material. It also did not involve study of any confidential material or personal, sensitive subject matter. Aside from the interviews, data gathered was publicly available online.

However, because interview-based material was incorporated into this paper and the interviewees were speaking on behalf of their communities, an ethics review was necessary to address potential risks and issues of representation and consent. Because the research participants were First Nations, these risks were especially pertinent. There is a well-known history of exploitation of First Nations, both in the academic context and in general. Because I am a member of white settler society and my school, York University, is a primarily settler-colonial institution, it is important that participants contribute to my research with the knowledge that the study is intended to be primarily for the use and benefit of First Nations communities.

[148] See Appendix C for full Ethics Review, consent forms and other accompanying documents.

To address these concerns, I applied for research ethics review by York University's Human Participants Review Committee and Aboriginal Research Ethics Advisory Group. My research design was approved by both review bodies.

To allay the ethical concerns, it was important to ensure that interviewees were valid representatives of their community's perspective, who were capable of speaking on behalf of their community (See 'individual inclusion criteria' above). Next, it was important that the full, prior and informed consent of research participants was achieved. I informed participants that their information was being used in a Major Research Paper that may become publicly accessible. I provided participants with a written consent form explaining the research scope and purpose and how I was benefitting from it. I also orally explained that the study was intended to provide useful and informative tools for First Nations considering their own Land Code and served no other ulterior ideological motive. I also provided them with an option to remain anonymous in the study or to omit any information they did not want included. Finally, to protect information, I ensured that interview data would be stored exclusively on a locked USB drive and deleted in entirety by July 31 2018.

2) RESEARCH DATA

Data has been organized into three tables below.

Table 2: Summary of Land Codes[149]

Table 2 is a summary of the contents of Land Codes. The powers codified by the Land Codes are listed by general category alongside the relevant sections of each community's Land Code, the sections of the *Indian Act*

[149] *Henvey Inlet Land Code, supra* note 77, *T'Sou-ke Land Code, supra* note 87, and *M'Chigeeng Land Code, supra* note 102.

that would have held those powers and the analogous Provincial power under s. 92 and 92A of the *Constitution Act, 1867*. This indicates the degree and significance of power transferred from the *Indian Act*.

	Pertinent Land Code Sections			Removed Indian Act Sections and Regulations	Analogous Provincial Constitutional Power[150]
	HIFN	TFN	MFN		
Reserve Land Use Planning	S. 17, 26.03(f)	s. 16, s. 24.2(c)	s. 23.3(c)	s. 18-19.	s. 92(8), s. 92(10), s. 92(13)
Land Rights and Instruments	S. 27-34	s. 28-35	s. 26-30, 32-34	s. 20- 28.	s. 92(13)
Trespass Offences	s. 37.04, 37.05	s. 37.4, 37.5	s. 36.4, 36.5	s. 30-33	s. 92(13), s. 92(14), s. 92(15)
Roads, Bridges, Ditches and Fences	none	none	none	s. 34	s. 92(5), s.92(10), (16)
Expropriation	s. 16	s. 15	s. 16	s. 35	s. 92(13)
Restrictions on Alienation and Land Surrender	s. 18	s. 17, s. 36	s. 17, 35	s. 37-41,	s. 92(5), s.92(13)
Testamentary Disposition and Spousal Property	Pursuant to s. 26.03(g) and s 38	*T'Sou-ke Nation Matrimonial Real Property Law* (2009), pursuant to s. s. 24.2(d), s. 38, 39	s. 23.3(c), 37, 38	s. 42, 49.	s. 92(13)
Rights of Non-Residents and Non-members	s. 31, S. 37	s. 34.3, s. 37	s. 31, 36	s. 50(4)	s. 92(13)
Lands and Natural Resources Management	s. 36	s. 32.1(b)	s. 25, 30.1(b)	s. 53-60, 71 and regulations under s. 57 and 73.	s. 92(5), 92A
Revenue Management	s 20,21, s. 26.03(a)-(c), s. 36	s. 19-21, s. 27	s. 19, 25	s. 66, 69.	N/A
Law	S. 10, 26.03(e),	s. 24.2(b), s.	s. 9, 23.3(c), s.	N/A	N/A

[150] *Constitution Act 1867,* s. 92 and 92A. Note that s. 92(16) arguably applies to all of these sections.

Enforcement and Dispute Resolution	39-48, 50	40-43, 45	39-45, 47		
Environmental Protection and Assessment	s. 26.03(d)	s. 24.2(a)	S. 23.3(a)	N/A	N/A
Transfer of Liability	s. 49	s. 44	s. 46	N/A	N/A
General Land Code Powers, Policies and Procedures	s. 7-9,11-15, 19, 22-26, 51-52	s.6-14, 18, 22-23, 46, 47	s. 7-9, 11-15, 18, 20-21, 22-24, 48.49	N/A	N/A

Table 3: Comparison of Participant Land Codes[151]

Table 3 is a summary of the differences between in each Land Code. Every community's land code takes a slightly different approach and a side-by-side analysis can be be instructive as to the priorities of a community in electing to develop a Land Code.

#	PROVISION	VARIATIONS BETWEEN CODE		
		HENVEY INLET	T'SOU-KE	M'CHIGEENG
PART 1: INTERPRETATION (LANDS SUBJECT TO CODE)				
1	**Community Input for Reserve Land Additions**	"Shall receive community input" [s. 6.03]	"Shall receive community input"- [s. 6.3]	"May recieve community input" [s 5.5]
PART 2: FIRST NATION LEGISLATION				
2	**Enforcement Provisions**	Has enforcement provisions [s. 7.02(e), 10]	No enforcement provisions	Has enforcement provisions [s. 7.2(e), 9.1(c)]
3	**Appointment of Prosecutors and Justices of the Peace**	None	None	Band can appoint both [s. 9.1(c)]
4	**Who has standing to Propose Land Laws besides Chief and Council**	Lands Committee or any eligible voter [s. 8.01]	Lands Committee or authorized body [s. 7.1]	Lands Committee or authorized body [s. 8.1]

[151] *Henvey Inlet Land Code, supra* note 77, *T'Sou-ke Land Code, supra* note 87, and *M'Chigeeng Land Code, supra* note 102.

5	**Rationale requirement for introducing Land Law**	Required [s. 8.02]	Not required [s. 7]	Required [s. 8.2]
6	**Website Postings**	Not specified [s. 9]	Not specified [s. 8]	Specific requirement [9.1(c)]
PART 3: COMMUNITY APPROVALS				
7	**Threshold for community ratification requirement for leases**	35 year transfer [13.01(b)]	25 year transfer [12.1(b)]	25 year transfer [14.1(b)]
8	**Heritage sites**	No heritage sites	No heritage sites	No community vote for deletion of heritage site [s. 12.1]
9	**Quorum for votes**	10% quorum [s. 13.4]	50% +1 quorum [s. 13.5]	10% [s. 14.3]
10	**2nd Vote in Event of 1st Vote Not Meeting Quorum**	2nd vote with 5% quorum [s. 13.07]	2nd crack at vote with no quorum [s. 13.8]	No second vote
11	**Ratification process**	25% quorum, 10% 2nd try, no third [s. 15.06, 15.11, 15.13]	Same as normal community vote [s.14.3]	Same as communite ratification process [s. 15.3]
PART 4: PROTECTION OF LAND				
12	**Expropriation**	Some limits on expropriation [s. 16] No mention of Crown interests	Expropriation forbidden [s. 15.1]	Relatively detailed limits on expropriation [s.16] Canadian or Provincial interests not subject to expropriation [s. 16.7]
13	**Environmental Audit and Remediation for acquisitions**	Audit and remediation required [s.18.08(d)]	No remediation requirement [s. 17.8]	Audit and remediation required [s.17.8(d)]
14	**Commercial Land Use**	Entire section [s. 36]	No such section	No such section
PART 5: ACCOUNTABILITY				
15	**Budgetary Provisions**	Codifies budgetary rules [s. 20]	Codifies budgetary rules [s. 19]	Defers to Council to make rules for lands budget [s. 19.2]

16	**Audit requirements**	Specific auditing requirements codified [s. 21]	General requirement for auditing [s. 19.2(c)]	Specific auditing requirements codified [s. 20]
17	**Annual report meeting**	Meeting 90 days following annual report [s. 22]	No annual meeting	No annual meeting
PART 6: ADMINISTRATION				
18	**Lands Advisory Committee Rules and procedures requirement**	LAC Rules and procedures mandatory [s. 26.03(a)]	LAC rules permissive [s. 24.4]	LAC rules permissive [s. 23.5]
PART 7: INTERESTS LICENCES				
19	**Transfer of Permanent interests**	Can't transfer permanent interest in HIFN land [s. 31]	All or any part of interest or license must be confirmed by Band Council Resolution [s. 30.4]	Can only transfer licence lease permits [s. 30.4]
21	**Allocation rules**	May make rules [s. 33.02]	May make rules [s. 34.1]	Shall make rules [s. 5.33]
22	**Limit on seizures/ mortgage interests**	35 year limit [s. 35.05]	25 year limit [s. 36.4(b)]	Limited only by term of lease – which is 25 years for community approval [s. 35.4]

Table 4: Phone Interview Questions and Participant Responses

Table 4 is a summary of the phone interview questions posed to the interviewees. There are 23 standardized questions in 5 categories: (1) Background, (2) Objectives, (3) Benefits, (4) Harms and Risks, and (5) Conclusions.

#	PHONE INTERVIEW QUESTIONS	PARTICIPANT RESPONSES		
		HENVEY INLET FIRST NATION	**T'SOU-KE FIRST NATION**	**M'CHIGEENG FIRST NATION**
BACKGROUND				
1	What is your role within the community	President and CEO of the Nigig Power Corporation and former Special Projects Administrator for the Band Office (during the developmental phase of the	Currently I'm a support technician at the LABRC but am formerly a Lands Administrator at T'Sou-ke First Nation.	Former Chief of M'Chigeeng First Nation, during the initial phases of the Land Code process.

		land code)		
2	What is **your role** within the Land Code process?	I was one of the people who initiated the Land Code process in 2006 and 2007 when we first began discussing it within the band.	I raised the idea of a Land Code while doing some research in 2004 while I was a secretary in the Band Office. I was then on the Lands Committee overseeing consultation and administration.	I started the whole process. I wrote a letter to INAC saying we wanted to do a Land Code and the Minister supported it. We got going right away.
3	Describe the **community consultation** process. How did you gauge support or dissent?	We consulted very thoroughly, including on and off-reserve membership. We travelled off reserve to consult. We provided lots of data and research. The community was overwhelmed by the volume of data but were positive and supportive of the Land Code and the process.	Because our community is small, consultation was not as onerous as in other nations to inform and mobilize people. We focused on consensus. Our Lands Committee was designed to be representative of the community in terms of families and age groups. We divided up the members list based on these criteria and divided the consultation tasks up among committee members. Committee members hosted family-based community meetings and dinners with small groups to discuss their concerns. We consolidated their feedback to produce a final land code.	We saw community consultation as one of the most important parts of development. We had a number of open community meetings that were well attended. The Land Code development was educational more than anything. Consultation needs to be educational. Our community members were learning about the Land Code but also learning about our traditions and the sacredness of our teachings about the land. They needed to learn that we are keeping colonization alive when we sit back and let the Federal government make decisions for us.
OBJECTIVES OF LAND CODE				
4	**Why** did you enact a Land Code?	The Land Code came out of frustration with INAC bureaucracy. Referendums to set aside land for commercial development (under INAC procedures) was too time-consuming. It took 3 years to do a referendum to do land with commercial use when we tried to do it in 2000. Too slow. Even then, we couldn't secure the type of land rights we needed for development. We called in the Minister and regional general counsel for assistance. They suggested a Land Code. In late 2006, we began researching it and I recommended it to Chief and Council.	Four main reasons: 1. **Demonstrate our inherent land rights** – most important for me. We have been managing our lands since time immemorial and we know best how to do it. The government stands in our way. 2. **Self-government under treaty -** we are under the douglas treaty but have unextinguished rights and title. If we sign a treaty, The Land Code and its laws will stay with us and form the land rights in the treaty	[See questions 5-8]
5	Was **self-government**	Even though the nation wants self-government,		Self-government was a big motivation and

	and/or reconciliation a goal of the Land Code?	the Land Code was not specifically intended to achieve self government or reconciliation. The motivation was more economic. We want to create our own economy.	government.(there is precedent for this in modern treaties in Land Code communities in BC) 3. **Environmental Stewardship** - we know how to manage our environment in a sustainable way. It builds and breeds resentment when the Federal government tells us how a. Solar project b. Agricultural process – food sustainability – concept came to light that an emergency would give the island 3 days worth of food. That sparked concerns and ideas. Traditional plants and food sources. Forabeable plants. Organic gardening. Certified organic. Not organic certified. Provides food for elders. Communit	keeping our traditions alive. Our seven grandfather teachings must be included in the land code. Maybe not all seven of them, but at least some of them. They are like our constitution. 10 commandments, even. Everything we do needs to be connected in some way to those teachings. INAC doesn't care about those teachings. Land Code process is part of reconciliation. If the government is serious about reconciliation, they need to look at their history and performance. They need to begin harmonizing our laws. THe Land Code is a small part of that bigger picture. Childcare, education, elections, land management, property, resources are all part of that picture.
6	Was **environmental protection** a goal of the Land Code?	Initially it wasn't major but, in a complete surprise to us, it became more relevant as time went on. The Land Code has a provision for environmental assessment. We had our own process but it wa clear for the wind project that we'd need to be more engaged. Under Environment Canada it wasn't possible at the time for us to conduct the assessment and issue a permit. We decided to take control of our own environmental assessment and permitting process using the Land Code. Even though we didn't have authority under the EA Act, we did our whole		Environment was another motivation. We care about the environment because we're a small place here. We have the Bay water which we want to take care of. Water need to have the same status over the area. Our water rights can't be violated. Land planning. Can't contaminate the land. We have to respect the earth we live on and our four sacred elements. The land has rights. Their not written down but we need to write them down and document them so they're not lost. The land code is a way to document our traditional values.

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<td>environmental stewardship regime, including EA and Species at Risk, as though we had the authority to do it under the Land Code. We replicated the Federal and Provincial standards.</td>
<td rowspan="3">y meals in general. Students who weren’t necessarily emlpoyable. Students making a few bucks. Somewhat lucrative. Food security. Fishing hunting gathering. Going out to see and learn how to live on the land.
4. Economic development - #1 for a lot of people, but not necessarily my top reason. It is important though. We were tired of asking permission to initiated leases to extract gravel pits, for example. A two-week project could take a couple of years to be approved under the Indian Act. Now we can lease land under development law. What would happen before is we would have talks with a developer and get some ideas and draw up plan and we’d tart the process with INAC and the developer would walk away because it would take to long. People would blame chief and council –- with a Land Code we can do this on our</td>
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<td>7</td>
<td>Was the alteration of reserve land rights a goal of the Land Code?</td>
<td>The Wind Farm project (HIWEC) was, and remains, our largest venture and required us to use the land in certain ways to allow the project. We always needed full community consultation and referendum to use the land that way. We still do, but now we control the process, not Indian Affairs (INAC)</td>
<td>We started the Land Code when we were doing our windmills because as we were doing the planning, reviews and studies, there were so many regulations that apply through INAC. The roads running down from the wind generators to the highway for the hydro line involved overlapping lands rights with other property owners and first nations. This was an obstacle and it would have been faster with a Land Code.

We also had to create a corporation to control the wind project which would have been better if it was a corporation of our own design and not through the INAC process. The Province and INAC all required us to incorprate their way which was a restriction we didn’t need.

In the future, using solar will be better than windmills. Windmills affect deer, partiridge, etc. Solar might be less of an impact. THe Land code could help by allowing the band to be more supportive and create options for people. The code might help the band encourage solar over wind, water-based or fossil fuel based energy projects.</td>
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<td>8</td>
<td>Were energy and natural resource</td>
<td>Yes. With the Land Code, we could handle</td>
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	projects a goal of the Land Code?	everything directly with the Wind Farm. We could hire more freely, direct the environmental report, respond to the partner more quickly and assert control over the permitting and land use process. Time sensitivity is crucial with an energy project because there is only a 3-year window for Provincial Power Purchase Agreements. We needed the Land Code to speed things along in that time window.	own time. We would not have done the solar project under the Indian Act because of delay. Now all we need is a Band Council Resolution to get started.	
9	What objectives did the community express for the Land Code during **consultations**?	The questions and input from the community were not as deep. Because of our knowledge base, we understand the Code better than other members. Members mostly wanted to understand more high level things. Members wanted to ensure benefits and proceeds and wanted to make sure we were protecting our land rights from exploitation or violation.	The reasons list in question 4-8 were attained through community consultation and consensus-building.	The community is generally supportive of taking control. Generally the community doesn't understand the sacredness of the teachings and the elements and why the Land Code is important in that way. People are generally concerned with specific issues like their own property or cottage or local marina but don't get to the root of the problem which is out tradition.
		BENEFITS OF LAND CODE[152]		
10	What are the **positive impacts** of your Land Code?	It is definitely beneficial. It gave us the ability to engage with the Wind developer on multiple levels. In addition to the environmental stewardship regime, we were able to make a corporate partnership more easily. Our agreement with the partner is 4 or 5 inches thick and we negotiated that ourselves. With	Overarching benefit is we are able to pass laws that are in line with our cultural values and traditions. Economic development, keeping up with the speed of business, the intangible pieces, increased self esteem, importance of community, accountability, consensus-building.	N/A [see questions 4-8]

[152] M'Chigeeng's Land Code is drafted but not operational so their answers are based on their expected outcomes.

		INAC oversight it never would have got finished – this is not an opinion, it is a fact..INAC was too slow. We absolutely would not have managed to forge this partnership without the Land Code.	The membership votes on the laws, the memebrship votes on the priorities, the membership passed the land code. Council are required by the land code to be accountable to the people only. Under the Indian Act they were accountable to the federal government too. The Land Code process paved the way for building community consensus on other issues.	
11	Have community members expressed **positive feedback** during **consultation**? How do you know?	The feedback from the community was overwhelmingly positive. There is a general community understanding that the Wind project would not be possible without our land code. Votes show community support. We gave them all the facts and they came out with overwhelming support in the referendum.	People feel that the Land Code projects have brought the families together for a common purpose. People's hands are tied by INAC and people tend to agree on things that relieve from INAC as a whole.	Yes. Positive feedback from community. [See question 9]
12	Has the Land Code furthered **self-government** and/or **reconciliation**?	Even though it wasn't a goal, the Land Code does have an impact on reconciliation and self-government, climate change and other 'Mother Earth' sorts of issues. What's really lacking for self-government is an economic base. With the wind project, we are going from a state of poverty to one of economy virtually overnight. We can finance any kind of program we want using revenues from this project – language, environment, infrastructure. We have capacity because we have achieved economic gains.	Absolutely self-government –- Land Code is a huge piece of that –- ⅓ of the Indian Act no longer applies. Reconciliation – NO. it doesn't lend to reconciliation at all. The Land Code is our inherent right. The government is not doing this. We are doing this for ourselves.	N/A [see question 4-8]
13	Has the Land Code improved **environmental protection**?		[See question 4-8]	N/A [see question 4-8]
14	Has the Land	[See question 7]	The Quick answer is its a	N/A

	Code altered your community's **land rights**?		quicker process – easier to go through the process without asking persmission to lease to yourselves.	[see question 4-8]
15	Has the Land Code enabled your **energy or natural resource** projects?	[see question 8]	Corporate partnerships –- Andrew Moore headed up the corporation would secure and leverage funding. We will give you thi much if another organization matches it. $1.25 million from various sources and pools of funding. Staff timing contributions. It was a bit of a process to leverage that money at once.	N/A [see question 4-8]
HARMS AND RISKS OF LAND CODE				
16	Are there any **negative impacts or risks** of your Land Code?	There are not really negative impacts. There are issues with developing an elaborate set of land laws. We are certainly operating under capacity to operate and manage our lands. Capacity building is more of a broader problem though, not specific to the Land Code. The Land Code and Framework Agreement is deficient in some areas – including a lot of commercial considerations. We had to modify certain things with the help of our legal team but it came out the way we want it.	Negative Risks –- we can't go back. For some people that felt scary. Once we make this decision, if we mess up nobody is fixing us. Nobody is taking the liability but us. We will have to live with the consequences of whatever we do. Of course its a risk. Its driver of why its so important to us. And insurance. We need to have tight streamlined processes.	It is 100% positive and beneficial.
17	Is there any **community dissent** about the value of a Land Code? How do you know?	Out of hundreds of members consulted, only ten or so people asked difficult questions. Of those, perhaps only two at the consultations remained opposed. I'd guess there were maybe 25 or 30 people in the whole community who were known to oppose the land code, but they	No dissent –- overwhelmingly positive because we focused on consensus-building. We gauged that through family and community meetings and through the land committees reports back with specific people. It was really overwhelmingly positive. If there was	Not really dissent, but lack of full knowledge [see question 9]

		didn't participate in consultation. Some people had fears of being exploited by the private sector or the government, fear of not getting the jobs and benefits promised, fear of losing land rights.	anything, it was fear of change. But people came around to it is and decided "lets make waves". Sometimes elders have the most to fear. Elders from that generation don't want to do anything with INAC. Teh generation from the sixties scoop and residential schools looked upon deals with the government with fear.	
18	Is the **transfer of liability** from the Federal government to the band a concern?	The Federal Department of Justice("DOJ") did warn us of potential for liability They thought we didn't have capacity for the land administration and the liability would blow up in our face someday. We took the concern seriously and took a lot of sophisticated legal measures to protect ourselves. The wind project is a billion dollar project and so we are aware of the liabilities. We see it as a positive if the DOJ and INAC are washing their hands of it. They are very parental and controlling, thinking they are protecting us from ourselves. We are ready to take control.	Liability is well worth the control	Not concerned about liability or the expense of band administration. It is all worth it to be able to uphold our sacred teachings.If you do things right and take care of business in the right way, there's no cost thats too high. After a year or two, the expense of monitoring would not be too much work.
19	Is the **expense and capacity required** for land management administration a concern?	[see question 16 and 18]	It is financially beneficial and we have the capacity for our projects.	
20	Do you trust the **Federal Government's motives** for wanting a Land Code?	Suspicion from dissenting community members was well-founded. There is a lot of distrust and a lot of cases of the government stalling our economic development.	Don't trust them. Federal government – their ulterior motives show up in the way that they select the next communities to enter into the framework agreement. Nations will fill out a readiness questionaire: (do they have the capacity and readiness to proceed with a land code) and they make a	[See question

			list of who is ready to enter the process. There is continuous negotiation and argument to decide who's ready. The federal government tends to select bands that are 'ready' based on criteria that don't make sense — from my point of view, knowing all the communities in the area well, it seems like the ones they choose tend to have the problems that they want to wash their hands of –- usually some big legacy issue. The goal of the indian act was to assimilate us –- we can't pretend its anything less than that so there is a huge mistrust of the government for sure.	
CONCLUSIONS				
21	**Overall**, do you think the Land Code has been **positive or negative**?	Definitely positive. Would do it over again. We need even more control. The government is incompetent when it comes to our local issues. We've managed to take on a very sophisticated environmental assessment process and species at risk mitigation measures. We sent lots of biologists to inspect the site and exceeded normal environmental assessment standards would be. The scale of our project made that possible but the Lands Advisory Board should provide more in the Individual Agreement for other First Nations.	Overall its positive and has accomplished its objectives.	Definitely positive.
22	Do you have any **advice** for communities who are thinking of enacting a Land Code?	To a large degree, the process is a good process and you have great access to other bands and lots of info to draw from. Lots	Biggest piece of advice is: do your homework. See what Land Codes are doing for other nations and see if it helps you. Call other lands	N/A – process not complete.

		of examples from the LAB are highly theoretical. Once you get back the theoretical phase, you can understand the realities and needs of your particular community. I have nothing bad to say about the LAB and the Land Code process but the IA would be better if it had more help on the commercial side. We managed to work around that with help from a lot of experts, legal and economic, that helped us understand what we needed. Other communities should do that too.	managers to see how its really working from their perspective. Research research research. Foster regional partnerships with other First Nations–- you can create think tank sections. Regional cooperation helps capacity building. It also helps troubleshooting – many other bands will have the same problems at the same time. They can solve them together. Think tanks sessions focus in on the communities greatest needs. Every region is different.	
23	**Do you have any other comments about Land Codes?**	Though the Land Code has been in place for a few years, the HIWEC project has not begun. In December 2017, the project contract will close and construction should begin in 2018. It will be a few years before the full economic	N/A	Land Code status is up in the air/delayed due to the current electoral crisis which has created uncertainty about band membership and voting eligibility

PART IV: ANALYSIS

1) SUMMARY OF RESULTS

a) Question 1: Purposes of Land Code

All three of the interviewees were in a strong position to discuss the purposes of enacting a Land Code because the representatives were each driving initial forces that pushed for a Land Code to be enacted in their respective communities. Once the Land Code development was underway, each of the interviewees continued in leadership positions to ensure their vision of a Land Code came to fruition.

i. T'Sou-ke First Nation

The representative of T'Sou-ke First Nation had comprehensive and concise reasoning for adopting a Land Code, describing a four-fold purpose[153]:

1. Inherent rights: to assert inherent pre-existing rights to land management

[153] See Above: Table 4, question 4-8.

2. Self-government: to establish a governing framework for self-government, in anticipation of potential modern treaty agreement
3. Environmental Stewardship: to manage the environment in a sustainable way through energy, agriculture and conservation policy
4. Economic development: to operate at the 'speed of business' by eschewing INAC bureaucracy and delays. Facilitating corporate partnerships to help accomplish community projects and goals

T'Sou-ke listed these in order of importance. However, they also acknowledged that other people in the community might order those differently. For example, some would rank economic development higher that she did.[154] Despite variation in their order, T'Sou-ke said that those four objectives are accurate reflections of the broader community perspective because they were derived directly from the community consultation process.[155]

ii. M'Chigeeng First Nation

The representative of M'Chigeeng First Nation cites many of the same reasons as T'Sou-ke for adopting the Land Code but puts a much stronger emphasis on the restoration of Anishinaabek spiritual and cultural roots as the driving factor.[156] M'Chigeeng mentions the inherent right to manage land, self-government, the benefit to business development and the importance of protecting the environment. He repeatedly directed the conversation towards the importance Seven Grandfather Teachings. For him, they underlie the purposes of the whole Land Code process. The Land Code, in his view, must be a direct expression of those

[154] *Ibid.*
[155] Table 4, Question 3.
[156] Table 4, Question 5.

teachings to properly move away from the more colonial, INAC-dominated model of governance.

M'Chigeeng's representative acknowledges that his emphasis on the Grandfather teachings is not shared by the whole community. He feels the community debates around the Land Code generally do not discuss the importance of the Grandfather Teachings. However, he says the Land Code still received universal community support during consultation because people want to reclaim control of governance from INAC, and want to have a say over their own environment and property.[157]

iii. Henvey Inlet First Nation

The representative of Henvey Inlet First Nation acknowledged the importance of T'Sou-ke's four criteria to varying degrees, but ultimately placed the most emphasis on economic development. He said that asserting inherent rights and self-government in a broader sense was not the primary motivation of the land code (although he clarified that the band does want to achieve those things). Henvey emphasized economic development motivations as the primary driving force, focusing on heavily on the implications of the Land Code for the HIWEC project.[158]

Henvey said that the community consultation echoed the emphasis on economic development. Many questions were about ensuring that benefits and proceeds would go

[157] Table 4, Question 9.
[158] Table 4, Question 4.

towards band members and that the band wasn't being exploited in any way by INAC or industry.[159]

The emphasis on economic development does not mean that Henvey or the community are unconcerned with the other motivations mentioned by T'Sou-ke and M'Chigeeng (self-government, inherent rights, spiritual traditions, and environmental protection). According to Henvey, they believe that achieving those other goals starts with building a local economy to provide the resources to support environmental and cultural programming.[160]

b) Question 2: Net Outcomes of Land Code

Participant communities stated unanimously and emphatically that the Land Code was a net positive contribution to their community. Each of them said that community consultations and feedback were overwhelmingly in favour of the Land Code.[161] Communities all agreed that land codes furthered self-government, economic development, and energy planning; however, they varied in their degree of emphasis. For example, Henvey Inlet downplayed the broader importance of the FNLMR in achieving self-government, emphasizing the economic and commercial benefits. T'Sou-ke and M'Chigeeng also emphasized economic benefits but were more emphatic about the cultural dimensions and broader significance of the shift in governance.

[159] Table 4, Question 9.
[160] Table 4, Question 12-13.
[161] Table 4, Question 9,11,17.

Communities were unanimous that there would be some risks from the transfer of liability and the challenges of community capacity building.[162] However, they were also unanimous that those risks were quite manageable and well worth the many other benefits of assuming control over local land management.[163] The three communities placed varying emphasis on the level of risk involved and the safeguards necessary to mitigate those risks; however, the substance of the three community's positions on negative impacts were more or less identical: that they were not significant enough to outweigh the benefits.

Table 5 summarizes the interviewee responses regarding the outcomes of the Land Code. This table condenses answers recorded in Table 4. For elaboration on these findings, see Table 4.

Table 5: Summary of Responses Regarding Land Code Outcomes

Henvey Inlet	*T'Sou-ke*	*M'Chigeeng*
a) Have Land Codes succeeded in their objectives of...		
...asserting inherent rights to land management and self-governance instead of perpetuating patterns of colonial mismanagement?		
Indirectly, yes[164]	Yes.[165]	Yes[166] (anticipated[167])
...improving environmental protection and conservation?		
Yes.[168]	Yes.[169]	Yes (anticipated)[170]
...stimulating local economic development?		

[162] See Table 4, Questions 16-20.
[163] See Table 4, Question 21-22.
[164] See Table 4, Question 5, 10, 12.
[165] See Table 4, Question 5, 10, 12.
[166] See Table 4, Question 5.
[167] **Note**: M'Chigeeng has not entered the Operational phase, so these questions are still highly speculative.
[168] See Table 4, Question 6, 13.
[169] See Table 4, Question 4-8.
[170] See Table 4, Question 6.

Yes but full results remain to be seen.[171]	Yes.[172]	Yes (Anticipated)
...achieving energy independence?		
Yes but full results remain to be seen[173]	Yes[174]	Yes (anticipated)[175]
b) Are there any negative impacts or risks from the Land Code? [176]		
There are risks but we took elaborate steps to mitigate them.	Not really. The control over land is worth the expense and liability.	No. It is 100% positive and worthwhile.

2) DISCUSSION OF RESULTS

This paper has sought to gain a limited glimpse into the implications and rationale for the implementing the FNLMR and to assess it as an enabler of self-governance, decolonization and energy independence. This discussion will look at how the community perspective aligns with various schools of academic thought on FNLMR Land Codes and on other bilateral agreements between Indigenous communities and the Canadian state.

a) The General Perspective of Participant Communities

Based on the findings summarized above, the participant community perspective on FNLMR Land Codes is overwhelmingly positive. According to the interviewees,[177] the Land Code has brought (or will bring) greater freedom to govern their own lands and develop local

[171] See Table 4, Question 5, 7, 8, 10, 23.
[172] See Table 4, Question 4-8, 10, 14,15.
[173] See Table 4, Question 5, 7, 8, 10, 23.
[174] See Table 4, Question 4-8, 10, 15.
[175] See Table 4, Question 7-8.
[176] See Table 4, Questions 16-21.
[177] As evidenced by interviewee reports about community consultation and the results of community referendums.

economies. In addition, it has enhanced communities to address local environmental concerns on their own terms rather than INAC's.

On the surface, the FNLMA and Framework Agreement show some indication of bearing negative neo-colonial traits that might not be in community's best interests. For example, INAC approval is still required at many stages of Land Code development, Land Codes have a mandatory clause transferring liability from INAC to the First Nation and Land Codes transfer various land administration expenses from INAC to First Nation government.[178] The Land Codes themselves are typically drafted in a legislative format that is in the tradition of European, colonial common law.

The communities participating in this study seemed unconcerned by these risks. When asked about the transfer of liability and transfer of expense, the unanimous response from the participants was that these risks are a small price to pay for the reclamation of control.[179] According to Henvey Inlet, who have perhaps the most potential lands-related liability due to their HIWEC project, the risks are all manageable if a signatory First Nation seeks appropriate legal counsel and financial consultation.[180]

In summary, the participants in this study are unanimously very optimistic about the positive impacts of their Land Code and somewhat dismissive of potential negative impacts or risks.

b) Indigenous Rights Perspective

[178] *Henvey Inlet Land Code,* supra note 77, s. 49, *T'Sou-ke Land Code, supra* note 87, s. 44, *M'Chigeeng Land Code, supra* note 102, s. 46.
[179] See Table 4, Question 16-20.
[180] See Table 4, Question 22.

The case for the legal right to self-government, made by Borrows, McNeil and Slattery, is paralleled by the participant communities in this study. All participants expressed that their communities sought self-government and freedom from INAC, especially T'Sou-ke and M'Chigeeng who expressed this as a central objective of their land code.[181] Henvey Inlet did not express self-governance, more broadly, as a central objective; however, they did describe as central the transfer of land governance from INAC to the First Nation, which is certainly related.

The development of Land Codes is often erroneously construed as a granting of positive governance powers by INAC. In describing the FNLMA, the INAC website says it "provides signatory First Nations the authority to make laws in relation to reserve lands, resources and the environment".[182] Based on this wording, the implication is that the authority to manage lands is something new for First Nations being granted by INAC from the *Indian Act*.

In her interview for this study, the representative of T'Sou-ke was critical of this point of view. She insists that Land Codes are not made 'under' the FNLMA.[183] The FNLMA is not the source of authority for First Nations, but rather is the Federal government's means of formalizing the government-to-government *Framework Agreement*, which itself is an expression of First Nations' pre-existing right to govern their own lands. By this framing, Land Codes are not a granting of rights or authority, but an amelioration of a negative infringement on an inherent right to self-govern imposed on First Nations by the *Indian Act*.

[181] See Table 4, Question 4.
[182] Canada, Indigenous and Northern Affairs Canada, *First Nations Land Management Act*, (2013) Online: <https://www.aadnc-aandc.gc.ca/eng/1317228777116/1317228814521>
[183] See Table 4, Question 4.

By T’Sou-ke’s reasoning, the INAC website would be more accurate in saying ‘the FNLMA facilitates for the signatory First Nation a transition away from the *Indian Act* towards a reclamation of authority over their own lands”.[184]

T’Sou-ke and M’Chigeeng’s rationale for the FNLMR both echo Napolean and Borrows arguments about the legitimacy of traditional Indigenous law. M’Chigeeng talks about using the Land Code to uphold their Seven Grandfather Teachings as constitutional principles and T’Sou-ke talks about returning to a traditional consensus-building model to make decisions about land use and sustainability.[185]

Overall, the community perspective provides an assertion of the inherent right to self-government that directly parallels the one advocated by scholars.

c) Commercialist Perspective and Energy Planning Perspective

Participant First Nations in this study were unanimous that the Land Code made the process of approving energy projects much quicker, easier and more effective, which supports the Commercialist Perspective of Alcantara and also supports the argument in favour of the FNLMR as an energy planning toolkit.

Clearly, a Land Code is not required to effectively facilitate an energy project. M’Chigeeng built two large wind generators with no Land Code in effect. Batchewana First Nation in Ontario implemented a wind farm without participating in Land Code process by

[184] It is because of this rationale that this paper uses the terminology of the ‘FNLMR’, to encompass the FNLMA, the *Framework Agreement* and community Land Codes.
[185] See Table 4, Question 4.

simply asserting their inherent right to self-govern in defiance of INAC's approval requirements.[186] Colville Lake in the Northwest Territories constructed a major solar project without the aid of a Land Code.[187]

However, the participants in this study have all said that a Land Code makes it easier. Henvey Inlet has demonstrated that such a project can use a Land Code to ensure the highest standard of environmental review. T'Sou-ke stated that the Land Code allows them to operate "at the speed of business".[188] Avoiding INAC approval requirements and delays was cited unanimously and quite frequently by all participants as a practical concern and motivation of implementing a Land Code. This supports the views of Alcantara and Flanagan who lambasted the burden of INAC bureaucracy and supports the views of Booth and Muir who see the Land Code as a decolonizing and innovative Land Use planning tool.

The principle of subsidiarity, as mentioned by Alcantara, is also paralleled by the community perspective. All communities asserted that they, as local governments with ancient ties to their lands, were in better positions to handle local lands, business and environmental issues than INAC with their remote oversight from Ottawa.[189] Participants saw local energy production as a way to empower their local economy and the Land Code allowed them to tailor laws to achieve planning goals that met own communities' particular needs.[190]

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[186] Globe and Mail. *Wind farm stirs up friction between First Nations.* (2012 Oct 5) Online: <https://www.theglobeandmail.com/news/national/wind-farm-stirs-up-friction-between-first-nations/article4593667/>, Batchewana doesn't appear on LABRC Member List, supra note 61.
[187] CBC News *An off-grid community goes solar and gets closer to its roots* (2016) Online: <http://www.cbc.ca/news/canada/north/colville-lake-solar-power-1.3604310>. Colville lake doesn't appear on LABRC Member List, supra note 61.
[188] See Table 4, Question 4.
[189] See Table 4, Question 4.
[190] See Table 4, Question 4.

None of the communities shared the views of Flanagan and Campbell that collective land rights needed to be eroded into privatized fee simple to facilitate economic development. Henvey Inlet, who has the greatest emphasis on commercial development in their Land Code, has found ways to work with collective land rights by offering longer term leasehold interests to secure loans from investors and project proponents.

Overall, participant First Nations seem to have some common ground with academic proponents of economic development in the sense that they want to see increased commercial development and financial prosperity, free from the bureaucratic micromanaging of INAC; however, there are important ideological differences and motivations underpinning these goals. The academic perspective is largely rooted in broader ideological theories of political science and economics, whereas the community perspective is largely about preservation of community and culture though the realistic necessity of economic participation.

d) Resurgentist Perspective

The participant community perspective would certainly accord with the resurgence movement in the objective of eschewing INAC bureaucracy and taking control of local land governance. Communities would also agree on the resurgent imperative of asserting inherent sovereignty and rights to self-determination. M'Chigeeng is especially parallel to the resurgence perspective when it comes to the Land Code because of their emphasis on returning to their Seven Grandfather Teachings as guiding principles and because of their more stark repudiation of INAC involvement in reserve activities.[191] T'Sou-ke also reflects a

[191] See Table 4, Question 4.

somewhat Resurgentist perspective in their return to tradition consensus-building models of local decision-making.[192] This is not only a transfer of power from INAC, but a process of cultural restoration.

Resurgent thinkers, however, may critique community involvement in the FNLMR process in the first place. Resurgent scholars tend to think of INAC-approved bilateral agreements as a degradation of community autonomy and an act of subservience to colonial oppression. They might also see the economic development motivations of all three communities, including the development and operation funding from INAC, as manipulative incentives to sign away rights and liabilities to the state. Resurgentists might argue that communities always had the inherent right to take control of their local governance from the *Indian Act* and never needed the consent of INAC to assert it.

It is possible, however, that Resurgentists would support Land Codes that, like M'Chigeeng or T'Sou-ke, work to restore traditional modes of governing and managing local lands. To the extent that Land Codes are used by communities to restore traditions and decolonize governance, Resurgentists and participant communities may see eye-to-eye.

Because I was unable to locate literature in which resurgent scholars study or opine on the FNLMR specifically, it is difficult to say how the community perspective relates to the Resurgentist perspective. However, it may be safe to assume that they are in similar vein, but the Resurgentist perspective would likely take a harder line on using a Land Code to assert sovereignty and independence.

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[192] See Table 4, Question 4.

3) CONCLUSION

This paper was not seeking to comprehensively evaluate the merits of the FNLMR. In a three-community case study, the breadth of the scope is inevitably limited. Because the study was limited to one interviewee, the depth of scope, too, is limited. Neither interviews with representatives, nor comparisons of Land Codes, nor reviews of public information effectively probe the entirety of the community perspective and they do not yield any quantifiable facts about economic impacts. Furthermore, an analysis of the cultural implications of the FNLMR evades the scope of this (and arguably any) study.

The goal of this paper was simply to voice the perspective of three communities who are participating in the FNLMR process. The overarching question in this paper is whether the Land Code is perceived by participant communities as beneficial or not, based on its contribution to energy projects. In general, the results indicate an unequivocally positive perception of the FNLMR process from these three participants.

All the communities implemented their Land Codes to regain control of land and resource governance, to relinquish the burden of INAC oversight, to protect their local environment and to streamline commercial partnerships. Participants emphasized these priorities to varying degrees, but all shared them as key motivations.

None of the participant communities thought that the FNLMR was the ‘silver bullet’ to achieve self-government and reconcile colonial histories. They all saw the FNLMR process as one small part of a broader picture of strengthening local governance. While communities tended to share the sort of distrust for government typically espoused by

Resurgence thought, they seemed willing to participate in a bilateral INAC-driven process because it allowed them to address practical concerns in their community and gives them freedom to operate lands on their own terms in the future. In the case of T'Sou-ke, it also helped the community to restore a profound traditional consensus-building model of decision-making and consultation.

All communities were confident that Land Code-driven energy projects were contributing positively to their governance and land-use goals. Communities felt empowered by the Land Code to design and execute their energy projects, while monitoring their lands for environmental impacts. Henvey Inlet and T'Sou-ke went so far as to say their energy projects would not have been possible in the absence of their Land Code.

Communities also shared a dismissal of the risks and concerns associated with the transfer of liability and administrative expenditure to their community from INAC. While all participants expressed distrust and frustration with the imposition of INAC management, they also unanimously felt that the risks and costs of the transferring land responsibility were worth the benefits.

Admittedly, this study is biased. Given the decision to interview communities that have already chosen to proceed with a Land Code, it is not surprising that such an inquiry would yield a positive response. Arguably absent from this inquiry are the perspectives of communities who deliberately refrained from a Land Code while furthering their energy project.[193] Perhaps the views that held them back from FNLMR are more in line with Resurgentist thought, espousing an uncompromising position on Federally-led self-

[193] For instance, Batchewana First Nation in Ontario.

government initiatives. Perhaps such committees simply feel, in contrast to this study's participants, that the risks of liability transfer outweighed the benefits of control. Without their participation in this interview, this is only speculation.

It is also true that the participant communities are very early on in the operation of their Land Codes. It is quite possible that another decade or two of FNLMR operation would lead to issues of expense or liability that would detract from the positive reviews given in this study, but this is, once again, speculative in the absence of a long-term study.

Despite these limitations, this study has conveyed the perspectives of three communities who have implemented FNLMR Land Codes for energy development, adding their voices to the academic conversation. Their insights corroborate what many scholars purport to be true: that many communities are ready to regain control of their lands and resources, that INAC bureaucracy is an impediment to doing so; and that even relatively small communities like Henvey Inlet, M'Chigeeng and T'Sou-ke are capable of sophisticated, far-reaching feats of energy planning and resource management if empowered to do so. Using the FNLMR as a legal toolbox, these communities have not only spearheaded major renewable energy projects, they have brandished their capacity to govern on a local level. In light of the regulatory gaps on reserves between federal and provincial governments, the growth of such local capacity could help clarify jurisdictional roles at all levels of governance. Though the FNLMR may not be **the** path forward, these three communities have shown us that it certainly is **a** path forward. Or, at least, it is a useful set of tools to bring along the way.

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APPENDIX A: PHONE INTERVIEW QUESTIONS AND RESPONSES

TEMPLATE INTERVIEW QUESTIONS

Background and Context

1. How long has your community had a Land Code in force under the First Nations Land Management Act
2. When did you decide to pursue a Land Code?
3. What is your role within the Land Code process?
4. Describe the community consultation process. How do you gauge support?

Objectives

5. Why did you enact a Land Code?
6. (How) Did your goals include:
    - Self-government
    - Environment
    - Land Rights
    - Energy and Natural Resources?
7. What goals did members of the community express during consultation?

Benefits

8. In your view, what are the benefits of your Land Code ?
9. What positive things have you heard people say about the land code?
10. Do you feel that the Land Code has enabled self-government and reconciliation, or not?
11. Is your Land Code involved in any energy projects or natural resource management plans? If so, how has the Land Code facilitated such projects.

Harms

12. In your view, are there any negative impacts or risks of your Land Code?
13. Is there any community dissent about the value of the Land Code? How did you gauge dissent? What negative things have you heard people say about the land code?
14. Has the transfer of liability clause in your agreement caused your community any concerns?
15. Do you trust the Federal Government’s motives in enacting a Land Code?

Conclusion

16. Overall, do you think the Land Code
    - has been positive or negative?
    - Has accomplished its objectives?
17. Do you have any advice for communities who are thinking of enacting a Land Code?
18. Do you have any public documentation to share which might help to understand the Land Code's impact?

NOTES FROM INTERVIEW RESPONSES

HENVEY INLET FIRST NATION REPRESENTATIVE
NOV 30 2017, 11:01 AM - 11:48 AM

Background and Context

1. Sept 2009
2. 2007.
3. Been working with the band directly since 2003. Special projects officer. President and CEO of nigig power corporation. Does a variet yof thikngs for the band. Started to comtemplet the land code in 2006 and 2007. One of the people who initiatied the approach under the land code.
4. I know it better than others because of my knowledge base. Very positive towards the land code. Dealing with environmental issues. Lots of support at the community level. - on and off reserve members. We went to those places to consult. Everything passed. Community was overwhelmed by the volume of data and were positive and supportive

Objectives

5. Came out of frustration. Referendums to set aside land for commercial development. In 2000 band trie to set aside large sets of land on reserve for commercial development. Chief and Coucil gave up on INAC bureaucracy. Called hum in. took 3 years to do a referendum to do land with commercial use. Even then, we couldn't secure the types of land rights we needed. Called in the minister and regional general. Called them in to assist us with working our. Minister suggested getting a Land Code. Abandon the Indian Affairs bureaucracy. Late 2006. Researched it and recommended to C&C. born out of roadblocks from INAC bureaucracy.
6. Self-government is not really the driving force (Even though any first nation wants self government.
    a. Self government - More economic motivation. Attempting to create own economy.
    b. Environmental motivation - complete surprise to us. When we come into the land code we were still using conventional approach to environmetnal assessment and continued to do that for other purposes. For wind famr project, we saw a need to be more engaged with environemtnal permitting process. Provision in the land code for us to do our own environmental assessment but EC was not handing out any of these subagreement. Wasn't even possible at the time. Not until a Nov 20__ by Harper for FN to take control of their own permitting process. Made a decision to take control of the enviornmental assessment

        i. Costly convoluted and the authorities we assumed we had under the ACt, we didn't, even though we did our entire stewardship regime as though we did have that force. Species at risk act as an example, we don't have authority
    c. Land Rights - the wind farm project was our greatest venture and remains so and it was all associated with Wind Famr Project. We were motivated to permit our own wind famr project. Cost $3 million for our own stewardship regime. First community to do so. REplicated the Federeal and Provincial standards that existed but we nonetheless got. Closed the gap for environmetnal and social regulations. Environmental permitting. Still ahve to do referendum-like processes. Full community consultation to get permission to use the land. Environmental stewardship. Similar to referendum. Self-managed.
    d. Energy - we could handle everything directly. We were able to hire through our project, direct the report, demonstrate from clients and assert some control over. Trie to get away from INAC. Time sentisitivty was critical. The power purchase agreement gives you only 3 years from operation.
7. . Questions from the community were not as deep. Wanted to know more high level things livke proceeds. Demonstrated a positive presentation. 800 members in total. Only 10 people asked difficult questions.of those maybe only 2 were opposed.
    a. Fear of being exploited by the private sector. Fear of not getting jobs or benefits. Fear of giving away land rights. ONly a few people who came out to ask those difficult questions. There were probably more like 25 or 30 people that are resistant and hesitant. Lack of participation doesn't work in their favour. Susicion. Distrust of government and industry.
        i. Well-founded suspicions – definitely. So many cases of the government stalling our economic development . Wind developers would pay the farmers the same $10 000 per year. We made a better deal because we made a team of economist/ banker and legal teams to engage with industry at a higher level. Made partnership for wind farm. Found a new partner 50-50

Benefits

8. Definitely beneficial. Gave us ability to engage wtih developer on multiple levels. In additiont o environmental stewardship regime, we could make a partnership. Our definitive agreements with aprtners are like 4 or 5 inches think. The rights we negotiated in that, INAC involvment would never have finished. Not an opinion. Absolutely would never have forged this partnership without it.
    a. Negotiated a 4 year extension on PPA because of INAC extension. Without that extension the project would have died.
9. A lot of people would share that opinion. There is a general understanind that this project towuld not have
10. It does have impact on self-government and reconciliation
    a. Reconciliation and climate change and self-government. Mother earth kinds of issues and we have the capacity. Whats still lacking for self-government is a economic base. Transforming economy from a stte of poverty to a state of economy overnight. We have an ability to finance any kind of a program we want –- language, infrastructre. WE have capacity because we've achieved an.
11. [See question 6]

Harms

12. Not really negative impacts because of the land code. There are issues with devlopming an elaborate slate of land laws. We are operating under capacity to operate and manage lands. More of a broader problem from the Land Code. Capacity building.
13. [see question 7]
14. Federal government - The department of justice did not encourage a land code because they are very parental. They didn't think we had the capacity. They thought the liability trasnfer

was goign to blow up on us. DOJ washed their hands. They do wash their hands. We see that as a positive. Gov side was never encourage. INAC were more supportive and helpful but theyre used to being in control and protecting us from ourselves. We recognize the concern and took sophisticated measures to protect ourselves. Billion dolalr project we could be exposed to large liabilities. Legal

a. Any liabilities. Not too concerned aobut it. Took the concern seriously.
b. Land code - the process is deficient in some areas – godo framework and foundation but a lot of commercial considerations were not in the land code, they were over and above. They had to modify certain things. Given the rights and commercial rights to implement the wind farm. Lot of things over and above the land code.

15. [see question 14]

Conclusion

16. Definitey a yes to do it over again. We need even more control then we had before. MIsgivings about the DF. Canadian wildlife service. They still have absolute authority to permit or not under the species at risk act. Incompetent gov that barely knows the. A dozen threatened species on our site and the ministry at the CWS tried to impose on us almost killed the project unnecessarily. Bats population. Millions of bats died from white noise syndrome. The CWS tried to impose mitigation measures. If one turbine killed one bat we've have to kill. Spent $15 million on mintigation measures. Mitigation measures themselves add a large
    a. Our resources – more biologists than you've ever met have been on our site. We did more than what a normal permitting proces would required but we funded the capacity on the environmental side because the first nation doesn't have the capacity ot make commercial leases, COP....still kind of 10 year land laws. With the Land Code' budget etc we would need to
    b. The LAB doesn't have enough in teh Individual Agreemetn to provide capacity for FNs. That owuld be different for every first nation
17. ADVICE FOR FN – To a large degree, the process is a good process and you have great access to other bands/ lots of info to draw from. Lots of examples that are highly theoretical. Once you get back the theoretical phase, you can understand the realities of your particular need. Having a better idea of
    a. Nothing bad to say about the LAB and the process, but the foundational IA would be better if it had more help on the commercial side. You can compromise on whatever you require. Wihtou baselin information/data on economics etc. It was a huge cost and a huge burden on the community because we dumped alot of information which might have been costly.
18. Check out our Henvey Inlet Wind website –- very high end public posteing process that wind projects must enter. HI website is the end product of us having this abuility.

Other Facts

Financial close on Dec 15th – for a project of this nature –- all of the debt from the external letter. The actual contruction but the close will allow us to get this up and running by april 2019.

M'CHIGEENG FIRST NATION REPRESENTATIVE
DEC 4th 2017, 3:16 PM - 4:09 PM

Background and Context

1. Land Code process started around 8 years ago. Started it when we were doing the windmills on the bluff because at that point when we were planning and doing the reviews and the studies so many rules and regulations that apply through INAC. One of them was we had to

(theres a Section ? in Indian Act) – requirement to incorporate the windmill project and another requirement – when the corporation wants to use the reserve land, it is nol longer reserve land (Strictly speaking) it had to go into a different status. (also happened with casino rama). I didn't like that special category. Removes authority of chief and council. Trust status –- there's a word for it. Didn't like that idea at all. There's some dangers with that sort of characterization of that type of land. We had to do that and get incorporated which is not that easy to do or to live with because you're dealing now with a corporation. I thought if there was going to be a corporation, it hould be of our design and making not INAC's withint he business code (we have). We have a business bylaw. Provides for the status of a body – trust of some kind. To be responsible for the windmills at that time. Corporation under IA is not an ABoriginal entitiy. We were force to incorporate –- the funding source as well wanted to make sure there was a corporation. The funding sources, the ON government wanted to work with a corproation. Gives you a sense of not being sufficiently sophisticated. For use as a band to deal witht he groups we needed to. Runs contrary to the notion that we wre going to be self governing. Gov of ON required it. INAC required it. Required land to be severed. Having our own land management code allowed us to step up the develpment of a lands management body.

2. [See question 1]
3. Rep started the process. Wrote the latter to INAc. Minister supported it at the time. We got going. To do it in a good way, and mindful of hte g-father teachings and the four directions. Community consultation code being drafted. I'll have an oportunity to review the content. Code reflects some of these things that I mentioned? There is a n overall sacred oversight of what was to be done. That was to be refelcted in the code. Technical part of it I don't care about. You ened isnpectors and approvals and BCRs but thats process after the code has been approved.
    a. Current status: Everything is stalled. Ryan Miigwans is the one working in the community to bring th ecode forward and have it developed and have 9it approved. I don't think its going to happen for a long time because of the elevtion and member disputes. Questtion of eligible voters. Doens't detract from the need to do the right thing.
4. COmmunity consultation: generally they are in agreement. IMportant part of hte development. Most people are not aware of the sacredness of the teachings and the elements. The development of the Lnad Code is an educational exercise more than anything. Consultation needs to be educational. People are ignorant of these teachings. Some say ok just let the federal government do this or that, not realizing that we are keeping colonization alive –- it has never been good for us – childcare, education, elections, land management, property, resources….still controls it and the court controls it. All of these moves or impositions put on us by the federal government. Never works.

Objective

5. Self government. Traditions. Environment, for example was another motivation. Roads running down to the hydro line on the highway. This was part of a land claim agreement from the 80s and 90s. That was an obstacle too. THe right of way is not strictly M'Chigeeng's land. Agreement at the time. Wanted us to consult with other FNs and townships. Using the right of way. Became clear to many of us. If we had jurisdiction over the right of way. We were against a brick wall. Had to work with our COPs.
    a. We care about the environment because we're a small place here. We have the Bay water which we want to take care of. Waters need to have the same status over the area. Our water rights can't be violated.
    b. Planning – land planning. Can't contaminate the land not just the waters but the land as well. You gotta be respectful of the earth and accord certain rights. They're there now but they're not written down, as it were. THey have to be recorded and properly documentd so that if there were any violations to the water and the land. The four

sacred elements that we beleive in. All of those have to be respected. Has to be documented so its not lost. The Land Code is a way to document our traditional values –- reminders of the old ways. Our seven grandfather teachers –- these are laws developed a long time ago by elders. They are the teachings of the creator. The creator handed down to the Anihinaabek. Everything that we do ha to be connected in one way or another by those teachings. INAC doesn't care about these values Anishinaabek nation, people and cultures. Law has to be honest truthful

   c. **7 grandfather teachings. Must be the presence of those grandfather teachings. NOt all seven of them, but at least some of them. Grandfather teachings are like the CHarter of rights and freedoms. 10 commandments.**

6. [See Question 5]
7. [See Question 4]

Benefits

8. Reinforce our traditions and beliefs and customs
   a. Greater community awareness, maybe will seep into water system. Sewer system output in the bay. Water might get polluted
      i. Better handling of pollution. Water is sacred.
9. Consultation – there's broad support but its based on technical imformation. Like "planning for community for where certain types of businesses can be situation. Whether people can build docks or a marnia or a cottage." generally they support those things. They need to get to the root of why the land code is importants –- understand more easily why certain things will be done in a certain way.
10. Reconciliation –- if the government is really serious about reconciliation, they need to look at their history and performance. Then we need to begin harmonizing. Land Code is part of reconciliation.
    a. Land code is part of that bigger picture . small but important part.
11. Future energy projects – harnessing solar energy is a better option that having windmills. You displace living things that live on the earth where the windmill project is situated. It affects deer, aptridge, etc. Solar might be better. Land Code – better for solar.
    a. Land Code - could help by being more supportive – better options to pursue. If the code said, only renewable energy can be developed, then that blocks out a windmill project or a water project. Preferred option or

Harms

12. Negative impacts or risk –- 100% positive. Very beneficial. Cement plant right in the village. Should not be here. Right in the water and then the water flows right out into the bay. They clean out the big drums and the water flows down into the bay.
    a. Not concerned about the expense of band administration. Not concerned about liability. Its worht it to uphodl our sacred teachings.
    b. If you do things right and take care of business in the right way, there's no cost thats too high. Mercury poisoning etc.
    c. After a year or two, the monitoring would not be so much work
13. Not really dissent, but lack of knowledge [see quesion 4]
14. See question 12
15. See question 12

Conclusion

16. See question 12
17. N/A
18. Ask Ryan Migwans, Lands Coordinator

REPRESENTATIVE OF T'SOU-KE FIRST NATION
Dec 8 2017, 5:00 PM - 6:00PM

Background and Context

1. April 2006. Passed land code. Not under *First Nations Land Management Act*. Under the Framework Agreement. The Framework Agreement is at the top. In order to codify the agreement.
2. Rep's idea. Caught my eye and found it interesting. Spoke to band manager at the time and thoguh ti looked interesting and might suit our purposes. She agreed. From that way forward, got the RC and the LAB to meet with C&C. around Sept 2004 first started looking at it and talking. T'Sou'ke is a small band. 250 people. Not an onerous task to mobilize people. Within a year.
3. At the time, she was secretary but have changed. Support technician. I go into communities and help them engage with their process and land code. In vote.
4. Consultation was small so not as onerous in other nations. Our lands committee. 13 community members. See who was interested in sitting on the committee. Elders represented. Youth represented. Each branch of family represented.
    a. Divided up our voters list and went to see who on the community would be best to consult with that person.
    b. Had the luxury of being able to look at each individual member and strategize an approach. We determined a script and went out with a consisitent message and all the information.
    c. Hosted community meetings. Not only are they not well attended, they can be dominated by certain individuals. We let that happen naturally. We concentrated on smalle rfamily dinner meetings. Bring food or dessert or snacks. I was Lands Coordinator at the time. Kept track of consulatiaiotn and make sure it was done throughly. Smaller groups between 5 and 10 people. In their home, more comfortable to ask and just their family no fear of judgment.

Objectives

5. Four main reasons:
    a. Most important – express and demonstrate our inherent right. Been doing it since forever. We know best how to do that. Government stands in the way. It was expression of our inherent right. Most talked about.
    b. Important step for preparing for self-government under treaty. Douglas treaty but negotiating (22 years) with government for modern treaty. Need to get laws for how to manage our lands and resources. Land code will follow us under treaty. Why reinvent the wheel? We will keep those if we do treaty. (Two other land code nations have moved into treaty)
    c. Environmental stewardship – we know how to manage our environment in a sustainable way. Built and bred resentment.
    d. Economic development #1 for a a lot of people. We were tired of asking for permission to initiatie leases to extract gravel pits Indian Act bureaucracy takes foreverr. Can be a couple of years under the Indian Act. It could be two weeks to get the work done. Again, the onerous and resented task to ask permission and then go through
6. It was mandatory at the time of th eland code. Its not mandatory – Act to cover MRP law in the absense of a law. We have the law. The MRP is not necessarily needed to be used.
    a. Now we can lease land under development law. What would happen before is we would have talks with a developer and get some ideas and draw up plan and we'd tart

the process with INAC and the developer would walk away because it would take to long.

b. People would blame chief and council –- we can do this on our own time.

c. Aboslutely – it allows the speed of business. We didn't try the solar project under the Indian Act. Just BCR.

    i. Agricultural process – food sustainability – concept came to light that an emergency woulc give the island 3 days worht of food. That sparked concerns and ideas. Traditional plants and food sources. Forageble plants. Organic gardening. Certified organic. Not organic certified. Provides food for elders. Community meals in general. Students who weren't necessarily emlpoyable. Students making a few bucks. Somewhat lucrative. Food security. Fishing hunting gathering. Going out to see and learn how to live on the land.

7. [See question 4]

Benefits

8. Benefits – overarching benefit is we are able to pass laws that are in line with our cultural values and traditions. Econoimc development, keeping up with the speed of business, the intangiable pieces, increased self esteem, importance of community, accountability, consensus, under the Indian ACt they are accountable to the government for anything that we do on the reserve. The membership votes on the laws, the memebrship votes on the priorities, the membership passed the land code. They are required by the land code to be accountable. Under the Indian ACt they would be accountbale. Creating a vision that the community can participation.
    a. Absolutely on the positive impact on the community –- it paved the way for other processes like land codes. We set up (myself and the other people) set up a stracture for how we would set up the communtiy projects. The treaty process. We developed a way and it worked. Given my role as a technician and every community would use derivatives of that message.
9. Positive things – people feel thaat they'e brought the families together for a common purpose. No matter how much you tell people they don't have a positive intention, their hands are tied by INAC and people tend to agree on things that relieve from INAC as a whole.
10. Absolutely self-government –- huge piece of that –- ⅓ of the Indian Act that no longer applies.
    i. Reconciliation – NO. it doesn't lend to reconciliation at all. It is our inherent right. Its not oh yes we feel good about it –- the government is not doing this. We are doing this for ourselves.
11. Quick answer is its a quicker process – easier to go through the process without asking persmission to lease to yourselves.
    a. Corporate partnerships –- Andrew Moore headed up the corporation would secure and leverage funding. We will give you thi much if another organization matches it. $1.25 million from various sources and pools of funding. Staff timing contributions. It was a bit of a process to leverage that money at once.

Harms

12. Negative Risks –- we can't go back. For some people that felt scary. Once we make this decision, if we mess up nobody is fixing us. Nobody is taking the liability but us. We will ahve to live with the consequences of whatever we do. Of course its a risk. Its driver of why its so important to us. And insurance. We need to have tight streamlined processes.
    a. Liability – well worth the control
13. We were ok with people who didn't want to talk about it and didn't really care. Th 10 % that will do all the work. Interested parties want input but don't want to do all the work. Some people won't participate in a vote. I don't liv eon reserve so I don't care. That is the same

no matter how big or small it was. 12 moving members. 10 people don't have anything to do with it.

a. No dissent –- overwhelmingly positive. We gauged that through family and commmunity meetings and through the land committees reports abck with specific people. It was really overwhelmingly positive. Anything. FEar of change. Its fine – lets ot makes waves. Find with other nations that that fear stems from elders. Have the most to fear. Elders from that generation don't want to do anything with INAC. looked upon with fear.

14. [See question 12]
15. Don't trust them. Federal government – their ulterior motives show up in the way that they select the next entrance into the framework agreement. Nations will fill out a readiness questionairre – do they have the capacity and readiness to proeced onf a a land code and they make a lsit of who is ready to enter the process. There is continuous negotiation and argument –- who are you to tell them when you're ready. The federal government tends to select bands that are 'ready' based on criteria that dont make sense –– the ones they choose tend to have ht eproblems that they want to wash their hands of some big legacy. The goal of th eindian act is to assimilate us –- we can't pretend its anything less than that. There is a huge mistrust of the government for sure.

Conclusion

16. Overall its positive and has accomlished its obectives.
17. Advice –- biggest piece of advice. Do your homework. See what its doing for other nations doing and see if it helps. Call other lands managers to see how its really workign for their perspective. REsearch ressearch.
    a. Fosters regional sections –- think tank sections. Capacity building person in the region and many other bands will have the same problems at the same time. They will come in together. Regional think tanks will be focused around the greates lands. Traditional holdings under the land codes. Registry under the land codem under the FNLM ssytem. Land encumbrance check. Set up a strucutre to do that in their own communities. Think tanks sessions focus in on their greatest needs. Every region is different.
18. Can't think of anything. Been out of the loop of T'Souke nation for a while now. Andrew might be the best best for that infroamtion.

APPENDIX B: INVITATION AND INFORMED CONSENT FORM

LETTER OF INVITATION

JD/MES MRP: *First Nations Land Management Act* and Energy Planning
Chris Hummel

To Whom it May Concern:

I am writing to invite **[insert community]** to participate in a study on the First Nations Land Management Act ("FNLMA"). My name is Chris Hummel, a law student in the joint Juris Doctor and Master of Environmental Studies program ("JD/MES") at York University.

My study seeks to evaluate how FNLMA Land Codes have impacted First Nations energy projects and the general pursuit of community self-determination. I am approaching your community because you have implemented a Land Code and have facilitated local energy projects. If you choose to participate, I would hope to conduct separate phone interviews with First Nation representatives who have knowledge of the Land Code (either elected officials, band administrators or other people who can represent the community and speak to the Land Code)

The results of the interview will be included in a Major Research Paper which will be submitted to York University's Faculty of Environmental Studies for review in Spring 2018. The objective of the study is to determine opportunities and challenges associated with adopting Land Codes and communicate them to communities who are considering passing a Land Code or are in the process of implementing a Land Code.

My decision to conduct this study came from my work as a law student on M'Chigeeng First Nation in the summer of 2016, where the community was working on drafting and implementing an FNLMA Land Code. I will be distributing the results to communities undergoing or considering the FNLMA process, including M'Chigeeng and the FNLMA Lands Advisory Board. None of these groups are commissioning the study. I am conducting independent research as part of studies.

Your involvement in this study is totally voluntary and you may withdraw at any time or withhold information that you don't wish to be published. Though your community will be identified in the study, any individual representatives may remain anonymous if they choose. Information you provide will be destroyed by August 1 2018.

I appreciate your consideration and hope you choose to help my investigation into the FNLMA and its implications for communities.

Sincerely,

Chris Hummel
JD/MES Candidate, Class of 201

CONSENT FORM
JD/MES MRP: *First Nations Land Management Act* and Energy Planning
Chris Hummel

Date: Oct 23 2017

Study Name: First Nations Land Management Act

Researchers: Chris Hummel, JD/MES Student, Faculty of Environmental Studies, York University

Purpose of the Research: The study investigates the impact of Land Codes drafted under the First Nations Land Management Act (**"FNLMA**"). As an initiative of the Federal government's Indigenous and Northern Affairs Canada **("INAC")**, FNLMA Land Codes allow communities to opt out of 30 sections of the *Indian Act* and take over a wide share of jurisdiction over the management of lands, property rights and resources on their reserve land.

Recognizing that Indigenous communities across Canada have been targets of oppressive colonial policies for hundreds of years, the FNLMA has a complicated role in history. On one hand, it is eroding one of the most oppressive pieces of legislation in the *Indian Act,* a great deal of control to First Nations over their land laws and reduces bureaucratic overreach of the Federal Government. On the other hand, FNLMA Land Codes are very prescriptive with tight controls over what can be in a Land Code, they transfer a great deal of potential liability to communities and result in communities undergoing a rapid transfer of authority which raises questions of capacity.

This study will seek your participation in order to explore the implications of the FNLMA, as discussed in the previous paragraph, and to add other input. Your input will be incorporated into a Major Research Paper which will be submitted to York University for my joint Law Degree (Juris Doctor) and Masters of Environmental Studies (MES) program at York University. If there is interest, I will also hope to distribute the paper to the participants in the study, to other First Nations involved in the FNLMA process and the FNLMA Lands Advisory Board.

What You Will Be Asked to Do in the Research: Participants will be asked a series of questions to engage in a conversation about the community's Land Code under the *First Nations Land Management Act* and any consequences – either positive or negative or neutral – of enacting it. These questions can be answered in text form or orally over the phone.

If providing the researcher with documents would help answer any questions, you may provide those documents if you choose to.

Risks and Discomforts:
There are no major risks to participating in the research. You may provide or withhold any information you choose and the information will be used primarily to help communicate successes, warnings or general advice to other First Nations and the FNLMA Lands Advisory Board which is largely operated by First Nations. While we ask that the community name be disclosed in the study, any individuals who provide information will remain anonymous unless they wish to be disclosed.

Benefits of the Research and Benefits to You: The purpose of the questions in this study is to find information about consequences– benefits, risk and impacts – of enacting an FNLMA Land Code. The audience for this study are communities that are in the process – or considering entering the process – of enacting a Land Code.

The benefits of the study are that communities:

- share their experience with the FNLMA Land Code
- hear about other communities' experiences with the FNLMA Land Code
- consolidate community information surrounding the Land Code
- provide the broader network of FNLMA Land Code communities with a measure of transparency and feedback

Voluntary Participation: Your participation in the study is completely voluntary and you may choose to stop participating at any time. Your decision not to volunteer will not influence the nature of your relationship with York University either now, or in the future.

Representation
By consenting to participate in the study, you are consenting both as an individual with knowledge of the FNLMA Land Code and as a representative of your community. Information you provide will be cited in the study as coming from your community.

Withdrawal from the Study: You can cease participation in the study at any time, for any reason, if you so decide. Your decision to stop participating, or to refuse to answer particular questions, will not affect your relationship with the researchers, York University, or any other group associated with this project. In the event you withdraw from the study, all associated data collected will be immediately destroyed wherever possible.

Confidentiality: All information you supply during the research will be held in confidence and unless you specifically indicate your consent, your name will not appear in any report or publication of the research. While the name of the community will be disclosed in the study, the identify of the individuals who provide information will be left confidential. We recognize that, given the size of communities, the number of their elected officials and lands experts, it will often be possible to deduce who provided specific information. For this reason, the

individual participant will given the authority to restrict what information is included in the study.

Your electronic data will be safely stored in a locked computer hard drive and hard copies will be stored in a locked cabinet. Only the researcher and his supervisor will have access to this information.

Any data can be destroyed at your request. In any case, all information will be deleted by August 1 2020, by erasing digital files and by shredding paper documents.

Confidentiality will be provided to the fullest extent possible by law. If the possibility of publishing the study arises, it will only be published with your approval.

How will this information be used?
The research findings will be submitted as a major research paper to York University's Faculty of Environmental Studies for review as part of the JD/MES Joint program. It will also be used as course credit at Osgoode Hall Law School.

The paper will also be distributed to participants in the study and the FNLMA Lands Advisory Board, pending the consent of all First Nations involved in the study.

Questions About the Research? If you have questions about the research in general or about your role in the study, please feel free to contact Dr. Deborah McGregor either by telephone at (416) 736 5184 or by e-mail (dmcgregor@osgoode.yorku.ca).

This research has received ethics review and approval by the Human Participants Review Sub-Committee, York University's Ethics Review Board and conforms to the standards of the Canadian Tri-Council Research Ethics guidelines. If you have any questions about this process, or about your rights as a participant in the study, please contact the Sr. Manager & Policy Advisor for the Office of Research Ethics, 5th Floor, Kaneff Tower, York University (telephone 416-736-5914 or e-mail ore@yorku.ca).

Legal Rights and Signatures:

I_____________________, consent to participate in *First Nation Land Management Act and Natural Resource Planning* conducted by Chris Hummel at York University. I have understood the nature of this project and wish to participate. I am not waiving any of my legal rights by signing this form. My signature below indicates my consent.

Signature_______________________ **Date** _______________________
Participant

Signature_______________________ **Date** _______________________
Principal Investigator