

**Community Land Use Planning on First Nations Reserves  
and the Influence of Land Tenure:  
A Case Study with the Penticton Indian Band**

**by**

**Marena Brinkhurst**

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# Approval

**Name:** Marena Brinkhurst  
**Degree:** Master of Resource Management (Planning)  
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**Title of Thesis:** *Community land use planning on First Nations reserves and the influence of land tenure: A case study with the Penticton Indian Band*  
**Examining Committee:** Chair: Jane Hauser  
Master of Resource Management Candidate

**Murray B. Rutherford**  
Senior Supervisor  
Associate Professor

---

**John R. Welch**  
Supervisor  
Associate Professor

---

**Joan Phillip**  
Supervisor  
Lands Manager  
Penticton Indian Band

---

**Date Defended/Approved:** April 19, 2013

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## **Abstract**

Understanding the land tenure and management systems that exist on First Nations reserves in Canada is foundational to supporting effective and sustainable local land use and planning in these communities. Proposed federal legislation has reignited debate over the individual landholdings system (Certificates of Possession) existing on many reserves, but there is a lack of research concerning the history, impacts, and practical implications of this land tenure system, particularly empirical research and perspectives of First Nations themselves. This research project provides an empirical exploration of the *Indian Act* land tenure system from perspectives of local land management and planning, based on a case study of the history and experiences of the Penticton Indian Band. Findings illustrate the complexity of this land tenure and management system in action and highlight the numerous and influential ways that the individual landholding system impacts reserve land use, management, and planning.

**Keywords:** land tenure; land management; planning; First Nations; Indigenous; reserves



I dedicate this research project to the Penticton Indian Band community and the many individuals - past, present, and future - working to heal divides of the past, make their community stronger, and share their experiences with other communities.

It has been an honour to learn from you.

“...through all our lives, our elders and our ancestors’ lives,  
we’ve done the best that we could with what we had...  
at the time, they were just trying to survive, trying to find their way.  
We’re still trying to find our way today. So we can find peace.”

(Chad Eneas, PIB member, 2011)

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## List of Acronyms

AANDC	Aboriginal Affairs and Northern Development Canada. Name of federal entity responsible for Status Indians and Aboriginal peoples in Canada, 2011 – present.
BCR	Band Council Resolution
CP	Certificate of Possession
DIA	Department of Indian Affairs. Name of federal entity responsible for Status Indians in Canada, 1873 – 1936.
DIAND	Department of Indian Affairs and Northern Development (synonymous with INAC). Name of federal entity responsible for Status Indians in Canada, 1966 – 2011.
FNLMA	First Nations Land Management Act (1999)
IAB	Indian Affairs Branch. Name of federal entity responsible for Status Indians in Canada, 1936 – 1966.
ILH	An individual landholding on reserves in Canada
INAC	Indian and Northern Affairs Canada (synonymous with DIAND). Name of federal entity responsible for Status Indians in Canada, 1966 – 2011.
PIB	Penticton Indian Band
RLAP	Regional Lands Administration Program
RLEMP	Reserve Land and Environment Management Program

## Glossary

Band	A community of status Indians in Canada officially recognized by the federal government and defined by the <i>Indian Act</i> . A Band typically has at least one reserve.
Band Council	The local government structure for Bands as established by the <i>Indian Act</i> . Some Bands have opted to use a customary system instead.
Band member	A status Indian individual registered on a Band's membership list (or is entitled to be).
Communal lands	Lands recognized as held and managed by a community, though a community may allocate use rights to households or individuals (Bruce, 1998, p.2). These use rights may be long-term and may be inheritable, but typically would not include a right to sell one's allocated land. The community may retain rights in certain resources on the land (e.g. water, wildlife). A non-legal term "developed by Western social scientists to describe non-Western property systems" (Bruce, 1998, p. 3).
Customary law	A legal system defined and upheld by a local community and its norms, customs, and practices, not the formal state legal system. Enforcement may be through local institutions, such as customary courts or leaders or informal social mechanisms (FAO, 2002, p. 7; Fortmann, 1990, p. 198). Customary property rights or land tenure are similarly rights or holdings recognized and protected by the local community based on local customary tenure rules and land use norms (Fortmann, 1990, p. 195).
First Nation	An Aboriginal group or community, especially a Band officially recognized by the Canadian government. A First Nation can sometimes include several Bands.
Formal/ informal	I use 'formal' to denote an institution or right that is explicitly recognized by the state and/or codified and enforceable in the dominant legal system. 'Informal' refers to ones that are unwritten, customary, or otherwise lack official recognition and protection by the state and/or dominant legal system) (Bruce, 1998, pp. 1–2; FAO, 2002, p. 11).
Holding	In reference to land, a holding is an area of land held by a household or person, whether owned, leased, or in another form (Bruce, 1998, p. 5).
(status) Indian	An Aboriginal individual who is registered as an Indian (or entitled to be registered as an Indian) under the <i>Indian Act</i> .
Institutions	Formal or informal rules, norms, and customs that shape individual and collective behaviour. Institutions can permit or constrain actions, determine how costs and benefits are shared, allocate decision-making authority, or establish the procedures to follow in disputes or decision-making (Ostrom, 1990, p. 51). Land tenure rules are examples of institutions (FAO, 2002, p. 7).

Land management	Work by individuals and organizations focused on achieving goals (or balancing competing goals) for the use of land resources. Land management activities range from day-to-day use decisions, to developing management rules, to land use and development planning (Davy, 2012, pp. 65–66). I also include land administration, which refers to the governance and implementation of the land tenure system and other related land policies (e.g. land registration, surveying, land valuation and taxation) (FAO, 2002, p. 12; Rakai, 2005, pp. 3, 41).
Land tenure	Rights (e.g. to use, control, or transfer areas of land), responsibilities (e.g. stewardship of the land), obligations (e.g. paying property tax or sharing benefits), restraints (e.g. land-use restrictions), and possibilities (e.g. determining future uses of land) that individuals or groups have with respect to land (FAO, 2002, p. 7; Rakai, 2005, p. 26).
Land tenure system	A land tenure system is made up of all the forms of tenure operating or recognized in a given area or community, including, for example, tenure forms such as private land, leases, mortgages, common property, and state ownership (Bruce, 1998, p. 1; Dekker, 2003, p. 209).
Locatee	A Band member who has an individual landholding (evidenced by a Certificate of Possession). The name is derived from the earlier 'Location Ticket' system of registration.
Parcel	A single, continuous unit of land held in some form by an entity or person. 'Parcel' normally refers to a surveyed area, but other forms of recognizing spatial boundaries are possible.
Property (right)	In the context of land, property typically refers to one's legitimized and enforceable rights concerning one's landholdings. Tenure rules define property rights and their distribution (FAO, 2002, p. 7).
Reserve	In Canada, an area of land held by the federal Crown for the use and benefit of a Band in common.
Tenure security	Perception that one's land tenure, within whatever temporal or use restrictions it is held, is "held without risk of loss except for customary rulings or formalized expropriation with fair compensation" (Dekker, 2003, p. 57). Tenure security can exist without formal registration, it is a reflection of the trust and confidence that individuals and households feel in "the continuous protection of their tenure" (Dekker, 2003, p. 57).

## Executive Summary

Indigenous peoples around the world, including First Nations in Canada, are seeking information on experiences, local knowledge, and strategies of other Indigenous communities regarding land tenure, management, administration, and planning systems. First Nations reserves operate within a great diversity of these systems, yet they are also remarkably understudied and misunderstood. Understanding land systems on First Nations reserves is foundational to supporting effective and sustainable local land management. Recently, proposed federal legislation has reignited debate over the individual landholdings system created under the *Indian Act* (R.S.C., 1985, c. I-5) that exists on many First Nations reserves, but research is lacking on the history, impacts, and practical implications of land tenure system (Alcantara, 2003; Baxter & Trebilcock, 2009; Egan & Place, 2013; Hibbard et al., 2008). Particularly lacking are empirical research and perspectives of First Nations communities and individuals themselves.

This project is an empirical exploration of the *Indian Act* land tenure system from local, intra-Band land management and planning perspectives. This research is primarily a detailed case study of the land tenure and management systems and experiences of the Penticton Indian Band in southern interior British Columbia, but to broaden discussion I also include some history and experiences of other Bands and Canada generally. I document the history and evolution of the Penticton Indian Band's land tenure system and explore relationships between land tenure, use, management, and planning. I identify strengths and challenges of the individual landholding system and discuss potential changes to the system and land management more generally.

My findings point to the need for a range of options to address reserve land tenure and management issues. In particular, I highlight the need for First Nations to match their land management approaches with the institutional characteristics of their land tenure system. First Nations that use the *Indian Act* land tenure system without other available land management tools risk creating or exacerbating local land management gaps and challenges. I discuss ways that Bands can address challenges related to individual landholdings and so strengthen their local land management. I also discuss ways that the Canadian government and other actors can support First Nations' local land management efforts. These findings highlight that while the current debate



over land tenure reform on reserves is an important one, it is only one piece of a larger land management system that requires reform informed by local experiences.

## **Research Approach**

This research project is an exploratory case study, developed in partnership with my case study community, the Penticton Indian Band. I used primarily qualitative research techniques using data from an extensive review of available research on land tenure, First Nations reserves, and land management; federal land registry and survey data; historical and contemporary documents from the federal government and Band Council; legislation and policy documents; semi-structured interviews with Band staff and members, and government staff; and participant observation.

## **Structure of Report**

My first Chapter introduces why land tenure matters and how I have approached this research. The first part of Chapter 2 reviews relevant literature concerning land tenure; legal dualism; conflicts between customary and formal rights; contested property narratives; the interplay between politics, power, and property; and gaps between different concepts of property. The second part of Chapter 2 introduces the First Nations reserve system, the context of land tenure and management on reserves, and an overview of current related issues. Chapter 3 introduces my case study community, the Penticton Indian Band, and our research partnership. I summarize my research approach and methodology in Chapter 4.

My findings have several components. In Chapter 5, I reconstruct the history of the individual landholding system on reserves, both generally across Canada and specifically on the main PIB reserve. In Chapter 6, I describe PIB's contemporary land tenure and management system and explore local perceptions of the individual landholdings system. I also report on the land management implications and influences of the individual landholding system at PIB. I discuss implications and recommendations arising from these findings in Chapter 7 and offer final reflections and conclusions in Chapter 8. Several appendices of supporting information are also included and referenced in the report.

# 1. Introduction

## 1.1. Importance of First Nations' Experiences of Land Tenure, Management, and Planning on Reserves

Indigenous peoples around the world, including First Nations in Canada, want information on experiences, local knowledge, and strategies of other Indigenous communities regarding land tenure, management, administration, and planning (Rakai, 2005, p. 194). The recently released *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests* from the United Nations provide governments with the first comprehensive set of high-level recommendations and standards concerning the design and administration of land tenure systems and land policies (FAO, 2012a). This is a celebrated development, but more information on land tenure governance in practice is needed to guide state and local tenure policies. This is particularly needed in contexts of Indigenous communities, many of which are working to define, defend, or reform their land tenure and management systems to reduce (or prevent) effects of colonization that do not reflect their values and goals regarding land.

Many dynamic interactions between Indigenous and non-Indigenous land systems are occurring on First Nations reserves across Canada. These diverse situations offer a wealth of experiences and models of land systems, particularly “for the coexistence of both individual and collective rights” (Stephenson, 2010, p. 102). First Nations in Canada have the potential to lead in the evolution of flexible, culturally sensitive, legally pluralistic land systems, especially in parts of the world grappling with colonial displacement of Indigenous peoples and institutions.

However, land tenure and management on First Nations reserves are contentious and remarkably understudied and misunderstood. First Nations face many struggles over the management of their reserve lands. Understanding land systems that currently exist on First Nations reserves is foundational to addressing many of these

challenges and supporting effective and sustainable local land management systems on reserves (Alcantara, 2003; Rakai, 2005). Most recently, proposed federal legislation has reignited debate over whether First Nations governments should have the legal authority to grant parcels of reserve land to individuals as *fee simple* title (meaning freehold tenure, or 'private property' in Western property systems). The proposal is advocated as a natural and necessary extension of policies and programs designed to decentralize land management powers to First Nations. However, it is opposed by those who fear it will lead to encroachment upon and eventual loss of Indigenous homelands.

Critical to this debate is information on the individual landholdings system created under the *Indian Act* (R.S.C., 1985, c. I-5) that exists on many First Nations reserves. There is a significant lack of research concerning the history, impacts, and practical implications of this land tenure system (Alcantara, 2003; Baxter & Trebilcock, 2009; Egan & Place, 2013; Hibbard, Lane, & Rasmussen, 2008). While individual landholdings have been the subject of some recent economic and legal analyses (Alcantara, 2003; Baxter & Trebilcock, 2009; Fiscal Realities Economists, 2007), there is little empirical research on land management and planning implications of this tenure system (Alcantara, 2003, pp. 394, 405). Also lacking is research that gives voice to perspectives of First Nations communities and individuals themselves.

Greater awareness and consideration of cultural variations in land management, planning, and tenure systems are needed in the context of Indigenous communities, including First Nations in Canada (Copet, 1992; Egan & Place, 2013; Jojola, 2008; Millette, 2011; Palmater, 2010, 2012; Porter, 2010). This is particularly apparent when attempting to balance both individual and collective interests in land, a challenge faced by many communities, Indigenous and non-Indigenous. Many Indigenous cultures provide instructive alternative conceptions of land and models of tenure systems based on principles of collective interests in land and relationships of respect and reciprocity. Neglect, exclusion, and misrepresentation of these models of land tenure, management, and planning systems have resulted in land systems and policies that fail to meet, and even undermine, needs of Indigenous communities (Godden & Tehan, 2010, p. 20; Rakai, 2005, p. 195). The land systems of Indigenous communities that have been changed by and adapted to colonialism, such as on First Nations reserves, offer a productive - if contentious - space for examining different land tenure systems and their

interactions. Investigation of the land tenure, management, and planning experiences of First Nations on reserves in Canada not only potentially informs better land policy and practice in these communities, but can also inform the understanding, design, and reform of land systems generally.

## **1.2. Research**

My project is an empirical exploration of the *Indian Act* land tenure system from local, intra-Band land management and planning perspectives. With my partner community, the Penticton Indian Band (PIB), I use historical records and interviews with community members, landholders, Band staff and leadership to explore and document the local-level history and contemporary land management and planning implications of this land tenure system. This research is intended to help inform management and policy decisions related to reserve lands, especially for PIB but also for First Nations and others more generally.

### **1.2.1. Research Goals and Objectives**

My overarching research goal is to contribute to understanding of Indigenous land tenure systems, contemporary Indigenous land-use planning, and management of landscapes of mixed and overlapping communal and private land interests. Empirical research in these areas is limited, particularly in the contexts of First Nations reserves in Canada. Therefore, my objective is to provide a detailed case study of the reserve land tenure system and its influences on land use, management, and planning in practice. This research is also informed by broader experiences of other First Nations and by interviews with government staff and concepts from related literature, particularly concerning legal dualism; conflicts between customary and formal rights; contested property narratives; the interplay between politics, power, and property; and gaps between different concepts of property.

A personal goal of my work and research is to support communities, particularly Indigenous communities, in understanding, documenting, protecting, designing, and implementing their own land tenure systems and land governance regimes. This goal

has shaped my approach to this project, particularly in my emphasis on understanding and documenting the history and development of land tenure systems; the importance of investigating how the local community actually uses and manages their land and tenure system(s); my preference for considering practical implications and applications of this research; and in my collaborative, community-driven approach.

### **1.2.2. *Areas of Inquiry***

There are two components of my project. First, I reconstruct the history of the individual landholding system on reserves, both generally across Canada and specifically on the PIB main reserve. Second, I explore local perceptions of the individual landholdings system and its influences on land management.

#### **History and Evolution of the Individual Landholdings System on Reserves**

My first area of inquiry concerns the history of individual landholdings on First Nations reserves, particularly the Penticton Indian Band. My community partners emphasized the value of this historical information, seeing it as a way to better 'understand where we've come from' and provide insight on contemporary land management, particularly where there is disagreement or limited awareness over where landholdings came from and why. However, there is more than one story to tell. Rakai (2005, p. 75) notes that "land tenure problems are a product of a particular history, a history of which there will always be more than one account." In my research, not only are there differences among the perspectives of the federal government, local government agents, local Band government, and individual Band members, there are also widely differing opinions within each group. As such, I consider historical evidence available from multiple sources (official and local documents, interviews, and oral history) and include the full range of perspectives and interpretations I encountered.

The history of landholdings on reserves can be contentious and is often linked to contemporary disputes. I am sensitive to the potential of this research to inflame tensions between those who have landholdings on reserves and those who do not, or between those involved in land disputes. Therefore, early in the project I decided to focus on the landholding system as a whole, rather than specific conflicts or land parcels.

## **Influences of Individual Landholdings on Reserve Land Management**

Building on the land tenure history, my second area of inquiry examines relationships and influences between the individual holdings system and reserve land use and management. Understanding the *Indian Act* land system, particularly individual landholdings, is critical for informing reserve land policies and management. This second part of my research explores why and how individual landholdings affect reserve land use, management, and planning.

### **Scope**

I focus my research on the land tenure system shaped by the federal *Indian Act*, within the reserve system, as it exists today. To manage the scope of this project, I do not address larger questions about the legitimacy or implications of the reserve system itself. As well, I do not include Aboriginal Title land, modern treaty lands, *First Nations Land Management Act* land codes, or Métis Settlement lands. I also limit my discussion of traditional or customary forms of individual land tenure that some First Nations use today (PIB does not use these). While the *Indian Act* lands system is a narrow slice of Canadian law and policy concerning reserve lands, it is the subject of much ongoing national debate and there is a need for research that gives voice to local experiences.

## **2. Background - Literature Review**

In this chapter, I connect my research to the literature on land tenure and property rights, land management, Indigenous land ethics, and First Nations reserves land management and planning. Taken separately, these are all multi-disciplinary areas of research with extensive and dispersed literatures. For research that seeks to integrate such diversity an “extraordinary depth ... [and] inter-disciplinary appreciation” is required (Sheehan, 2006, p. 391). I have reached into many fields, including legal studies, policy studies, anthropology, sociology, economics, history, land management, planning, and the various hybrid fields that bridge them. I have selected recurring themes and topics relevant to this study and other research concerning land tenure regimes in First Nations and other Indigenous communities. The following sections summarize the most relevant concepts from the literature and introduce concepts and terminology I use throughout this report, as well as contextual information on land tenure and management on First Nations reserves in Canada.

### **2.1. Land Tenure and Land Management**

Land tenure matters to resource and environmental management, and particularly land management, because it determines who has what land and who has what powers over land decisions. The distribution of rights and powers in turn influences how individuals and communities use land and resources. Land tenure has been recognized by academics and practitioners as a critical component of land and resource management systems, particularly for developing countries and common property resources (Alchian & Demsetz, 1973; Bromley, 1989; Cortner, Wallace, Burke, & Moote, 1998; FAO, 2002; Janssen, 2006; Ostrom, 1986; Schlager & Ostrom, 1992). In most societies, land rights “carry emotional, social, and sometimes great material value” (Dekker, 2003, p. 27); they are “a primary element of the social and ecological fabric” (Morad & Jay, 1997, p. 45); and are “integral components of the governance processes

that sit at the interface of human communities and the regulation of the environment” (Godden & Tehan, 2010, p. 2).

Emerging areas of importance in land tenure research are the need for cultural sensitivity and flexibility; the balancing and protection of individual and collective interests in land; and protection of the homelands of Indigenous peoples around the world, including First Nations in Canada. As Godden and Tehan (2010, p. 1) explain,

...for many Indigenous peoples and local communities ...the capacity to build viable futures is premised upon retaining and enhancing communally held land and resources. On the other hand, there are strong pressures operating through globalization, and in locally oriented land policies, to renounce communal holding in favour of an individualized form of ownership. Individuated ownership is seen as the key to providing property related protections to individuals, thereby allowing freedom of choice and a basis for entrepreneurial success.

Tensions between communal and individual, tradition and entrepreneurial innovation, and the local and external are evident throughout my research project and the literatures I connect to it. These dynamics are particularly evident in Indigenous communities as they navigate their relationships with other societies, cultures, economies, and traditions of land tenure and management.

Following a summary of three key concepts, I discuss Indigenous and Western approaches to land tenure, management, and planning. I then review the public-private nature of land; cadastralization and tenure Eurocentricity; legal pluralism; and the importance of narrative and power relations for land tenure.

### **2.1.1. *Land Tenure Terminology***

As land tenure research is multi-disciplinary, it is not surprising that authors use a wide range of terms, and sometimes the same terms have different meanings. I define my key terms in the Glossary, but here I include an expanded explanation of three terms for additional clarity.



## **Land tenure**

There is some ambiguity concerning the term 'land tenure' and what it encompasses (Rakai, 2005, p. 20). The United Nations explains land tenure as:

...systems [that] define and regulate how people, communities and others gain access to natural resources, whether through formal law or informal arrangements. The rules of tenure determine who can use which resources, for how long, and under what conditions. They may be based on written policies and laws, as well as on unwritten customs and practices. (FAO, 2012b, p. 3)

Land tenure relationships include rights (e.g. to use, control, or transfer areas of land), responsibilities (e.g. stewardship of the land), obligations (e.g. paying property tax or sharing benefits), restraints (e.g. land-use restrictions), and possibilities (e.g. determining future uses of land) that individuals or groups have with respect to land (FAO, 2002, p. 7; Rakai, 2005, p. 26). Any particular land tenure arrangement is a dynamic institution that emerges out of social interaction and negotiation of rights and responsibilities among individuals. A system of land tenure is made up of all the forms of tenure operating or recognized in a given spatial area or community, including, for example, tenure forms such as private land, leases, mortgages, common property, and state ownership (Bruce, 1998, p. 1; Dekker, 2003, p. 209). On First Nations reserves, individual landholdings are an important component of the land tenure system.

## **Property**

According to Rakai (2005, p. 32), in legal, economic, and legal anthropology research the term 'property' is often used to describe rights in land instead of 'land tenure.' It seems that property is a subset or outcome of land tenure, with "rules of tenure defin[ing] how property rights to land are to be allocated within societies" (FAO, 2002, p. 7). As Bruce (1998) explains, a property right in land is more than the simple fact of holding land, it also refers to the defensible and enforceable claims that one has to land, regardless of whether one is currently occupying or using it. While Dekker (2003, p. 210) defines 'property' to include rights and responsibilities, I agree with Rakai that 'land tenure' is a broader and more appropriate term for use in the context of Aboriginal communities, where responsibilities and restrictions of landholders are emphasized over rights (Rakai, 2005, p. 33).

## **Formal and informal rights**

Land tenure (and property rights) are often classified as ‘formal’ (explicitly recognized by the state and/or codified and enforceable in the dominant legal system) and ‘informal’ (unwritten, ‘customary,’ or lacking official recognition and protection by the state and/or dominant legal system) (Bruce, 1998, pp. 1–2; FAO, 2002, p. 11). This distinction acknowledges that while land tenure often has a formal basis, property relations can “also flow from the local property culture or extra-legal power relationships” (Davy, 2012, p. 10). These two categories are also sometimes labelled ‘de jure’ (formal, by law) and ‘de facto’ (informal, by practice). I use the terms ‘formal’ and ‘informal’ because they are widely used in land tenure research and help to distinguish between where and how rights are recognized. However, these labels can sometimes be problematic because, as the FAO (2002, p. 11) explains, “some so-called informal rights may, in practice, be quite formal and secure in their own context.” An example would be the formal recognition and protection of rights by a traditional or customary authority, such as community Elders. In this research I use ‘formal’ and ‘informal’ to denote whether or not the rights are recognized and recorded in the federal government’s tenure system and protected by the dominant Canadian legal system.

### **2.1.2. *Land Tenure Models***

Researchers model land tenure systems using a variety of approaches. These range from simple categorization of major property ownership types (communal, private/individual, and state/public - for examples, see Alchian & Demsetz, 1973; FAO, 2002, p. 8) to more complex models that attempt to represent actual tenure systems, which include co-occurring ownership types and hybrid categories (Rakai, 2005, p. 45). A slightly expanded model from Doebele (1983), as presented in Rakai (2005, pp. 48–49), includes consideration of customary, informal, and lease-based tenures; this model is summarized in Table 2.1 below. Note that in some more complex tenure models, tenure forms exist along a spectrum rather than as distinct categories due to “the dual nature of land as a private and public good [and] tenure pluralism” (Rakai, 2005, p. 49) and other factors. However, the model described in Table 2.1 provides a useful typology for understanding differences between forms of tenure often found in tenure systems.

**Table 2.1. Model of Tenure Types**

Tenure Type	Description
Informal, de facto (non-customary)	Often called 'squatting,' privately held lands and/or public lands that are occupied and used without protected formal or customary rights. E.g. urban slums in developing countries
Informal, de facto (customary)	Land that is occupied and used informally, protected by customary law but not statutory law
Private freehold (Formal)	Most familiar tenure in most Western systems, land 'owned' legally by a private individual or corporation and rights are protected by the state
Private leasehold (Formal)	Where a private individual or corporation leases/rents the land from a private owner, usually with restrictions on certain uses and activities.
Public freehold (Formal)	Lands 'owned' by the government and used by the public. E.g. Public buildings, parks, and roads.
Public leasehold (Formal)	Lands owned by the government and leased to a private individual or corporation, usually with restrictions on certain uses and activities.
Formal communal (customary)	Territory that is legally recognized as being held communally by group, often with chiefs or leaders allocating sites for specific uses and resolving disputes. Individuals have usufructuary rights (right to use but not permanently alter) to land they are allotted, which may be transferrable to heirs or other members but typically not to anyone outside of the group.
Formal communal (non-customary)	Lands held communally by various land owners who voluntarily pool their ownership into one organization that controls all dealings relating to the pooled lands, e.g. a co-operative, a condominium, or communally held lands of a religious group.

Note. Adapted from Rakai (2005, pp. 48–49).

In addition to using classifications of tenure forms, Rakai (2005, p. 72) explains additional components, or 'criteria,' to include when modelling land tenure systems, especially in situations of cross-cultural tenure research (reproduced in Table 2.2 below).

**Table 2.2. Additional Components of Land Tenure Systems**

Criterion	Purpose of Criterion
Worldviews, Values, Goals	To appreciate overall goals of society or community
Concepts of land	To understand perceptions of land & tenure
Institutions affecting tenure	To appreciate players, forces & issues involved
Land tenure arrangements	To describe land tenure patterns

Note: Adapted from Rakai (2005, p. 72)

### **2.1.3. Indigenous Perspectives on Land**

There are many fundamental differences between Indigenous and Western concepts of land, land tenure, and land management. This is even evident in the words that we use to describe these concepts. 'Tenure' is derived from the Latin word *tener*, to hold or to possess (Bruce, 1998, p. 1; Rakai, 2005, p. 24) and 'resource management' of land implies a degree of control and a focus on utility and consumption of resources. 'Land', while it is a more complex concept that refers to the physical earth, a space or platform for activities and various other resources, seems surprisingly limited when compared to Indigenous concepts. For example, contrast these terms to the Syilx concept of landscape as an interconnected and spiraling web that both supports and is the living world and living things, as taught by Dr. Jeannette Armstrong, an Indigenous researcher, author, and philosopher from the Penticton Indian Band:

...the Syilx Okanagan understanding of the land as the *tmx<sup>w</sup>ulax<sup>w</sup>* which translates as *lifeforce place*, rather than of land as location or ecology type. The *tmix<sup>w</sup>* ... 'relatives' embodying the dynamics of the interrelationship between the flora and fauna ...are understood to be many strands which are continuously being bound with others to form one strong thread coiling year and year creating a living ecological future.  
(Armstrong, 2011a, p. 2)

The Syilx environmental philosophy is only one of countless Indigenous worldviews that stress how humans and the rest of the world are inseparably bound together in relationships that demand reciprocity, respect, and humility (Armstrong, 2011a; Bruchac & Landau, 1993). Vasquez (1998, p. 92) explains how, for Quechua people of the Andes, a relationship of reciprocity with land and other lifeforms "is not a constraining 'obligation'" but rather "the 'pleasure of giving and nurturing with affection.'" Similarly, for the Syilx "regenerative land ethic" is based not on utility or management of the land, but rather a "willingness to live within a strict imperative to continuously sustain a unity of existence [and] ...respect toward all life-forms" (Armstrong, 2011a, pp. 2–3). In this framing, while all individuals, including humans, have an inherent right to be supported by the land, land can never be solely a private good – it is a public and collective good in the widest sense, one that respects and requires that use of the land should not undermine its regenerative capacity that supports all lifeforms.

These teachings do not imply that humans can do nothing, rather “that humans are not the sole cause and controller of events” (Bruchac & Landau, 1993, p. 11) and “that human beings are a part of nature, not above it” (Bruchac & Landau, 1993, p. 8). Humans still use and are sustained by the land and other lifeforms, but with this influence comes responsibility and recognition that humans are reliant upon land and others and so should be humble in their interactions with the larger ecological, physical, and social systems that support them. And in keeping with worldviews that emphasize the cyclical nature of ecological and social systems, the obligations of individuals apply not only to immediate use and management decisions but extend, temporally, to honoring ancestors who used and preserved resources and to protecting the regenerative capacity of resources for future generations (Cove, 1982; RCAP, 1996).

Indigenous societies have diverse systems of land tenure and land management, although they are typically explained in terms of individual and group stewardship responsibilities and relationships rather than rights to resources and control. Roseman (1998) describes the intricate relationship of the Temiar people of Malaysia who “map and mediate their relationships with the land and each other through song[s]” that function as maps, historical records, and property deeds. Evolving through time and generations, Temiar land tenure systems can accommodate joint ownership, overlapping resource claims, and a dynamic adaptability to circumstance. Similar emphasis on adaptability of individuals and communities to changing needs and circumstances is a common principle of many Indigenous cultures. For example, the Quechua people of the Andes, have embedded within their concept of *ayllu* (roughly translated as the community of relatives that includes the entire world) a recognition that life is unpredictable and that survival “means constantly to nurture the capacity to attune oneself, to make adjustments ...” because “everything is in a continual regenerative change” (Vasquez, 1998, p. 105).

The cultural, spiritual, and personal importance of land is another common theme in Indigenous perspectives on land and systems established to organize human relationships to land. Grand Chief Mercredi of the Assembly of First Nations, explained to Canada’s 1996 Royal Commission on Aboriginal Peoples how:

Our songs, our spirits, and our identities are written on this land, and the future of our peoples is tied to it. It is not a possession or a commodity for us. It is the heart of our nations. In our traditional spirituality it is our mother.  
(RCAP, 1996, p. V2:465)

As Rakai explains, while European concepts of land tenure are based on land as a divisible, tradable commodity, Aboriginal tenure systems instead conceptualize land as a “source of identity” and something one has emotional, spiritual, and cultural links and responsibilities to, in addition to practical and economical resource-based dependencies (Rakai, 2005, pp. 11, 23). Land is also a source of community; whereas in European models, one can become part of a community by buying or otherwise gaining rights to land, in Aboriginal systems access to land requires that one is already a member of the community (Hawthorn, 1966, p. 270; Rakai, 2005, p. 25).

#### **2.1.4. *Western Perspectives on Land***

European tenure systems were once Indigenous systems, grounded in the social, cultural, and ecological systems of local communities and landscapes. Feudal and church-based land tenure systems began to shift tenure towards more centralized models, primarily to assist with the administration and collection of taxes on land, but it was not until the 1700s that parcel surveys, property records, and title registration became standard components of human-land relationships in European societies (including colonies) (Scott, 1998). Before then, and even for many generations after, rights to use and manage land were recorded in collective and family memories. Individual ownership and control over land in the sense of contemporary Western private property is generally identified as having grown out of the English land tenure system created by the Normans and the gradual emergence of freehold land title that corresponded with the rise of capitalism in England (Bruce, 1998, p. 1). The influence of formal, state-enforced land tenure systems spread with literacy, access to legal services, and state administration of tenure and taxation.

Private property has been central to the development of the Western capitalist and individualistic society. Economists from Adam Smith to Friedrich Hayek and Hernando de Soto and other theorists of today have repeatedly argued that private property rights “are crucial for personal welfare and economic development” (Levine,

2005, p. 1) and that land is a valuable commodity that should be exchangeable in order for it to be used for its 'highest and best' use. Western theories of property rights also require a security of tenure, which refers to confidence in the legal and/or state system that records and protects the exercise of individual property rights, including property rights that extend permanently or for a long duration in order to create incentives for investment (Bruce, 1998, p. 2). To that end, economists and supporters of private property rights often claim that property rights function optimally only when free from the uncertainty created by control or interference by the state or others (Bruce, 1998, p. 2).

The moral and philosophical foundations of what became the Western conception of land are very different from Indigenous approaches. While most Indigenous interactions with land are based on relationships of equality, respect, and regeneration, European culture "had been shaped by thousands of years of subduing nature" (Bruchac & Landau, 1993, pp. 8–9) and interactions with land emphasized control and a belief that the myriad life forms and materials of this planet exist solely for the use and benefit of humans (J. J. Clarke, 1993). This worldview has influenced much of the ethical foundations of Western property rights systems. Most famously, English philosopher John Locke drew upon this worldview to justify the existence and defense of individual property rights (Locke, 1690). With this attitude towards the non-human world comes an acceptance of the idea that land can be 'held' and controlled by humans, a framing very different from many Indigenous models:

... If the image of Europe's relationship to the natural world was a closed fist, the Native American relationship could be symbolized by an open hand. Rather than the urge to control and reshape the face of the land, the concepts found in Native cultures were and remain relationship and maintenance of a balance. (Bruchac & Landau, 1993, pp. 8–9)

Europeans held tightly to ideas of individual rights and this is apparent in the Western emphasis on rights instead of relationships and responsibilities. With Western private property, control over land is largely transferred to the individual and the necessities of reciprocity and continuous negotiation with community and landscape are reduced in favour of individual needs and gains. I do not mean to imply an undue or romanticized preference for Indigenous land tenure systems. Many aspects of individual rights and security came with Western land tenure systems that were, and are, highly

valued by Western societies. This was particularly the case for individuals who had experienced generations of inequality and oppression by those with land and power. My point is to emphasize the different foundations of values, goals, and relationships that underlie Western and many Indigenous land tenure systems.

Despite shifting to goals and values that favoured individualism, Western societies were not blind to the impacts of giving individuals greater control over land. Through Western history and today, tools of Western land management respect the interrelationship between individuals and their social and ecological communities. Municipal land use by-laws or zoning designations place restrictions or requirements upon landholders and represent the interests of others affected by an individual's land use decisions. Similarly, property taxes function as an obligation to share individual benefits (or bear a share of collective costs) of property with the wider community. In addition, as much as Western property regimes emphasize individual rights and tenure security, the rights and responsibilities of land tenure are not static, they too can be dynamic and evolving institutions that are adapted to changing values, goals and aspirations of society (Freyfogle, 2003, 2007).

### **2.1.5. *Public-Private Nature of Land***

While most Western land tenure models distinguish between individual and communal or public tenures, the terms are oversimplifications. Complete power over land is rarely, if ever, held entirely by the individual or community. This is partly because land exists simultaneously as a public and private good (Rakai, 2005, p. 197). In Canada, this duality is evident in the law of Eminent Domain, by which the underlying title of all land belongs to the government and therefore, will be subject to certain limitations, taxation and/or expropriation for the public good. Across land tenure systems, individuals have recognized rights to use land. However, while land can be a private good in the sense that an individual or household has priority or exclusive authority over the use and management of an area of land and the resources connected to it, this does not transform land into an entirely private good.

First, because of its permanence and integrated nature, land is a resource that cannot be owned entirely or exclusively by an individual. As Rakai (2005, p. 8) explains,



land is “not limited to one specific generation, ... Each generation therefore has a moral duty to use it with a view to those who follow.” Dekker (2003, p. 2) also recognizes this aspect of land, particularly in customary land tenure regimes that “carry for the current users of the common land an obligation toward past and future generations.” Second, what we call ‘land’ is not a single, easily divisible resource. A land parcel is a slice of many integrated hydrological, geological, atmospheric, ecological, and even socio-cultural systems. Deininger (2003, p. xliii) and Freyfogle (2009, pp. 250–251) both recognize this when justifying the role of state or public action to control “myopic individual actions” (Deininger, 2003, p. xliii) that threaten to irrevocably damage the public resources linked to private landholdings.

A third, related aspect of this is that use of land intertwines with actions and interests of many others. In 1848, John Stuart Mill saw the need to “develop[ ] a concept of property strata that links ownership rights with community needs and the potential of a tract of land and its use to affect the lives of others” (Davy, 2012, pp. 224–225). Carruthers & Ariovich (2004, pp. 27–28) highlight that even when the enclosure movement in England was dramatically increasing private control of land, the use of land was still regulated. Privately held land remains a public good in many respects and is regulated as such, through state powers such as land use planning and regulations (Davy, 2012; Egan & Place, 2013, p. 2; Freyfogle, 2003, 2007; Needham, 2006).

Because of the public and private nature of land, and the trans-boundary systems that it is a part of, it is beneficial for communities and governments to coordinate and plan land uses and changes. Davy (2012, pp. 65–66) specifically explores planning as an important part of land policy because planning “manage[s] private and common property relations.” The *Voluntary Guidelines on the Responsible Governance of Tenure* identify that “no tenure right, including private ownership, is absolute” because they are “limited by the rights of others and by the measures taken by States necessary for public purposes” (FAO, 2012a, p. 6). These measures may include “regulated spatial planning” which is recommended as a tool that States should use to shape land use to encourage sustainable development, constraining land tenure rights as necessary (FAO, 2012a, p. 32).

### **2.1.6. Cadastralization and Paperization**

Despite the integrated and intertwined nature of land and land tenure, Western systems have long attempted to simplify it. A critical part of the development of Western concepts of property and land was the invention and use of the cadastral map, which divides land into a grid of separate, recordable parcels (Bohannon, 1960, p. 102). Described in detail by Scott (1998), the development of the cadastral map was part of government efforts to administer and tax landholders in Europe:

...so the complex tenure arrangements of customary practice are reduced to freehold, transferrable title...the administrative landscape is blanketed with a uniform grid of homogenous land...How much easier it then becomes to assess such property... [rather than] the thicket of common property and mixed forms of tenure. (Scott, 1998, p. 36)

Bureaucratic simplicity preferred landscapes be divided into clearly delineated parcels, arranged in a grid, a process Scott refers to as 'cadastralization' (Scott, 1998, pp. 35–36). Porter (2010) explores how cadastralization became central to Western concepts of landscape and spatial organization, a relationship to land that continues in planning and land management today. Land use plans, surveys and parcels, securely defined land title, and title registration systems have become central to Western concepts of land and property. In Western tenure systems, land used by individuals has been effectively transformed into bureaucratized and commoditized parcels of land that can be freely traded in an open market (Rakai, 2005).

Cadastralization requires the simplification of complex local land tenure and management systems. In this way local customs, traditional rights, culturally-enshrined responsibilities to land and others, and other untranslatable values and institutions were (and are) not captured in the written documents and records of a cadastral system (Dekker, 2003, p. 2). Morad & Jay (1997, p. 45) identify this failing as "probably the most common cause for the ineffective functioning of a cadastre." It is also one of the aspects most criticized by Indigenous leaders and communities. At the time of colonial expansion over North America, Indigenous peoples repeatedly stressed that land was "something not to be owned and divided up, but to be kept intact for all the people" (Bruchac & Landau, 1993, p. 7). Similarly today, Indigenous communities around the

world continue to stress that inflexible, defined borders and fragmentation of a landscape “freezes life” (Vasquez, 1998, p. 113).

Cadastralization was not merely an indirect outcome of colonizers’ worldview. It was also, as Sheehan (2006) observes, central to the intentional dispossession of Indigenous peoples from their lands. The colonial “paperization” of property systems resulted in exclusion or misrepresentation of Indigenous rights, which were based in oral systems and ill-suited to written documentation (Sheehan, 2006, p. 392). Written documentation was a source of power for colonial authorities, as is evidenced in the history of treaty making across North America (Moore & Wolch, 2011). Paperization also fundamentally changes land tenure for Indigenous communities. As Abram (1996, p. 110) explains in his exploration of effects of the invention of written language, when something is written down “it become[s]...a fixed form independent of both the speakers and of situations.” As with language, the use of written records mean that concepts, agreements, and contracts concerning property need not rely upon “oral utterances called forth by particular social situations” (Abram, 1996, p. 110). Written records, unlike oral records, can be permanent and unchanging, despite challenges by others or ecological changes. As well, written title records can allow abstraction of landholdings from a particular context, making them transferrable or tradable.

In contrast, oral records are contingent upon and adaptive to culture and circumstance. In an oral culture, the individual remains directly dependent on the collective for the continual existence of property rights, and therefore the collective retains greater power for requiring individuals to fulfill their responsibilities associated with their property rights. In an oral culture, the concept and functioning of property is dynamic, emerging from a continual and adaptive negotiation of a relationship between the needs and wishes of individual resource users and the needs and wishes of collective (Rakai, 2005; Ward, 1997). For example, the song-based tenure systems of the Temiars “... reinforce the positive ethical value placed upon group decision making and interaction” not only in the composition and content of the songs, but because a property claim is “actualized most thoroughly when it is sung not solo by the dream-song receiver but with choral interaction (i.e., communalized, embedded in social relations)” (Roseman, 1998, p. 116). While an individual can attempt to claim particular resources independently, if they want the collective to strengthen and defend this property claim,

participation of the community is required. In contrast to individualistic, divided, and permanently recorded land tenure systems, land and resource tenure systems based on orally recorded claims at least support, if not create, land-human relationships that are dynamic, continuously negotiated, adaptive, and based on respect and mutual benefit for all life forms (Battiste, 2009; Cove, 1982; Langdon, 2007; Roseman, 1998). The imposition of European tenure institutions upon Aboriginal tenure systems disturbed some of this balance and interdependence (RCAP, 1996, p. V2:465).

### **2.1.7. Tenure Eurocentricity**

I borrow the concept of tenure Eurocentricity from Rakai (2005) and the evidence she collected concerning the global bias towards Eurocentric concepts of land and land tenure systems (Rakai, 2005, p. 197). This is partly due to European colonialism which spread European concepts of land and land tenure systems around the world, resulting in Indigenous land tenure systems “being misunderstood, underplayed, misrepresented or simply ignored by the colonising institutions” (Rakai, 2005, p. 7). As Dale Turner writes, the Eurocentric “intellectual landscapes that have been forced on Aboriginal peoples” through past and ongoing colonialism “have created discourses on property... that have subjugated, distorted, and marginalized Aboriginal ways of thinking” (Turner, 2006, p. 88). The colonial land tenure models and the “cultural blindness” with which they were imposed are still evident in “flawed” land tenure systems today (Sheehan, 2006, p. 391). Eurocentric concepts continue to shape property law and land administration systems around the world, including in Canada (Rakai, 2005, p. 56), where “the present cadastral system is European and favours individual land titles” (Morad & Jay, 1997, p. 45). This cultural bias extends to research on land tenure (Bohannon, 1960) and is particularly evident in legal and regulatory contexts (Dekker, 2003, p. 21; Godden & Tehan, 2010, p. 4) as well as economic development models which facilitate a replacement of communal land tenure by individualized property rights (Deininger, 2003, p. xxiv; Dekker, 2003, p. 2; Godden & Tehan, 2010, pp. 13–14).

The Eurocentric nature of land tenure in Canada is particularly apparent in the context of First Nations reserves, where the establishment and management of colonial land tenure systems were guided by European models of land “that distinguished between distinct disparate classes of communal and individual tenures” (Rakai, 2005, p.

11). Not only did this create an artificial dichotomy between individual and communal authority over land (Rakai, 2005, p. 46), but it clashed with Aboriginal peoples' fundamental concepts of land (Godden & Tehan, 2010, p. 4).

While Eurocentric concepts dominate Western and colonial-based land tenure systems, they have not erased or entirely displaced Indigenous ones. Colonial land administrators were deluded by the conceit that the strengths of Western land tenure systems were such that Indigenous peoples would readily adopt them; instead, resistance continues even today and there is evidence of shifts towards more “culturally-sensitised ways of viewing land tenure systems” and more flexible land tenure systems (Rakai, 2005, pp. 4–5).

### **2.1.8. Legal Pluralism**

In practice, legal pluralism provides some flexibility in land tenure systems. In the context of land tenure, this concept refers to the simultaneous existence of multiple legal constructions of tenure or property rights within a social unit, or tenure pluralism (Dekker, 2003, p. 209; Fortmann, 1990, p. 198; Rakai, 2005, p. 9). (Legal pluralism is also sometimes called ‘legal dualism’ in the case of only two parallel legal systems.) In legally pluralistic societies, the state is not the only perceived source of law; rights and rules are also created by Indigenous, customary or folk legal systems that are perceived as legitimate by their users (Fortmann, 1990, pp. 197–198). Legal pluralism has been widely documented in post-colonial societies where colonial law was imposed but never completely replaced local law (Dekker, 2003, p. 4; Egan & Place, 2013, p. 7; Godden & Tehan, 2010, p. 7; Rakai, 2005, pp. 1–2; Wiber, 1994). In the case of tenure pluralism, there are multiple land tenure systems operating in a given area, sometimes hybridized and other times in parallel at different levels of law, some may be formal (recognized by state law, *de jure*) and others informal (*de facto*). The primary indicator of plurality of tenure systems is that the multiple systems are viewed as legitimate by users and continue to influence landholding behaviour (Rakai, 2005, p. 10).

It is important to recognize the existence of overlapping and potentially conflicting land laws because the plural tenure systems will influence individuals' behaviour and land management. Fortmann (1990, p. 206) points to legal pluralism as central to

untangling “paradox[es] of seemingly inconsistent local action” which may result from operating under different but parallel legal systems. Legal pluralism may also help to explain issues with compliance with land management regulations, where compliance “depends on the perceived legitimacy of the rules” (Carruthers & Ariovich, 2004, p. 29) or where a customary system is only partially subsumed by another system, leaving a sense of rights but a lack of a coherent system to sanction resource misuse (Fortmann, 1990, p. 196). Hvalkof (2008) provides another empirical example of the effects of tenure pluralism in his study of *de facto* forms of property in Latin American Indigenous communities, where:

It is quite clear that there is an interest among many community members in acquiring an individual land title, an extra tenure security, but it is equally obvious that they at the same time are acknowledging the communal title as legitimate and, not least, the community authorities as a lawful governing body at par with any State institution. Individual land titling is thus seen rather as a complement to already existing communal and customary tenure arrangements, and not necessarily as an alternative. (Hvalkof, 2008, p. 9)

Similar patterns of multiple co-existing tenure systems and simultaneous individual and collective rights in land can be observed in many First Nations communities in Canada, where dual systems of land tenure (i.e., certificates of possession and customary laws) operate (Nemoto, 2002, p. 214; Stephenson, 2010, pp. 106–107). In Canada as well as other colonial-Indigenous interfaces, it seems that plural land tenure and land management systems did not operate entirely in parallel; instead, they often “became interspersed” and hybridized with each other (Chimhowu & Woodhouse, 2006, p. 347; Godden & Tehan, 2010, p. 7; Roseman, 1998). Many Indigenous people, adapting to changing circumstances, began to find ways to use rules of the colonial system, including property rights, to their advantage (Thomson, 1994).

Local adoption and adaptation of colonial land tenure systems resulted in “a layering of new institutions and property law on old forms” (Brisbin & Hunter, 2006, p. 139). However, hybridization can also create “messy... and contradictory policies” that clash with other aspects of the land tenure system (Brisbin & Hunter, 2006, p. 139). As previously discussed, Eurocentric tenure systems have developed in individualistic societies that use legal abstractions, written records, and bureaucratic administration

systems. Aspects of these systems were, and continue to be, incompatible with highly complex Indigenous tenure arrangements that accommodated flexibility and resource uncertainty, spatially and temporally overlapping claims, co-ownership and a host of other adaptations to social and ecological circumstances. Hybridization also resulted in a loss of control over local land tenure systems due to power imbalances between colonial authorities and local communities (see section 5.4).

### **2.1.9. *Narrative, Power, and Land Tenure***

Fortmann (1995) demonstrates the importance of story-telling and narratives for land tenure and property systems, particularly in situations where claims to land rights are contested. Especially in oral cultures or other situations where rights to land are not physically documented or mapped out, a “virtual land registration in the minds of people” (Dekker, 2003, p. 138) is required to legitimize land tenure claims. For many Indigenous people, including First Nations in Canada, “stories translate into land tenure” (Turpel-Lafond, 2012, p. 714). Rakai (2005, p. 93) quotes Aboriginal researcher Leroy Little Bear, who explains that

for Aboriginal people, it is the songs and stories about their lands and the specific places in their lands, and the renewal ceremonies that occur about those places in their lands, that provide evidence of their title...

In these settings, stories about places and one’s relationship to them, if maintained and acknowledged by the audiences that hear them, can confirm a claim or right to land or resources and therefore can give their tellers, whether it be local residents, elites, or state officials, significant power in struggles over land (Fortmann, 1995, p. 1055). This power is not fixed; it can shift depending on how the stories are told. Fortmann (1995) presents many examples of different land disputes where the details of the past differ, depending on who provides the narrative and what claim is being justified. These differences may be a result of “deliberate discursive strategies ... to articulate and assert the basis and legitimacy of [one’s] own claims” (Fortmann, 1995, p. 1054) or they may be a less intentional result of the point of view of the teller and positioning embedded in an inherited narrative. Either way, in many cases stories used in land disputes are “changed to meet contemporary needs” (Fortmann, 1995, p. 1055).

Even written documents and maps are coloured by their creators' perspectives, the cultural assumptions underlying the system they are part of, and contemporary reinterpretation. In these contests, Biezeveld (2004, p. 138) comments, "the distribution of power determines whose version of reality will win."

Renegotiations of property rights, boundary disputes, or the claiming or defence of claims to land rights all involve narratives or constructions of a property relationship (Davy, 2012, p. 13; Fortmann, 1995, p. 1061). These contested narratives might be between individuals and their government, between rich and poor members of a community, between rivaling families, between men and women, or between a local community and a distant government or legal system (Fortmann, 1995, p. 1061). In her research on land disputes in Indonesia, Biezeveld (2004) refers to the variety of arguments and stories used in land disputes, and the various ways they are used, as "discourse shopping." Biezeveld links the prevalence of this behaviour to "the functioning of a society with overt legal pluralism" where situations of overlapping and conflicting laws can be manipulated to one's benefit, if one can leverage power to do so (Biezeveld, 2004, p. 138). The narratives of property claims competing for legitimacy are examples of efforts to shift balances of power over land.

Situations where colonial tenure systems are imposed on Indigenous communities amplify the importance of narratives and power. The resulting legal plurality can create opportunities for local elites, opportunistic individuals, or corrupt officials to increase their power over land (Carruthers & Ariovich, 2004, p. 29; De Schutter, 2010, p. 10). This is the case especially if a preference for individual titling "put[s] groups that do not use the land intensively or do not occupy it permanently at a particular disadvantage" (De Schutter, 2010, p. 10). Those left at a disadvantage by colonial land tenure systems contest the formalized system through narratives that reinforce and appeal to the customary system of rights. In the past, the narratives of those with power decided property disputes, at least in formal courts, but today there is an increasing recognition of imbalances of power and the need to recognize differing historical and contemporary accounts, either to remedy past injustices or to learn from mistakes (Rakai, 2005, p. 75). For example, Egan & Place (2013, p. 1) issue a call to the Canadian state and settler society to take a more nuanced look at debates over Aboriginal land tenure issues, particularly how "property is configured and contested." In



their view, it is the gaps between these narratives that create space for negotiation, creative responses, and recognition of “alternative models of Indigenous land tenure and self-determination” (Egan & Place, 2013, p. 3).

## **2.2. Land Tenure on First Nations Reserves**

In this, the second part of my literature review, I focus on academic and grey literatures concerning land tenure on First Nations reserves in Canada.<sup>1</sup> Following a description of the land tenure system created by the *Indian Act*, I examine legal and technical perspectives on individual landholdings. I then review research on economic, social, political, and practical implications of this system. My findings in Chapter 5 explain the history and development of the system, nationally and locally for PIB.

### **2.2.1. *The Indian Act Reserve System***

Two institutions dominate the history and contemporary realities of First Nations peoples in Canada: the *Indian Act* and the reserve system (see Chapter 5). Canada’s colonial administrations ‘reserved’ areas of land for use and occupation by Aboriginal peoples, typically as part of negotiations to make land available for non-native settlers and to avoid conflict. As colonial policy shifted from settlement to assimilation, reserves became central to federal administration and efforts to control First Nations. Canada’s Constitution allocates official jurisdiction over “Indians, and lands reserved for the Indians” to the federal government. Title to reserve land is held in trust for Bands by the federal government. The *Indian Act*, together with policies of the federal ministry responsible for First Nations (currently named Aboriginal Affairs and Northern Development Canada, AANDC), are the legal foundations for reserve land tenure,

<sup>1</sup> There has also been substantial research on land tenure situations on reservations in the United States, a different legal and historical context than reserves in Canada that has resulted in some unique challenges. For information on Native American reservation land tenure and land management, see (Ballantyne & Dobbin, 2000; Campbell, 2007; Cornell & Kalt, n.d., 1991; Frye, 2012; Jones, 2012; Kelly, 1975; Sawers, 2010; Shoemaker, 2003; Zaferatos, 1998). Baxter & Trebilcock (2009) offer additional discussion of the American context as well as a detailed review and discussion of land tenure reforms and formalization efforts in other post-colonial states, including New Zealand and South Africa.

management, and planning. The *Indian Act* regulates what limited authority a First Nation has over its reserve land. For example, Bands have authority to make land use by-laws, zoning by-laws, and traffic by-laws, but these must be approved by the Ministry. In the last three decades, some authority over land management has been devolved to some Band Councils through federal legislation, including the *First Nations Land Management Act* (S.C., 1999 c. 24) (FNLMA) and delegations of authority under ss.53/60 of the *Indian Act* as part of the (now inactive) RLAP (Regional Lands Administration Program) and RLEMP (Reserve Land and Environment Management Program). Most First Nations continue to operate under the *Indian Act* lands regime.

As of February 2013, there are 617 officially recognized First Nations Bands in Canada (AANDC, 2013a) and 3,003 reserves<sup>2</sup> with a combined area of over 3.8 million hectares (Geomatics Services AANDC, 2012). A total of 534 of these reserves are classified by AANDC<sup>3</sup> as 'remote' or 'special access' (no year-round road access), 694 are 'urban', and 1660 are 'rural' (14 are unclassified) (Geomatics Services AANDC, 2012) (see Appendix D). The current First Nations population (registered Indian) in Canada is estimated at 530,000 and the 2006 census estimated that 40% of this population lives on reserves (Statistics Canada, 2010); however, on-reserve populations vary widely, ranging from multiple thousands to less than 50 permanent residents, or in the case of some small hunting or fishing reserves, only seasonal use. A First Nation community is officially referred to as a Band and is typically governed by a Band Council government as structured in the *Indian Act* or according to a customary governance arrangement as negotiated with the federal government.

<sup>2</sup> Reserves with the same Administrative Land Identifier were removed from the data as duplicates. With duplicates included, there are a total of 3185 reserves.

<sup>3</sup> AANDC uses a Band classification system of four geographic zones based on distance to nearest service center with year-round road access: Urban (<50 km), Rural (50-350 km), Remote (>350 km), and Special Access (no year-round road access to nearest service center) (Mchardy & O' Sullivan, 2004, p. 17). A 'service center' is a municipality where First Nations individuals can access to social services and living supplies (Wassimi, 2009, p. 34).

### **2.2.2. Contemporary Reserve Land Tenure**

There is no single land tenure system that applies to all reserves. Reserve land tenure systems are categorized into those that follow the *Indian Act* regime; those based on Land Codes under the FNLMA; those established under other self-governance regimes (modern treaties or self-government agreements); or locally determined customary land tenure systems (see Flanagan & Alcantara (2002) and Ballantyne & Dobbin (2000) for more details on these various models). Customary systems of land tenure on reserves operate outside of the formal Canadian tenure system. While the federal government accepts that these exist and operate, they are currently not recognized by federal or provincial governments or courts because of "...the impossibility within the framework of the legislation for the Minister to protect the individual and/or Band interest in such circumstances" (Bartlett, 1990, p. 138). Therefore, customary allotments are made at the discretion of the Band Council and not formally registered with the federal government. This avoids the federal approval system but also offers less legal protection and tenure security if the Band Council decides to change the allotment or if the federal government decides to take or direct the use of that land (Bartlett, 1990, p. 138). Even so, many First Nations have preferred customary systems as a way to localize control over their lands and avoid the federal supervision and approvals required in the *Indian Act* land regime (Bartlett, 1990, p. 138; Kydd, 1989, p. 11; Rakai, 2005, p. 117). Given the complexity of questions associated with customary systems in existence and their high levels of variability, my research focuses on the formal *Indian Act* land tenure system.

Several forms of tenure exist under the *Indian Act* land regime (though for all these tenure forms the federal Crown holds the underlying land title):

- Collectively held Band land that is managed by the Band government (can be surveyed or unsurveyed parcels);
- Land allotted as individual landholdings ("lawful possessions" under s.20 of the *Indian Act*, and evidenced by Certificates of Possession (CPs)). These are typically held by individuals (in severalty or co-ownership);

- Conditional or temporary forms of CPs known as Certificates of Occupation<sup>4</sup>;
- ‘Locatee leases,’ leaseholds of CP lands;
- Leases of designated Band land;
- Permits for utility corridors (roads, power, gas, telephone, cable etc.) (s.28(2)); and
- Various leases or permits for specific activities (agriculture, timber harvesting, mining, oil and gas extraction, etc.) (Imai, 2011; INAC, 1982, p. 2)

The CP system was introduced by the federal government in 1951 to replace earlier instruments for registering individual holdings on reserves (‘Location Ticket,’ Notice of Entitlement, and Cardex holdings) and to enhance individuals’ legal rights to their land allotments (Alcantara, 2003). A CP is the record of lawful possession of a parcel of reserve land and is “the highest form of landholding [on reserve] available to an individual First Nation member” (Alcantara, 2003, p. 408; Ballantyne, 2010, p. 41). A CP is permanent in that it cannot be cancelled by the Band or federal government except in cases of error or fraud or if the locatee (derived from ‘Location Ticket’) loses his or her Band membership. CPs are also inheritable, transferrable to other Band members, and can be leased to members or non-members (under s.58 (3) of the *Indian Act*). Revenue from a CP lease goes to the individual holder(s), though some Bands require that a percentage of revenue or Band fees be paid to the Band (Cowichan Tribes, 2011). A CP interest functions almost like fee simple title, a legal term used to refer to freehold tenure; it is also used to refer to private ownership as is commonly conceptualized in Western land tenure systems (Bruce, 1998). A CP is not exactly equivalent to fee simple because it cannot be alienated to non-Band members (Alcantara, 2003; Ballantyne, 2010, p. 41; Place, 1981; Yuen, 2009) and most legal land transactions require Ministerial approval. Also, CPs, like all reserve lands, are exempt from legal seizure and taxation (except if a Band has adopted its own taxation policy, in which case some lands may be taxed by the Band) (Alcantara, 2003, p. 405).

<sup>4</sup> Certificates of Occupation are issued when the Minister withholds a full CP for the time being and so might have conditional requirements, such as the cultivation of the land or the building of a house, before the land is allotted as a full CP. Certificates of Occupation may also be used for time-limited allotments of land, though this appears to be less common. For more on Certificates of Occupation, see Kydd (1989).

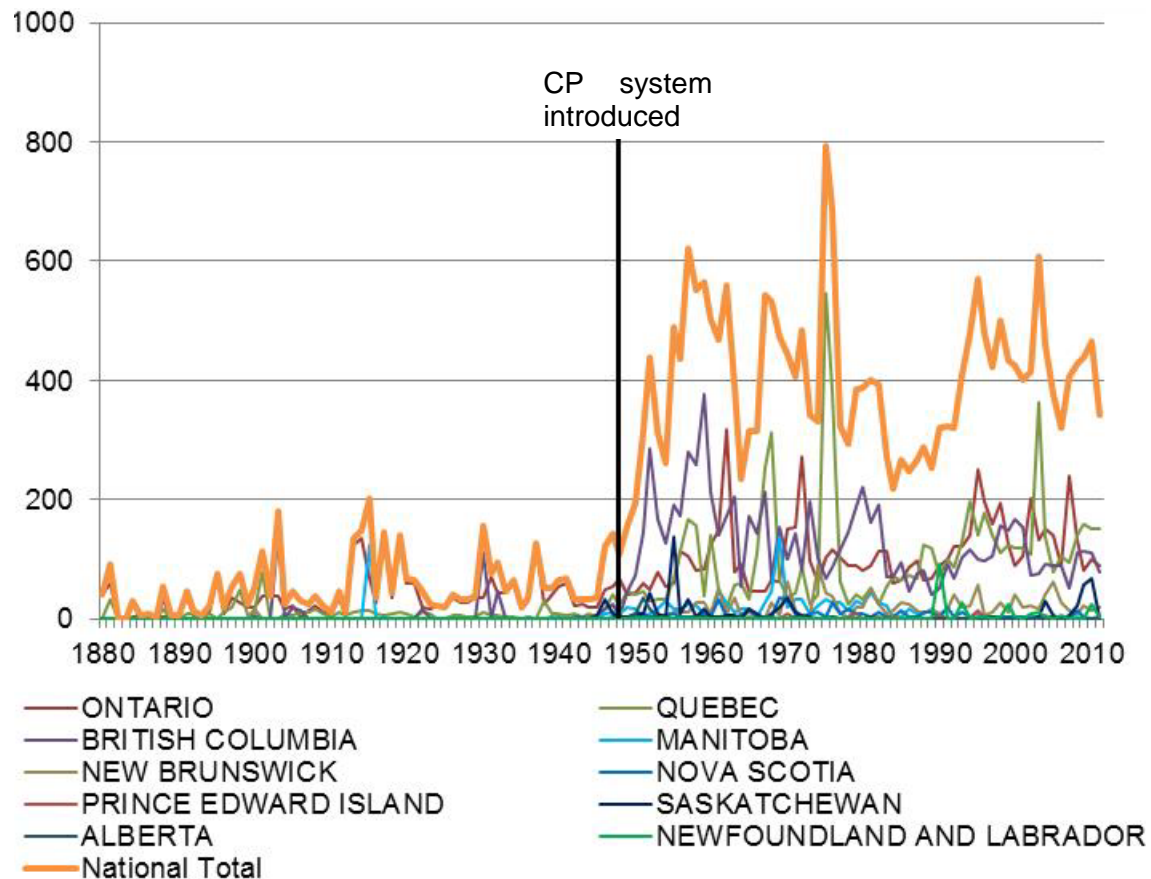
Individuals can secure a CP in one of four ways: allotment of a new CP or sale, transfer, or inheritance of an existing CP. The creation of a lawful possession through allotment is done by the local Band Council, followed by approval and registration of the interest (along with a description or survey of the parcel involved) in the *Indian Lands Registry System* by the Minister of AANDC (Alcantara, 2003; Ballantyne, 2010, p. 41; Kydd, 1989, p. 14). Once an individual has a lawful possession, he or she can use the land exclusively, build a house or transfer (or bequeath) it in whole or part (subdivide) to another Band member (Alcantara, 2003, p. 405). A CP holder can also have the Minister lease the land on his or her behalf to others, including non-Band members, known as a 'locatee lease.' Leases are arranged by the individual CP holder, sometimes with and sometimes without formal Band Council support (Alcantara, 2003, p. 414). If a CP lease is over 49 years, a community vote is required to approve it; if the lease is 49 years or less a vote is not required (INAC, 2005, p. 50). This is in contrast to a lease of Band land, which always requires a Band referendum to approve it. However, it is AANDC policy that even for CP leases 49 years or less a Band Council Resolution should be submitted that supports the lease and indicates whether the proposed lease complies with any existing land use plans or by-laws, and if the Council has concerns that these should be addressed prior to Ministerial approval (Ballantyne, 2010, p. 44; INAC, 2005, p. 50; Pushor Mitchell, 2011). Council alone cannot veto a locatee lease (Alcantara, 2003, p. 414; Poitras, 2004, p. 6) (though if it is for over 49 years, the Band membership as a whole may vote not to approve it). In many reserves, informal leases occur when a CP holder or the Band enter into land agreements outside of the *Indian Act* provisions and without Ministerial approval; these agreements are commonly called 'buckshee leases' and may not be recognized by Canadian courts (Alcantara, 2003, p. 415; Ballantyne, 2010, p. 45).

### **2.2.3. Descriptive Statistics on Certificates of Possession**

According to data from the *Indian Lands Registry System* (ILRS), the official register for lands administered under the *Indian Act* lands regime, 414 reserves currently have at least some lawful possessions created under the *Indian Act* (Geomatics Services AANDC, 2012), up from 301 in 2003 (Alcantara, 2003, p. 393). However, First Nations are not required to create individual landholdings under the *Indian Act* and some

operate under the *Indian Act* without individual landholdings and others operate under their own customary landholding system (Imai, 2011, p. 110).

Use of the lawful possessions system is ongoing. Figure 2.1 shows data on the annual number of individual landholdings ('Evidences of Title' in the ILRS terminology) registered by Band Council Resolution (BCR) and recorded in the ILRS. However, not all holdings records begin with a BCR: the first record for some appears to be other instruments, such as a transfer or administrative note. Due to these sorts of complications and historical inaccuracies, I decided to use only BCR records. Therefore, as these data only represent the allotments recorded by BCR they may not reflect the full number of holdings per year.



**Figure 2.1. Number of Evidences of Title for individual landholdings recorded by BCR, by year and province**

Source: Author generated. Data from ILRS AANDC, 2012.

In the ILRS, individual holdings may be updated or transferred over time and a new certificate issued for the same parcel. Alternatively, a holding may be subdivided and two (or more) new certificates issued instead. This means that data reporting the number of Evidences of Title issued does not equate to the number of distinct, current parcels held under lawful possessions. This detail is sometimes overlooked when reporting on the adoption of the CP system. For instance, in 2011 Flanagan et al. (2011, p. 91) reported that since 1951, over 140,000 CPs had been issued across the country<sup>5</sup>, with 40,000 in 2002-2004 alone, implying a dramatic increase. But this does not mean that the total number of current lawful possessions, or land parcels held under them, had increased by that much because many newly issued CPs refer to already existing lots.

To assess the total number of distinct, current lawful possession holdings, records for the same parcel must be removed. When past CPs and duplicate CPs for the same parcel of land are removed, 2012 data from the ILRS reports that there are 40,841 distinct, current lawful possessions (LPs) in existence,<sup>6</sup> each representing a distinct parcel of land (Geomatics Services AANDC, 2012). In November 2012, the total acreage of land held under these current lawful possessions is 113,032.76 hectares, or 2.93% of the total reserve area in Canada (Geomatics Services AANDC, 2012). Table 2.3 breaks down the national data by province.

Distribution of CPs is highly variable. In some reserves, almost the entire reserve land-base has been subdivided to individuals; in others CPs have been adopted minimally or not at all (Alcantara, 2003; Baxter & Trebilcock, 2009, p. 79; C. Walton, personal communication, 2012). Some reserves continue to allot CPs; others no longer allot them or only allot in certain situations; still others have not yet used the system but are considering it (Alcantara, 2003; Ballantyne, 2010, p. 41; C. Walton, personal communication, 2012). Some communities employ a mixed system, allotting CPs in some cases and customary holdings in others (Baxter & Trebilcock, 2009, p. 79).

<sup>5</sup> As of February 2013, 160,600 CPs have been issued since federal records began, along with 74,658 other EOTs (Evidences of Title) (ILRS staff, personal communication, 2013).

<sup>6</sup> If parcels that are classified as 'retired' and 'unresolved' are included, the total is 43,633.

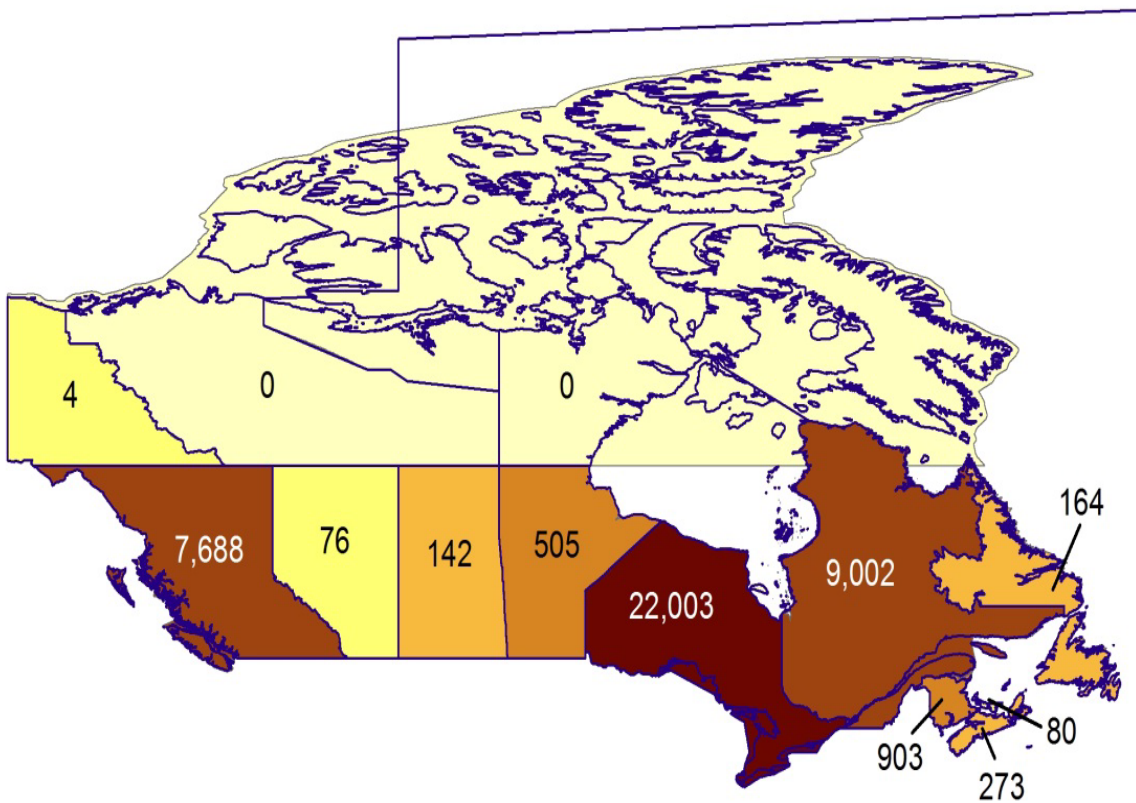
**Table 2.3. Registered Current Lawful Possessions by Province**

Province	Reserve land in Province (hectares)	Number of current LPs	% of national total number current LPs	Area under LP (hectares)	LPs as % of reserve land in Province	Province's % of all LP land nationally
ON	812,807.42	22,003	53.87%	60839.63	7.49%	53.82%
PE	781.01	80	0.20%	56.46	7.23%	0.05%
BC	351,820.57	7,688	18.82%	22193.34	6.31%	19.63%
QC	415,425.00	9,002	22.04%	14230.99	3.43%	12.59%
NB	16,340.80	903	2.21%	280.08	1.71%	0.25%
MB	480,462.06	505	1.24%	6460.75	1.34%	5.72%
NS	12,197.55	273	0.67%	115.03	0.94%	0.10%
NF	6,641.93	164	0.40%	47.04	0.71%	0.04%
SK	949,318.27	142	0.35%	6702.57	0.71%	5.93%
AB	763,252.82	76	0.19%	2094.55	0.27%	1.85%
YT	2,826.18	4	0.01%	3.60	0.13%	0.00%
NT	52,339.77	0	0.00%	0.00	0.00%	0.00%

Source: Geomatics Services AANDC, 2012. (Duplicates, Retired, Unresolved, and Easement registrations removed. One lawful possession could not be associated with a reserve and was excluded.)

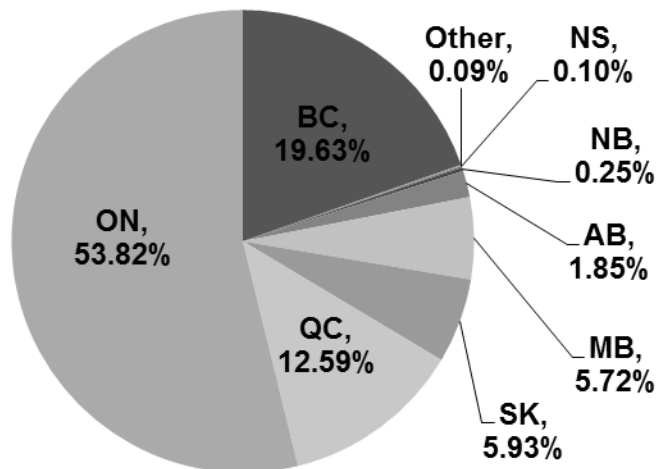
These data, visualized in Figure 2.2 and Figure 2.3 show that reserves in Ontario, Quebec, and British Columbia contain the majority of current lawful possessions, both by absolute number and area. This uneven distribution is partly because there is a lot of reserve land in these provinces, but there were also historical differences in how the federal reserve land tenure system was introduced and adopted in different regions of the country (discussed in section 5.1).





**Figure 2.2. Total number of current lawful possessions, by province**

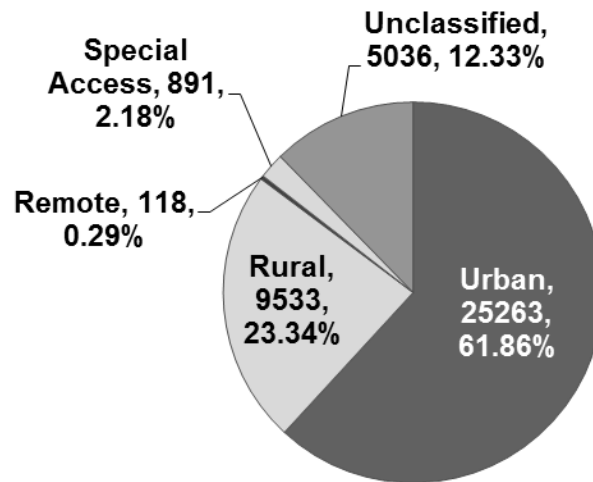
Source: Author generated. Data from Geomatics Services AANDC, 2012.



**Figure 2.3. Provincial distribution of total area under lawful possession**

Source: Author generated. Data from Geomatics Services AANDC, 2012.

It is also interesting to note that most lawful possessions are on reserves classified as urban and rural (rather than remote or special access), as illustrated in Figure 2.4 (see Appendix D for more data on reserve classification).

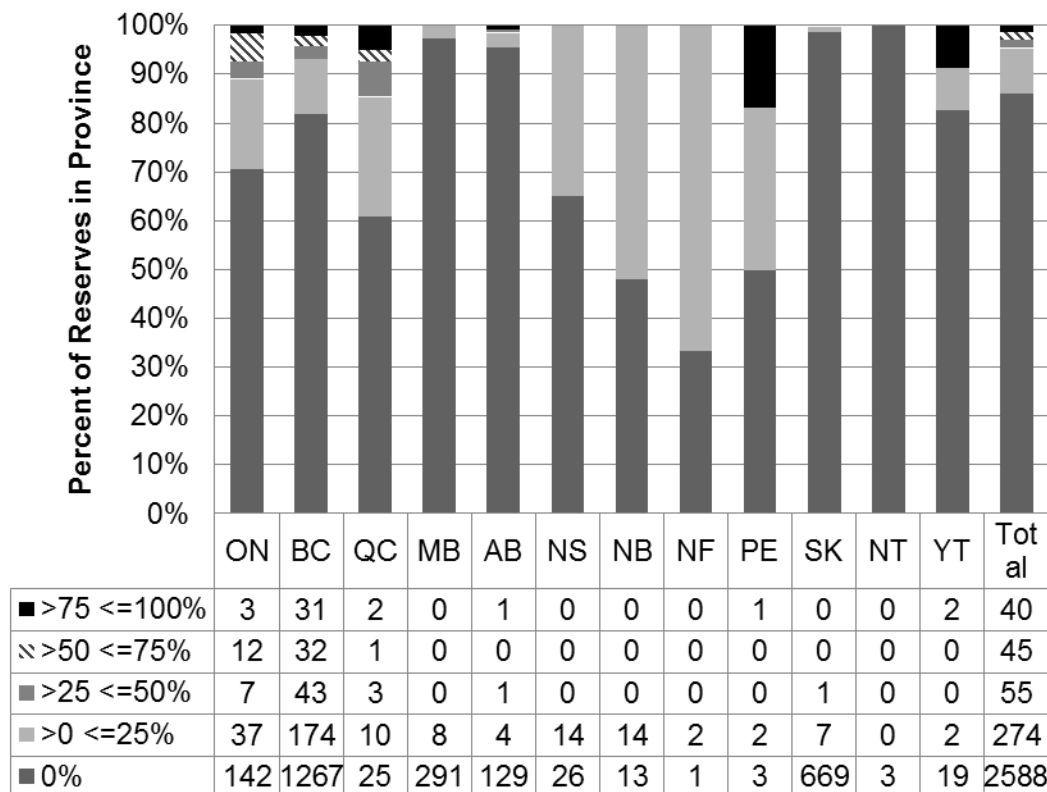


**Figure 2.4. National lawful possessions by reserve geographic classification**

Source: Author generated. Data from Geomatics Services AANDC, 2012.

Overall, the majority of reserves in most provinces have no lawful possessions, as shown in Figure 2.5. This graph shows what share of the reserves in each province are in five categories of percentage of land under registered current lawful possessions. While most reserves have under a quarter of their reserve as lawful possession (if any), there are 140 that have over a quarter, and 40 that have over three quarters of their land as lawful possessions (31 of which are in B.C.). Some of these, it should be noted, are very small reserves that have been allotted for the most part or in full to a family or single member because it is a particular family's fishing site (C. Walton, personal communication, 2012).

It is also important to remember that while a community may have a small percentage of its overall area held as lawful possessions, in many communities, such as the Penticton Indian Band, the lawful possessions held by individuals include much, if not all, of the most suitable land for housing, agriculture, and other developments.



**Figure 2.5. Distribution of reserves by percentage of area under lawful possession**

Source: Author generated. Data from Geomatics Services AANDC, 2012.

#### **2.2.4. Legal and Technical Issues**

The policy and practice of CP individual landholdings are still evolving. Courts are reluctant to define the legal nature of lawful possessions (beyond that fact that they require a Band allotment and federal registration) because of ambiguities concerning the rights involved and because the tenure system relies upon “the Minister’s discretion” (INAC, 1982, p. 2). Despite this, Courts are increasingly called upon to interpret the *Indian Act* land tenure system. Alcantara (2003) provides an in-depth overview of the case law that has shaped CP interests. Imai (2011) provides case law details. This section highlights legal and technical points significant to PIB’s situation.

A major point of legal and technical debate concerns the balancing of individual and collective interests in reserve land allotted as CPs. It is clear from case law that once land is allotted as a CP, a Band’s collective rights to the land are reduced

(Alcantara, 2003; Amyot, 2009, p. 7; Baxter & Trebilcock, 2009; Flanagan et al., 2011; Poitras, 2004, p. 5). However, several provisions in the *Indian Act* are ambiguous on this issue, such as the interpretation of the phrase "lawful possession" (Alcantara, 2003, p. 406). According to official AANDC policy, 'lawful possession' is the name of the interest in a parcel of reserve land that an individual receives when allotted land by Band Council under the *Indian Act* and approved by the Minister (INAC, 2002, pp. 2.4, 2.8). The full legal nature of the right has to be teased out of the *Indian Act* across numerous sections and is defined primarily by case law. While all reserve lands have an element of collective interest because they were set aside for the use and benefit of the Band as a whole, "individual members may acquire the right to use and occupy parcels of reserve land" (INAC, 2002, p. 3.6).

Lawful possession has been interpreted by the courts to be less than ownership, but also a *sui generis* (unique in law) right that "defies any rational classification under ...traditional [common law] property law" (Alcantara, 2003, pp. 406–407). Some lawyers have argued that "the Band as a whole has an interest in all the lands of its reserve, whether or not individual Band members have lawful possession of certain parcels in the reserve," meaning that a CP holder's interest is "second to that of the Band as a whole" (Amyot, 2009, p. 18). The decision in *Tsartlip Indian Band v. Canada* [2000] 3 C.N.L.R. 386, 250 N.R. 75 (Fed.C.A.) represents the most current legally tested interpretation of this balance of powers. According to *Tsartlip*, the interests of CP holders can be held second to Band interests when a use or lease can be shown to harm the overall interests of the Band (Flanagan & Alcantara, 2002, pp. 14–15). Otherwise, a CP gives its holder all rights of ownership (except alienation to a non-Band member). A CP holder may act contrary to Band Council preferences when transferring a CP to another member, using it, or leasing it - provided that transactions or leases are approved by AANDC, and if the lease is over 49 years, a community vote (Flanagan et al., 2011, p. 93). Band Councils do have the authority to create land use by-laws, zoning, and land use plans that can legally restrict uses of CP lands, if the regulations are approved by the federal government. AANDC also considers existing Council by-laws or regulations when reviewing locatee applications. However, most Bands do not use these powers extensively. This is partly because of limited enforcement capacity but also because

there is often little local support for use of these instruments. Councils also criticize the Minister's power to overturn a local land regulation.

Outside of reserves, collective interests in land manifest to a certain degree through the public taxation of individually held land. On reserves, taxation is an extremely contentious topic. Under the *Indian Act*, status Indians are exempt from many forms of federal or provincial taxation, and for many First Nations people this has become a valued part of their identity. Therefore, when a Band Council elects to enact tax laws (which it has the authority to do under s.83 of the *Indian Act* and the *Budget Implementation Act*, 2000, S.C. 200, c.14) there is often significant opposition and concern expressed. Many Bands do not use their taxation powers and there can be administrative difficulties in setting up a land taxation system, such as inaccurate parcel boundary surveying (Lang Michener LLP, 2010, p. 9). For more on on-reserve property taxation, see Ostrove (2010). An alternative to taxation is the policy of AANDC that Bands should collectively benefit when an individual receives lease revenue, typically accomplished by having the Band Council and locatee negotiate an official "revenue allocation agreement" (INAC, 2002, p. 7.67). These agreements set out whether the Band will receive a share of lease revenue (typically up to 25% of lease revenue) and/or other administrative or servicing fees (Amyot, 2009, p. 19; J. Phillip, personal communication, 2013).

The roles and powers of the Minister and the Band Council also present difficult legal and policy questions, particularly over leasing approvals, land management, and environmental regulation. While day-to-day land management decisions are typically made by Band Councils and their staff, under the *Indian Act* land regime the federal government retains the ultimate authority, and liability, for decisions and transactions involving reserve lands (Rakai, 2005, p. 109), unless approval powers have been delegated to a Band under provisions of the *Indian Act*, in which case the Band Council and Lands Manager bears greater fiduciary responsibility (NALMA, 2009a, 2009b). This distribution of powers sometimes puts the federal government in a challenging position. It has an obligation to protect a Band's collective interest in its reserve, particularly when a lease is involved (NALMA, 2009a, pp. 3, 6; Poitras, 2004, p. 6) and must follow legislation such as environmental laws. However, it has also created a system of permanent, legal individual interests in reserve land which it is obligated to protect

(Amyot, 2009). As a result, the federal government must balance potential competing obligations when considering the approval of reserve land transactions.

Much of the legal and technical literature on the *Indian Act* land tenure system criticizes it for several failings: using an inadequate land registry, ambiguous surveying requirements, and several limitations on the economic functionality of the land interests (explored in the next section, 2.2.3). The government has acknowledged that the *Indian Lands Registry System* has flaws and has been working to improve it (Ballantyne, 2010, p. 36). Part of the challenge it faces is that the registry was not created until 1951, meaning it had to deal with a backlog of individual interests created using widely varying standards and processes<sup>7</sup> (Ballantyne & Dobbin, 2000, p. 4.5). While the registry, combined with the internal policy manuals that determine its proper use, has led to much greater standardization, transparency, and accuracy (Lang Michener LLP, 2010, p. 4; Pushor Mitchell, 2011), it remains a “best efforts registry” (Camp, 2007, p. 4.1.4) that does not provide complete certainty of the accuracy of its records (Ballantyne & Dobbin, 2000, pp. 2.10–2.11; Camp, 2007, p. 4.1.5; Pushor Mitchell, 2011). It is also criticized for not meeting First Nations’ needs (Ballantyne & Dobbin, 2000, p. viii; Cragg, 2007, p. 23).

Surveying of land interests on reserves faces challenges similar to the land registry. While there is no statutory requirement for CPs to be surveyed, AANDC requires “a land description which meets the requirements for legal descriptions of Indian lands” (INAC, 2002, p. 3.9). Legal surveys are recommended for allotments (INAC, 2002, p. 3.11) but required for lease approvals (INAC, 2002, p. 7). As well, a Band Council can pass a by-law that requires a land survey for land transactions (Camp, 2007, p. 4.1.8; Lang Michener LLP, 2010, p. 9). Surveys are expensive and often slow to complete, partly because of the administrative requirements of processing survey requests through the Canada Lands Surveys System (the system that reserve lands are part of) and the Surveyor General Branch of Natural Resources Canada (Ballantyne & Dobbin, 2000, p. viii; Ballantyne, 2010, p. 47). From PIB’s experience, it takes six months to a year to have a survey request processed by Natural Resources Canada and its surveyors (J. Phillip, personal communication, 2013). Ballantyne & Dobbin (2000, p.

<sup>7</sup> For a detailed history and description of the Indian Land Registry, see Camp (2007).

4.5) also suggest that some of the delays and confusion around survey requirements are due to reluctance on the part of AANDC to officially assume the responsibility for providing surveying services. Interestingly, research on reserve lands by the Surveyor General Branch found that there is a “strong positive correlation between good parcel fabric (where improvements conform to the surveyed parcels) and both community socio-economic wellbeing and proximity to urban areas (Ballantyne, 2010, pp. 46–47). This suggests that the quality of surveys used, or required, on reserves may reflect First Nations’ differing degrees of need and ability to pay for them.

There is additional legal and technical research that considers issues of matrimonial property on reserves and customary land rights but I did not consider these issues in detail.

### **2.2.5. *Economic Issues***

Much of the existing research that links reserve land tenure and economic development has similar themes as the literature on land tenure and economic development more generally. In much of this general literature, formalization of land rights and land administration, and particularly the privatization or individualization of land tenure, are considered “pre-requisite[s] for economic development” (FAO, 2002, p. 15). The arguments in favour of the formalization and privatization of land tenure are based on perceived benefits of improving tenure security to support investment in land and housing, creating or strengthening markets in land and land rental, improved access to credit based on land assets, and more efficient use of land (H. De Soto, 2000; FAO, 2002, p. 15; Hvalkof, 2008, p. 11). Godden & Tehan (2010, p. 8) identify that similar arguments are made in favour of privatization of lands on First Nations reserves.

Many proponents of strengthening individual property rights to reserve lands base their arguments on expected economic benefits. Proponents of reserve land privatization identify the primary weakness of the current system as its lack of economic functionality, which mean that current land tenure forms are “falling short of what Indigenous people need to ‘escape’ from the poverty trap” (Egan & Place, 2013, p. 3). Criticisms of the current system include the challenges of securing mortgages or other loans based on reserve land assets (Alcantara, 2003, p. 406, 2012; Cragg, 2007, p. 3);

difficulties in attracting investment on reserve lands (Cragg, 2007, p. 3); the significant transaction costs that come from the administrative processes involved with reserve land transactions (Alcantara, 2003, p. 410, 2012; Lang Michener LLP, 2010, pp. 7–8); and the restriction that CPs may only be sold to other Band members (Flanagan & Alcantara, 2002, p. 8; Lang Michener LLP, 2010, pp. 7–8).

While some of these critiques may be warranted, other researchers are cautious about using them to justify policies that would further privatization reserve landholdings. They point to the various ways that Band Councils and individual members have found to enable individuals to access mortgages and other loans:

- A Ministerial Guarantee (Alcantara, 2005, p. 194; Nemoto, 2002, p. 213): The Minister of Indian Affairs guarantees a loan to an individual from a bank or the Canada Mortgage and Housing Corporation. In practice, the Band is liable for defaulted loans as the government pays the loan with funds from the Band's annual funding.
- Revolving housing loan fund (Alcantara, 2005, pp. 190–193; Baxter & Trebilcock, 2009, pp. 91–92): A member is granted a loan from the Band for building, renovating, or repairing a home. If they already have a CP to the land, they transfer it temporarily to the Band to guarantee the loan. When the individual pays off their home loan, the Band (re)issues the CP to the land that the house is on to the individual. If the individual defaults, the Band, as the CP holder, can evict them and sell or rent the house to recover money owed.
- First Nations On-Reserve Loan Program (Alcantara, 2005, pp. 194–195): Similar to above, a Band member obtains a mortgage or loan from a financial institution and the Band guarantees the loan in exchange for formally transferring the individual's CP to the Band until the loan is repaid.
- Leasing: A leasehold of a CP can be mortgaged, leading to some cases where lease arrangements are set up in order to access a mortgage (Poitras, 2004, p. 7; Woodward & Company, 2010, p. 2).
- As well, in many cases individuals and Bands can secure loans from banks to start businesses without leveraging homes or lands (Palmater, 2012).

On-Reserve Loan Programs, where CPs are involved, appear popular and have been used by Bands and financial institutions across Canada (Alcantara, 2005, pp. 190, 195). Revolving loan funds are also being adopted, but access to these funds can be limited and waitlists long because Bands can only guarantee a limited amount of loans (Alcantara, 2005, p. 193). Ministerial Guarantees are less popular because of lengthy administrative processes involved and because it puts the Band at risk in the case of default (Alcantara, 2005, p. 194; Nemoto, 2002, p. 213).



### **2.2.6. Cultural, Social, Political, and Land Management Issues**

In some First Nations, the *Indian Act* has undermined, if not completely displaced, culturally embedded land tenure systems (Nemoto, 2002, p. 219). While First Nations communities and individuals may support individual tenure security (Nemoto, 2002, p. 214), the CP system is regularly criticized for emphasizing individual interests over collective ones, which puts it at odds with many First Nations' traditions, cultures, and value systems (Nemoto, 2002, p. 214; Rakai, 2005). Despite criticisms, the *Indian Act* land tenure system has protected aspects of reserves that are fiercely defended (Palmer, 2010; Woodward & Company, 2010). For example, because CPs cannot be sold to non-members this preserves land exclusively for First Nation's members (Woodward & Company, 2010, p. 2). Additionally, research has suggested that formal surveying and registration, as used in the CP system, may help to legally protect culturally sensitive areas (Hickling Arthurs Low, 2001, pp. 9–10).

The primary social concerns with the *Indian Act* reserve land tenure system are the potential for conflict and inequality that can result, but there are also social benefits. In many international situations where a formalized land registration and tenure system was introduced alongside existing local land systems, conflict and disputes over land increased (Baxter & Trebilcock, 2009, p. 102; Hanstad, 1996, p. 12). Ballantyne & Dobbin (2000, p. 42) found that internal land disputes related to land title and boundaries are common in most First Nations. Many of these originate from “improper land dealings orchestrated by the former Indian Agents” or errors and discrepancies in surveying and occupation (Ballantyne & Dobbin, 2000, p. 42). Baxter & Trebilcock (2009) also link historical disputes and improper handling of land allocations to past and current inequality of distribution of land among Band members in some First Nations. Even proponents of the privatization of reserve lands acknowledge that in some cases landholdings can concentrate into a “small number of individuals and families” (Flanagan & Alcantara, 2002, p. 14). These observations align with international experiences with land reforms geared towards individualization and formal titling of landholdings that contributed to inequality of landholding and concentration of property in the hands of elites (Godden & Tehan, 2010, p. 10; Morad & Jay, 1997, p. 44). However, other researchers at the law firm Hickling Arthurs Low point to social benefits of formal land registration on reserves, including: a reduction in disputes over boundaries; reduced

social tensions over land uses as a result of clearer distinctions between Band land, common land, and private land; promotion of social justice and equity where land rights are poorly defined or difficult to enforce; and economic benefits that can lead to local development and employment opportunities (Hickling Arthurs Low, 2001, pp. 9–10).

Land tenure is political and the distribution of property is always “deeply implicated in power relations” (Blomley, 1994, p. 42). Land tenure on reserves is no different, and some researchers argue that current *Indian Act* tenure has aggravated the political nature of property by eroding leadership and dispute resolution capacity in some communities (Baxter & Trebilcock, 2009, pp. 103–104; Nemoto, 2002). Particularly when parallel or hybrid land tenure regimes exist, differences in perceived legitimacy of different rules and authority over land can cause or exacerbate conflicts over land and power (Baxter & Trebilcock, 2009, pp. 103–104). While the CP system may provide individuals with greater tenure security and protection against “dispossession by arbitrary local authorities” (Hickling Arthurs Low, 2001, pp. 9–10), this transfer of power has upset other aspects of land governance. As Alcantara (2003, pp. 410, 417) explains, collective interests may not be adequately represented in certain decisions because the approval of Band Council or the Band are not legally required, resulting in situations where individuals may benefit at the expense of the Band.

Several researchers have identified potential administrative and land management issues related to the *Indian Act* land regime. Of primary concern are apparent gaps in First Nations’ land governance authority resulting from insufficient empowerment of Bands to administer and manage lands. Regulatory gaps, or at least ambiguities, regarding land management and environmental protection on reserves have been found and critiqued (Edgar & Graham, 2008; Moffat & Nahwegahbow, 2004; Office of the Auditor General, 2009). Band Councils do have the authority to create land use by-laws and conduct land use planning, and some First Nations have secured additional authority over land management through federal legislation (such as the FNLMA) or under ss.53/60 of the *Indian Act*. These delegations were typically part of the former RLAP (Regional Lands Administration Program) or RLEMP (Reserve Land and Environment Management Program) programs (see AANDC (2012)). However, for Bands that secured greater land management authority through these mechanisms, challenges remain with funding, enforcement, and capacity. These are significant

hurdles for First Nations' local land management efforts. In addition, the division of regulatory authority and responsibility over reserve lands between multiple jurisdictions means that laws and policies that do apply are often unclear or unenforced (Edgar & Graham, 2008; Environment Canada, 2006; Krehbiel, 2008; Office of the Auditor General, 2009; Schertow, 2009).

For some First Nations, such as the Lil'wat Nation profiled by Nemoto (2002), governance ambiguities combined with a dual system of land tenure have resulted in the use of customary law (traditional or old customs as well as new local rules and norms) to govern land management on Band land and individual landholdings (Nemoto, 2002, p. 214). While local land rules and protocols might operate more effectively and be more culturally and practically appropriate than Canadian laws, customary systems are potentially vulnerable to pressures from outside the community (such as market forces, encroachment by outsiders, or the imposition of individualized landholding systems) and inside the community (such as the spread of individualistic values or the emergence of new benefits or opportunities for individuals under alternative land governance systems) (Dekker, 2003, p. 139; Haagsma & Mouche, 2012, pp. 1–2; Nemoto, 2002, p. 232). In Nemoto's assessment, these types of pressures have been steadily eroding local, customary control over land use activities on reserves (Nemoto, 2002, p. 232).

Similar social, political, and environmental issues related to land tenure are also present off reserve in non-Aboriginal communities. For example, it is increasingly apparent that large-scale landscape or ecological protection efforts are more complicated and difficult to implement when control over land is fragmented among many individual owners (Freyfogle, 2007, p. 88). To some degree, all societies grapple with questions of how power over land should be allocated between individuals and the collective or the state (Freyfogle, 2007, p. 89). However, the context of reserves amplifies these concerns because First Nations people generally place high importance on community and collective values; because land is central to their identities, cultures, local economies, and self-determination; and because reserve lands are currently limited and constrained.

### **3. Case Study Description**

This chapter will introduce the people and place of my partner community, the Penticton Indian Band, as well as explain the process by which our research collaboration developed.

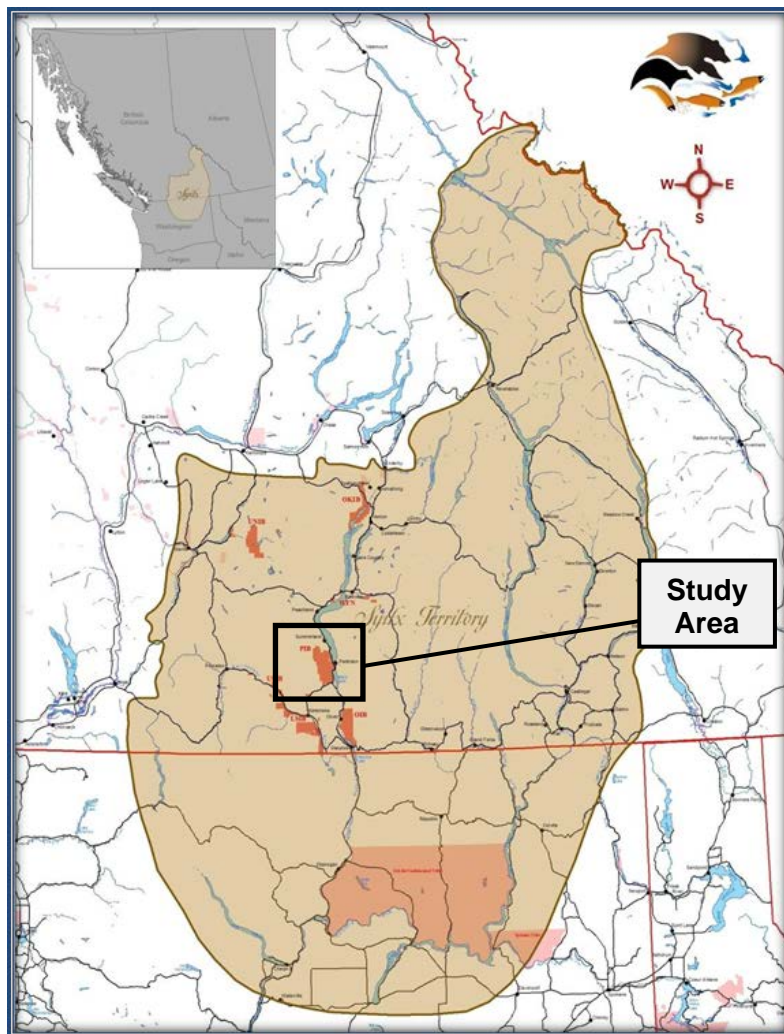
#### **3.1. Introduction to the Penticton Indian Band**

The Penticton Indian Band is an Okanagan, or Syilx, First Nation located in the Okanagan Valley in the southern interior region of what is today the Canadian province of British Columbia (B.C.), circled on the map in Figure 3.1. PIB is a member Nation of the Okanagan Nation Alliance, a regional organization that reflects the unity of Syilx peoples. The Okanagan traditional territory includes the Okanagan Valley and stretches northeast to the Alberta border and south into the United States (Figure 3.1).

The main PIB reserve (IR1), initially created in 1856 and formally allotted in 1877, is currently 19,346.83 hectares (193.468 km<sup>2</sup>) (AANDC Geomatics, 2012), making it the largest reserve by area in B.C. (PIB, 2013a). Today it borders the municipalities of Penticton (east) and Summerland (north) and Lake Okanagan and Skaha Lake, shown in Figure 3.2. The current population of PIB is 1,022 with 537 living on-reserve (AANDC, 2013b). PIB has chosen to govern itself through customary elections, an option for First Nations to modify election procedures in the *Indian Act* to better fit their culture and governance traditions. As a result, the federal government has no role in PIB elections. PIB has one Chief and eight Councillors elected every four years. I explain PIB's governance system further in Chapter 6.

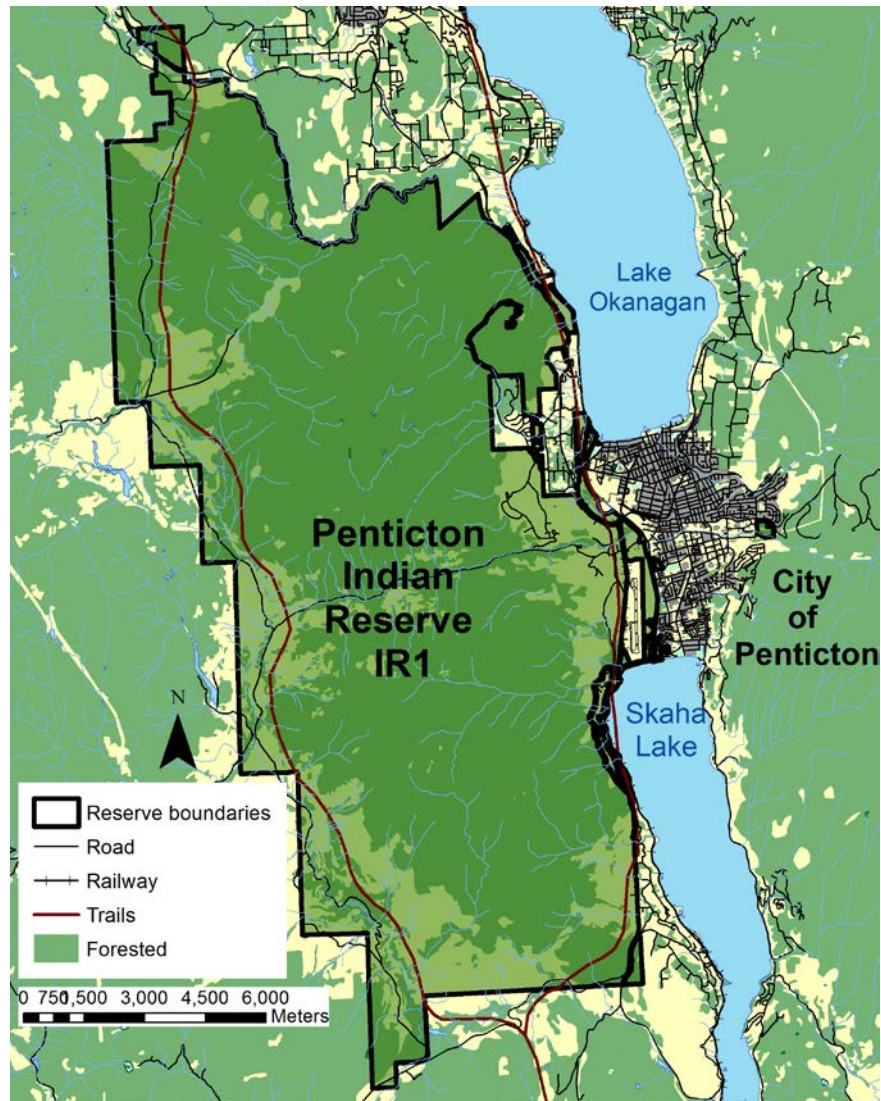
PIB has a reputation among First Nations in B.C. and Canada, as well as government staff, for being politically active, independent, and committed to Indigenous self-determination. This stems partially from historical events, such as championing early Indigenous opposition to the taking of lands by European settlers in the Okanagan,

or the reserve reductions of the McKenna-McBride Royal Commission (1912-1913), and decades of roadblocks and protest against government actions. PIB's influence also stems from leadership that PIB has provided. For example, former Chief Stewart Phillip is currently the Grand Chief of the Union of B.C. Indian Chiefs and a prominent First Nations leader and spokesperson in Canada. Interviewees explained to me that other First Nations often look to PIB for leadership on contentious issues, such as the B.C. Treaty process or agreements concerning the delegation of federal responsibilities (C.J. Kruger, personal communication, 2011; J. Phillip, personal communication, 2011).



**Figure 3.1. Syilx Traditional Territory**

Source: Okanagan Nation Alliance, 2010. Reproduced with permission.



**Figure 3.2. Penticton Indian Band reserve (I.R.1)**

Source: Author generated. Date from GeoGratis © Department of Natural Resources Canada. 2012. All rights reserved.

### 3.2. PIB Reserve Lands and Management Issues

PIB's historical and contemporary reputation makes PIB's land tenure and management a particularly interesting case study, not only because their decisions and actions seem to wield influence with other First Nations, but also because PIB has adopted the formal *Indian Act* land tenure system (this history is discussed in Chapter 5).

PIB has three reserves, but IR2 and IR3 are both small, separate parcels of land within the city of Penticton and are not currently inhabited. PIB is also a party to the South Okanagan Commonage Claim, an ongoing land claim for an area of land that was historically set aside for the Penticton Indian Band and non-native settlers to use for grazing. However, this area is still under dispute and therefore I do not include it in this study. The main PIB reserve, I.R.1, is a mix of forested, mountainous land, grassy bench lands,<sup>8</sup> and low-lying lands in what used to be a river floodplain. The landscape is semi-arid and supports primarily ponderosa pine and sagebrush habitats, with spruce and fir at higher elevations (MoE, 1998). However, oral history indicates the low lands used to support more lush habitat and extensive agriculture. In the 1910s, the river was dredged and straightened into the river channel that exists today (Symonds, 2000, pp. 1–2). This river channel came to symbolize the divide between the members of PIB and the citizens of Penticton. The river channel also changed the flow of groundwater on the reserve and because of this, along with the diversion of water from streams flowing from the mountains by settler farmers, the low-lying lands on the ‘Lower Reserve’ became significantly drier and most agriculture there was abandoned. Only today is PIB gradually regaining water rights from federal and provincial governments.

PIB has been named as one of the “land rich” nations of the Okanagan (TOBE, 2008). This reflects the fact that PIB’s lands include large areas of undeveloped land alongside the major regional highway. These lands are also directly across from the city of Penticton, which has expanded out to its boundaries and is looking for more development room. These conditions make these lands highly valuable economic assets, if the necessary access and servicing infrastructure can be extended to them. However, these lands are mostly individual landholdings, not Band land, making these private assets (see Chapter 6). While the majority of PIB IR1 land is Band land, Lawful Possession lands contain the majority of lands most suitable for housing, development, agriculture, and ranching (more on distribution of reserve land in Chapter 6).

<sup>8</sup> Bench land: a long, typically narrow strip of relatively level or gently inclined land bounded by steeper slopes above and below it (Jackson, 1997). In the Okanagan these bench lands are prized as prime agricultural land, especially for growing grapes and stone fruits.

### 3.3. Community Values and Goals

Between 2009 and 2013, PIB conducted a Comprehensive Community Plan (CCP) process to identify and articulate community goals and values. The CCP will guide future plans such as land use plans, sector and project plans, and Band development decisions. Values emphasized in PIB’s CCP are: importance of culture and language; pride and celebration of PIB identity and history; the need for individual, family, and community healing; and economic development that is sustainable, self-reliant, and respects community wishes, Syilx teachings, and the land (PIB, 2013). Community goals identified in the CCP are:

**Table 3.1. PIB Comprehensive Community Planning Goals Summary**

<b>Culture &amp; Language</b>
Incorporate Syilx Culture into Daily Lives; Language Revitalization; Have More Cultural Programs and Events; Bring Back Use of Traditional Medicines; Have Cultural Teaching and Story Telling
<b>Governance</b>
Improve Communication; Make the CCP a Priority; Improve Animal Management; Create a Transparent Process for Decision Making; Strengthen Organizational Structure and Human Resources; Develop Constitution and Protocols; Create an Animal/Range Management Committee
<b>Lands &amp; Resources</b>
Develop By-laws, Laws, and Land Codes; Create a Land Use Plan; Build Capacity in PIB Lands Department; Recognize Economic Opportunities for the PIB; Protect Cultural Sites; Beautify and Clean Up the PIB Reserve; Protect Wildlife and Cultural Wildlife Resources; Increase Capacity for PIB Membership in Forestry; Increase Licensing and Renewable Forest License; Assume Greater Control Over Water Resources
<b>Community Services</b>
Health Goals (6); Education Goals (6); Youth Goals (7); Elder Goals (5); Community Social Development Goals (5); Addictions and Counseling Goals (2); Community Safety Goals (6)
<b>Administration &amp; Finance</b>
Administrative Goals (4); Finance Goals (2); Taxation Goals (3); Capital Works and Infrastructure Goals (5) [include a new hall and community Pithouse for meetings]; Ground Water Maintenance Goal (1); Fire Department Goal (1); Housing Goals (3): Develop Units/Apartments for Singles/Single Families (including rental units); Re-Visit Band Owned Construction Business; Bring Back Community Based Building
<b>Economic Development</b>
Develop Cultural Tourism and Economic Development Opportunities; Create Job Opportunities for PIB Members; Improve Communications with Community; Establish Sound and Transparent Business Practice; Incorporate Environmental Sustainability into All Business Practice; Incorporate Language, Culture, and Cultural Sensitivities into Economic Development Practice

*Note.* Adapted from PIB CCP (2013)



The CCP emphasizes the importance of respecting all individual community members and encouraging diversity of values and goals, reflected in the PIB CCP vision:

i? k<sup>w</sup>u\_Syilx i? tk<sup>w</sup>æck<sup>w</sup>actantət tl tmix<sup>w</sup>tət u? ecyi?akstmstəm y?at i? tli? i?  
k?n?xəstantət. k' l təsx<sup>w</sup>uys kækuləmstm ansyixcəntət u? anč?wiltns i?  
cəcaptik<sup>w</sup>tət u? əcnha?ilsəm?tm y?at swit i? tkak?ustans u? i?  
k'pa?smistəns tac i? k' l ks\_nagsəmscut\_tət

We are Syilx who receive our strength from timixw [land/nature] and encompass what is good for our livelihood. We are committed to our language and the teachings of our captiklxw [stories] and respect that everyone has value and purpose to come together as one.  
(PIB, 2013b, p. 9)

Section 5.2.1 presents more on Syilx worldviews and values. I discuss more of PIB's land management goals and concerns in Chapter 6.

### **3.4. About the Research Collaboration**

This research collaboration began when the PIB CCP team issued a call for research collaborators. I responded with a proposal to do a Master's project focused on the reserve land tenure system. After initial discussions and relationship building with the PIB Land Manager (Joan Phillip) and community planners (Elaine Alec and Anona Kampe), we agreed that I would spend a summer interning with the PIB planning team so I could learn about the community and develop my project in collaboration with them.

Over the summer (May 2011 – September 2011), in addition to community planning tasks and taking courses at the En'owkin Centre (a cultural and environmental education institution on the PIB reserve), we developed my areas of inquiry and methods. We focused on practical application for land management and planning and aimed to contribute to PIB's land use planning processes. Together we wrote a formal research agreement between Simon Fraser University and PIB (Appendix A), officially added Joan Phillip to my supervisory committee, and secured ethics approval and a Band Council Resolution from PIB supporting the project. My data collection and analysis spanned August 2011 - January 2013. This included several follow-up visits to PIB to conduct additional and second interviews and to receive feedback on my analysis and preliminary findings, as I detail in Chapter 4.

## **4. Research Methodology**

In this chapter, I explain my approach to this research, as well as my methodology, limitations, and reflections on my perspective as a researcher.

### **4.1. Research Approach**

Before summarizing the methods I used in this study, I explain what I consider the key elements that shaped by research approach more broadly: my research paradigm, the choice of qualitative methods and a case study approach, the analytical frameworks that informed my research, and ethical considerations.

#### **4.1.1. *Paradigm***

LeCompte and Schensul (2010) stress the importance of considering one's research 'paradigm,' which is a combination of one's epistemological approach to research and the creation of knowledge as well as ontological reflections on the nature of reality. I orient my research approach as interpretivist and interactionist (LeCompte and Schensul, 2010). Interpretivist research paradigms are based on the belief that "reality differs, depending on whose reality is considered" (LeCompte & Schensul, 2010, p. 67), and that "multiple realities exist in any given situation" where multiple individuals are involved (Creswell, 1994 quoted in (C. Soto, 2006, p. 23)). I believe that research should include diverse perspectives concerning particular concepts or institutions. However, like Soto (2006, p. 23) I also believe that social regularities do exist and can be perceived by researchers (albeit through their own lens of personal perspective). I believe that socially constructed concepts and institutions do exist outside the individual, but individuals' perceptions differ depending on their situation and interactions. Therefore, I also use an interactionist approach which focuses on interactions between

people and interprets the role of the researcher as inferring rules and patterns from observations of behaviour (LeCompte & Schensul, 2010, p. 67).

I consider social rules, institutions, and constructs to be dynamic; as LeCompte and Schensul (2010, p. 69) describe, they “are not fixed or immutable: they can be altered through dialogue or over time and the alterations can lead to new constructions or views of reality and new ways of acting.” I believe that patterns of change in socially constructed institutions and concepts, such as land ownership, can be reconstructed using interviews and observing behaviour combined with analysis of historical and contemporary documents and other data.

#### **4.1.2. Qualitative**

Together with my community partners and supervisors, I decided that a qualitative approach was most appropriate for my research questions. Qualitative approaches are particularly useful when investigating understudied topics because of their flexibility and responsiveness to emerging findings. Qualitative studies provide a depth of investigation and understanding not possible in purely quantitative approaches, particularly where there is uncertainty concerning identification and interpretation of variables. The contextual detail that qualitative research can capture helps to improve understanding of subjects' social reality, perceptions, and the factors that shape behaviour (Creswell, 2007; Patton, 1990).

I also believe that we need qualitative research to investigate complex social situations where quantitative data would not tell the whole story. In academic debates concerning land tenure reform on reserves, information on context and local complexities is lacking, with arguments heavily influenced by theory rather than empirical research. I considered a qualitative approach to this research to be most appropriate for developing a better understanding of the reserve land tenure system in practice and for documenting local experiences and perspectives.

### **4.1.3. Quasi-Grounded Theory**

I was guided by the methodological approach of grounded-theory. Grounded-theory, developed in the field of sociology, is an inductive, iterative research approach (Trochim, 2006). A grounded-theory approach uses “a continual interplay between data collection and analysis to produce a theory during the research process” (Bowen, 2006, p. 2). The derived theory is typically presented as a “plausible relationship among concepts and sets of concepts” (C. Soto, 2006, p. 26) or “an extremely well-considered explanation for some phenomenon of interest” (Trochim, 2006). This approach allows for themes and relationships to emerge from the data without forcing them to fit into a pre-determined theoretical framework.

However, I recognize that findings of this research have not emerged entirely inductively because my own preconceptions and interests have shaped my interpretation of questions and data. Miles and Huberman (1994, quoted in (C. Soto, 2006, p. 21)) explain this challenge:

From the beginning of data collection, the qualitative analyst is beginning to decide what things *mean*, is noting regularities, patterns, explanations, possible configurations.... The competent researcher holds these conclusions lightly, maintaining openness and skepticism, but the conclusions are still there...vague at first, then increasingly explicit and grounded... "Final" conclusions may not appear until data collection is over...but they have often been prefigured from the beginning, even when a researcher claims to have been proceeding "inductively."

I do not think it would have been possible to have an understanding of the situation emerge entirely from my data alone. All stages of my research design, data collection, and analysis were influenced by my perspective and background, as well as my interest in using three analytical frameworks (section 4.1.4) as tools to guide my data collection and analysis. As well, goals of my partner community shaped my approach and design of this project. Therefore I follow Heaslip (2008) in describing my approach as “quasi-grounded theory” to acknowledge that my approach is not entirely inductive.

#### **4.1.4. Analytical Frameworks**

While this research project was designed to be exploratory and based largely on inductive analysis, other researchers working on similar projects have recommended the use of analytical frameworks, or conceptual frameworks (Rakai, 2005, p. 73; C. Soto, 2006). These tools are used to “frame research questions, sampling, and methods” (C. Soto, 2006, p. 27) and “help to think about phenomena, to order material, [and] reveal[ ] patterns” (Rapoport, 1985, p. 256). Particularly when addressing a complex social and institutional situation such as a land tenure system, a framework assists researchers to

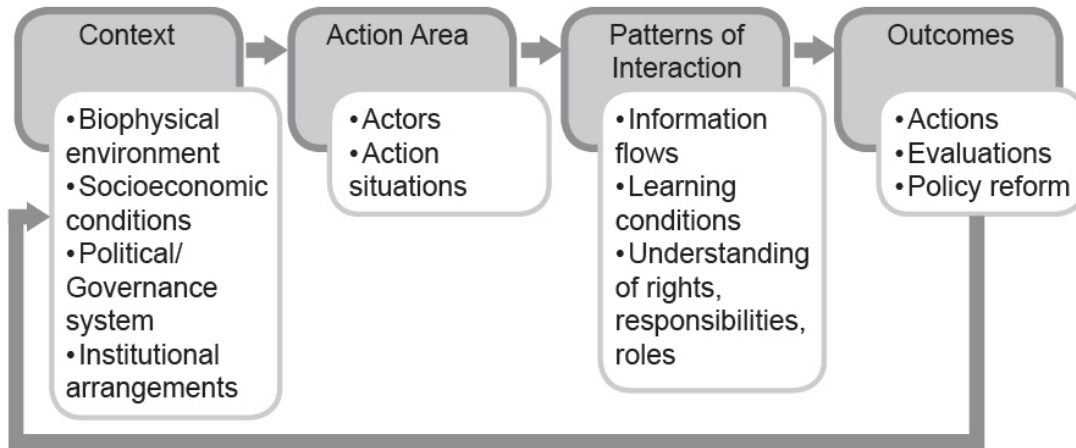
think about, understand and analyse the diverse concepts of land, the various structural and functional or operational components of a land tenure system, and the resulting pattern of relationships and land use activities that arise from them (Rakai, 2005, p. 74).

I use three analytical frameworks: the Institutional Analysis and Development (IAD) framework, the En’owkinwixw framework, and a project-specific framework. I used these three frameworks for different purposes and goals, but I consider them compatible and they intersect at multiple points. In addition, I decided early in the project that part of the exploratory nature of this project would be the application of a number of analytical frameworks and research methods to the context of reserve land management.

#### **Institutional Analysis and Development (IAD)**

Institutions are rules and norms, such as land tenure systems, that shape human behaviour and decision-making. Institutional analysis has been recognized as a useful strategy for understanding “the wider context of change and the conditions of planning trajectories” when looking at land use planning and changes in land use (Parker & Amati, 2009, p. 141). The IAD framework was developed by Elinor Ostrom and other researchers, and is essentially “a multi-tier conceptual map” for the study of institutions (Ostrom, 2011, p. 9). Blomquist and deLeon (2011, pp. 1–2) identify that the framework’s primary value is as a tool to organize inquiry and identify a comprehensive set of variables. The framework focuses on decisions and behaviours made in “action arenas” and how arenas and the actors within them are affected by contextual factors such as biophysical conditions, socio-economics, or institutions (formal and informal) (Ostrom, 2011, p. 10). Figure 4.1 illustrates a conceptual diagram for the framework. I am

primarily interested in the institutional arrangements (land tenure and land policies) that shape land management ‘arenas.’



**Figure 4.1. Institutional Analysis and Development framework**

Note: Adapted from (Andersson, 2006)

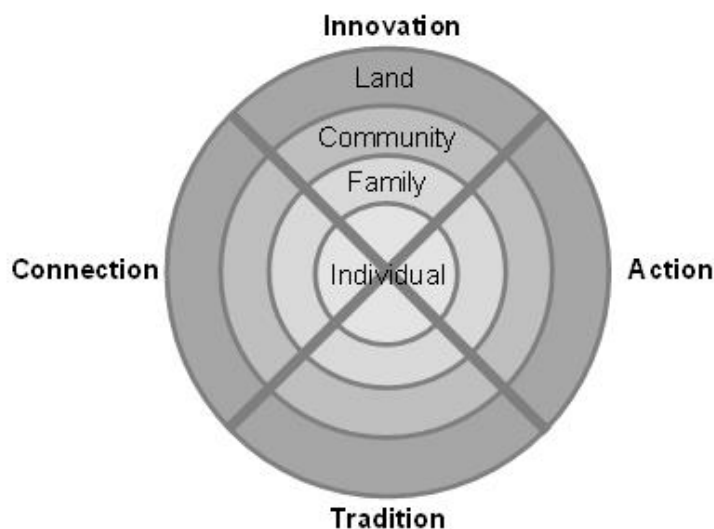
The contextual factors of the IAD can include historical influences and institutions operating at multiple scales. The IAD framework is thus compatible with research approaches recommended by Rakai (2005) where both de jure and de facto institutions and their effects are included and where the framework used accommodates contextual factors such as “various layers of culture” and historical events (Rakai, 2005, p. 57). In addition, a similar project examining water governance institutions on First Nations reserves (Cave, 2012) applied the IAD framework and found it to be useful and appropriate in that context. In this project, I used the IAD framework when designing my data collection and coding process (described in section 4.2.2). This framework implies directional causal effects; while I considered these in my analysis, I did not restrict my coding to the categories or predictions of this framework.

## **En’owkinwixw**

I was introduced to the En’owkinwixw framework during my internship with PIB when my community partners invited me to take a class, *Examining an Indigenous Methodology: En’owkinwixw*, taught by Dr. Jeannette Armstrong, a PIB member and professor at the University of British Columbia – Okanagan. The En’owkinwixw process is a traditional Syilx process or model of community discourse and consensus building.

It is designed to recognize and include a wide diversity of perspectives on a question or issue, assist in developing shared understanding, and “ensure all voices are heard and represented” (PIB, 2013b, p. 6). Jeannette Armstrong’s work has developed this model into a method applicable to a wide range of situations, including PIB’s CCP process.

I describe this framework in more detail in Appendix C. Briefly, the framework is based on the Syilx Pithouse, a traditional community gathering space. It is circular, with two cross beams that quarter the circle (Figure 4.2). The four poles of the circle represent the four poles of perspectives present within a community – values based positions that individuals typically gravitate towards. These four poles are: Tradition (Elders), Innovation (Youth), Connection (Women), Action (Men). Each position will interpret a situation or question differently, based on their values and experiences. In the model, each of these perspectives is equally important to the discussion and decision process. They are all required to make a well-balanced deliberation. Also within the model is the consideration of nested systems, stretching from the individual at the centre of the circle to family, community, and land. In this way the framework requires consideration of an issue or question at all levels of impact.



**Figure 4.2. The En’owkinwixw framework**

Source: Author generated, adapted from (Armstrong, 2011b)

This framework has greatly influenced both my approach to and understanding of this research project. I used it extensively as a guide in my exploration of multiple perspectives on PIB's land tenure and management, both historical and contemporary. I used it informally as a concept mapping tool (also called situational analysis maps) (A. E. Clarke, 2003) and have used it to aid my summary and presentation of historical perspectives in section 5.3 and different perspectives on strengths, challenges, and suggested changes of the CP landholding system in section 6.2.1.

### **Strengths, Challenges, Changes**

This third framework, unlike the other two, I developed specifically for this study. My community partners and I decided that research design, analysis, and outputs would ideally be oriented towards practical application. Therefore, we decided on a simple framework to organize potential land management impacts and implications into three categories: strengths to acknowledge and support, challenges to consider or address, and changes that are being or could be made. My community partners and I were interested in what individuals (staff, Council members, locatees, and members generally) would themselves identify as strengths, challenges, and proposed changes of the CP system. Therefore, I did not ask interviewees to evaluate a set list of identified impacts; instead, I asked open questions about what things they would identify as strengths/advantages, challenges/disadvantages, and current or suggested changes to the CP system. I also collected data from documents like Band Council minutes where land issues were discussed. Often in the minutes there are discussions of things that Councillors or members considered problems or advantages of the CP system.

This approach made interpretation and analysis challenging, because the evaluative criteria and perspectives of each respondent were different. Sometimes a particular impact or implication was considered a strength by some and a challenge or disadvantage by others. In terms of methodology, as I worked with my data I realized that analysis could not be a simple exercise of grouping the strengths, challenges, and changes as originally envisioned. I attempted to use these categories in my qualitative coding, but soon found the framework was overly constraining for the themes that emerged. As an interview participant explained in his answer to my question about strengths, "it's not a question of good or bad" necessarily, but rather a question of



differing perspectives and concerns on a range of land management issues. Therefore, while this framework was fruitful for having interviewees evaluate the CP system from their own perspectives, I decided against constraining my coding and presentation of findings within this framework. I used this framework in combination with the En'owkinwixw model to explore the differences in evaluations of the system and to help summarize findings in section 6.2.1. Ultimately, my findings required a more flexible structure to accommodate the complexity of perspectives. As a result, I organize section 6.2 by the dominant themes that emerged from my analysis of interviews.

#### **4.1.5. Case Study**

I designed this research project as an exploratory and descriptive case study. Given the current understanding of reserve land tenure systems and goals and constraints of this project, my research partners and I decided that other techniques, such as surveys, indicator development, or comparative analysis were not appropriate or useful for the nature of my areas of inquiry at this stage.

The case study approach has been used in many research projects with similar goals and design, such as Land-Murphy (2009), Heaslip (2008), Cave (2012), and those compiled by Godden and Tehan (2010). Case studies are appropriate in situations where there is limited existing research, where variables cannot be manipulated (Gerring, 2007), where context is of critical importance (Heaslip, 2008, p. 20), and where the researcher is “engag[ing] with complex reality on the ground while seeking to select the most relevant outcomes and suggest how they might inform theory” (Heaslip, 2008, p. 20). Yin (2003) identifies that there are multiple types of case studies and recommends identifying one’s case study type. For this research, my approach is largely an exploratory case study, meaning that it empirically “investigates a contemporary phenomenon in depth and within its real-life context” even though it may not be possible to clearly delimitate the phenomenon and context – such as situations where there are “many more variables of interest than data points” (Yin, 2003, pp. 18, 21).

Findings of case study research may be limited in their generalizability (Blaikie, 2000). However, by providing detailed insights from a specific, real-life situation, a case study provides a useful starting point for more generalizable research in the future. I

also decided that a single case study was most appropriate given the nature of my research partnership with PIB and their interest in having research outputs that related specifically to their context. To provide some comparison and to inform certain land management issues that PIB has not experienced I also include experiences from several other First Nations and two AANDC officials.

#### **4.1.6. *Ethical Considerations and Research Principles***

The fact that this project was a partnership with a First Nation also influenced the design of this research project. Most effective qualitative research incorporates cultural awareness and sensitivity; however, the context of working with Indigenous peoples amplifies the importance of respect for culture, knowledge, and traditions. These considerations apply not only to the use of research findings, but also to the design of the research process to avoid issues around lack of respect, inappropriate research methods and analytical techniques, and expropriation of knowledge. In efforts to address these concerns, I have attempted to apply ideas of ‘decolonization’ of research methodologies, or “the process... of valuing, reclaiming, and foregrounding Indigenous voices and epistemologies” (Denzin & Lincoln, 2008, p. 21). As such, I have chosen to orient my research towards supporting Indigenous self-governance and local land management and selecting culturally and socially appropriate research methods, in consultation with my research partners at PIB.

Additionally, I adopted some techniques from cross-cultural research approaches. Cross-cultural research projects are designed to emphasize equal involvement and benefit for both researchers and Indigenous participants, not just at the conclusion of the project but throughout the research process (Cave, 2012, p. 32; Gibbs, 2001). Other principles of cross-cultural research include using a case study approach, emphasizing interviews as the primary source of information, and “respectful, open, honest, and timely communication” and the development, where possible, of “relationships of trust between researchers and researcher participants” (Gibbs, 2001, p. 684). These techniques improve the culturally sensitivity of research, as well as the quality and validity of data and analysis.

Together, my PIB collaborators and I developed a formal research agreement (see Appendix A) informed by several core principles: collaboration between the SFU research team and community partners; an emphasis on relationships and trust building; review of findings and publications by community partners; and mutual benefit. These principles resemble Participatory Action Research in that we focused on knowledge creation rather than replication and verification; we included community review of preliminary findings; and we designed research questions and analysis to align with community goals and needs (see Pinkerton (2012)). These design principles are not only ethically appropriate and strengthen the research partnership, they are also “useful where the aim of research is not to establish *the* truth but to reveal different truths and constructions of reality by different groups” (Pinkerton, 2012).

Community members were not directly involved as researchers, but several community partners contributed significantly. The PIB Lands Manager, Joan Phillip, joined my Supervisory Committee to support shared design and review. As well, I have shared research outputs with all community partners and research participants.

## **4.2. Methods**

In this section, I describe my data sources and collection and analysis methods.

### **4.2.1. *Data Sources and Collection Methods***

As Richards (2009, p. 20) explains, qualitative research often uses “multiple sources of data or ‘views’, with the aim of bringing many perspectives to bear on a question.” Case study research specifically “relies on multiple sources of evidence” ideally with data converging to provide triangulation of evidence (Yin, 2003, p. 18). Cave (2012, p. 34) adds that drawing from multiple sources of data allows for investigation of “a range of behaviour, attitudinal, and historical issues” which is very important in the context of First Nations research. I used four primary data sources: semi-structured interviews, participant observation notes, contemporary and archival documents, and spatial information.

## Interviews

Semi-structured interviews provided the majority of my data. In semi-structured interviews, questions or discussion topics are prepared in advance but questions are primarily open-ended and the order of questions is flexible in order to adapt to the flow of conversation (Merriam, 2009, p. 90). I prepared an interview guide (Appendix B) to ensure that I addressed key topics and questions, but the form and order in which questions were discussed varied. Questions included specific factual or historical questions, clarifying questions on concepts and topics, as well as open ended and exploratory questions designed to create opportunities for narrative answers and introduce new topics.

I selected semi-structured interviews as the interview style for several reasons. First, I considered it the most culturally appropriate method for collecting information from Aboriginal participants. Semi-structured or unstructured conversational interviews are considered an effective data collection technique for research involving Aboriginal communities (McAvoy et. al, 2000). It is also a suitable format when dealing with sensitive topics that make direct questions challenging or when there might be considerable variation in how questions are interpreted (Huntington, 2000). Given the exploratory nature of this study, I also decided it was appropriate to use a semi-structured format to allow unanticipated topics of discussion to emerge.

When designing my interview methodology, I recognized that I did not have time to interview every member of the community. Instead, I attempted to consult individuals representing a range of perspectives, including: men and women; a range of ages (including members who were identified as Elders by other interviewees and community partners, or who attended PIB's regular Elders' meeting); landholder status (current, expecting to inherit or receive, or non-landholder); and individuals who were currently, formerly, or never involved with Band Council or Band Office (Table 4.1).

**Table 4.1. Characteristics of PIB Interview Participants**

Band Council/Office Involvement		Age			Landholder Status		
		<40	≥40	'Elder'	Current	Expecting	Undeclared
Women (7)							
Current Council/Staff	3	2	1	0	2	1	0
Former Council/Staff	1	0	1	0	1	0	0
Never Council/Staff	3	0	0	3	0	0	3
		2	2	3	0	0	3
Men (9)							
Current Council/Staff	3	1	2	0	2	1	0
Former Council/Staff	2	1	1	0	2	0	0
Never Council/Staff	4	0	2	2	4	0	0
		2	5	2	8	1	0

I interviewed a total of 21 individuals: 16 were PIB members, 3 were from other First Nations (Westbank First Nation and Tsawwassen First Nation), and 2 were AANDC staff (including an individual landholdings specialist in the BC region and a Lands director in the Atlantic region). Despite my efforts, I was unable to interview any PIB members that identified as currently holding no land who were also not expecting to inherit any. However, three of my interviewees did not state their landholding status. Also, at least two others were currently involved in disputes over land parcels. I discuss limitations related to my interview sample in section 4.3.4.

My design of interviews and interview guide (in Appendix B) were informed by Spradley (1979). I conducted all interviews in person in a location of the participants' choosing (except for one telephone interview and some follow-up email correspondence). Interviews ranged from one to three hours. All interviews were done one-on-one except for one group interview with four Elders at a PIB Elders meeting (one of whom I also interviewed individually). At the start of every interview, I discussed the informed consent process with the participant and they signed their consent to participate, with the option of remaining anonymous (though only one interviewee opted for this). In the first round of interviews (14 interviews), the interviews were not recorded electronically, upon advice from my research partners out of concern that recording would make participants feel less at ease and less willing to engage in exploratory

discussions. Instead, detailed hand-written notes were taken during interviews and these were subsequently typed and sent to the interviewee for review, providing them with a chance to make changes in order to ensure that their views and comments had been accurately recorded (see Laverack & Brown (2003)). For my later interviews, I had used a recorder for documenting my community feedback sessions and my community partners suggested that I try recording interviews as well. For these six interviews, I recorded and transcribed them verbatim. I secured approval from each interviewee before using any quotes attributed to them; otherwise, I left the quotes anonymous.

### **Participant Observation**

My research also benefited greatly from informal and formal personal observation and participation in context. In my first research season, I spent four months as an intern with the PIB Comprehensive Community Planning team, assisting with various meetings, community events, and report writing. I worked in the Planning office as well as occasionally the Lands office, in the central Band Office building. Included in this time I attended two Planning Team meetings, the formal opening of the new school, the PIB Annual General Meeting, a land use planning meeting with staff from AANDC, a formal presentation of the community planning process to AANDC in Vancouver, and a community meeting on the topic of individual landholdings and land use planning. In addition, as mentioned in section 4.1.4, I took an En'owkinwixw class at the En'owkin Centre where I interacted with and learned from a mix of students from PIB and beyond. During formal observations in meetings or events, I recorded observations. Following informal conversations and interactions, I recorded observations and ideas they generated. Additionally, the En'owkinwixw course was structured around a rigorous self-reflective process and in my projects for that course I recorded reflections and ideas related to my research.

My everyday experience working with PIB did not always directly relate to my research questions, but it was invaluable for learning about the larger context of the community and gaining insights into behaviour, norms, and values of community members and research participants. These insights were critical during my analysis of interviews and documents because they helped me to better understand the context of

written or recorded information, read between lines, and identify subtle nuances and implied meanings that I might have otherwise overlooked.

## **Document Review**

Contemporary and archival documents were important sources of information for this research. In case study research it is important to include documents in the data collection strategy because they are often rich sources of information and may present concepts or issues to pursue further in other data collection (Yin, 2003). Heaslip (2008, pp. 23–24) recognizes collecting and reviewing documents as “an unobtrusive method often used to gain an understanding of the broader political, institutional, legal and social contexts” and is useful for cross-checking information gathered from interviews. In addition, documents can often provide more specific details of past events and decisions than can be recalled in interviews (Yin, 2003).

My document collection for this research was extensive. I obtained permission from PIB to access the PIB Band Council records (files that are not normally publically available to non-community members or researchers) as well as relevant historical files in local library archives, the Union of B.C. Indian Chiefs resource centre archives, and National archive files from Indian Affairs, some of which were restricted and required special access requests. I searched the full PIB records of Band Council meeting minutes and resolutions and collected all documents that made mention of issues related to land and/or individual landholdings. At the time of collection, Band records were still in paper format and not searchable by topic, so I reviewed records manually. Due to a fire in the PIB Band Office in 1973, poor maintenance of paper records by Indian Affairs prior to 1977, and alleged destruction of some documents, the Band Council records are not complete (PIB, 1992b, p. 7; J. Phillip, personal communication, 2013). The PIB archives contain BCRs starting in 1972 and Band Council meeting minutes starting in 1949 (however they are sporadic until the 1970s).

## **Spatial Data**

I included historical maps, surveys, and other spatial data (aerial images, GIS data, and survey data) in my data collection strategy. These sources visually document the spatial history of individual landholdings on the reserve and I used them to

supplement and crosscheck information from documents and interviews as well as help to provide a visual reference for the area under study. I collected maps and planning sketches for each decade stretching back to the 1950s, as well as a historical map of the reserve from the 1880s that notes settlement patterns. I had the historical maps and surveys digitized so I could work with them in ArcGIS software to make maps for illustrative purposes and provide PIB with digitized versions. As well, I obtained land registry and survey data from the *Indian Lands Registry System* and the Geomatics office of AANDC in order to generate descriptive statistics on landholdings nationally and locally (in sections 2.2.3 and 6.1.2) and to inform my analysis of the history of registrations at PIB.

#### **4.2.2. Analysis**

According to Trochim (2006) there are three primary analytic strategies used in grounded-theory: coding, memoing, and integrative diagrams. While I used the latter two strategies informally when developing ideas during analysis (including use of the En'owkinwixw model as a concept diagramming tool), my primary method of analysis was qualitative coding. Documents, spatial data, interviews notes and transcripts, and observation notes were all analyzed using coding.

In the context of qualitative research, coding refers to “a process for both categorizing qualitative data and for describing the implications and details of these categories” (Trochim, 2006). Coding strategies differ, however typically an initial, descriptive ‘open coding’ phase of naming or labeling each segment of data (Heaslip, 2008, p. 25) is followed by a second, more focused and analytical phase of selective or “axial” coding (Charmaz, 2006; Ellinger & Watkins, 2005; Trochim, 2006). In the first phase, the researcher reviews the data in their entirety and codes descriptively for themes, key terms, significant events, or other things of interest. Categories that emerge in the first phase of coding are typically revised and refined as more data sources are included and over the course of repeated readings of the data (Richards, 2009). In the second coding phase, the goal is to review the data and initial coding analytically to identify relationships between themes and concepts that are emerging, delving deeper into linkages, influences, and reasons behind the descriptive information.



In this project, I did an initial phase of open coding to organize and describe my data on the history of the CP system, the various types of reserve land management activities, land management issues, and what interviewees identified as strengths, challenges, and potential changes of the CP system. From there my analysis split into the history and the land management implications. For my historical analysis, I followed primarily a narrative approach, as recommended by Cave (2012, p. 40) who notes that orienting open coding towards a descriptive narrative is culturally appropriate in the context of communities with a culture of oral history and story-telling. In fact, when developing my research plan, I was asked by my community partners to 'tell the story' of the individual landholding system. Specifically, I coded archival materials and oral histories coarsely for historical dates and events in order to organize them chronologically. However, since the goal of qualitative research is to provide analytical as well as descriptive findings, I also coded for apparent changes in policy or practice regarding landholdings and themes that emerged through the history. Therefore, in Chapter 5 my reconstructed history is interspersed with discussion of overarching themes and relationships between historical changes that I identified. These analytical findings represent my interpretation of the descriptive history and help explain and more critically examine this history.

It is challenging to collect archival documents and historical research for a single First Nation. Therefore, while I do use some archival references and work by historians, for the reconstruction of this history I rely primarily on the oral history shared with me in my interviews with PIB members and the Band Council documents I was able to collect from PIB Band archives. It was stressed to me regularly that published histories and archival documents do not tell the whole story, and should be used with caution as they reflect only the perspectives of those writing, and for much of PIB's early history (pre-1960s) the authors of documents were not Band members. Even quotes of Band members reported in archival documents I had to treat carefully, given challenges of translation and interpretation. Therefore, I tried to avoid favouring written documents.

My analysis of contemporary land management aspects of the CP system required many iterations of open coding in order to organize my large body of data and capture the full range of relationships and emergent themes. The open-ended and exploratory nature of my interviews meant that organizing my data was not a

straightforward process. I did several rounds of open coding on these data: one to capture information on the structure and dynamics of the land management system and different land management activities (reported in section 6.1.4); another to code for different perspectives on how the rights and responsibilities associated with CP landholdings were understood (reported in section 6.1.3); and several rounds to identify land management issues and what participants had identified as strengths, challenges, and potential changes of the CP system (reported in section 6.2). I then reviewed and coded these sub-groupings for overall themes and relationships. As well, there were many land management issues discussed in interviews, not all of which directly related to the CP system. My analysis required many layers of exploring for relationships and unifying themes between land management issues to see how and if they related to other aspects and themes identified.

The three analytical frameworks discussed in section 4.1.4 did inform my analysis, primarily functioning as tools to make me look at my data differently, investigate potential relationships, and experiment with different thematic groupings. As discussed in sections 4.1.4 and 8.2.1, I found that the three frameworks, while useful, were not ideal for presenting the themes that emerged from my analysis. Therefore, while I used the frameworks to assist my organization of data and different coding arrangements, I present my findings as the dominant themes and relationships that I found through my analysis.

I used QSR Nvivo 9 software to organize my data and manage my qualitative coding. I did not use the software's more advanced analysis tools (such as quantitative word queries or data visualizations) partially because I was unfamiliar with them but primarily because I did not find them well-suited to the nature of my data, coding structure, or overall approach to analysis.

### **4.2.3. *Feedback and Review***

I crosschecked my analysis and interpretation of data through several mechanisms. The primary method was member checking with community partners, key-informants, and interview participants. According to Creswell (2007, p. 196), member checking is a technique for “determin[ing] the accuracy of the qualitative findings through

taking [findings] back to participants and determining whether these participants feel that they are accurate.” I also presented my draft findings in an open community event in order to create an opportunity for a larger number of people previously not involved with the project to consider my findings and interpretations and offer additional perspectives. These sessions led to additions and revisions to my coding, modifications to how I presented findings, and the inclusion of additional interviews with Elders and members. Triangulating my findings across a diversity of data sources was also important for my verification strategy.

### **4.3. Reflections on Researcher Perspective**

Qualitative researchers consider reflexivity as an important component of research design, presentation, and evaluation. Reflexivity refers to critical self-awareness and reflection on how one’s background and experiences can result in biases or interests that influence the research process and findings. Blaikie (2000) stresses the importance of social science researchers recognizing that their perspective directly shapes their interpretation of data and urges researchers to be transparent about this influence. As Heaslip (2008, p. 26) explains, reflexivity “should give audiences of our research a more realistic basis with which to evaluate, reinterpret and use our outcomes.” While reflexivity is important in all qualitative research, it is particularly critical in situations of cross-cultural research, such as this project. Researchers are “embedded in several cultures which influence perception” (C. Soto, 2006, p. 24) and cultural lenses exert powerful influences on cross-cultural research.

I am a middle-class Canadian woman of British and Canadian settler descent and a graduate student in my mid-twenties at the time of this study. I grew up in southern Ontario and Nova Scotia, my friends and classmates were primarily Canadians of settler descent and some new immigrants to Canada. These aspects of my identity have influenced my interactions with interview participants and my interpretation of situations and information. First, I am young and a relatively new researcher, applying qualitative research methods for the first time. My research is in a culture and geographic region that were entirely new to me. I think some aspects of my background, such as growing up in rural small towns and experience studying in foreign cultures,

aided me in establishing relationships with my research partners and interview participants. As well, being young, a student, and eager to learn about Syilx culture, protocol, and history seemed to make people feel more at ease and willing to share their thoughts and stories with me. However, there were still many cultural and personal differences between participants in my research and myself.

I have spent most of my life in school and academic training. Like my family, I place a high value on formal education and the production of academic research. I enjoy writing and exploring questions and information analytically. My previous academic experience has been in policy and economics, through which I moved to land economics and institutional analysis and eventually to my current interest in the institutions that shape the use and management of land. While I have moved away from quantitative and model-based research, these experiences still shape my perspectives on land issues and land systems. However, I have noticed that since I began this research the influence of land economics and institutional analysis on my thinking has lessened and my interest has shifted more towards the social, cultural, and political complexity of land systems. That said, I have drawn upon ideas from institutional analysis, policy and legal studies, and economics in my research design and when analysing and organizing my findings.

Finally, it was not until my undergraduate degree that I began to learn in depth about the history of Indigenous peoples and colonization in Canada, and critically reflect on what this history means for me personally and professionally. I am continuing to develop my interests in Indigenous societies around the world, specifically concerning their relationships with land. I seek to orient my work and research towards supporting and empowering local communities to govern their own land, particularly through land tenure systems and locally driven land use planning. These goals certainly shape my perspective and my research design and presentation.

I have attempted to address issues of researcher perspective in several ways. Collaborating with my research partners in PIB helped me to reflect on and broaden my perspective when developing my research approach and reviewing my analysis and preliminary findings. Similarly, using the En'owkinwixw framework (section 4.1.4.) required me to reflect on topics and issues from multiple points of view and has made

me more aware of my own biases. I have emphasized interviews as my primary source of information and have regularly included direct quotations to present the authentic voice of participants. In my analysis of information I did not attempt to resolve all conflicting or discrepant information from different sources and respondents, an exercise that involves judgement decisions by the researcher that may be inappropriate or ill advised in a cross-cultural setting. Instead, I explored differences I found in my analysis and chose to present the range of perspectives.

#### **4.4. Research Limitations**

In additions to challenges resulting from my social identity and perspective, I briefly discuss several methodological limitations to this research.

##### **4.4.1. *Single Case Study***

Research based on a single case study is inherently limited in terms of its generalizability to situations outside the specific research case. I anticipated this as a limitation to my research and accepted it as a trade-off in light of the benefits of using a case study approach. Accordingly, it was necessary for me to report the results of this research humbly and in a way that recognizes this limitation and does not attempt to generalize findings beyond what can be considered externally valid.

##### **4.4.2. *Reconstruction of History***

Another of my challenges was the interpretation of historical records. I have created a reconstructed history of PIB's land tenure system and this is shaped by my interpretation of historical documents, oral history, and attempts to bridge gaps in the historical record. Many critical aspects of this history were likely never recorded in written documents, such as the nature of the relationship between the local Indian agent and past PIB Band Chiefs and Councils, or internal informal policies and practices of the federal government concerning individual landholdings. What was written down and still survives today is heavily coloured by the perspectives of the European and settler recorders (Rakai, 2005, p. 88; Ware, 1973a). In addition, as discussed in section 2.1.6,

reconstructed historical narratives concerning property and the perspectives and interpretations contained therein are “part of the conflict” (Biezeveld, 2004, p. 151) and are linked to struggles for power and legitimacy, making them methodological and ethical minefields for researchers. However, this history is of interest to PIB and important for understanding the current land tenure situation. In light of these limitations however, I include caveats in my presentation of historical information.

#### **4.4.3. *Limited Triangulation and Participant Observation***

I have used multiple sources of information in this research in order to triangulate findings and make them more reliable. However, I acknowledge that my sources were still limited, especially considering local historical narratives based primarily on oral history shared in interviews. Historical documentation of local perspectives was extremely difficult to find and even the sources I found are questionable in terms of representativeness and accuracy of the recording or interpretation/translation. Also, while I conducted participant observation in formal settings and some informal conversations with research participants and collaborators, I did not have opportunities to observe individual landholders engaging with their land or making land decisions in practice. While these activities were discussed in interviews, my research may have benefited from additional participant observation for contextual information and verification of my interpretations. Given that I rely heavily on interviews, my findings are limited somewhat by the subjective nature of participant perspectives on land issues and their own land decisions.

#### **4.4.4. *Incomplete Representation in Interviews***

Another limitation to my research is issues with sampling and representativeness of my data, particularly from interviews. Natcher and Hickey (2002) argue that in research involving Aboriginal communities it is important to remember that communities are not heterogeneous and that often a very wide range of perspectives and values exists within a community. However, given time and capacity limitations and challenges of building relationships with a wide network of participants, I was limited in the number of interviews completed. Identifying, contacting, and actually interviewing community members beyond Band Office staff presented logistical and relationship-based

challenges. In addition, my ethics approval required that the majority of my interviews be with Band staff and officials, with limited recruitment of private individuals. However, I was able to broaden my range of community member perspectives by including observations collected during community meetings, collecting them from documents recording past community meetings, and interviews with Elders and several members not connected with Council or the Band Office following my community presentation of preliminary findings. I reflect on these challenges in section 8.1.1.

Gaps in my interview sample include children and youth, members with little or no experience working within the Band Office or Council, and individuals who identify as holding no land and not expecting to inherit any. While I did interview a number of young adults, in retrospect it would have been potentially beneficial to explore what younger PIB members understand about the holding of land and land management issues. Several community members expressed concerns that young people would not respect culturally and ecologically important areas of land adequately in the future. As well, several interviewees suggested that young people in the community are aware of land disputes and divides between families but are confused as to the source and reasons for these tensions. If I had interviewed younger members I would have had a chance to explore these comments further and more authentically. Young members might also have perspectives less influenced by past land issues and disputes and more by current issues and community discussions.

Significantly, the majority (9/16) of my PIB interviewees were either currently Band Council or Band staff members (6) or had been in the past (3). Of those who had not been involved in Council or the Band Office (7), 5 were Elders and 3 of these I interviewed in a group setting only. While the Elders group is one that meets regularly and the participants seemed very comfortable talking openly with each other, it is a limitation of group interviews that participants may not express their full opinions or perspectives because of the lack of anonymity and potential fear of correction or disagreement by the others present. It was also more challenging for me to ask clarifying and probing questions in the group setting because of the nature and pace of the group conversation.

Another gap in my sample is the lack of individuals who have no land and do not expect to inherit any. Some of my interviewees currently have no landholding on the reserve but their families do and they expect to inherit some from family in the future. When discussing interviewing and sampling with my community partners I expressed that I wanted to include interviews with some members who have no land. When I tried to determine how many members this included I was told this information was not currently available and difficult to obtain. Official numbers were not available (a component of the current land use planning process is to collect this information) and anecdotal estimates ranged from a small number (most of whom were thought to be young people) to large numbers, potentially even the majority of members. I also realized that this was complicated by the fact that 'locatees' and 'landholders' are often understood to mean individuals and families with large landholdings, not members who only have house lots. Over the course of my interviews it became clear that a significant number of members do not hold land (see section 6.1.2). While overall my interviews were skewed towards perspectives of members who do have land or expect to in the future, within those there is a balance between those who hold large landholdings (individually or with family members), those with only a house lot, and those who hold no land currently but expect to inherit some.

I also encountered mentions of divides or sub-groups within the community (such as the "up the hill gang" and the lower reserve families) late in my data collection and was not able to fully explore. While I attempted to include a diversity of family names in my interviews, it is likely that some groups or families are not adequately represented.

Because of these gaps, my interview data are skewed towards the perspectives of those who have been or are involved with Council or the Band Office and those who have or expect to have some landholding on the reserve. If I had addressed those gaps with more interviews I expect there might have been an even greater range in perspectives on locatee rights and responsibilities (section 6.1.3) and land management issues and the strengths, challenges, and proposed changes of the CP system (section 6.2). I suspect there would have also been a more noticeable difference between those who were familiar with the land management systems of Council, the Band Office, and AANDC and those who were not. However, even with these gaps, there was a surprising range in opinions and perspectives represented, which I think is partly because I did



have many of the different family names represented in my sample as well as younger and older members, many of whom have different and far-reaching connections throughout the community. The staff members that I interviewed have had many years of experience working with members from all across the community on lands issues, and the community planners in particular had spent several years doing house visits and building connections across the membership to collect their thoughts on community planning issues, including land issues. As a result, many of my interviewees expressed what they thought were perspectives of other members in the community as well as their own, particularly concerning issues of land disputes and conflicts, and land distribution and inequality. While these data are of course coloured by their perspectives and interpretations, they nonetheless contribute to what I feel is a well-balanced set of findings. The representativeness of my data also benefited from my observations of community meetings where a wider range of members and perspectives were voiced.

#### **4.4.5. *Concerns Relating to Land Tenure Research***

The specific topic of this research also presents several challenges. It is extremely challenging to tease out effects of individual lands holdings specifically from a highly complex history and social and institutional context. A great number of social, economic, political, cultural, and institutional changes coincided with the introduction and reforms of individual landholdings on reserves. It is virtually impossible to assess which outcomes link directly to individual landholdings with certainty; therefore, I present findings as potential implications of individual landholdings. Further research on specific implications is needed and could be designed to assess causal relationships between institutional changes and land management outcomes.

Also, I am approaching this topic from a cross-cultural perspective, as I am an outsider to Syilx culture and to the PIB community. My position does have some benefits in that I bring a new perspective to observing and interpreting the community's lands system, and as an outsider I do not have some of the preformed ideas that community members may have. However, challenges of cross-cultural land tenure research include "fundamental epistemological concerns" (Rakai, 2005, p. 54) such as a bias towards Eurocentric concepts of land and "the long-standing practice of fitting or translating foreign concepts of land tenure into a local area" (Rakai, 2005: 54). To

minimize this, I adopted three assumptions recommended by Bohannan (1960), reported in Rakai (2005, p. 56):

- People have their own concept of land and their own representational 'map' of the country in which they live – i.e., their own understanding of their geography
- People have their own set of concepts for describing and dealing with the relationships they have with land
- People have their own spatially-based concepts for organizing themselves socially and dealing with their relationships with each other

Remembering these three assumptions, I have tried to avoid forcing my own or foreign concepts of land tenure onto my findings, though still acknowledging them when they do appear (such as in the *Indian Act* and other federal policy).

Finally, individuals often hold very strong views on land ownership and land issues, often connected with deeper ideologies and values. This is the case in non-Aboriginal contexts, but is likely amplified in the context of Aboriginal communities that have had European models of governance, economic development, and land tenure imposed upon them. This history influences the opinions of participants in this research differently and to varying extents. I have had to try to consider these influences when interpreting data, particularly interviews, as well as in the presentation of my findings.

## 5. History of Individual Landholdings on Reserves

This chapter summarizes my findings regarding the history of the individual landholding system on reserves, generally across Canada and specifically for the Penticton Indian Band. Section 5.1 is a timeline summarizing relevant events in the national and local land tenure histories. Section 5.2 presents a summary of perspectives, values, and motivations I encountered when reconstructing this history, both from government officials and First Nations. Section 5.3 describes the national history of reserve land tenure and management changes. In section 5.4, I chronicle the historical development of the land tenure system at PIB, based on what I have interpreted from interviews and archival documents, and the findings of other researchers of Okanagan history. (A more detailed version of this history is available in an unpublished report that I prepared for PIB in 2013.) Section 5.5 concludes the chapter with my analysis of land tenure changes that moved PIB from locally controlled traditional land tenure to an external, legally formalized system.

### 5.1. Timeline Summary

**Table 5.1. Summary of National and Local Land Tenure Histories**

National – Canada	Time Period	Local – PIB
<p><b>Pre-contact</b> Indigenous peoples operate under their own culturally and ecologically embedded land and resource tenure systems.</p> <p>Early colonial policy: Lands reserved for First Nations communities, internal governance largely left to First Nations.</p>	Pre-contact – 1800s	<p><b>Pre-contact</b> Syilx peoples living in extended family units with allegiances to larger groups and various leadership figures. Lifestyle is seasonally-nomadic, with several semi-permanent and permanent village sites used for larger gatherings, with some families living at the sites year round. Leaders grant families rights and responsibilities to manage certain areas.</p>
<p><b>British Colonial policy</b> Royal Proclamation of 1763: establishes</p>	1800s – 1867	<p><b>Contact - Early BC colony</b> ~1810s: Sustained contact with Europeans</p>

National – Canada	Time Period	Local – PIB
<p>relationship of nation-to-nation respect between British Crown and First Nations. Reserve system formalized. Increasing interference of colonial authorities in the internal workings of First Nations on reserves. Individual holdings of reserve land encouraged but not legally prescribed. 1830s-1840s: Colonial officials, judges, and some First Nations leaders urge federal government to develop an official system for registering individual reserve landholdings. 1867: Canadian Confederation</p>	<p>1800s – 1867 cont'd</p>	<p>begins. Smallpox and other diseases decrease Syilx population. By 1860s horticulture and livestock raising widespread amongst Syilx. Lifestyles begin to become more settled and land becomes valuable for agriculture. ~1860: loosely negotiated agreement with Governor James Douglas on early boundaries of Pentiction Indian Reserve</p>
<p><b>Post-confederation, <i>Indian Act</i></b> 1876: <i>Indian Act</i> consolidates existing colonial policies and laws - foundation of all subsequent federal policies. 1876: Federal government can order the survey and subdivision of reserves into individual parcels. First Nations express concerns over subdivision and other powers of federal agents. 1869, 1876: Individual holdings on reserves formalized with Location Ticket system. Allotment of land remains under the authority of Band Councils. Uptake of system is slow and variable, policies applied inconsistently. 1880: federal Department of Indian Affairs established. Bands assigned to regional agencies and Indian Agents. 1881: Indian Agents legally able to enforce regulations.</p>	<p>1867 -1910s</p>	<p><b>Early reserve</b> 1865: Area of the Pentiction reserve lands reduced under Trutch policy. 1871: BC joins Canada, BC First Nations under federal authority 1877: Pentiction Indian Reserves 1, 2, and 3 formally allotted. Approximately 5-8 original families live on reserve lands. Settlement and agriculture on reserve increases, including extensive gardens, fields, orchards, livestock herds, and fencing of lands. 1881: First Okanagan Indian Agency created. Indian Agent visits Pentiction Band regularly, begins restricting local powers. By 1889: PIB reserve lands reduced. Some PIB members living in log houses, rather than traditional pit houses. Location tickets mentioned in relation to other reserves in Okanagan Agency. Land allotments determined by local system of 'traditional ownership' based on formal permission to use land from the Chief. Orally recorded, no written records used. 1912-1913: McKenna-McBride Royal Commission decides to 'cut-off' 14,060 acres from main reserve and completely remove the two smaller Reserves 2 and 2A. At this time, PIB Chief reports that reserve land is 'allotted' to individuals under customary system, not federal. Agriculture becomes more difficult as water is taken by settlers with water licenses (unavailable to Band members).</p>

National – Canada	Time Period	Local – PIB
<p><b>Increasing federal influence</b> Federal government continues to increase its authority over reserve governance and services, including management of lands and individual holdings. Indian Agents continue to encourage use of individual holdings. Legal nature and duration of the rights granted by Location Tickets is ambiguous. Securing a Location Ticket often requires demonstrated use and improvement of land. System of registrations is inconsistent, local variation in records and policies. Various forms of registration are used (Location Tickets, Location Certificates, Notices of Entitlement, Certificates of Entitlement, Cardex holdings etc.)</p>	1910s – 1950s	<p><b>Land systems in parallel</b> Alcohol consumption and violence increase. PIB children forced to attend residential schools. 1924: <i>Indian Act</i> election system imposed on First Nations across BC 1920s and 1930s: Indian Agent mentions individual holdings on PIB reserve 1938 and 1942: PIB lands expropriated for federal airport. After WWII welfare system introduced. Local agricultural economy in decline. Uneven adoption of formal registration of interests with federal government begins (Indian Agent heavily involved). Local customary system of land allotment still dominant and verbal agreements still widely used. Leases and sales/exchanges of land between members begin to increase. Evidence of blending or parallel use of local and federal land tenure systems.</p>
<p><b>Increasing Standardization</b> Increasing standardization of land allotment, management procedures, and registration of holdings. 1951: Certificates of Possession replace Location Tickets and Indian Lands Registry System established. Temporary possession (Certificates of Occupation) introduced. Bands can be granted special authority over land tenure and management under s.60 of <i>Indian Act</i>.</p>	1950s -1960s	<p><b>Signs of Standardization</b> 1950: Records of individual landholdings on PIB reserve begin in the federal Indian Lands Registry System Registrations increase. Council minutes describe Chiefs working with Agent to locate individual holdings. Council passes resolutions locating individuals to parcels and “recognizing” or “confirming” individuals’ ownership of existing parcels. 1955: Fry plan sketches out individual landholdings on PIB reserve. Locally, landholding still required use and improvement of land. Otherwise, land not allotted or if already allotted would be revoked/reverted to the Band. Leasing continues to gradually increase.</p>
<p><b>Gradual devolution of powers</b> Various governance and land management powers begin to be devolved to Band Councils. Government officials still active in administration of land system. Gradually, through court cases and departmental policy, lawful possession becomes a permanent interest and cannot be revoked or cancelled except in situations</p>	1960s – 1970s	<p><b>Further Formalization</b> PIB increasing its role in reserve land management and local governance. Increasing use of federal land tenure system, including registration. 1970: confirmation that individual lots being registered by Kamloops land registry office. 1973: Legal surveying of holdings. Registration as ‘Certificates of Possession’ encouraged.</p>

National – Canada	Time Period	Local – PIB
<p>where the individual is no longer legally entitled to reside on the reserve (no longer a Band member), where there was error or fraud in the allotment, where the Band surrenders the land, or where the Minister expropriates the land.</p> <p>1970s: Indian Affairs introduces changes to land allotments and leasing approvals to make them more controlled, fair, and transparent. Maximum lot size for funded housing reduced to one acre, later ½ acre.</p>	<p>1960s – 1970s cont'd</p>	<p>Long-term leasing of lands occurring (1974: longest lease is 40 years)</p> <p>1974: PIB replaces <i>Indian Act</i> election system with locally custom elections.</p> <p>Late 1970s – mid 1980s: PIB adopts community policy of not allotting Band land except for small house lots.</p> <p>Band Council begins planned housing developments and community planning initiatives increase.</p>
<p><b>Increasing self-governance</b></p> <p>Devolution of powers continues, including land administration responsibilities. Federal department shifts to a funding agency, rather than a direct service provider.</p> <p>1985: Bill C-31 restores Indian status to women who had lost it by marrying non-status men, and to their children. Increases membership of Bands.</p> <p>Alternate land regimes introduced (self-government agreements, First Nations Land Management Act).</p> <p>2006: Decrease in federal funding for reserve land management, e.g. surveys of individual holdings no longer funded.</p> <p>Ongoing debates on reforming tenure system.</p>	<p>1980s+</p>	<p><b>Increasing local land governance</b></p> <p>PIB's land administration more bureaucratized, handled by Lands and Estates. Land tenure system now follows the rules and policies of the <i>Indian Act</i> land tenure system.</p> <p>Ongoing community planning, economic development planning and long-term leasing by Band and individuals.</p> <p>1990: General land use bylaw and waste disposal by-law adopted.</p> <p>2007: PIB votes to adopt property taxation of non-member residents.</p> <p>2009: Council authorized holders of large land parcels to use 'large lot infill process' to subdivide land for house lots.</p> <p>Claims to traditional ownership of lands and disputes over land ownership ongoing.</p>

## 5.2. Summary of Perspectives

Many different perspectives and values informed historical decisions about reserve land tenure, as with land tenure in Canada generally (Brisbin & Hunter, 2006, p. 139). General themes can be distilled from the written and oral records left behind, with some extrapolation. To explore historical perspectives of federal officials, First Nations, and local PIB members, I used the En'owkinwixw framework (section 4.1.4.). I present a summary of my analysis here (diagrams and further explanations are in Appendix E).

### **5.2.1. Government Perspectives**

Many European settlers and government officials had a narrow concept of land ownership, based on their own experiences and cultural heritage in Europe, and did not consider that Aboriginal peoples owned their land, collectively or individually (Freyfogle, 2003, p. 115). Colonial officials believed that having property would encourage Aboriginal people in "their hopes, interests and ambitions" (Carter, 1990, quoted in Alcantara, 2003, pp. 396–397), reduce their "dependence on handouts" (Alcantara, 2003, p. 402), and support the overarching goal of assimilation (Alcantara, 2003, pp. 396–397; Canada, 1890, p. 28; McHugh, 2004, p. 181; Nemoto, 2002). Two major parts of assimilation efforts were the "substitution of limited local administration for existing tribal organizations" and "issuance of individual location tickets [to] gradually eliminate communal tenure practices" (INAC, 1978, p. 66). As late as the 1970s, the goal of eventually dissolving reserves was apparent in government policy and adoption of private property was seen as a way to encourage this gradual break-up of Aboriginal communities (Baxter & Trebilcock, 2009, p. 27).

Individual landholdings on reserves also served government's action-oriented goals in other ways. Officials thought that surveyed, individualized land allotments, and reserves generally, would make government oversight and administration easier (Baxter & Trebilcock, 2009, p. 27; Millette, 2011, p. 24; Rakai, 2005, p. 42). Allotting reserves based on a formula of acreage per family was also politically expedient as it helped to justify arguments to limit or reduce reserve lands (Walkem, 1875, p. 64) in areas where settlers were hungry for land. At the same time, early colonial governments wanted to maintain good relations with the Aboriginal nations that were their allies, and that included protecting some lands from encroachment by settlers (Alcantara, 2003, p. 394; Haring, 1998). As well, some settlers and missionaries also hoped that private property would reduce conflicts between Aboriginal peoples by more clearly dividing land and creating an incentive for peace (Alcantara, 2003, pp. 396–397). Government officials also struggled with their "contradictory mandate of representing and controlling Indian people" (Satzewich & Mahood, 1995, p. 26). The competing obligations and demands on government officials may explain some of the inconsistencies and contradictions in past actions concerning reserve land management.

In recent decades, government narratives have shifted to emphasize entrepreneurship and economic development on reserves. Many see land as a major asset of many First Nations and improving land administration and strengthening individual's land tenure are seen as effective and efficient ways to help First Nations reduce poverty in their communities. Today, government and First Nations are promoting more decentralized land management and this has resulted in opportunities for First Nations to opt out of the *Indian Act* lands system through self-government agreements or the *First Nations Land Management Act* (FNLMA), though most of these are still early in their adoption. A related policy goal is to increase the efficiency of reserve land administration to support economic development and reduce costs to the department and First Nations (L. Pardy, personal communication, 2012).

### **5.2.2. First Nations and PIB Perspectives**

The Penticton Band, like many First Nations, adapted to most changes that came with European contact, taking advantage of new technology or institutions that they found acceptable and useful (Carstens, 1991, p. xix; Thomson, 1994). The registration of individual property was a new tool, an adaptation that appeared useful in that it protected land for one's family and for one's community in the eyes of the colonial legal system. Individuals were granted land based on their demonstrated ability or intention to use it productively, as a farm, ranch, or home site. As time passed, it became apparent that formal registration of landholdings also gave individuals more tools to support their initiatives, such as securing funding for housing or for business developments.

In Penticton's experience, it seems that when a few individuals adopted this new external system, and security and other benefits accompanied it, others also began to register their lands. Power relations also shaped the adoption of the federal tenure system. Government officials, such as Indian Agents, often wielded significant local power and influence, potentially registering land into the federal system without fully explaining what that meant to individual landholders. Within communities too, control over land was political, and for some the prospect of an externally protected right to one's land would have been attractive (Royal Commission, 1913a). However, other community members were concerned about how individual landholding would change relationships to land and between community members. With external registration, an



individual's accountability to the community was reduced because external courts could be called upon for protection and legitimacy; in this way the tenure system was seen to shift towards protecting individual interests over collective interests (Canada, 1902, p. 25). The registration of landholdings, written documents, Indian Agents, and the whole colonial system these were a part of, were distrusted and rejected by many, sometimes at the individual level (as with PIB) and other times by entire communities.

A major driver for the standardization of the land tenure system and land administration by the PIB has been the prevalence of land disputes in the community. As local, customary mechanisms for conflict resolution were undermined or could no longer effectively resolve land disputes, land registration and standardization of tenure and administration offered a way to manage conflicts. However, the changes brought new forms of conflict, over property lines, historical claims to land, and contested land deals. Exacerbating this concern was the fact that historical registrations with the federal system were uneven based on individual values and understanding of the system, and access to registration was unequal and controlled by the Indian Agent (Personal communication: C. Eneas, 2011; J. Kruger, 2012; J. George, 2012). Since the 1970s, there have been several efforts to make land tenure security more equal and standardized for all community members, but some individuals and families continued to feel like they had not been treated fairly.

In contemporary PIB, a major theme concerning individual landholdings has been individuals' and Council's interest in supporting local economic development on locatee lands. From the initial leases to more recent community planning initiatives, there has been an ongoing effort to help individuals in using their landholdings to support themselves, their families, and ideally the wider community. Since the 1970s, the PIB has been increasing its local control over land management, and some see individual landholdings as presenting opportunities for more local control, given the many decision-making powers that rest with individuals. Along with local control, there has been increasing attention on managing individual land uses, through community planning and regulatory tools such as by-laws.

### **5.3. Reserve Land Tenure History: Canada**

The history of individual landholdings is a thin, but illustrative, slice of a much wider history of interactions and struggles between First Nations' and European/Canadian legal systems (Harring, 1998) and systems of land tenure and management. While this is not a comprehensive review of the legal and political histories of First Nations in Canada, many other researchers and authors have explored this past in detail; for more see Bartlett (1990), Moss and Gardner-O'Toole (1991), Cunningham (1997), Harring (1998), Alcantara (2003), McHugh (2004), Manzano-Munguía (2011).

#### **5.3.1. *Pre-contact Indigenous Tenure Systems***

Well before contact with Europeans, Indigenous peoples across North America had developed their own systems of land and resource tenure and management (UBCIC, 1975). Oral history and anthropological, archaeological, and historical research indicate that many Indigenous groups in North America had customs whereby a family unit would be allocated areas of land or a resource for their use but the land and/or resource continued to 'belong' to the group and individual rights were subject to management by the group or leadership (Alcantara, 2003, p. 397; Flanagan et al., 2011, p. 32; Fortmann, 1990, p. 196; Millette, 2011, p. 23). These tenure systems were culturally and ecologically embedded, reflecting resource patterns such as seasonal harvest sites in nomadic or seasonally-nomadic societies (Rakai, 2005, p. 103).

#### **5.3.2. *Contact – 1867: British Colonial Policy***

With the arrival of European explorers and settlers, Indigenous systems of land tenure and management began to conflict with European concepts of ownership and administration of land. As described in this section, British colonial rule did not impose an individual landholding system on First Nations, but British policies did lay foundations for later Canadian policies. Following Cunningham (1997) and Alcantara (2003), I divide this summary of Canada's British colonial history into three periods based on the goals that informed policy: settlement, 'civilization', and assimilation.

## **Settlement**

In the early days of European settlement in Canada, First Nations peoples were critical allies in settlers' efforts to survive and defend their newly claimed territories (Alcantara, 2003; RCAP, 1996; Saul, 2008). As a result, colonial policies generally favoured avoiding conflict with local Indigenous peoples. However, officials needed land for settlements, so they sought agreements that would allow Europeans to share areas of land. The Royal Proclamation of 1763 established a relationship of nation-to-nation respect between the British Crown and First Nations and emphasized the protection of Indian lands. As European settlement increased and spread, early reserve-like settlements were used as a way for the Crown to protect lands that were occupied and used by First Nations from settler encroachment, an approach that is still reflected in the contemporary Canadian reserve system (Bartlett, 1990, p. 11; RCAP, 1996, p. 1.2.9.2).

When the first reserves were created, there was little emphasis on individual allocation of land. The focus of colonial officials was on treating Nations as collectives and dealings were primarily with Aboriginal leaders in order to negotiate treaties and establish the boundaries of reserved lands. In order to protect good relations, transactions to transfer land from Aboriginal to settler control could only be made between the Aboriginal nation and the Crown itself (RCAP, 1996, p. 1.2.9.2). Internal workings of communities were largely left to Aboriginal peoples themselves.

## **'Civilization'**

Relationships began to change in the late eighteenth century as immigration pressure and demand for land in British North America increased. In addition, after the War of 1812 military alliances with Aboriginal nations became less critical for the Crown (Alcantara, 2003, p. 396; Cunningham, 1997, p. 29). Colonial officials began to extend their involvement in the governance and administration of First Nations communities and reserved lands (Baxter & Trebilcock, 2009; RCAP, 1996, p. 1.2.9.3). Traditional land uses and economies of Aboriginal peoples were becoming less viable and less compatible with spreading agrarian development and the relationship between the colonial administration and Aboriginal peoples became one of political, economic, and social control (RCAP, 1996, p. 1.2.9.3). Colonial policy began to develop an "overriding

tendency to emphasize the individual to the detriment of the community” that persisted well into the 1970s (Cunningham, 1997, p. 29).

By the early 1800s, there is evidence of government interest in creating individual allotments on reserve lands. In 1828 the first formal report on Indians in British North America, written by Major General H.C. Darling, proposed policy to “establish[ ] Indians in fixed locations where they could be educated, converted to Christianity and transformed into farmers” in order for them to be less dependent (RCAP, 1996, p. 1.2.9.3). Baxter and Trebilcock (2009, p. 27) report that by the 1830s, British policy makers were undertaking the creation of ‘model communities’, sometimes overseen by missionaries, in order to establish Aboriginal peoples in sedentary, agrarian settlements and “encourage the organization of [their] land into private, Western-style landholdings.” These communities and their administration mark the beginning of the modern reserve system that exists today (Alcantara, 2003, p. 398).

Allotment of reserve land to individuals continued to be a specific recommendation expressed in colonial commissions and reports. In 1839, Judge James B. Macaulay wrote the first general judicial inquiry into the legal and social position of Aboriginal peoples. This report focused on the “duty of Canada’s Indian ‘citizens’ to settle on individual plots of farm land and work hard...” alongside the other hard-working settlers of Canada (Harring, 1998, p. 81). In order to encourage this and abolish collective property arrangements, Macaulay recommended that Aboriginal peoples be brought under British law, particularly relating to individual property (Harring, 1998, p. 82). According to Harring (1998, p. 82), while the Macaulay report did not lead directly to policy, his recommendations are representative of the attitudes of the judicial and political elite in Upper Canada at the time.

The next major legal inquiry into the administration of Aboriginal communities was made in 1840 in response to growing concerns about the government’s handling of contentious issues such as settlers’ demand for land, trespass, and corruption in the Indian Department (Harring, 1998, p. 30). One of the recommendations of the commission was again that reserve lands be allotted to individual Indians as private property. In 1844 an extensive report on Upper Canadian reserves produced by the Bagot Commission agreed with the 1840 inquiry’s recommendation that reserves be

'properly' surveyed and Aboriginal communities be encouraged to assign surveyed plots of land to individuals (Harring, 1998, p. 31; RCAP, 1996, p. 1.2.9.4). It was proposed to register these holdings in a specialized Indian land registry, so that individuals could familiarize themselves with a European-style land-tenure system, adopt farming lifestyles, and develop a market for land amongst themselves without the threat of predatory land purchases by settlers (Alcantara, 2003, p. 398; Flanagan et al., 2011, p. 62; RCAP, 1996, p. 1.2.9.4)). Not only would this reduce conflicts over settler encroachment and "discourage white squatters" (RCAP, 1996, p. 1.2.9.4) but as well, any excess reserve lands could be alienated to settlers (Harring, 1998, p. 31). In this manner, the Bagot commission proposed, reserve lands would be gradually incorporated into the colonial land tenure system. The recommendations of the Bagot commission were not acted upon until several decades later; however, Alcantara (2003, p. 399) notes that some Bands were already allocating areas of land to individuals on their reserves, although these holdings were not legally recognized by the colonial courts. But these were locally controlled tenure systems; the proposition to impose an externally controlled system of allotments was met with widespread protests by First Nations communities and leaders (Harring, 1998, p. 31).

## **Assimilation**

While the land tenure recommendations of the Bagot Commission were not immediately enacted, legislation concerning First Nations peoples and their lands did increase. In 1857, the *Gradual Civilization Act* made it official government policy to locate or move reserves closer to European settlements and created a process for enfranchisement (losing Indian status) that used the granting of legally-recognized private property as an incentive (Alcantara, 2003, p. 399). A Bagot Commission recommendation to centralize Indian administration was implemented with the 1860 *Indian Lands Act* and its creation of the position of Chief Superintendent of Indian Affairs to oversee all policies regarding Indians and Indian lands (RCAP, 1996, p. 1.2.9.4). As well, legislative measures were taken to protect Indian lands from encroachment. Despite "legal uncertainty about the status of Indian lands" (Flanagan et al., 2011, p. 62) the trend in these new Acts was one of increasing colonial interference and control over First Nations communities and lands in order to assimilate them into settler society. This model of assimilation was further developed in the later *Indian Acts* of the Canadian

government, despite ongoing opposition by Aboriginal individuals and communities (Harring, 1998, p. 33; RCAP, 1996, p. 1.2.9.5).

Outside of Upper and Lower Canada, there were also signs that the concept of individual allotment of land was influencing colonial policy. In 1858 James Douglas, Governor of the Colony of Vancouver Island, was appointed the Governor of the new Colony of British Columbia (B.C.), where he began surveying reserves for mainland Aboriginal nations instead of negotiating treaties (see section 5.3.3. for more on reserves in B.C.). Already at this time it was expected that reserves in B.C., like elsewhere in North America, would eventually be subdivided into individual holdings to encourage adoption of European-style private property:

...every family should have a distinct portion of the reserved land assigned for their use, and to be cultivated by their own labour, giving them however, for the present, no power to sell or otherwise alienate the land; that they should be taught to regard that land as their inheritance; that the desire should be encouraged and fostered in their minds of adding to their possessions, and devoting their earning to the purchase of property apart from the reserve... (Douglas, 1859, p. 2)

### **5.3.3. 1867 – 1910s: Post-Confederation Policy**

Following the creation of the Dominion of Canada in 1867, the policies of the British colonial administration became the policies of the Canadian federal government (Gailus, John & Chunick, 2009; McHugh, 2004). The *Gradual Civilization Act* was reborn as the 1869 *Gradual Enfranchisement Act* and a core feature of this new *Act* was that the Superintendent-General of Indian Affairs was given the power to force the replacement of traditional governance systems with municipal-style government structures (McHugh, 2004, p. 183). These local councils were assigned “minor and circumscribed powers” and the federal government assumed “extensive control of reserves” through the Indian Affairs department and its agents (RCAP, 1996, p. 1.1.6.8). According to Foster (1999, p. 354), federal powers over reserves were interpreted “not as a mandate to forge relationships with self-governing communities, but as entirely displacing Aboriginal sovereignty.” The Canadian Parliament’s 1867 *Indian Act* consolidated existing colonial policies and laws concerning First Nations and reserves and formed the basis of all subsequent federal policies. Rakai (2005, p. 106) identifies

the *Indian Act* as “the most influential instrument used ... to control and manage the lifestyles and land tenure systems of the Indians in Canada.” Included in the *Act* was a new Band Council authority, the power to legally allocate reserve lands to individuals, provided allotments were approved and registered by the Superintendent-General (RCAP, 1996, p. 1.2.9.8). Other federal legislation and amendments to the *Act* steadily increased federal control of reserve lands and communities up until the mid-1930s (Foster, 1999, p. 364; McHugh, 2004, p. 259). In 1880, the federal Department of Indian Affairs was established and Bands were assigned to regional agencies and Indian Agents, who were given legal authority to enforce regulations in 1881.

### **Location Tickets**

The assimilationist goals of British policy continued to manifest in Canadian policy concerning private property on reserves (Alcantara, 2003, p. 401). While the reserve system was overtly forced upon First Nations, the introduction and development of the individual landholding system was more subtle. With the *Gradual Enfranchisement Act* in 1869, the federal government introduced the standardized system of ‘Location Tickets’ which created legally protected individual interests in reserve land (Alcantara, 2003, p. 401). These were issued by the Superintendent-General, were exempt from legal seizure, could be passed to heirs but not otherwise transferred (Place, 1981, p. 2), and were restricted in their size based on the per capita land availability for Band members on a reserve (Place, 1981, p. 3). The *Act* also established a way for individual Indians to secure fee simple title to reserve land provided they relinquished their Indian status through enfranchisement, which was intended as the next step in the assimilation of individuals and Bands (Canada, 1882; Place, 1981, p. 3). However, very few Bands consented to allowing members to enfranchise, in part because enfranchisement would make parcels of reserve land into fee simple land and so “open reserves to ‘white’ occupancy” (Place, 1981, p. 6).

The 1876 *Indian Act* further developed the Location Ticket system. A champion of the Location Ticket system was David Laird, the Minister of the Interior and Superintendent-General of Indian Affairs, who in 1873, stated that “the great aim of the Government should be to give each Indian his individual property as soon as possible” in order to end dependence on government support (Alcantara, 2003, p. 402; Flanagan et

al., 2011, p. 66). Like Justice Macaulay before him, Laird saw the “communal lifestyle” of Aboriginal communities as a fundamental weakness that required legal and policy intervention (Flanagan et al., 2011, p. 66). Accordingly, the 1876 *Indian Act* gave the Superintendent-General the power to order the subdivision of reserves into individual lots and assign lots to individual Locatees; however, approval of both the Band and Superintendent-General was required before an individual could gain lawful possession of a parcel of reserve land. The 1876 *Act* also made Location Tickets transferrable to other members of the same Band, provided the Band Council and Superintendent-General approved (Place, 1981, p. 5). This location ticket system was not modified significantly until the *Indian Act* amendments of 1951, though there was some legal and political fine-tuning. An 1894 amendment gave the federal government, not Bands, the sole authority to decide whether and how non-Indians could reside on and use reserve lands. As well, in 1895 the federal government gave itself the power to lease land held under a Location Ticket if the locatee consented (Band consent was not required) (RCAP, 1996, p. 1.2.9.9.1).

According to the analysis of Baxter and Trebilcock (2009, p. 28), the Location Ticket system “created a state-level framework for creating private allotments on reserves” but did not force Aboriginal communities to “relinquish their ... political or legal decision-making power over reserve lands.” Band Councils did retain the authority to decide on land allotments, but the federal government restricted other powers of local land use planning or management (Nemoto, 2002, p. 212) and exercised control over reserve lands through requiring Ministerial approvals and permits.

### **Reserve Land Allotment in Practice**

Adoption of the federal government’s Location Ticket system was slow and inconsistent. It appears that the process of allotment and registration of interests was not standardized, and certainly in British Columbia there was debate and uncertainty over how large the allotments were to be (Commissioner, 1897; Laird, 1874a; Reed, 1889a). It was also unclear in practice who had the authority to subdivide and allot land. While the federal government did stress that division of reserves into allotments and registration of those interests would only occur “whenever it is so desired by a majority of Indians at any Reserve” (Laird, 1874a), the Royal Commission on Aboriginal Peoples



(RCAP) found that in practice the Superintendent-General could order a survey and subdivision of a reserve “and then require that Band members obtain location tickets for individual plots of land” (RCAP, 1996, p. 1.2.9.8). In 1952 the federal government acknowledged that prior to the 1951 amendments to the *Indian Act* Band Councils were not ensured control over allotment of lands in reserves (Canada, 1952, p. 4).

The federal government actively and regularly encouraged the subdivision and allotment of reserve lands by its Agents. For example, in his 1878 annual report, the Deputy Superintendent-General of Indian Affairs writes: “Their Reserves should be subdivided into lots, and each head of a family should receive a location ticket, covering the land to which he is entitled” (Canada, 1878, p. 6). There are reports where Agents are instructed to assign locations or permanent property to families as they deem appropriate (Commissioner, 1896; Himsworth, 1873) and carry out subdivisions to encourage location tickets (Canada, 1882, p. 34). In some cases, Agents were ordered:

Whenever a portion of a reserve shall have been surveyed..., efforts should be made to induce the Indians to locate on separate subdivisions  
(Reed, 1889b)

There are archival records of complaints from First Nations leaders about “arbitrary” division of reserves by officials (Ayessik, 1874) and concern amongst First Nations leaders that subdividing reserves would undermine their communities’ values and collective models of land ownership (Canada, 1881, p. 47; House of Commons, 1951a, p. 64; McHugh, 2004, pp. 182–183; Reed, 1889a). An exchange of letters from the Muscowpetung Agency in Saskatchewan from 1889 illustrates debates ongoing within First Nations communities at the time:

...[Other Chief] said it was very wrong for him to permit the surveyors to cut up his land into small squares, as it would be no good to the Indians after that... it was the intention of Government to restrain him and his people within the lines that the surveyors were running inside the reserve...  
(Nelson, 1889)

Look at the White man how he has his land surveyed to him. What quantity of land do you see that he receives. The Government wishes us to take an example by them and wants our lands... surveyed to us ... [and] we get a paper to show that it is our individual property that no one else can take it from us... If you understood this ... you would... think it was right. (Chief O’Soup Crooked Lake Reserve [transcribed], 1889)

Indian Affairs reports indicate that some Bands did order and request surveys directly (Canada, 1884, pp. 15, 56, 1888, p. 21). However, support of subdivision and allotment by a Chief or Band Council does not equate to community-wide support for the changes. The issue would have been contentious within most, if not all, communities, and this was sometimes noted by federal officials (Canada, 1893, pp. 16, 69). As well, by this time most Band Councils were heavily influenced, if not entirely controlled, by Indian Agents and federal policies (RCAP, 1996, pp. 1.2.9.9, 1.1.6.8).

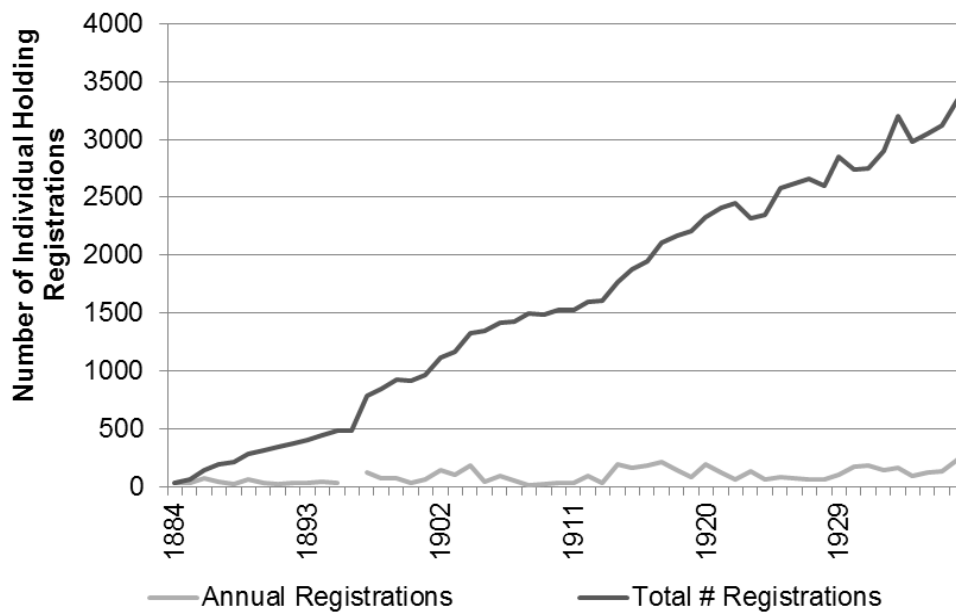
Indian Agents themselves also varied in how forcefully they encouraged use of the Location Ticket system. Some Indian Affairs reports describe the individual holdings being decided and granted by the Band Councils, and other times the agent seems to have played a direct role in dividing the reserve and assigning individual locatees (Canada, 1884, p. 56, 1885, p. 141; A. Bak, personal communication, 2012). One reserve surveyor in 1896 wrote to an Indian Agent that he was confident that the Bands he was assigned to “could easily be induced to take up individual holdings” (Ponton, 1896). One agent for the Cowichan agency in 1884 described using the promise of landholdings to help force cultural changes:

The fact that, though I am allotting lands to each family, only such [families] as give up the ruinous customs of the "potlach" and "tomanoes" dances are recommended for location tickets, is having a very good effect. (Canada, 1884, p. 176)

At least in some cases in the early days of individual holdings, Indian Agents were strongly encouraging adoption of individualized holdings and using individual and community fears about insecurity of land tenure to encourage formal allotment and registration of land. This type of influence and manipulation continued through the 1950s and likely beyond (discussed in section 5.4).

While allocation of individual holdings and assignment of Location Tickets were not legally mandatory, it is clear there was pressure to change land tenure systems of First Nations communities on reserves. Without a Location Ticket, “reserve residents would not be considered to be lawfully holding their individual plots of land” in the judgment of the Canadian government or courts (RCAP, 1996, p. 1.2.9.7), making Location Tickets attractive for increased security of tenure (RCAP, 1996, p. 1.2.9.7), and

gradually the system began to spread. Figure 5.1 illustrates data on the number of Location Tickets, collected from the annual and cumulative totals reported in the annual Indian Affairs reports from 1884-1938. Note that data on existing Location Tickets prior to 1884 were unavailable (so in actuality the total number of Location Tickets begins somewhere higher than illustrated) and in early days of Location Tickets registration practices were inconsistent and not centralized, so some holdings that were recorded locally are likely not accurately reflected in these data. Figure 2.1 in section 2.2.3 presents data on individual holdings in the mid-twentieth and twenty-first centuries.



**Figure 5.1. Registrations of individual landholdings (Location Tickets), from Indian Affairs annual reports 1884-1938**

Source: Author generated, data collected from Library and Archives Canada.

## Reserves in British Columbia

While Location Tickets were being established on reserves in eastern Canada, in B.C. the boundaries of reserves themselves were still being hotly debated, particularly on the mainland (Canada, 1880, p. 13). As previously mentioned, in the early years of the Colony of British Columbia, Governor James Douglas negotiated what have come to be recognized as treaties with fourteen First Nations on Vancouver Island, but he stopped conducting these negotiations as the Colony spread inland. The primary reasons for his shift in approach were financial constraints and the urgency of securing

land for the British Crown as a result of increasing American interest in the region (Harring, 1998, pp. 186–195). Instead of negotiating treaties, in the 1860s he sent surveyors to mark out reserves (based on the lands that each Band requested) and remaining lands were made available for settlers. The fact that this policy opened up large areas of land for European settlement raises questions about how exactly reserves were explained to Bands as they marked out their territories (Harring, 1998, p. 194; Thomson, 1994; UBCIC, 1975, p. 7). According to the Royal Commission on Aboriginal Peoples (1996, p. 2.2.4.4.2), Douglas' policies "effectively transferred most of the land owned and used by Indian nations in southern and central British Columbia to non-Aboriginal farmers and ranchers" by the time of Confederation.

Douglas' approach of letting Bands select their own land led to criticism and complaints by settlers, and in 1865 Joseph Trutch, the new Commissioner of Lands and Works and authority over Indian policy in B.C., decided to reduce the size of reserves (UBCIC, 1975, p. 10). Under Trutch's direction, reserves were surveyed to accommodate an average of ten acres of land per family, which was drastically less than the per capita acreage used in the creation of reserves in other provinces (RCAP, 1996, p. 2.2.4.4.2). These changes provoked serious protests from First Nations, as well as concern from the federal government when B.C. was negotiating to join Canada.

The Colony of British Columbia joined Canada in 1871, transferring responsibility for First Nations in the province to the federal government. Federal legislation concerning Location Tickets was made applicable to First Nations in B.C. in 1874 (Place, 1981, p. 3). Two years after B.C. joined Canada, the federal government requested that B.C. revise its reserves to accommodate 80 acres per family of five. This sparked years of dispute over the per capita acreage of reserves that led to the establishment of the joint federal-provincial Indian Reserve Commission (1876-1910). The mandate of the Commission was to review existing reserves, in some cases enlarge or reduce them, as well as create reserves for First Nations that had not originally been allotted them (UBCIC, 1975, p. 12). The Commission decided reserve acreages using per capita allowances. This was done at a time when First Nations populations had been ravaged by European diseases and so the resulting reserves seriously underestimated the land base needed for sustainable and growing communities (UBCIC, 1975, p. 12). The per capita approach, which by 1874 had settled on approximately 20 acres per head of a

family (Laird, 1874b, p. 152), may have influenced the early subdivision into lots on some reserves in B.C., as many old lots are approximately 20 acres (A. Bak, personal communication, 2012). Additional lands were ‘cut-off’ from reserves in BC by the McKenna-McBride Commission in 1912-1916, see section 5.2.3

Though debates over reserve boundaries and the lack of treaties in B.C. continue, by 1885 most Bands and reserves across the province were operating under the same institutional regime as First Nations in the rest of Canada: the *Indian Act*, Department of Indian Affairs policies, and Indian Agents (UBCIC, 1975, p. 14). Part of this regime was the *Indian Act* reserve land tenure system.

#### **5.3.4. 1910s – 1960s: Increasing Federal Influence**

Beginning in the early 1900s and continuing into the mid-century, the influence of the federal government on reserves continued to increase (RCAP, 1996, p. 1.1.6.9). The Location Ticket system and policies concerning registration became more standardized and registrations gradually increased (see Figures 2.1 and 5.1). I discuss local level outcomes of these changes through the history of the Penticton Indian Band in section 5.2.3; this section will simply highlight the national-level changes that affected reserve land tenure generally.

In 1911, the *Indian Act* was amended to allow local governments and utility or transportation companies to expropriate portions of reserve land without surrender or permission from the Band, for the purposes of roads, railways, and other public works (Conrad, Finkel, & Jaenen, 1998). Federal powers over reserve lands also increased during both the World Wars. Expropriations of land by the Soldier Settlement Board (1917) led to widespread fear that reserve lands would be expropriated and led to large amounts of land being surrendered (formally handed over to the Crown for leasing or sale) by Bands (Bartlett, 1990, p. 81). In 1919 as part of the *Soldier Settlement Act*, the Deputy Superintendent-General of Indian Affairs “gained the power to grant location tickets to returning Indian war veterans without Band consent” in order to give returning First Nations soldiers an equivalent to the 160 acres that non-Aboriginal Canadian veterans were promised when they returned home (Canada, 1919, pp. 28–29; RCAP, 1996, p. 1.2.9.9.1). However, it seems that these allotments were contested by Band

Councils, possibly due to fears that these land allotments entailed enfranchisement and a removal of the land from the reserve, and it seems the federal government was reluctant to force the issue (Auditor General, 1922, p. 258; Special Committee, 1951, pp. 67, 70; J. Kruger, personal communication, 2012).<sup>9</sup> Also, the *War Measures Act* (1940) led to expropriations of reserve land for military purposes, such as the construction of airports as occurred on Penticton Indian Band reserve land (UBCIC, 1975, p. 20).

More generally, the increasing control and influence of the federal government and its agents continued to undermine local customary processes of land use planning and management (Millette, 2011, p. 24). Until the 1960s, the federal government was a direct provider of all federal programs and services on reserves (INAC, 1993, p. i). This role was further cemented by amendments to the *Indian Act* in the 1920s that granted the government further and stronger powers to “intervene in and control the affairs” of First Nations, particularly to encourage development of agricultural economies (RCAP, 1996, p. 1.1.6.9). Power extended even to directing Band Council meetings and casting deciding votes in tied elections or referenda (RCAP, 1996, p. 24). Increasing involvement was accompanied by growth of the bureaucracy needed to maintain it, as described in the 1937 and 1939 annual reports of the Indian Affairs Branch:

In those reserves where the Location Ticket system prevails and in those where "recognized ownership" is the guiding factor, occupational rights are constantly changing, necessitating a vigilant supervision and a vast amount of detailed office routine, and with the improvement in administrative methods, and procedure this work increases proportionately. (Canada, 1937, p. 197)

With the growth of individual ownership and more universal recognition by the Indian of his power to will and to inherit property, the administrative duties of the Department in respect to Indian personal estates are rapidly increasing. (Canada, 1939, p. 15)

The federal government was thoroughly and increasingly involved in individual and Band affairs, and not only in administrative roles. Enfranchisement, the renunciation of Indian status and Band membership in exchange for the rights of non-Aboriginal

<sup>9</sup> There is a small spike in registrations of individual holdings evident around 1920, primarily in Ontario (see Figure 2.1), but I did not find evidence to link this directly to veteran settlement.

Canadian citizens, was made compulsory in many circumstances (Four Arrows, 2010). The government also took steps to encourage voluntary enfranchisement, including amending the *Indian Act* with a provision that if an individual Band member made permanent improvements on reserve land, he was entitled to receive compensation if he was lawfully removed from the reserve (Alcantara, 2003, p. 403), such as through losing his Band membership or enfranchising, as the fear of losing one's investments into land was thought to be holding individuals back from enfranchising. However, despite these changes and pressure from Indian Agents and federal officials to divide land into Location Tickets, uptake of the system continued to be slow and resisted until changes to the system in 1952, reflected in data from the Indian Lands Registry System (see Figure 2.1 in section 2.2.3). In 1951, Location Ticket allotments were described as varying in size "from an acre up to several hundred acres" depending on the particular reserve, its population, the land use goals and capability of the applicant, and "the action the council wants to take" (House of Commons, 1951b, p. 71). The use of the tenure system also varied, with some reserves having "considerable tracts of land not yet allotted" while others "are completely allotted but they are the exceptions" (House of Commons, 1951b, p. 71).

### **Certificates of Possession**

In 1951 and 1952 the *Indian Act* underwent a major review, spurred in part by public opinion that more should be done to improve the conditions of First Nations communities (Rakai, 2005, p. 111). While the main components of the *Act* remained the same, amendments began to reduce some of the federal government's power concerning day-to-day management of reserves, emphasizing a supervisory role instead of micromanagement (McHugh, 2004: 261). The Minister now needed Band Council approval "before intervening in most Band and personal matters" (Rakai, 2005, pp. 111–112) but the Minister retained his authority to veto local Band Council decisions, and over half of the sections of the *Act* operated at the discretion of the federal government.

In terms of reserve land tenure, the amendments brought significant changes. The Location Ticket system was replaced with Certificates of Possession (CPs) (explained in section 2.2.1), which were promoted as better meeting the needs of First Nations and moving reserve land rights closer to those held by other Canadians

(Alcantara, 2003, p. 404). CPs expanded and clarified the rights associated with individual lawful possessions of reserve land, and made landholdings more permanent and protected (see section 5.4). A new registration system for landholdings was also introduced. From the 1880s until 1951 Location Ticket Books had been used to maintain reserve land records; after 1952 these were replaced by Indian Land Registers (which were eventually updated in 1967 to make the Indian Land Registry System used today) (INAC & Mitchell, n.d., p. 4). Prior to 1952 there was a lack of standardization and transparency concerning landholdings: reserves were not fully surveyed, interests in land were not all registered, documents were inconsistent and not systematically examined prior to registration, records were not kept systematically or in centralized locations, and files suffered from loss and damage (Camp, 2007, p. 4.1.2; Canada, 1939, pp. 14–15, 1943, p. 16; House of Commons, 1951b, p. 71). It was unclear whether responsibility for maintaining land records rested with Bands or the federal government. According to federal staff who worked with Location Ticket files prior to 1951:

The department was not proactive; it received documentation and issued documents. ... we didn't register holdings, we just approved transactions. There was no registration, it was documentation put on file for safekeeping, that's all (quoted in Camp, 2007, p. 4.1.2)

As the registry developed, allotment documents and processes were standardized and kept on file more systematically, eventually leading to the abstract-based system that the registry currently uses (Camp, 2007, p. 4.1.3; INAC & Mitchell, n.d., p. 5). These changes were made gradually, given the complexity of the task and increasing interest from Bands in adopting and expanding the system on their reserves (Canada, 1961, p. 26, 1964, p. 23).

With the increased clarity of government policy and processes associated with individual holdings, more individuals who had interests in reserve land sought to officially register their holdings or were encouraged to do so by their Band Councils and Indian Agents. Past holdings that had been registered with local Agents were reviewed and updated in the national registry (Camp, 2007, p. 4.1.3). These factors likely contributed to dramatic increases in the number of individual holdings allotted by Band Council Resolution (BCR) and officially recorded with the federal government, as shown in Figure 2.1 in section 2.2.3. However, as discussed in section 2.2.3, use of the system



continued to vary by region, with most of the increases occurring in Ontario, Quebec, and British Columbia. The reasons for this are not entirely clear, but it appears that regional policies and local practices differed in how strongly individual Indian Agents encouraged, or required, official registration of holdings as CPs, and First Nations opposition to the system varied. As is recorded in the minutes of the House of Commons Special Committee reviewing the amendments to the *Indian Act*, some First Nations representatives were opposed to the federal government's power to order subdivisions of reserves "on the basis that it might lead to allotment" (House of Commons, 1951a, p. 63). This opposition varied regionally, for example:

... Indians in Southern Alberta were not opposed to surveys of reserves, but that the Indians of Central and Northern Alberta definitely were, and that because of this opposition no surveys should be made without the consent of a Band Council. ... In southern Alberta the Indians are gradually becoming used to and in fact requesting allotment of land and for that purpose they must have surveys and that is why they are favourable to surveys being made. (House of Commons, 1951a, p. 63)

It appears that some Parliamentarians questioned the government's surveying powers, as Members of Parliament Mr. Blackmore and Mr. Harkness express in an illuminating exchange at the 1951 Special Committee meeting (bold added):

Mr. Blackmore: I wonder if the minister would explain to us why (b) [lots and subdivisions] would be justified [in Clause 19]? It looks a little bit severe – divide the whole or any portion of a reserve into lots or other subdivisions. **I notice no stipulation is made to the effect that the Indians would have any voice in the matter.** I wonder - is that sort of wording is necessary?

Hon. Mr. Harris: **We are perhaps confusing what we do in surveying with what we do by allotment.** We do not disturb the Indian in the possession of any land he is entitled to but when we survey the land we do mark on it lots and subdivisions of lots so as to determine from that his actual occupation, but that someone reading that might get the idea that having completed the survey we would take his land and move him over to some other place because there was some vacant land there.

- ...Mr. Harkness: **Is any consideration given to this proposition that these surveys would only be made with the consent of the Band council?**
- Hon. Mr. Harris: We approach the Band councils and hope to obtain their assistance in the carrying out of the survey but we would not want them to be in a position to stop the work at a time when we had the opportunity to do it. ...in every case we do our best to get the consent of the Band council.
- Mr. Harkness: The basic point there, I think, **is it not that some Indians are very much wed to the fact that all reserves held by the Band is common land and if they are surveyed into plots that this is breaking down that idea. I would think if the Band as a whole does hold that idea strongly that they might be forced, as you might say, into another system.**
- Hon. Mr. Harris: **The forcing of another system goes with the allotment, not the survey.**
- Mr. Murray: Mr. Chairman, it is necessary to survey these reserves where there are villages to lay them out properly, if you are going to bring the Indian up to the level of other people.  
(House of Commons, 1951a, p. 63)

This dialogue appears to indicate that it was that stance of the Minister and Department of Indian Affairs that surveying and subdivision of reserves was distinct from the allotment of land, which remained the power of Band Councils (and Indian Agents). The Minister acknowledges that the allotment system and its encouragement by the federal government could constitute a “forcing of another system” upon First Nations who disagree with individual ownership of land. In the 1950s the prevailing opinion among government officials, and Parliamentarians, was that surveying and individual allotment of lands were necessary components of the development of reserves and were to be encouraged in the design of the *Indian Act* land tenure system.

Many First Nations also registered their opposition to s.20 of the *Indian Act*, which concerns possession of reserve land (House of Commons, 1951b, p. 67). Despite opposition, the 1951 amendments expanded the landholding system (House of Commons, 1951b, p. 67). Discussions at the Special Committee explained the introduction of CPs as a beneficial, but technical and bureaucratic change:

Mr. Applewhaite: Following the passage of this Act is it the intention of the department to start the issue of certificates to cover all cases involved? ... You are not contemplating any extension of the practice?

Hon. Mr. Harris: **We require the assent of the Band council to the allotment first.** The decision has to be made by the Band council. ... The Indian has to have the land allotted to him by the Band council. We have to see that the allotment is made. We are, you might say, the final registry office. (House of Commons, 1951b, p. 67)

...Mr. Charlton: Just what right does the location ticket or the new certificate, called the certificate of possession, give to the Indian holder?

Mr. MacKay: The location ticket really is **Indian evidence of ownership**, it is almost equivalent to title. **Once the land is allotted and the allotment approved by the minister**, this location ticket is issued in the same manner as a title to land would be. The Indian owner has a copy of it, the copy of the location ticket is in the agency office, and one is held here in the branch. (House of Commons, 1951b, p. 71)

...Mr. Applewhaite: I would like to ask who is the representative that objected to subclause (4)?

Hon. Mr. Harris: Mr. Andrew Paul said that **when the Band council allots land there is no good purpose in the minister refusing the allotments and imposing conditions**, that under those circumstances he thought the Band council would act, and having in mind the desires of the Band, that if it were their wish to allot the land to an Indian the minister should not have any say about it.  
(House of Commons, 1951b, p. 71)

This exchange points to concerns and tensions over the balance of federal and Band Council powers, similar to debates today. Ultimately, in the amended 1952 *Act*, Band Councils retained the power to decide on allotment of land, but allotments also still required approval by the Minister and the Minister could still order the subdivision of a reserve into lots in order to facilitate 'orderly' settlement. It is significant to the history of reserve land tenure that the federal government did not directly force Bands to allot and register individual holdings, as was done in the United States with the *Dawes Act*. Rather, the Canadian system left the decision to adopt the CP system up to the local Band Council (House of Commons, 1951a, 1951b). However, Band Council decisions regarding adoption and use of the CP system would have been highly political and often

influenced by federal agents and policies. While the extent of federal influence and its impact on the overall use of the individual landholding system is difficult to determine, it is clear that in some cases Indian Agents did use coercion, manipulation, or misinformation to forcefully 'encourage' use of the allotment system (local examples of these dynamics based on PIB's history are included in sections 5.2.3 and 5.2.4.). As well, federal policies and practices regarding such things as funding for Band housing or infrastructure favoured, and sometimes required, individual landholdings, as noted by Superintendent J.S. Dunn in a 1956 letter to the Indian Affairs Branch (IAB) about a Band near Cranbrook, B.C.:

I advised the council that my applications for assistance toward housing for their Band had been returned from the Commissioner's office pending submission of adequate proof of ownership to the various building sites of the various individuals concerned. (Dunn, 1956)

After the 1950s, Individual allotments also became increasingly popular with Band Councils and federal officials as a method to facilitate the leasing of reserve land to non-members (Canada, 1955, p. 12). In some cases, Band Councils were in favour of this, as with the example of the Columbia Lake Band discussed in Dunn's 1956 letter. The Columbia Lake Band Council is described as being anxious to have a plan of individual allotments approved, and passed a resolution asking for the Commissioner for

immediate [sic] action being taken in allotting [sic] individual holdings so the individual owners could lease their lands to non-Indians with adequate capital and machinery who were interested in developing the reserve (Dunn, 1956)

Dunn also indicates that this situation arose because of the federal government refusing to allow the use of Band funds for purchasing agricultural machinery for Band members to develop their lands themselves. While allotments on reserves in Canada did not result in the type of land sales of desperation that occurred on US reservations when individuals were given alienable title to land parcels (Shoemaker, 2003), the lawful possession system may have resulted in a similar loss of reserve land through leasing under similar situations of economic duress. Leases, while not permanent, did result in individuals and communities losing access to parcels of their reserve. Long-term leases

(over 49 years) effectively function like sale or encroachment on reserve lands for at least one lifetime (I discuss benefits and costs of CP leases in Chapter 6).

### **5.3.5. 1960s – 1970s: Gradual Devolution of Powers**

From the late 1950s onwards, federal policy became increasingly contradictory and confusing. Federal control of First Nations and goals of assimilation were criticized, not only by First Nations but by the general public and the international Indigenous movement (Plant, 2009, p. 6; RCAP, 1996, p. 1.2.9.12). Cunningham (1997, pp. 34–35) illustrates how by the 1950s and 1960s the Indian Affairs Branch was troubled by contradictions and clashes in models of thinking, internal inconsistencies, and paradoxes. These challenges resulted in ineffective, piecemeal policies. Some of these issues stemmed from shifting mandates and tensions between simultaneous obligations to First Nations and the federal government. Nevertheless, or perhaps as a result, the bureaucracy and professionalization of the Indian Affairs Branch continued to increase (Plant, 2009, p. 6). Forms, processes, and roles were standardized, illustrated by the 1959 *Handbook for Indian Band Chiefs and Councillors* (IAB, 1959) produced by the federal government to attempt to clarify the roles and responsibilities of those involved with reserve governance. Indian Agents continued to be heavily involved with administering the various policies and procedures required by the government; as documented by the 1958 Hawthorn Report, the duties of Indian Agents (now called superintendents) were extensive:

[T]he superintendent deals with property and with records, or with the recording of property. He registers births, deaths and marriages. He administers the Band's funds. He supervises business dealings with regard to Band property. He holds Band elections and records the results. He interviews people who want irrigation systems, who complain about land encroachments, who are applicants for loans. He suggests to others that, if they are in a common-law relationship, they should get married, for, among other reasons, this simplifies the records. He obtains information about persons applying for enfranchisement. He adjusts the property of Bands when members transfer. He deals with the estates of deceased Indians. He obtains the advice of the engineering officers on irrigation systems, and the building of schools. He negotiates the surrender of lands for highways and other public purposes. He applies for funds to re-house the needy and provide relief for the indigent. He draws the attention of magistrates to factors which bear upon Indians standing trial on criminal charges. To that list, of course, must be added

the justice of the peace duties and powers described earlier: the power of inspecting schools and health conditions on reserves, presiding over Band council meetings and, later, voting to break a tie.

(RCAP, 1996, p. 1.2.9.9.11)

The growth of regulations, policies, and procedures, all reliant upon a dispersed network of federal government agents and officials, resulted in a “cumbersome bureaucracy that ...impeded[ed] good land management and sound planning practices” (Millette, 2011, p. 24). By the late 1950s it was becoming apparent that the situation was inappropriate, ineffective, unsustainable and necessitated some devolution of authority and roles (INAC, 1993, p. 9). In 1956 the federal government began initial transfers of responsibilities to Bands for program delivery; by the late 1970s these became more established arrangements for delegated authority and shared funding (INAC, 1993, p. 9). With regards to land tenure, the federal government began using s.60 of the *Indian Act* to grant some Bands selected land tenure by-law powers, including surveying, allotment, and registration of CPs (IAB, 1959, p. 7), though most continued to operate under the regular CP system and Ministerial approvals (or customary tenure, if they had not adopted the CP system). As early as 1965 federal officials were exploring the possibility of some Band Councils assuming full “responsibility for maintaining its register and participating more fully in the management of reserve lands” (Canada, 1965, p. 19).

The trend towards devolution of powers continued. A 1965 report identified that more changes were required to continue the “shift of emphasis from traditional protection towards self-government” (IAB, 1965, p. 2), such as removal of the Minister’s authority over the “orderly development of reserves” and changes to the system of CPs as they had “not proved entirely acceptable to Indians and have presented difficulties in administration” (IAB, 1965, p. 3). The report noted suggestions by federal staff that Band Councils be granted greater authority and autonomy in establishing and administering reserve land tenure (IAB, 1965, p. 4) and individuals be given more control and responsibility over leasing (IAB, 1965, p. 7). While devolution of powers did increase, many of these land tenure recommendations are still debated today.

Various approaches to the devolution of powers were proposed. The two Hawthorn reports of 1958 and 1964 first introduced the idea that First Nations peoples “should be regarded as citizens plus” with special rights but who would eventually be

supplied with programs and services by provincial governments (INAC, 1993, p. 42). The reports also introduced the 'community development' approach to devolution, inspired by similar discussions occurring at the United Nations (Cunningham, 1997, p. 47). The Indian Affairs Branch tried a Community Development Program between 1964 and 1970, which made community development officers available to First Nations (in addition to the Indian Agents who now functioned largely as administrative bureaucrats) to "provide technical and other services in ways which encourage initiative and establish a basis for self-sufficiency" (Cunningham, 1997, p. 57). The program did mark a change in policy as it lacked assimilationist underpinnings (Cunningham, 1997, p. 59) and its officers played a much more passive role than the Agents (Cunningham, 1997, p. 67), but ultimately it was criticized for being ineffective. Eventually it was replaced by having First Nations organizations take over responsibility for community development (Cunningham, 1997, p. 75) and by the government's Comprehensive Community Planning initiative that began in the late 1970s-1980s (Copet, 1992, p. 39).

Another proposed approach to devolution of powers was the gradual dismantling of the reserve system and absorption of First Nations communities into wider Canadian society, represented by the federal government's 1969 White Paper. The White Paper advocates transfer of authority over reserves to the Provinces and Bands, stating that "control of Indian lands should be transferred to the Indian people" and that "[t]he Government believes that each Band must make its own decision as to the way it wants to take control of its land and the manner in which it intends to manage it" (INAC, 1969, p. 12). The White Paper approach continued the theme of favouring individual rights over collective rights evident in earlier land tenure policies (RCAP, 1996, p. 1.1.7.1). However, this approach to devolution was met with widespread protest from First Nations and was withdrawn (INAC, 1993, p. 42). Still today, some First Nations are critical of the full transfer of authority to Bands out of concerns that doing so will also remove the federal government's fiduciary obligations to Bands (Bartlett, 1990, p. 212).

### **5.3.6. 1970s Onwards: Increasing Self-governance**

Devolution followed a sensitive and rocky path but it gradually increased and in the 1970s and 1980s, under increasing pressure from First Nations, provisions for enabling actual self-government began to be incorporated into law (McHugh, 2004: 261).

The federal government's approach turned to strengthening Band governments, supporting First Nations' own delivery of federal programs and services, and devolution of powers over funding (RCAP, 1996, p. 2.2.5.1). In 1972, Bands administered 16% of INAC funding, by 1982 this had increased to 49% (INAC, 1982, p. 1) and by 1993 this had reached 77% (INAC, 1993, p. 44). Along with this shift, accountability for programs and services is now intended to be shared between First Nations and the federal government (INAC, 1993, p. i).

A change that is of particular importance to reserve land tenure came in 1985 with Bill C-31 and its changes to the requirements of Indian status (which is a requirement for Band membership). Prior to Bill C-31 a woman with Indian status who married a man without status would lose her status, and so lose her Band membership and right to hold land on a reserve. Bill C-31 removed this discriminatory rule and returned a large number of women and their descendants who had lost their status to their Bands and reserves, where they could once again hold land (UBCIC, 2010). Bill C-31 also abolished the rules concerning enfranchisement and loss of status and loss of reserve landholdings.

The federal government continued to lessen its involvement with local governance on reserves. The limited successes of the Comprehensive Community Planning initiative of the late 1970s and 1980s were attributed to inadequate empowerment of local Band governments and continued ineffectiveness of the federal bureaucracy (Copet, 1992, p. 39). A 1982 report by INAC identified that the system of Ministerial control "often leads to interminable technical complications to accomplish the simplest act" (INAC, 1982, p. 2), jurisdictional conflicts between Band Councils and other governments (INAC, 1982, p. 3), and treatment of Band Councils like "administrative arms of the Department of Indian Affairs" rather than fully empowered and accountable local governments (INAC, 1982, p. 4). The same 1982 INAC report also specifically criticized the land tenure system on reserves as "limit[ing] the ability of both the Band and individual to deal with the land" (INAC, 1982, p. 2) and inadequately defining the rights that go with allotment (INAC, 1982, p. 2). Reserve land tenure has proven to be a challenging policy area to address. As has been illustrated here, while reserves were initially set aside as collective lands, the administrative system that grew around them was intentionally shaped to promote Eurocentric ideas of private property (Baxter &



Trebilcock, 2009, p. 26) as a route to assimilation. While today the federal government does not advocate any particular type of tenure arrangement over another, there is an ongoing push to legally describe lawful possessions where they do exist and update and correct registration of interests (C. Walton, personal communication, 2012).

Despite the federal department's recognition of these issues, they have not yet been adequately addressed under the *Indian Act* regime (Bennett, Wallace, & Williamson, 2008). Instead, the approach taken by the federal government and First Nations has been to create alternative land regimes, such as the *First Nations Land Management Act* (FNLMA), which emerged out of efforts by First Nations leaders in the 1980s and 1990s to develop a new approach to the management of reserve lands, based on self-governance principles rather than attempting to modify a system that was founded on paternalism and assimilationist goals (Millette, 2011, p. 25). However, there are ongoing efforts to reform the *Indian Act* land tenure system, such as proposed legislation that would give Bands the option to assume authority over the design and administration of their land tenure system.

## **5.4. Reserve Land Tenure History: PIB**

I focus this second part of my history of individual landholdings on reserves specifically on the history of the Penticton Indian Band (see Chapter 3 for context). I summarize my findings on PIB's history of land tenure and land governance, focusing on the major themes and shifts [for further detail, my 2013 unpublished report to PIB contains additional quotes and additional details on PIB's local history]. I stress that this history, like any history involving land conflicts and power struggles, is not meant as the definitive truth but merely one version, based on my interpretation of information that I was able to gather (for more on these challenges, see sections 4.4.2 and 8.1.2, for discussion of my sources and methods of data collection, see section 4.2.2).

### **5.4.1. Pre-contact – 1860s: Okanagan Peoples and Early Contact**

The Okanagan people, or Syilx (sqilx<sup>w</sup> in Nsyilxcen, the Syilx language) are the original peoples of the Okanagan region (ONA, 2001). Traditionally, the Syilx were an

oral culture, passing down history, teachings, and laws through *cepcaptik*<sup>w</sup> (ONA, 2001). Respect for individual as well as collective rights remains a strong theme in Syilx culture today (J. Armstrong, 2011b; E. Alec, personal communication, 2011; J. Phillip, personal communication, 2011) and this is rooted in an ethical tradition that holds that individual rights should be “very carefully respected as long as they in turn respected the rights of others” (ONA, 2001). The Syilx were traditionally an egalitarian society (not patriarchal or matriarchal) (J. Armstrong, personal communication, 2011). The Okanagan Nation Alliance (ONA, 2001) describes various leadership roles, including high chiefs, tribal chiefs, and multiple village chiefs (men and women), chosen by family head elders, and *xatus* (the heads of extended family clans, men and women). The community leadership system was based on “headsmanship” by individuals who were respected but did not wield “coercive authority backed by formal courts, councils, and other law-enforcing institutions” (Carstens, 1991, p. 12) and leaders were ordinarily “not more conspicuous than any other individual, and ...seldom interfere[d] with family affairs, or the ordinary routine of daily occurrences” (Ross, 1849 quoted in Carstens, 1991, p.12). Thomson (1994) describes the Syilx governance system similarly, wherein leaders, often family heads, “played a mediation role but had little real authority” over other families, except regarding the distribution of resource harvesting and sharing. Egalitarian distribution of resources was based on sharing and shared feasts, but according to Carstens (1991, p. 10), potlatches like those used by coastal tribes were seldom, if ever used.

The Syilx were semi-nomadic, moving seasonally around their territory, setting up new camps or village sites, following different resources and managing their use of them (ONA, 2001; Thomson, 1994; M. Kruger, personal communication, 2012). Most of the territory was communally accessed and managed (Carstens, 1991, p. 9; ONA, 2001), but access and management of some sites (such as fishing weirs) was assigned to certain families (Carstens, 1991, p. 9; Thomson, 1994; C.Eneas, personal communication, 2011). While regular, large gatherings would occur throughout the year in villages that existed either seasonally or year-round, most of the time Syilx people lived in smaller, independent units consisting of a few families (Carstens, 1991, p. 10; Thomson, 1994). Family units were largely independent and were free to change which larger groups and leaders they associated with (Dolby, 1973, p. 137; Thomson, 1994).

Some camps became semi-permanent and permanent village sites. Penticton (Sn Pint'ktn) is identified as one of the consistently occupied villages of the Syilx, with its name translating to “people always there” (Thomson, 1994). Carstens’ (1991, p. 6) description of Syilx settlements stresses their social and political dynamics:

...there was always flexibility, so that some families (and individuals) could winter with one village and summer with the members of another, after which they were free to change their winter allegiance and settle with another Band. This practice of changing social and residential formations mitigated against a static reproduction of social relations ...Another consequence of this practice was the opportunity it afforded families and individuals to sever close ties when disagreements occurred, enabling them to avoid serious conflict by changing local affiliations.

(Carstens, 1991, p. 6)

These patterns of seasonal nomadism and shifting settlement patterns continued well into the late 1800s, with some families continuing to move around regularly and travel across Syilx territory following seasonal resources well into the 1930s and 1940s (J. George, personal communication, 2012; L. Alec, personal communication, 2012). As European settlement increased in Syilx territory and reserves were created, settlements became much more permanent and families had less geographic, social, and economic flexibility. The Syilx, like most tribes in British Columbia and across Canada, also suffered severely from European diseases, especially smallpox, and the loss of huge portions of their population disrupted family and political networks (Donovan, n.d.; UBCIC, 2010). In the opinion of Carstens (1991, p. 31), the disruptions of contact permanently “altered the nature of Okanagan chiefship and leadership... and undermined many facets of Okanagan culture and values.”

Despite the sweeping changes and challenges that came with contact, the Syilx were resilient and adaptive. They had well-established and extensive trading networks and were quick adopters of new technologies and resources, such as the horse, which appears to have been introduced to the Okanagan region in the early 18<sup>th</sup> century through trade routes from the south (Thomson, 1994). Very quickly, the Syilx became “horse people” and established a reputation as skilled horse breeders (A. Eneas, personal communication, 2011). European explorers were the first Europeans to interact with the Syilx, but sustained contact came with the fur traders of Fort Okanagan

(Washington state) in the 1810s and the forts of the Hudson's Bay Company in the 1820s (Donovan, n.d.). The forts and missionaries who followed them introduced horticulture to the region and by the 1860s horticulture, especially potato cultivation, was widespread among the Syilx tribes (Thomson, 1994; C.J. Kruger, personal communication, 2011; M. Kruger, personal communication, 2012). With the adoption of agricultural production, it is reasonable to extrapolate that land became an increasingly valuable asset for Syilx families and more sustained and intensive use of specific areas would have gradually increased (A. Eneas, personal communication, 2011).

#### **5.4.2. 1860s – 1910s: Early Reserve**

Syilx settlement and agriculture continued around the traditional village site of Penticton and as European settlement increased, Syilx families began to concentrate in the areas that eventually became the PIB reserve. In early days of the reserve, land tenure arrangements continued much as they had before. They changed gradually over time as members adapted to agricultural lifestyles and as external pressures increased.

#### **Creation of the Reserve**

The British colonial government led by James Douglas claimed authority over the Okanagan region in 1858, and in 1860, Douglas negotiated agreements (but not formal treaties) with Syilx groups to allow white settlement on their lands. Douglas secured some conditional and short-term permissions, but full negotiations were never completed (Thomson, 1994). In one of these agreements, lands around Penticton were identified as exclusive lands of the Syilx, stretching from Okanagan Lake in the north to Skaha Lake in the south and on both sides of the valley (Donovan, n.d.), but this area was reduced in 1865 (Donovan, n.d.). In November 1877, the Indian Reserve Commission formally allotted Penticton Indian Reserve No.1.

In 1877, the population of the Penticton Band was 144, with 32 adult males (Thomson, 1994), and already heavily agricultural. According to the oral history shared in a number of my interviews, in the early days of the reserve there were between five and eight original families, with additional families gradually immigrating and marrying in. The original families had been based in and around Penticton for generations and were the first farmers and ranchers on the Penticton reserve, working and living on their family

lands (A. Eneas, personal communication, 2011; C.J. Kruger, personal communication, 2011; J. George, personal communication, 2012). As more family members settled on the reserve, they shared existing family lands or cleared and cultivated their own areas nearby (J. George, personal communication, 2012). A PIB Elder explained:

There were no control there by no outsider, just on their own. ... it's the same thing like Oliver, Osoyoos and them [other Okanagan Bands], they divided their land just like we did. There was no one like...who had no rules or nothing to go by. Anyone who wanted land and had cattle and was there first got it. And we had relatives that had land or lived somewhere and then they stayed there long enough so they say they own it, owned<sup>10</sup> it. Like... it was all of theirs to begin with, so they, they kind of...whoever got there they got as much as they could and then family after family did the same thing. (PIB Elder, personal communication, 2012)

The local tenure system continued when lands became 'Reserve', and when there was still no control by outsiders. While families had areas for exclusive use and management, often for many generations, "that land was understood to be Band land" (C.J. Kruger, personal communication, 2012). Gradually, however, outsiders did get involved in Penticton Band affairs. In 1880 the federal Department of Indian Affairs was established and in 1881 the first Okanagan Indian Agency was created (UBCIC, 2010). As early as 1886, the Indian Agent was restricting local governance powers and decisions (Canada, 1886, p. 158).

### **Location Ticket Allotments**

It is difficult to determine when, if, and how the federal government's Location Ticket system began to be used by the Penticton Band because records for early Location Tickets were poorly kept and some were destroyed.<sup>11</sup> However, there are indications in the archival and oral historical records that in some cases individual

<sup>10</sup> Among elders and interviewees there was disagreement about when the concept of 'ownership' of land started to be used, with some insisting that still to this day no one on the reserve 'owns' their land in the Eurocentric sense. Part of this debate stems from the awkwardness of translating concepts and words between Nsyilxcen and English.

<sup>11</sup> It was mentioned by multiple interviewees, including the PIB Lands Manager, that several fires, both at the Agency office and the Band office, destroyed records, and that Indian Affairs has likely lost or destroyed old files, as they have been unable to locate certain records needed in legal cases concerning reserve lands.

holdings on some Okanagan reserves were being registered around the turn of the century (Canada, 1887, p. 235, 1889, p. 130). At this time, there are no records of Location Tickets in existence on the Penticton reserve. The earliest available map of the reserve, from 1895, notes the presence of fields and village gardens, but not individual landholdings (Plan of Penticton Indian Reserves, Osoyoos Division, Yale District. 1895, retrieved from PIB Lands department archives).

Location Tickets were seen by some Syilx individuals and families to offer increased security of tenure, particularly at a time when “different white governments gave and took land” (Thomson, 1994) and when encroachment and pre-emption by settlers was rampant (Canada, 1887, p. 235). Local Indian Agents were also becoming increasingly powerful, providing agricultural implements and seeds to those they favoured and requiring Departmental permission for individuals to build fences, cut timber, or other local matters (Thomson, 1994). The introduction of this new locus of power, along with the influence of missionaries, was disrupting local governance and undermining powers of Chiefs (Thomson, 1994).

### **Early Landholdings Locally Recognized and Orally Recorded**

Despite the appeal of the Location Tickets to some individuals and families, PIB Elders that I interviewed repeatedly stressed that the federal system of paper records was not used widely by Penticton members, if at all, until much later. Instead, a local system of land allotments and ‘traditional ownership’ was used to manage land use and access as settlement and agriculture increased on the reserve. This local system was based on formal permission to use a given area granted by the Chief, sometimes multiple Chiefs, representing the community:

...back in the early 1900s... if the family, you know, needed land and needed a place, then they went to the Chief and the Chief says Ok - go and find, you know, go and select some place where you know there's water, where you know you can...you know, survive. ...So, you went and then he said you go there and you mark it - you mark the boundary of what you want, when you've marked it clearly you give it a name. Then you come to me, then we'll go out and walk it together so I know where your land is. And that's what the Chief done. (Community member, personal communication, 2012)

Prior to the 1950s, certain families were allowed to work certain parcels of land within the reserve. They worked the lands, and

provided their family a means of living. At the time, the community would allot lands- people weren't allowed to take land and lay claim to it. (G. Gabriel, personal communication, 2011)

These allotments were marked out using physical markers or landscape features, boundaries that could be described and walked around, not requiring the abstractions of surveying and paper maps (Elders session, 2012; J. Kruger, personal communication, 2012; L. Jack, personal communication, 2012). Permissions to use and manage the land, as well as the boundaries, were recorded orally and would be reaffirmed by the community:

All they knew was that there was verbal history that ok, you own this, you own that. I seen that, now I know you own that, that's yours. So if somebody asked me, yeah I know that's yours because I seen it, and so-and-so told me and so-and-so told me and so-and-so told me, that's your land. So I knew it had to be true, because they're not of the same last family name, they're...maybe just friends, or maybe just acquaintances, people they know on the reserve. (J. Kruger, personal communication, 2012)

Important to the legitimacy and maintenance of one's claim to land was the demonstration of ongoing and active use and management by oneself and one's family (C.J. Kruger, personal communication, 2011; J. Kruger, personal communication, 2012; J. Phillip, personal communication, 2012). If these conditions were not met, or if use and management lapsed, then the land would often go back to the Band (PIB, 1987, p. 7; J. Kruger, personal communication, 2012; L. Jack, personal communication, 2012). As well, a distinction was made between land for housing and cultivation, which one could secure through clearing, maintaining, and fencing,<sup>12</sup> and range land, used for grazing, which always remained Band land even if you were given use of it for many years (J. Kruger, personal communication, 2012).

Local, customary allotments of land were matched to one's demonstrated need and use. This resulted in the granting of lots of various sizes and types of land. Small families or elderly members would only ask for small areas; individuals looking for land for their house or gardens and orchards would be given appropriate lots close to water

<sup>12</sup> Only reported in some interviews, other interviews disagreed and said that in the early days of the reserve nobody used fences.

or fertile soils; and ranchers, stock raisers, or those seeking to cultivate large fields for grains or hay would be granted larger areas (T. Kruger, personal communication, 2011; J. Kruger, personal communication, 2012; J. George, personal communication, 2012). In this local system allotments were heritable, often down the male line, though not exclusively, and so most early allotments stayed with the original family (L. Jack, personal communication, 2012; J. George, personal communication, 2012).

### **5.4.3. 1910s – 1950s: Land Systems in Flux**

The local system of land allocation and management continued well into the mid-twentieth century and later (J. George, personal communication, 2012; J. Kruger, personal communication, 2012). The system is similar to many customary landholding systems still used in other reserves today (Nemoto, 2002). However, today the Penticton Band uses the *Indian Act* land tenure system. This section and 5.4.4 explain how the land tenure system changed from parallel use of both the local and federal system to hybridized forms and eventual standardization with the federal system. While even today the local rules of landholding and community affirmation remain influential, the local system was gradually replaced by the externally formalized system as a result of efforts by federal officials, as individuals chose to use the external system, and as Band leadership attempted to resolve conflicts between the two systems.

### **Insecurity of Tenure**

Several major external shocks shook individuals' and the community's sense of security in their lands. In 1907, PIB's IR 3 in Summerland, which included several individual members' orchards and fields, was removed from reserve and replaced with 360 acres of rocky, dry land that remains IR 3A today (J. Phillip, personal communication, 2013). Another shock came in 1912 when the McKenna-McBride Royal Commission (established to settle disputes between the provincial and federal governments over the size of reserves in British Columbia) reduced Penticton's main reserve by 14,060 acres and completely removed the two smaller Reserves 2 and 2A. These 'cut-offs' included hayfields, gardens, orchards, grazing lands, and timberland used by Penticton members (Donovan, n.d.; G.Gabriel, personal communication, 2011).



These lands were then open to purchase and settlement by non-Aboriginals, including some lands that were used to build housing for veterans.

Records of the Commission's meetings and interviews provide a snapshot of the land tenure situation on the Penticton reserve in 1913. According to these records, land on the Penticton reserve, like the other reserves in the Okanagan agency, had not yet been formally allotted to individuals using the *Indian Act* system of Location Tickets, but lands were held by individuals as customary holdings, approved by the Chiefs, ranging in size from approximately 20 acres to over a hundred, and many of them were fenced (Royal Commission, 1913b, pp. 71–74). Later records from PIB Band Council minutes in the 1950s make reference to past Chiefs, including Chief Edward, giving and allotting land to individuals as well as giving permission to use certain areas but having them remain Band land (PIB, 1949, p. 3, 1950a, p. 1, 1953a, p. 1). The Commission record is not detailed enough to infer the nature of the collective interests in and governance of reserve lands at this time. However, later in the record there is some indication that land tenure was politically contentious. Some individuals at the time rejected laws and authority that the federal government was attempting to impose (Royal Commission, 1913b, pp. 75–76) but others preferred the proposal of an external, formalized system over internal Band politics (Royal Commission, 1913a, pp. 227–228). The federal officials working with Bands also favoured formalizing individual allotments and increasing the individual rights attached to reserve property (Royal Commission, 1913c, p. 52, 1913d, p. 213, 1913e, p. 232).

### **A Time of Change and Instability**

After the McKenna-McBride cut-offs, external pressures continued to erode members' tenure security. In 1915, more reserve land (including pieces of individual holdings) was expropriated for the Kettle Valley Railroad. In addition, members' access to water for their crops and orchards disappeared as settlers claimed and diverted it. Settlers' were protected by provincial water licenses that Band members and 'Chinamen' were not permitted to hold because they were not the owners of lands in fee simple (RCAP, 1996, p. 2.2.4.4.3; Royal Commission, 1913b, pp. 75–76; Thomson, 1994; J. Phillip, personal communication, 2013). Members increasingly worked off-reserve as agricultural labourers in settler-owned orchards in the region and across the border in

the United States (E. Alec, personal communication, 2011; J. George, personal communication, 2012). Around this time alcohol consumption and community violence began to increase on the Penticton reserve, which Thomson (1994) blames on members' "...frustration with their poverty and with the barriers which disenfranchised and marginalized them." This was exacerbated by increasingly forceful control by federal officials in the region, spurred by demands from a top-down, centralized bureaucracy and wider national policies of assimilation (Thomson, 1994).

Indian Agent reports from the 1920s and 1930s still include mentions of individual holdings on the PIB reserve (Coleman, 1931; Pragnell, 1926), but individuals' valuation and uses of lands were in flux. Reserve land was not yet being developed or leased extensively (except for perhaps a few informal agricultural leases to neighbouring non-Aboriginal farmers) and land deals (including leases, swaps, permits, and sales) were done informally, between individuals and often without knowledge or recognition by the Chief or Indian Agent (J. George, personal communication, 2012). Beginning around this time of social instability, some individuals were taken advantage of by other members or outsiders who got them to agree to sell or lease their lands for alcohol, for very low prices, or, later on, using forms and agreements that many members could not read and did not understand fully (E. Alec, personal communication, 2011; J. Phillip, personal communication, 2011; Anonymous Band member, personal communication, 2011). This, in turn, fuelled internal discord and disputes over land (Agent, 1938).

## **Parallel Systems**

From the early 1900s on, alongside increasing social instability and distrust of both federal officials and Chief and Council (who many members viewed as extensions of the federal system), individual Penticton Band members began to take interest in the formal registration of their land interests, likely as a way to protect their individual and family interests. In 1938, the Agent for Okanagan reserves reported that while most landholdings and transactions were still not recorded, there were "a few instances in recent years" of individuals registering interests and land deals (Agent, 1938).

Adoption of formal registration was very uneven. Even if individuals were interested in registering their land interests, multiple interviewees emphasized that access to registration was unequal and controlled by the Indian Agent, who manipulated

this power for his own ends (Personal communication: C. Eneas, 2011; J. Kruger, 2012; J. George, 2012). The influence of Agents likely included advising certain individuals to get their lands registered, particularly to facilitate leasing or as protection from potential land disputes. It also appears that registration occurred in situations where land was formally exchanged or transferred, at least when the Agent was favourable to having it registered (J. George, personal communication, 2012). The gradual increase in land deals, and particularly leases with non-members, likely facilitated and encouraged by the Indian Agent, would also have increased the formal recording of interests.

Another reason for unequal access to land registration was language gaps. Many community members could not speak or read English, particularly the kind of legal formalities involved with the formal registration process (J. George, personal communication, 2012; J. Kruger, personal communication, 2012). As a result, many of the old documents and land transactions that the Agent was involved in were not fully understood by those whose lands were involved (J. George, personal communication, 2012; J. Kruger, personal communication, 2012):

I remember the old Indian Agent coming and talking to my grandma 'Put your X here'... a lot of documents... you can see an old elder writing Xs, it's not straight, it's shaky. (PIB Elder, Elder's Session, 2012)

While some individuals were able to use the formal registration system to increase their security and land assets, understanding of the system and of the advantages of registration was unequal among community members. In fact, gaps in understanding of the system and how to use it persist today (see section 6.2.4.).

In the face of the foreign and often incomprehensible nature of the federal land tenure system, it is not surprising that many community members instead relied upon their local, customary system well into the 1970s (J. Kruger, personal communication, 2012). For some this also represented an intentional rejection of and resistance to the imposed regime in favour of local legal and property traditions, as was the case for Indigenous groups across Canada and the world (Egan & Place, 2013, p. 3; Satzewich & Mahood, 1995, pp. 1–2). This is evident in PIB member Jack Kruger's story about how his father rejected formal registration of his land in the 1970s:

And my dad [John Kruger] said, 'I don't need that [paper] to prove anything' - he told [the Chief], 'I told you, we already know who owns which land. I don't need that piece of paper, telling me or telling anybody this is my land, this is where my house is. I built this house, Indian Affairs didn't build it, I built it from my own hands...' (J. Kruger, personal communication, 2012)

For many individuals and families, the local familiarity and legitimacy of the customary system, based on family heritage and observable land use, was morally and practically superior. Many distrusted and rejected the Indian Agents, and the entire colonial system they represented:

A lot of the Band members didn't agree with the Indian Agents about how they gave out and they allotted lands. A lot of the PIB Band members didn't appreciate being bossed around, being told what to do like a bunch of little kids on their own land, because the way a lot of the elders at that time, in the 1900s, didn't think of the reserve as a reserve, they thought of the whole territory as theirs. (J. Kruger, personal communication, 2012)

Instead, individuals preferred to use their own, verbal system and the communal recognition that it required, "they didn't care about 'legally' ...whether it was 'legal' or not, we owned what we owned" (PIB Elder, personal communication, 2012). In a time when formal registration of land and land transactions was still new and untested, and in the face of deception by settlers and governments, the local system may have seemed to some to be more resilient and reliable.

However, customary land tenure systems, like the one on the Penticton reserve, are vulnerable to external pressures and internal changes (Dekker, 2003, p. 139; Godden & Tehan, 2010, p. 4; Rakai, 2005, p. 43). In PIB's land tenure history, these pressures included increased leasing of reserve lands; the breakdown of community and families resulting from alcohol, conflict, and colonial oppression; loss of customary rules of landholding (J. Kruger, personal communication, 2012); and the gradual loss of elders who for generations had been the holders and guardians of the community's oral land tenure records (C.J. Kruger, personal communication, 2011; E. Alec, personal communication, 2011).

## Blending of Systems

In the face of challenges and changes, more Band members began to formalize previously informal or verbal agreements over land “so the original intent of the arrangement would not be corrupted” (E. Alec, personal communication, 2011). Yet, even though formal registration did increase, the customary system remained very influential and operated in parallel to the federal system until further standardization in the 1970s (L. Jack, personal communication, 2012; J. Kruger, personal communication, 2012). Rather than the federal system fully displacing the local system, it seems that at least in some aspects, the customary system and federal system hybridized in local practice and perception (see further discussion in section 5.5). While it is difficult to reconstruct what this gradual blending looked like, there are hints in oral and archival records. For example, customary community rules for landholding as described to me are similar in many ways to the land rules of the early federal Location Ticket system (that Indian Agents would have regularly referenced and enforced). My observations of these similarities are summarized in Table 5.2:

**Table 5.2. Blending of Local and Federal Land Tenure Rules, c.1930s – 1970s**

	Community Rules	Federal Rules
1	Allotment formally approved by Chief(s)	Allotment documented and approved by Chief and Council
2	Allotment required certain conditions of use, such as demonstrated use (cultivation, building a house, or fencing)	Allotment was often recommended by Indian Agents for individuals who had built houses and/or cultivated land, or could demonstrate intention and ability to do so
3	Allotment of land sometimes happened in phases, a first phase where an individual would be granted a small lot for a house and garden and permission to use a larger area, and then a second phase where the larger area could be granted.	Allotment was often conditional, an individual would be promised a Location Ticket provided he adequately cultivated and used the land area for a set length of time. (Also similar to the later CP system. Certificates of Occupation could be granted which would be valid for two years and then could be formalized into a CP.)
4	If individual no longer uses the land, or leaves, it reverts to the Band	Land retains its collective interest and reverts to the Band if the individual is no longer a member or wills it to a non-member
5	If a female Band member married a non-Aboriginal man, her land would go to her next of kin, or the Band	Historically, if a status Indian woman married a non-status man, she would lose her status, along with the right to hold land on a reserve, so any landholding she had would revert to family who were still members or the Band (Canadian Human Rights Commission, 2005).
6	Holdings were heritable and divisible	Location tickets were heritable and divisible (unless they were made as a life-estate) (Place, 1981)

It is plausible that the local, customary system gradually adopted aspects of the federal system and those aspects were absorbed into the community rules. Some of the blending of the systems likely resulted from registration being imposed by federal officials, or Chief and Council under advice or pressure from federal officials. A PIB Elder remembered that Agents were “the ones that made all the decisions” and another PIB Elder Jimmy George recounted how the Indian Agents were the ones who drew up the property lines for formal surveys and registration. These sorts of impositions of property lines or formal registration documents, and the conflicts that arose from them, would have had an impact on understandings of the land tenure system, but apparently not enough to displace the customary system. As a PIB Elder explained, “...most Indian Agents they just did their thing and got out...” and their influence was limited in the minds of people who distrusted them because “...nobody hardly listened to him [the Agent] back then...” (PIB Elder, personal communication, 2012).

While some changes may have been compatible (or at least easily ignored), other changes caused friction with the traditional, customary tenure system. Conflicts over land increased; a PIB Elder remembered how:

there was nobody that got mad at each other for going on other property, I can remember nobody you know saying ‘hey this is my land’ ...no, they didn’t do that. The Indian Agent’s one that... [caused that] (PIB Elder, personal communication, 2012)

Likewise, Jack Kruger blames disputes over land primarily on weaknesses and failures of the federal system and how it was administered and communicated:

the culprits wasn't our people, the culprits were Indian Affairs agents. ...Because Indian Affairs never told us the laws [of the Indian Act] (J. Kruger, personal communication, 2012)

Between the parallel land tenure systems, even as they blended, there were gaps, ambiguities, and inconsistencies. This is similar to many other land tenure situations internationally where “formal and informal land administration co-exist” but between them there are gaps and “discrepancies” that can lead to conflict or opportunities for exploitation (FAO, 2002, p. 16). In the case of the Penticton reserve, one of the most noticeable outcomes of these gaps, combined with the undermining of

local authority, was the loss of an effective mechanism to resolve land disputes. In a 1938 letter, the Indian Agent for the Okanagan writes:

...I have been having considerable difficulty the past few years with respect to claims by Indians and others against real and personal property on Reserves in this Agency... ..it is practically impossible to make an adjudication upon such ancient claims with a clear feeling that one is in possession of all the fact and both parties have been fairly dealt with, despite the fact that the claimant produces witnesses with verbal evidence of knowledge of some gift, or sale. ...none of their transactions, except in a few instances in recent years, were recorded in this office and very few of them could successfully bear the onus of producing proof of how they originally came in possession.” (Agent, 1938)

In the emerging land tenure system, people were struggling to secure their claims in the face of changing measures of legitimacy and ‘proof.’ In the customary system, respected community members and elders decided on land disputes, but with increasing formalization of land tenure arrangements this became less effective (Elders session, 2012). A PIB Elder recounted land disputes that struggled with this mixed, disjointed, system:

... just because they used it and they said they own it... they don't really... in Indian, you do own it, but then again it's not written, ...the Indian Agent or government or anything don't get involved... (PIB Elder, personal communication, 2012)

Land disputes such as this and other challenges of navigating parallel land tenure systems created an impetus for clarifying and eventually standardizing local land tenure. Through the 1950s until the 1990s, there were spikes of conflict over land ownership and methods for resolving conflicts changed over this time. Initially most disputes were settled based on conversations between parties and what Elders and community members remembered and affirmed.

#### **5.4.4. 1950s – 1990s: Land Tenure Standardization**

Starting around the 1950s and continuing through the 1970s and 1980s, the land tenure system on the PIB reserve began to move away from the local, customary system towards a more standardized system based on the one administered by the federal government. Also during this time, the Band began developing its own capacity to

manage land records rather than depending on the Indian Agency office, with the eventual creation of the PIB Lands and Estates Office (later the Lands Department). As documented in this section, landholdings were a topic of much community discussion throughout this period, and several community and Band Council decisions occurred that significantly shaped the nature of the current tenure system.

Over this period, the purpose of individual landholdings also shifted. Agriculture on the reserve continued to decrease, and interest in land development, leasing, and housing developments began to take the place of agriculture. Mapping and surveying of landholdings also began. These early records spatially show how preferences for allotments were shifting away from large, spaced out, irregularly located holdings (presumably for agricultural fields and ranches) in favour of smaller, standardized parcels closer to main settlement areas and bordering the City of Penticton.

### **1950s: Signs of Standardization**

From both Band Council minutes and interviews, it is evident that in the 1950s and 1960s the reserve land tenure system was still functioning heavily under the influence of the customary traditions of allotments by the Chief and recognition of ownership by the Chief and Council. However, there are also signs that more elements of the federal land tenure system were being incorporated locally. Records of individual landholdings on the Penticton reserve in the federal Indian Lands Registry System begin in 1950. The Band Council minutes in 1949 and the early 1950s make mentions of the Chiefs (Gideon Eneas and Jack Alec) working with the Agent to “locat[e] individual holding” of land (PIB, 1949, p. 5) and the Council passing formal resolutions locating individuals to new parcels and “recognizing” or “confirming” landholdings (PIB, 1951, p. 1, 1952a, p. 2, 1952b, p. 1, 1953a, p. 1, 1953b, p. 1, 1953c, p. 1, 1953d, p. 1).

Minutes are incomplete for the 1950s and 1960s, and most likely not all land grants or confirmations were formally made at Council Meetings. However, available records show an increase in requests for land allotments and confirmations of land ownership in the 1950s that is not present in the 1960s minutes. This spike is reflected in the historical federal land registry data for Penticton (see Figure 5.2). As well, directives from Indian Affairs at this time were pushing local officials to clarify and standardize land records. A 1955 Indian Affairs report notes that across Canada



The increased attention given to sub-division surveys of reserves in recent years has facilitated the introduction of the individual landholding system, and approval of transfers of individual holdings on reserves from one Indian to another, the allotment of vacant lands by Band councils, and the replacement of old location tickets [with Certificates of Possession and Certificates of Occupation] (Canada, 1955, p. 12)

PIB Chief and Council may not have fully realized the implications of officially recognizing individual landholdings in the presence of the Indian Agent. It is plausible that Agents recorded what were intended as local, customary allotment decisions as official Location Tickets (or other federal instruments, such as Letters of Entitlement<sup>13</sup> or, after 1952, Certificates of Possession), knowingly or unknowingly converting local, customary decisions into federal registrations. Agents were being directed to increase formal registrations and follow standardized processes for land allotments, and so some Agents may have taken steps to formally register Council decisions without fully explaining this to Council. In this way, Councils may have unwittingly started to use the federal system (or at least started having allotments federally recorded without full Band discussion and consideration).

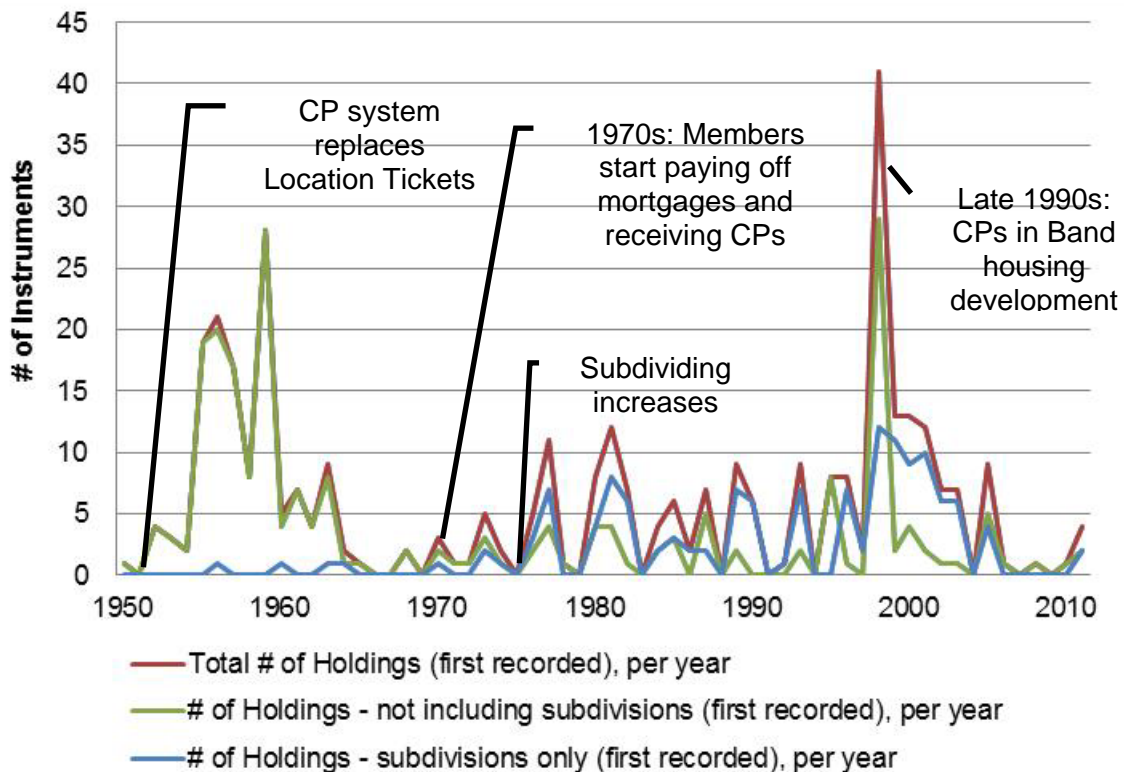
Other aspects of the new standardized federal system influenced local decisions more directly. Joan Phillip (PIB Lands manager) identified that

The [federal] policy at the time was ...that no one could be issued a parcel larger than the division of the membership with the size of the reserve. That is, if there were 100 members and 200 acres, each member could only get 2 acres of land at the time. There have been cases where a council would allot a huge piece of land and the allotment would not be approved by the Minister because of this formula. (J. Phillip, personal communication, 2013)

It is not clear if or how often this occurred with PIB allotments. More generally, the federal government was taking steps to regulate land allotments through use of its approval powers. Data from the federal Indian Lands Registry System show an increase in registrations for holdings on the Penticton reserve 1954 - 1959 (see Figure 5.2). These data were filtered from the raw data on all the 'lawful possession' registrations for PIB, most of which are individually held (though there are some lots that are registered

<sup>13</sup> A "Notice of Entitlement" dated 1955 is mentioned in a PIB BCR dated July 14, 1976.

in the Band's name). These data are approximate as they record the number of parcels registered in the ILRS using the first recorded mention of the holding as its creation date.<sup>14</sup> As discussed previously, it is likely that there were some early registration records existing prior to 1950, but these appear to have not been entered into the federal registry, possibly explaining the spike of registrations after 1952 when the new federal legislation on reserve landholdings came into effect. (See section 6.1.2 for data on PIB's current lawful possessions.) Both Band Council minutes and several interviewees indicate that landholdings began to be recorded on paper around the 1950s (J. George, personal communication, 2012; L. Alec, personal communication, 2012).

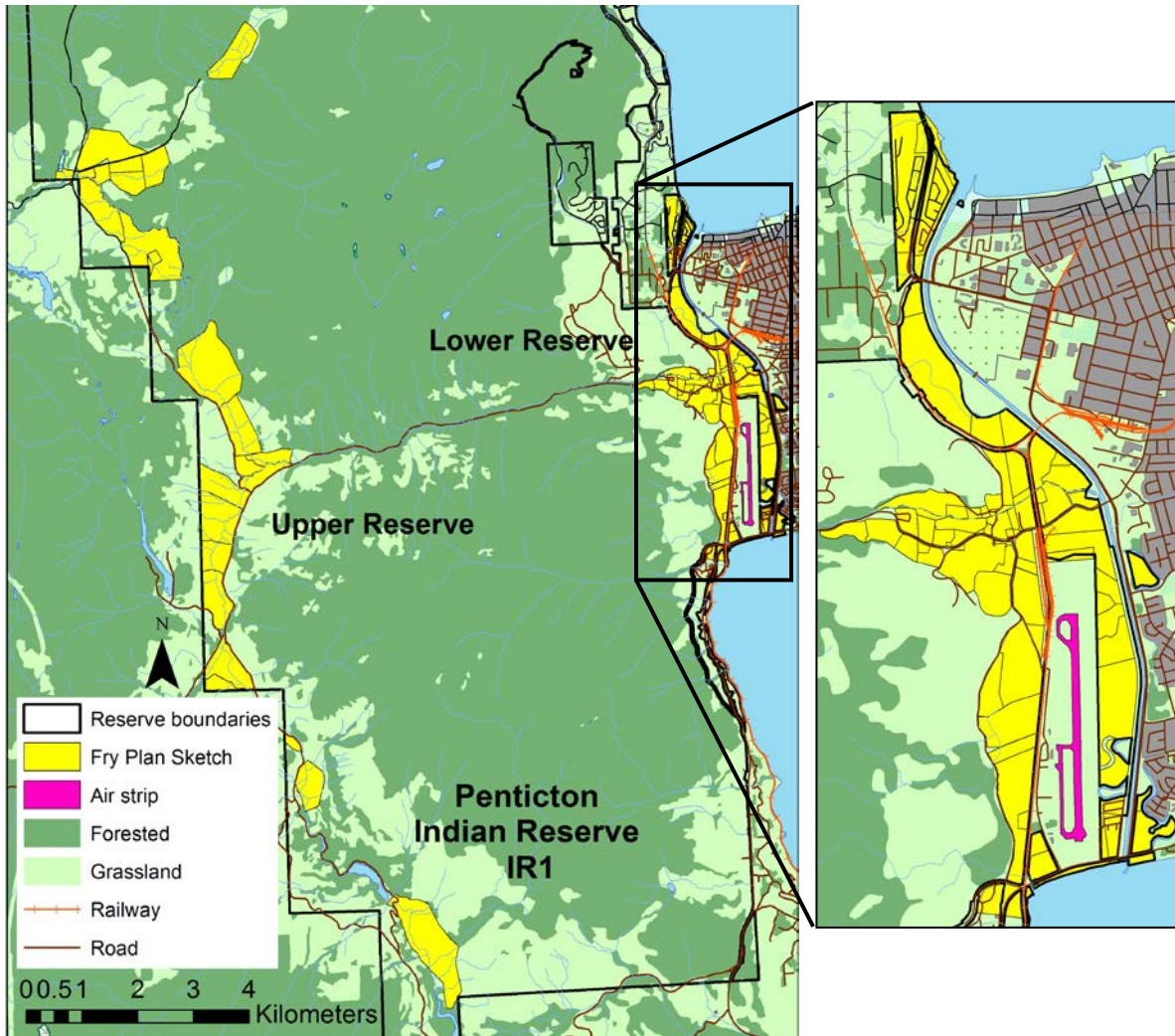


**Figure 5.2. Indian Lands Registry System records for PIB, annually**

Source: Author generated. Data: ILRS, 2012

<sup>14</sup> Some of these first mentions were not allotments, but transfers or other administrative notes; however, given that there was no earlier mention of the lot, these mentions are treated as the earliest recording of the existence of the holding.

Alongside registration, the first maps of landholdings were made around this time, though their accuracy is debated (PIB, 1998a, p. 28). The earliest map of individual holdings in PIB archives is the 1955 Fry plan sketch of existing Notices of Entitlement parcels, digitized in Figure 5.3:



**Figure 5.3. Individual landholdings, from Fry plan, 1955**

Source: Author generated. Data from PIB Lands Department, GeoGratis © Department of Natural Resources Canada. 2012. All rights reserved.

The Fry plan also shows the bench lands that were cut off by the McKenna-McBride Commission in 1913 (the rectangular section in the northeast corner of the reserve) and the fields cut off for the airport in 1938 and 1942 (the lands surrounding the

air strip). The Fry plan is the earliest surviving record of the spatial layout of individual holdings. However, while does show individual landholding parcels, it

... is just a sketch, not a legal survey ... [and when] the surveyors came out to look at the Fry plan and formalize it into an actual survey, all these allotments, there were little mistakes made here and there (J. Phillip, personal communication, 2011)

Likewise, a PIB Elder recalled that when

...they [Agents, external officials]... had meetings and then, they did stuff where nobody understood property lines, so they just went on their own and made a lot of mistakes. And that's what a lot of people didn't like, they argued over it and wanted to change that. (PIB Elder, personal communication, 2012)

Members were not the only ones opposed to the Agents' approach to introducing these and other changes. The Band Council was beginning to exercise more of its own authority, meeting with the Agent only when requested (PIB, 1954a, p. 1, 1954b, p. 1) and resisting rules and regulations that were being imposed (PIB, 1954c, p. 1, 1954d, p. 1). However, the Agent (or 'Superintendent') continues to appear regularly in Council minutes and explains federal laws pertaining to reserve lands (PIB, 1950a, p. 1, 1952a, p. 1). He stresses that allotment of land to individuals is a duty of Council (PIB, 1953a, p. 1) and continues to raise issues associated with individual landholding, including in 1959 forming a committee of members to work on, among other things, the "allotment of land to Band members" and "land leases" (PIB, 1959, pp. 1–2).

The process of land allotments documented in Council minutes in the 1950s and 1960s corresponds to interviewees' oral history of how lands were allotted by Chief and Council, especially concerning the requirement that land be improved (such as through cultivation and/or fencing) and actively used in order to maintain the legitimacy of one's land allotment. These rules are documented in Band Council minutes (PIB, 1949, p. 6, 1950b, p. 1) and evidently they were enforced by the Agent as well as Chief and Council:

Supt. asks if [X] understand that as long as they use the land there is no dispute about ownership.... As long as they can show they are working towards improving the land, their title will not be disputed. Council agrees. (PIB, 1950a, p. 1)

Mr. Hett [Agent] stated that when land is given to a person, they are suppose [*sic*] to improve it and as long as it isn't improved any [lease] revenue would go to the Band (PIB, 1962a, p. 2)

The rules requiring ongoing use could also result in individuals losing their claim to certain holdings, if they had failed to maintain their improvements or had not used the land for many years. These rules were also apparently supported by Agents and Department rules:

Supt. pointed out that the former council had refused to recognize [X] as the owner because he had not improved the land for over forty years, and that the Department, on the strength of that resolution, had confirmed that [X] had forfeited his right to ownership by non-use. (PIB, 1953d, p. 1)

[X] asks what will happen if they can't work their land, will they lose it? Supt. states that if land is left idle or continuously leased out to whites when Indians are in need a recommendation will be sent to the Department that land be sold to some member of the Band who needs it, and the proceeds paid to the former owner for the improvements thereon. (PIB, 1950a, p. 1)

It appears that there was some blending, or at least correspondence, between the federal reserve land tenure rules and policies and the local system of use-based claims to land. Interestingly, PIB Elder Jack Kruger said that around the mid-1950s and 1960s knowledge of the rules of landholding began to be forgotten or lost as elders died or chose not to "pass that information on" (J. Kruger, personal communication, 2012), which appears to correspond with a period of increasing use of federal land tenure rules within PIB. At the same time, through the 1970s and 1980s, federal rules gradually changed to make allotments permanent interests and not contingent upon ongoing use or improvement of the land (Kydd, 1989, p. 17). However, the process of this change and the precise nature of the rights associated with landholdings on reserves was unclear, even to legal scholars at the time (Place, 1981). This change was, in Band Manager Greg Gabriel's mind, "an imposed change, imposed laws and legislation that divided up tracts of land, and gave away a lot of lands" and yet it was not rejected outright because "[t]he community, the ones that voted on it anyway, accepted it" (G. Gabriel, personal communication, 2011) (see section 5.5 for further discussion).

Part of the reason for formalizing individual landholdings was to facilitate leasing parcels of reserve land. The federal government, Bands, and individuals were interested

in turning “unused and unrequited portions of reserves [into] a valuable asset which can earn substantial revenue” (Canada, 1955, p. 12). While Okanagan Bands, the Penticton Band included, did have concerns about leasing in the 1950s and 1960s (Carstens, 1991, p. 170), there are signs that leasing activity and land sales between members increased after the 1950s, likely fuelled by successful experiences of a few members:

People saw them [the original ranch leases] making money, being successful. Then campgrounds started, down by the lake, then everyone along the lake was doing that. And billboards, some were on private land, some on Band land. So people were switching... (E. Alec, personal communication, 2011)

Early leases were typically for small amounts and short terms (J. George, personal communication, 2012). Many individuals did not like how involved the federal government was in formally registered leases and distrusted the Agent’s involvement in arranging leases (J. George, personal communication, 2012). To avoid government involvement and the confusing and potentially costly rules that came with it, many individuals arranged their own small-scale or short-term leases without formal approval, known as ‘buckshee leases’ or ‘handshake deals’ (Carstens, 1991, p. 170).

The increase in leasing and development activities by individual members was a major impetus for improved land management practices on the reserve. As early as the 1950s, the PIB Band Council and individual members realized that there was the potential of increasing numbers of formal and informal leases and recognized the need for management of them. There are records of issues with delinquent lease payments (PIB, 1982a, p. 4), environmental issues with dumping and pollution from lessees (PIB, 1979a, 1979b, p. 2), serious health and safety concerns with a mobile home parks operated by individuals on their land (PIB, 1979c, p. 5, 1980a, 1980b, 1997a, p. 6), and locatees and lessees not following proper standards for lot servicing (plumbing, sewage, access etc.) (PIB, 1982b, p. 2). These pressures pushed Council to develop by-laws and regulations regarding leasing (PIB, 1980c, p. 5, 1980d, p. 5, 1982b, p. 2, 1987b, 1988a, p. 7) and by the 1990s the Band, and the federal government more generally, had more controls in place for large-scale, long-term leases.

## 1960s & 1970s: Further Formalization and Management

As with lease management, overall reserve land management began to gradually decentralize across the country around 1960 (See section 5.3.5). Across Canada, the roles and powers of Agents were slowly reduced and Band Councils assumed more decision-making and administrative responsibilities (A. Bak, personal communication, 2012), though most still operated under the confines of the *Indian Act*. These gradual changes are evident in PIB's Band Council minutes through the late 1960s and 1970s. A major change came in 1974 when PIB members voted to replace the *Indian Act* election system in favour of a locally designed 'election by custom,' championed by Chief Adam Eneas (Indian Affairs, 1975; PIB, 1974a, 1974b). Under the previous system, the Chief was elected by majority of the elected councillors from among themselves (Council, 1975), but PIB's new customary system instead had a four-year term Chief who was nominated separately from councillors at a general Band meeting (nominated and seconded orally by voters present) and then elected by a majority win in a secret ballot by eligible voters (PIB, n.d.). Interestingly, in contrast to the rejection of other aspects of the *Indian Act* regime, the PIB Council continued to use the federal government's rules and procedures concerning individual landholdings (PIB, 1966a, 1966b, p. 1, 1969a, p. 2). In discussions regarding individual holdings at this time, reference is made to papers, land Entitlement papers and Notices of Entitlement (PIB, 1992a, p. 14), "Certificate of land possession," and maps of lots (PIB, 1969a, p. 2, 1972). By 1970, details on individual lots were being registered and maintained by the federal lands registry office in Kamloops (PIB, 1970), and it was reported that of lowlands on the reserve, "all available lands are now individually held" apart from bench lands (Eneas, 1970).

Council's role in land decisions and administering federal policies continued to grow. These new responsibilities required that Council address more and more land-related matters. To help manage this increased workload, in the 1970s Council increased its use of standardized and formalized land management tools, such as surveys and by-laws, but it soon found these to be very politically sensitive (G. Gabriel, personal communication, 2011; J. Kruger, personal communication, 2012). Tensions over land issues pervaded Council business and at times proved divisive. Council minutes indicate that the position of Chief changed relatively quickly over this time, with some Chiefs in office for only 2 or 3 years. Practices and policies around landholdings

fluctuated in correspondence with this, with some Chiefs making effort to formalize and update land policies, and others falling back on the traditions of land allotment and administration of earlier days. One period of attempted change was during Chief Adam Eneas' first term in the early 1970s. Chief Eneas was in favour of economic development on the reserve and attempted several changes to support it: he suggested "a pooling of properties to benefit everyone" in their development project (PIB, 1974c, p. 3); he initiated business development planning processes intended to optimize individual and collective benefits as well as guard against collective costs such as environmental damage (PIB, 1974d, p. 3); Council facilitated individuals getting loans and mortgages by using their lands as collateral held by the Band (PIB, 1973a, p. 3); legal surveying of existing and new lots was initiated (PIB, 1973b, 1989a, p. 3); and he attempted to have more members be aware of and use the federal system for individual holdings (Certificates of Possession).

While CPs and other formal paper documents were in use by this time, not all community members used or recognized them. Efforts to promote them as the standard for confirming landholdings proved contentious. PIB Elder Jack Kruger:

... he [Chief Eneas] asked Band members to come to. And he asked this one question of all the Band elders that were there at the time - Adam asked, who all has certificates of possession to their lands? Not one person could answer him, because nobody knew what a certificate of possession was. ... Nobody even knew we were supposed to have CPs - it was like shock city, I remember the elders standing there looking at each other like 'what the hell are you talking about?' They were asking the Chief, 'what do you mean Certificate of Possession?' 'Well it's paper saying you own the land.' ...all the elders... said 'No - we already know who owns which land, we don't need to write it down,' so they went against it. In fact the majority of people went against the allotment of land and the CPs. (J. Kruger, personal communication, 2012)

Despite opposition from some, possibly the majority, of the community, it seems that further formalization and registration of holdings did occur. The way Adam Eneas remembers it is that when he was Chief he

made a commitment to make sure locatee lands were surveyed ...because many of the lines here were not formally established. They were informal – a fence here, lines were not recorded. (A. Eneas, personal communication, 2011)



Chief Eneas did want to see existing and future holdings formally surveyed and registered, but this did not necessarily mean more land allotments. Some members interpreted the shift away from local, customary rules as promotion of individualized land ownership; however, as documented previously, the shift to externally registered and formalized land tenure rules had begun long before the 1970s. Chief Eneas appears to have been trying to standardize land tenure for all locatees, to avoid the situation of having some members operate under the customary system while others used the federal system. In fact, rather than using surveying and registration as a way to increase land allotment to individuals, Chief Eneas is recorded as being opposed to further allotment. He was “against allotting lands” when houses were being developed, in favour of it remaining Band land so that “if the house is vacated, Band has right to take over house” (PIB, 1973b, p. 2). And significantly, it appears that it was during his tenure that a Band policy was introduced that Chief and Council would no longer allot land to individuals apart from house lots of an acre or less. This policy was referred to by many interviewees as a pivotal shift in the history of landholdings on the reserve; however, there is disagreement about how exactly the policy came into being and why. Explanations range from it being a Council decision based on a desire to preserve Band control over some lands, to being motivated by a desire for fairness or reducing conflict, to being a community-driven push to stop unwise or unjust allotments (Personal communication: A. Eneas, 2011; G. Gabriel, 2011; E. Alec, 2011; C.J. Kruger, 2011; J. Kruger, 2012; J. Phillip, personal communication, 2011). Documents indicate that much of the community discussion was precipitated by concerns over attempts by Chief Archie Jack to have a large allotment (between 112 to 544 acres) issued to himself in 1970 (he was denied because INAC refused to approve such a large allotment, but in 1984 his younger brother, Chief Ernest Jack, granted him a CP that was approved) (J. Phillip, personal communication, 2013).

It is also possible that this policy was influenced by changing policies at Indian Affairs. Around the 1970s, Indian Affairs was changing policies concerning land allotments to make them more controlled, fair, and transparent. Indian Affairs also gradually reduced the maximum size allowed for lot sizes for housing built using Canada Mortgage and Housing Corporation (CMHC) loans to one acre and less (today standard house lots are 0.25 acres), in order to increase housing density and reduce servicing

costs. A PIB Lands staff member reflected that this directive from Indian Affairs was “progressive thinking ...they realized that reserve parcel is never going to get bigger” and it enabled “multiple generations of people having a place to say they’re a CP holder of a lot, but no net loss of land” (PIB Lands staff member, personal communication, 2011). While there are multiple versions of the history of PIB’s allotment-limiting policy, it is likely that all of them factored into the creation and continued support for the policy by Council and members.

While it is possible to identify various reasons for the increased community concern and debate, I was unable to precisely locate when the PIB community formally adopted the allotment-limiting policy. Estimates place it between the late 1970s to mid-1980s (J. Phillip, personal communication, 2013). I was also unable to locate any documents that fully explain the policy apart from a draft PIB lands policy manual (approved in February 2010) that states that allotments for Band housing developments are to be 1/3 acre lots, with larger lots permissible only “under extraordinary circumstances” (PIB, 2010).

In 1975 PIB changed Chiefs again (from Adam Eneas to Morris Kruger) and practices around land allotment and management shifted. Under Chief Morris Kruger, land allotment practices apparently returned towards more familiar, customary rules. Allotments and claims to land were again based upon conditions of use and improvement (PIB, 1977a, p. 1, 1977b, p. 3, 1978a). However, by this time federal government rules for registered individual landholdings had changed to make allotments more permanent. Whereas in the 1950s and 1960s an individual could lose or forfeit their right to possession of land by neglecting or abandoning it, by the 1980s a Certificate of Possession was a permanent allotment, revocable (by the Minister) only in the case of an error in registration, a Band surrender of land, or an expropriation by the Minister (Kydd, 1989, p. 17) (more on this change and its implications in section 5.5).

Perhaps as a result of this change in the legal nature of lawful possession of reserve land, or because of the community support for a ban on non-house lot allotments, PIB made very few non-house lot allotments after the mid-1970s. Most allotments were for house lots and were conditional upon the completion of mortgage (or rental) payments to the Band before the CP was formally registered to the individual.

However, through the late 1970s, 1980s, and 1990s requests for non-house lot allotments continued (PIB, 1980e, p. 10, 1984a, p. 1). By the 1980s the need for clearer land policies was apparent. Council was continuing to refuse large land allotments in most cases, and it was also trying to increase its land base of Band land. It sought to buy land that locatees offered for sale (PIB, 1978b, p. 5, 1981a, p. 3) and considered a policy that would have “all pieces of abandoned land to revert to Band” (PIB, 1981a, p. 3). These efforts, combined with uncertainty around the shifting measures of what constituted a valid claim to land were apparently creating apprehension among community members. Individuals were uncertain of their land tenure security and suspicious of the Band Council’s motives. One member refused to lease her land to the Band because she feared the Band was “trying to take her land away” (PIB, 1980f, p. 2) and another sold her land to another member out of fear that “the Band was going to take it away from her... [and] it would be better if [member] were to get it, not the Band” (PIB, 1985a, p. 4). In 1991, then Band Manager Stewart Phillip “advised Council that it would be beneficial to develop a ‘Land Allocation Policy’” (PIB, 1991a, p. 1). Despite this recognition, Council continued to struggle with the issue of a land policy. Throughout the 1990s and the 2000s, Council refused to consider requests for allotments larger than a standard house lot because the Band had not yet established a comprehensive Land policy or land-use by-law (PIB, 1999a, p. 4, 2000a, p. 5, 2004, p. 4, 2005a, p. 1) or because Council simply “will no longer allocate Band land to individual members” (PIB, 1997b, p. 17, 2005b, p. 4, 2005c, p. 2). Since the 2000s, Council has typically responded to requests with a “standard (request denied) Letter” (PIB, 2000a, p. 5, 2000b, pp. 2–3).

### **Late 1970s – Early 1990s: “We’ve been talking about land issues since the beginning”**

From the late 1970s onwards, the PIB’s land administration became more bureaucratized. In 1977 the Band was delegated authority to manage its health, education, and land administration (J. Phillip, personal communication, 2013). Day-to-day land issues such as sales and transfers of lots between members, subdivisions of lots, and requests for parcel surveys and information, were handled by the PIB Lands Department and Lands and Estates Officer (later the Lands Manager), not Council (PIB, 1988b, p. 8). This trend is also apparent in the records of Band Council Resolutions from

1973 (earliest available in archives) to 1990, which show a decrease in the number of Band Council Resolutions (BCRs) issued to confirm land ownership and approve leases.

While Council dealt with fewer administrative details concerning individual landholdings, its roles concerning overall reserve land management continued to increase, spurred by increasing delegation of management authority to the Band, community development projects, and increased leasing and development by individual landholders. The minutes in the late 1970s and 1980s mention Council's ongoing desire for more community planning (PIB, 1979d, p. 4, 1981b, p. 4), zoning for development (PIB, 1985b, p. 1), and better information and mapping of landholdings to facilitate development planning (PIB, 1980e, p. 7), including legal surveys of lots.

Council's efforts to increase its powers of use and management of lands and housing were not welcomed by all. The period between the 1980s to the mid-1990s was politically volatile for the PIB. Among the many reasons for the political and social tensions were a number of land issues. There was still a need for housing on the reserve, and some Band members disagreed with the way that housing was being developed and managed (PIB, 1983, p. 13). Across the community, there was frustration with inconsistent and shifting Band rules and policies. At a general Band meeting, Band members spoke about the need to formalize Band policies and regulations (PIB, 1983, pp. 10–11). What many people wanted, and continued to ask for, was clearer Band by-laws and policies, in particular concerning land issues. As Chief Stewart Phillip is quoted as saying: "Of all the 24 years being at this table we've been talking about land issues since the beginning" (PIB, 2008, p. 4).

By the 1970s and 1980s, most land records had been formalized and based on legal documentation, and so the resolution of disputes depended on what documents were in existence. Gradually, as legal requirements and restrictions on the *Indian Act* land tenure system increased, Council had less direct control over the resolution of disputes. As well, legal documents and surveys became more prevalent and, given their power in the courts, they were used more regularly as the determining factors in land disputes (PIB, 1984b, p. 1, 1997c, p. 4; A. Eneas, personal communication, 2011) and the verbal, 'handshake' deals of the past were considered unreliable (PIB, 1979a, p. 2, 1985a, p. 12). From the late 1980s onwards, the Band Council minutes show that land

disputes were increasingly resolved using a combination of official documents and more traditional methods such as confirmation by Elders and circle discussions (PIB, 1981c, p. 2, 1989b, p. 2, 1989c, p. 5, 1991b, p. 9, 1992a, p. 13, 1996, p. 2, 2008, p. 3). However, in some cases it is one individual's word against another's (PIB, 1992a, p. 13) and there is concern about reliance on Elders' knowledge of property lines because over time there are fewer of them who still remember them (PIB, 1989a, p. 3, 2008, p. 4). Since the 1980s there has been an ongoing effort to get disputed or unrecorded property lines clarified and resurveyed (PIB, 1989d, p. 3, 1991c, p. 2), often combined with a review of any existing old documents and old fence lines (PIB, 1991b, p. 9, 1998a, p. 27), and site visits to the properties with Elders (PIB, 1991b, p. 9, 2008, p. 3). More on current land conflicts and dispute resolution is discussed in Chapter 6.

In the late 1990s, work on land use by-laws and policies continued and these formal Council prescriptions gradually increased in number. In addition to a general land use bylaw from 1990 and a waste disposal by-law that accompanied it, by 1997 new developments had to undergo an environmental assessment study (PIB, 1997a, p. 50), and Council formally assumed "the right to control and restrict places of entertainment" (PIB, 1998b, p. 14). For many years, Council supported and paid for surveys (PIB, 1999a, p. 6, 2000a, p. 5) and subdivisions (PIB, 2000c, p. 4, 2005d, p. 3) for individual landholders in an effort to encourage formal registration. Community planning and development efforts also continued, including supporting development on individually held lands (PIB, 2006a, pp. 1–2). A major change came in 2007 with the Band's adoption of property taxation of non-member residents. Most recently, Council authorized holders of large land parcels to use "the 'large lot infill process'" to "subdivide and provide housing lots for new housing to qualified family members" (PIB, 2009). However, even with these changes, it was still repeatedly noted in Council minutes and in interviews that more land policies and by-laws are needed to comprehensively regulate land use on individual and Band land (PIB, 1997d, pp. 22–23, 1998a, p. 18, 1998b, p. 13, 1998c, p. 20; J. Phillip, personal communication, 2011; C.J. Kruger, personal communication, 2011; E. Alec, personal communication, 2011; G. Gabriel, personal communication, 2011). Contemporary land management is discussed in Chapter 6.

## 5.5. “However it came to be...”: PIB Land Tenure Changes

PIB members and staff often asked me about the process by which the CP system was adopted - how the land tenure system had changed and why. In this section I summarize how PIB shifted from a local, traditional tenure system to the federal one. Figure 5.5 is a visual summary of the major shifts.

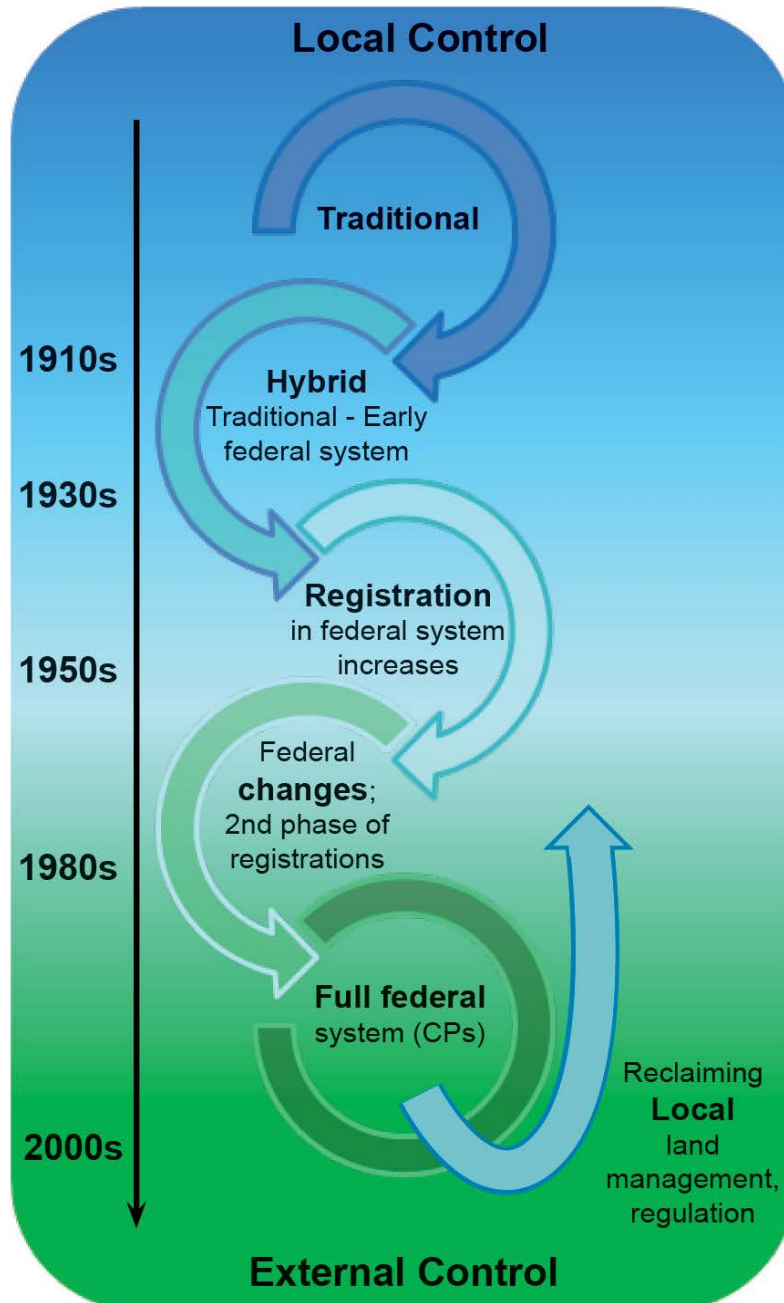


Figure 5.4. PIB's transition from local to external control over land tenure

### **5.5.1. *Traditional, Local Land Tenure System***

The traditional local land tenure system was based on granting of lands to an individual or family, usually by the Chief. Ongoing legitimacy of one's tenure depended upon demonstrated and appropriate use and management of the land. This legitimacy would be confirmed and protected by the Chief, and more importantly, other community members. Records of land allocations were recorded orally and passed down through families. Land transactions and deals were also recorded verbally by those involved and by family members and other respected community members. Landholdings were passed down through families, but family members were required to use the land or it would revert to the Band. Under this system, which continued into the early history of the PIB reserve, control and authority over the local land tenure system legally and practically rested with the Chief and community members and the federal government was not involved (similar to First Nations that use customary tenure systems today).

### **5.5.2. *Shift 1: Hybridization Between Traditional and Early Federal Systems***

With European settlement, reserve creation, and increasing intervention and influence by external government agents, changes to land tenure were gradually introduced. At first, government officials simply encouraged the formal allotment of land to individuals by local leadership (traditional Chiefs and then the Band Council) but holdings were not formally registered. Land allotment continued in the traditional way and was verbally recorded at least until the early 1910s (Royal Commission, 1913b) but more likely well into the 1930s. As described in section 5.4.3, a number of factors led to increased interest in the federal land registration system, mainly: the influence of the government agents, the instability and insecurity people felt about land tenure, and local social, political, and economic changes. The two land tenure systems (local and external) began to blend as individuals sought to increase their land tenure security and as government agents came under pressure to increase formal registration of landholdings on reserves and enforce federal laws concerning reserve lands.

As I discuss in section 5.4.3., certain federal laws were similar to the local system and locally acceptable, such as individual Band members being allowed to hold land as

allotted to them by Chief and Council and the (historical) federal requirements that one demonstrate ongoing worthiness to hold land by using and improving it. In the early federal system, holdings registered with location tickets were less than permanent ownership: while location tickets could be passed on to children (they did not expire at the end of the holder's lifetime), individuals could be legally dispossessed of their lands or have their allotment revoked, provided they were compensated for improvements (*Indian Act, 1876, 1906, 1920, 1927*). As evidenced in PIB's Council minutes, individuals could lose their land if they did not actively use and maintain it. However, other aspects of the federal system, such as registration of holdings with paper documents, were less familiar and distrusted or rejected completely. In PIB's experience, some – but not all - landholdings were registered with government agents, often under advice or pressure from the agent or sometimes under duress, such as requiring registration to receive compensation for expropriated lands or in order to receive lease payments.

While registration of holdings and compliance with some federal reserve tenure laws did increase, PIB's traditional land tenure system continued to dominate local perceptions of landholder rights, particular with regards to them being contingent upon demonstrated and appropriate use. As well, land transfers and deals were verbally agreed upon, sometimes with the knowledge of Council, but more often just acknowledged by the families involved and other community members. Immediate and practical approval and protection of one's tenure was provided by the community and Band leadership, although the new written records offered another level of protection, particularly against external threats (such as expropriation, encroachment by a settler, or an uncooperative lessee). Across Canada, similar changes were occurring on reserves, with many First Nations communities gradually adopting, willingly or unwillingly, aspects of the federal system, but often with modifications or hybridizations with local tenure systems (Flanagan et al., 2011, p. 31; Godden & Tehan, 2010, p. 7).

### **5.5.3. *Shift 2: Registration in Federal System Increases***

Around the middle of the century, PIB's registration of individual holdings in the federal system increased. This was partly due to introduction of the Certificate of Possession system and increased emphasis on formally registering and surveying landholdings on reserve (from both the federal government and the PIB Band Council



which was increasingly involved with administering reserve lands). The first wave of registrations happened in the 1950s, likely as a result of previous records held by the Indian Agent being formalized into the national registry. By this time there was also increased awareness of the benefits of registration (such as increased leasing opportunities or legal protection in land disputes) among some members.

At this point in the 1950s and 1960s, even though the use of federal laws and registration had increased and this had brought certain changes to the local system (such as requiring federal approval of land allotments, transfers, or other changes to landholdings), the nature of individual landholdings (at least on the PIB reserve) appears to have still been conditionally-permanent, not the permanent ownership that a CP constitutes today. The condition that one continues to use and improve one's land as a requirement for a legitimate claim to land and maintenance of one's tenure was enforced both by Council and government agents:

[Xa] asks what will happen if they can't work their land, will they lose it? Supt. states that if land is left idle or continuously leased out to whites when Indians are in need a recommendation will be sent to the Department that land be sold to some member of the Band who needs it, and the proceeds paid to the former owner for the improvements thereon. (PIB, 1950a, p. 1)

Supt. asks if [Xb] understand that as long as they use the land there is no dispute about ownership.... As long as they can show they are working towards improving the land, their title will not be disputed. Council agrees. (PIB, 1950a, p. 1)

Supt. pointed out that the former council had refused to recognize [Xc] as the owner because he had not improved the land for over forty years, and that the Department, on the strength of that resolution, had confirmed that [Xc] had forfeited his right to ownership by non-use. (PIB, 1953d, p. 1)

Mr. Hett [Agent] stated that when land is given to a person, they are suppose [*sic*] to improve it and as long as it isn't improved any [lease] revenue would go to the Band. (PIB, 1962a, p. 2)

I have not confirmed whether this situation was occurring on other reserves outside this Agency, and other researchers and practitioners have not found similar situations in their experience (C. Alcantara, personal communication, 2013; L. Pardy, personal communication, 2013). There are several plausible explanations for why land

tenure rules on the PIB reserve continued to require ongoing use and improvement of landholdings and these are discussed in Appendix F.

Part of the reason this was occurring may be related to the government's practice of conditionally approving allotments:

[The federal government] would allot a parcel under "specific" conditions... [in an example case] the individual was asked to over the period of a year: 1. Get approval of Chief and Council through a Band Council Resolution 2. Fence 3. Improve the land and 4. Reside on it. If all conditions were met, then and only then would [the federal government] issue a Cardex Card, a Notice of Entitlement, [or] a Location Ticket... Once the individual was issued a legal document recognizing their title, they cannot "lose" it. [The federal ministries] have never, that I am aware of, taken away a title that has already been issued. When the person(s) demonstrated or fulfilled their conditions after one year, then they got title. (J. Phillip, personal communication, 2013)

This practice was likely in response to what the federal department had identified as an issue with "absentee landlords":

The Location Ticket System ... has been found to involve a problem which is giving the department some trouble through the creation of what might be described as absentee landlords. In many instances Indian members or descendants, having obtained location tickets, leave the reserve for lengthy periods or permanently, but continue either to hold their lands unproductive and unoccupied or to lease them to white tenants. This is a most undesirable situation, and is forcing the department to the consideration of some definite policy of basing land ownership on occupancy or beneficial use. (Canada, 1936, p. 23)

As a result, what was locally understood as an allotment or permission to use land similar to the traditional system, in the federal system might have been conditional and not formally registered until conditions were met. Conditional allotments are involved in several of the recent and ongoing land disputes within PIB.

#### **5.5.4. *Shift 3: Federal System Changes Without Local Control***

Sometime between the 1960s and 1970s there was a shift in how individual landholdings on the Penticton reserve were treated in practice. It seems that around this

time the federal policy on landholdings was clarified with the result that allotments were confirmed as functioning as permanent title to reserve land. In 1981, a report to the Department of Justice concluded that:

overall it appears that today an Indian holding land under a Certificate of Possession does indeed have a 'right' quite analogous to an interest in fee simple, even though such a right is subject to certain unique limitations (such as the sale of land to Indians within the Band).  
(Place, 1981, p. 13)

This conclusion concerning the permanent nature of 'lawful possession' has largely emerged from the courts treating it as such, although they have emphasized that its precise legal nature "defies any rational classification under our traditional property law" (Alcantara, 2003, pp. 406–407). This change was not a decision made by First Nations, or even with First Nations input. Instead, the legal nature of the holdings they had created shifted. At least in the case of PIB, up until the 1970s holdings had been allotted and managed with the understanding that they required ongoing approval by Council and were dependent upon conditions of use and improvement.

Perhaps more significantly, when the *Indian Act* was revised in 1952, two categories of allotment were created: Certificates of Occupation (COs) were introduced as the temporary and conditional form of landholding and Certificates of Possession (CPs) were the permanent form, not limited in length or conditional upon certain uses. When the federal tenure system was changed, all existing Location Tickets were converted to CPs (*Indian Act*, 1951, s.20 (3)), not COs. The introduction of COs signalled, legally, that CPs were a more permanent and secure form of landholding. Because the conversion of Location Tickets to CPs was done automatically by the 1951 *Indian Act*, local Council or Bands did not have a chance to control how the legal nature of their registered landholdings was changing. They were left with the result that all existing land allotments, granted under local understandings of their legal nature and permanence, were now externally determined to be permanent, not conditional upon use or improvement, and protected by the external legal system (as discussed in Chapter 6, some individuals consider these changes improvements while others disagree).

While the roles and influence of federal agents decreased after the 1960s, and even though Councils always held the decision-making authority over the allotment of land to individuals, these institutional changes to the federal tenure system were significant. Once a Council allots land to a member, a subsequent Council cannot ignore or retroactively remove that allotment; the allotment remains legally enforceable. For a Council operating under the conceptions of the traditional system but registering the holdings with the federal government, the act of federal registration and approval meant that those allotments would no longer operate under the traditional system and Council loses its authority to change the nature or conditions of the holdings.

A second, smaller wave of registrations occurred in the 1970s, partly as a result of an effort by Chief and Council to get all existing landholdings surveyed and officially recorded. Another reason for the increase was the introduction of Band funded housing arrangements that could enable individuals to secure a CP to their house lot. Much of this standardization and registration of holdings with the federal system was motivated by perceived benefits of registration and attempts to reduce conflicts over land. As well, problems in the hybrid land tenure system were becoming apparent and leading to tensions over land. Many of the disagreements over the land tenure system appear to have been based on different perceptions of the legitimacy of the various rules and authority over land. While some individuals favoured the local system, others, including Council, understood the power of the federal system and the individual tenure security, increased economic opportunities, and legal protection it offered.

### **5.5.5. Current**

Today, CPs continue to be treated as permanent holdings, and while they do not include the full powers of fee simple title held off reserve, CPs grant the legal right to occupy the land, use it, sell or devise it to another Band member, lease it, or develop it (McDonald & Jordan, 2009, p. 1.1.3). The *Indian Act* land tenure system and lands system has become more precise concerning individual interests and the role and “arbitrary” powers of the federal government have lessened (L. Pardy, personal communication, 2013). However, while Chief and Council have local authority over land decisions, such as through by-laws (if they choose to operationalize them and if regulations are approved by AANDC), they do not have control over the federal reserve

land tenure system and so do not have local control of land tenure, if their reserve has federally registered individual holdings. Control over the legal design of the tenure system currently rests with the federal government and Canadian courts. PIB and other First Nations are today working to reclaim their local control over land management, and in some cases, the land tenure system itself (Rakai, 2005, p. 4). [Bands that never adopted the federal system and use customary landholding systems have retained more local control over land tenure.]

In summary, control over the legal nature and functioning of individual landholdings shifted gradually from the local to external, not in a single change. The PIB land tenure system slowly integrated with the federal system and the registration of interests between the 1930s and 1970s locked PIB into the federal system. When the federal definitions of land tenure changed, PIB no longer had control over that change. This helps to explain the apparent incongruity between the federal land tenure system feeling like “an imposed change” that was nonetheless “accepted” by the community (G. Gabriel, personal communication, 2011). As Carstens (1991, p. 31) has argued concerning early Indian policy generally,

although there was negotiation between the two parties, the relationships were nearly always asymmetrical and skewed by potential white hegemony and power in favour of the newcomers, on whose terms negotiation was initiated and proceeded.

These dynamics are apparent in PIB’s land tenure history. While there was initially blending of the two systems, the nature of the colonial system was such that power over the legal nature of landholdings remained with external authorities. In this light, the PIB’s policy of limiting land allotments and ongoing interest in reviving aspects of the traditional tenure system can be seen as responses to this loss of control. The federal system was adopted by PIB members and leaders, in some cases willingly but in other cases unwillingly or with limited understanding. Today local land tenure is defined by federal law. However, PIB retains influence through internal land policies and practices and could potentially leverage this further, as I discuss in remaining chapters.

## **6. Individual Landholdings and PIB's Land Management**

This chapter describes PIB's contemporary land tenure and land management and potential impacts of the *Indian Act* individual landholdings system. In the first section, 6.1, I describe the current land management context, land distribution, and local perspectives on land rights. In 6.2, I summarize land management issues and other strengths, challenges, and changes associated with PIB's individual landholdings, as identified in interviews.

### **6.1. PIB's Contemporary Land Tenure and Management System**

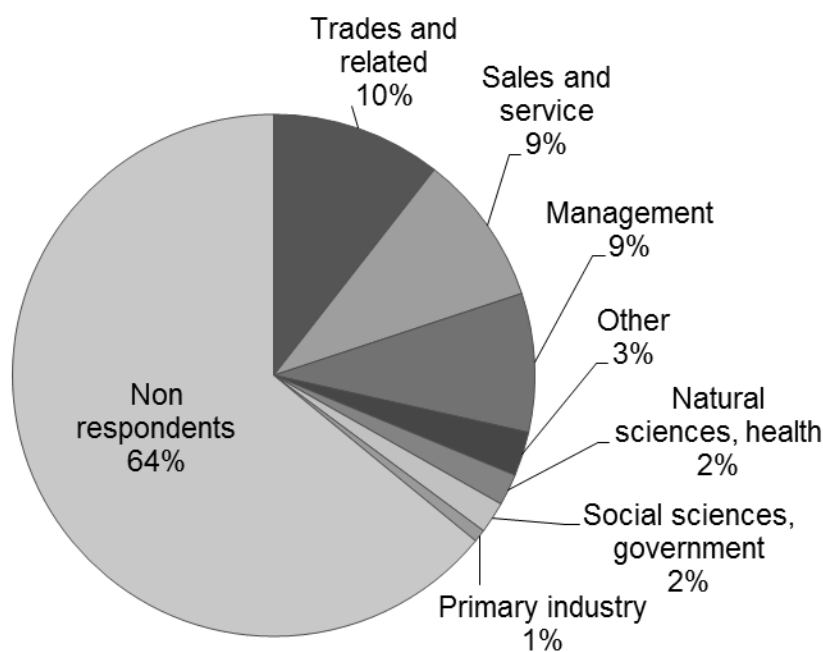
To understand the structure and functioning of a land tenure and management system, it is necessary to consider the larger institutional context, such as is described by the IAD framework (section 4.1.4.) (Ostrom, 2011) and “the economic, political, and social systems which produce [the land tenure system] and which [the land tenure system] influences” (Bruce, 1998, pp. 1–2). Therefore, I begin this section with a very brief profile of PIB's socio-economic and governance contexts before describing the land tenure and management systems.

#### **6.1.1. *PIB Socio-Economic Conditions and Governance Systems***

##### **Socio-Economic Conditions**

The PIB reserves are classified by AANDC as ‘urban’ reserves because they are close to the City of Penticton (AANDC Geomatics, 2012). Economically, Penticton Band members are intertwined with the economies of the City of Penticton and the Okanagan region generally. Of the 1,022 current Band members, over half live on-reserve (AANDC, 2013b), with other members living elsewhere in the census region and in the United

States and other provinces. Like the Canadian Aboriginal population generally, PIB's population is young and has lower median incomes and higher unemployment than national and regional rates. In the 2006 census,<sup>15</sup> PIB members reported a 31.6% participation rate<sup>16</sup>, 25.8% employment rate<sup>17</sup>, and 19.8% unemployment rate<sup>18</sup> (AANDC, 2013c). Of the 1,280 members who reported their industry and occupation, the majority worked in trades and related sectors, sales and service, or management (AANDC, 2013d), see Figure 6.1:



**Figure 6.1. 2006 census data on occupations of PIB members**

Source: Author generated. Data: AANDC, 2013

Note: 1,280 respondents reported in this question

<sup>15</sup> Note: Census data includes members living on and off reserve.

<sup>16</sup> Labour force participation rate for a defined group = total labour force in group, expressed as a percentage of the total population of group (Statistics Canada, 2009).

<sup>17</sup> Employment rate for a particular group = number of persons in group employed in the week prior to Census Day (May 16, 2006), expressed as a percentage of the total population of group (Statistics Canada, 2009).

<sup>18</sup> Unemployment rate for a particular group = the unemployed in group, expressed as a percentage of the labour force in group, in the week prior to Census Day (May 16, 2006) (Statistics Canada, 2009). Employment rate and unemployment rates therefore do not sum to 100%.

According to 2006 census data, 1,240 PIB members over the age of 15 reported they had income, on average \$25,199, and 545 of these had earnings, on average \$19,579.<sup>19</sup> Overall for PIB members, reported earnings represented 34% of income, government transfers another 33%, and other money, such as lease income, provided the remaining 33% of income (AANDC, 2013e). PIB's median household income in 2006 was \$34,620, whereas the Canadian median family income was \$63,600 (\$62,600 in B.C.) (AANDC, 2013f; Statistics Canada, 2006a).

Over the last three decades, PIB has invested heavily into housing and housing repairs for members, particularly homes for families (J. Phillip, personal communication, 2011). In the 2006 census, PIB members reported 725 houses, only 85 (11.7%) of which needed major repairs (AANDC, 2013f). Of the 725 households reported in 2006, 445 (61.38%) were single family, 390 were couples (53.79%), 50 (6.9%) were single mothers, 10 (1.38%) were multi-family households, and 270 (37.24%) were non-family households (AANDC, 2013f).

Education has also been a longstanding priority for PIB. The 2006 census reported that of 1,280 PIB members responding, 340 had obtained their high school diploma as their highest level of education (26.56% compared to 21% of the national Aboriginal population), 435 had trades or apprenticeship education (33.98% compared to 14% of the national Aboriginal population), and 90 had college or university certificates or degrees (7% compared to 27% of the national Aboriginal population) (AANDC, 2013g; Statistics Canada, 2006b). In 2011 PIB opened its new school building, the Outma Sqilxw Cultural School, which was designed to reflect Syilx concepts and traditions and which offers Syilx language instruction and other cultural activities to students. A small, but growing, percentage of members can speak and understand Nsyilxcen and language and cultural revival is a major priority of PIB (PIB, 2013b).

## **Governance System**

As mentioned in Chapters 3 and 5, PIB has chosen to govern itself through customary elections, meaning that the federal government has no role in PIB elections.

<sup>19</sup> For reference, the median earnings for the Canada population in 2005 was \$41,401 and in BC it was \$42,230 (Statistics Canada, 2006c).



Elections occur every four years and members vote to elect one Chief and eight Councillors from a slate of candidates nominated by other members at a general Band meeting. Both men and women run for Chief and Council, and typically several families are represented on Council. Councillors each have a portfolio that connects them to a Band Office department, program, or service (PIB, 2013c). It is not unusual for some Councillors to currently work or have previously worked in Band Office departments. The previous Chief, Chief Stewart Phillip, held the seat for 14 consecutive years, and the current Chief, Chief John Kruger, was re-elected to his second term in 2012. Chief and Council meetings occur twice a month and are structured with an agenda, voting on motions, and a required quorum.

As with most communities, there are differences in opinion regarding the degree of community engagement expected of Chief and Council. Currently, the Annual General Meeting is a session for all community members to ask questions of and receive updates from Chief and Council and Band Office departments. Major community decisions go to the community for a referendum, such as the 2007 adoption of property taxation of land or housing leased or rented by non-members. Otherwise Chief and Council deal one-on-one with issues that members bring to their attention, sometimes with the individuals' attendance at a Council meeting, other times with the Chief and/or Councillors meeting with them individually, or delegating the issue to the appropriate department. However, I did encounter community members who complained that Council does not pay enough attention to community members and that they feel disconnected from what Council works and decides on. A frequent request made by community members, especially Elders, is that the Chief and Councillors should meet with them more regularly. However, many of the interviewees involved with Council or the Band Office thought relations between Council, the Band Office, and members were improving with recent initiatives such as clearer protocols for committees making Band Office hiring decisions (T. Kruger, personal communication, 2012) and the CCP process (C.J. Kruger, personal communication, 2011; J. Phillip, personal communication, 2011; E. Alec, personal communication, 2011).

There are ten Band Office departments: Administration, Social Development, Finance, Property Taxation, Economic Development, IT, Health, Housing, Lands Management, and Education. Funding for Band administration, programs, and services

is provided from earnings from Band corporations, funding transfers from the federal government, and property taxation of non-members and leased lands.

At the family level, there are approximately 12 main family groups in the Penticton Band. Individuals seem to identify strongly with their extended family group. While rivalries and disputes between and within families do exist, according to interviewees social relations in the community were much worse in the 1970s and 1980s than they are today (J. Phillip, personal communication, 2011; E. Alec, personal communication, 2011). From my perspective, families appeared to be close-knit and large family gatherings were frequent. For business and personal affairs family members are often involved.

### **6.1.2. *Current Distribution of Land***

During interviews and conversations, many Band members, locatees, Band Office staff, and Council members asked me about the distribution of reserve land at PIB, such as: 'How much land is held by locatees?' 'How much is held by the Band?' 'How many members hold no land?' and 'How many members hold large land parcels?' Up to date information on land distribution is not fully available currently and the PIB land use planning process aims to collect this. In this section I summarize data that I had access to from the Geomatics office of AANDC and PIB. These data include information on lawful possession parcels, leased parcels, designated parcels, surveyed Band land parcels, and total reserve area. These data only contain information for current lawful possessions (not 'retired' holdings that AANDC Geomatics has recorded as existing historically but which have since been updated through transfer, subdivision or otherwise). These data also do not indicate whether a lawful possession is held by individual member(s) or if it is in the Band's name (which can occur if the holding is a Certificate of Occupation, if the Band purchases the lot, or if the Band is holding the lot as loan collateral). I also was unable to access data on how many individuals have no land, but interviewees estimated this to be a growing number, although some members will likely inherit land. Information on how much land is held by particular individual members was also not available to me. These limitations aside, these data are a window into current distribution of land in PIB and I present a summary here (additional data in Appendix D). I discuss implications of land distribution in section 6.2.2.

To begin, Figure 6.2 shows 2012 map data on current lawful possession parcels. Areas of land allotment have not changed much since the first registrations in the 1950s. Large land parcels were allotted in the upper reserve, where there was more ranching; medium parcels were allotted on the flat lowlands where there were hay and grain fields; and many smaller parcels were allotted around the lower reserve settlement for house lots and small gardens and orchards. The Band housing developments that were started in the 1980s can be seen in the lower reserve area. Other than these house lots, most allotments have clustered around the existing ones, with some boundaries changing slightly and occasional subdivisions creating new lots from existing ones. Interviewees confirmed that many earlier allotments have been subdivided into smaller lots (T. Kruger, personal communication, 2011).

Table 6.1 summarizes current distribution of reserve land by tenure type, number of parcels, and area. Figure 6.3 illustrates this distribution (when interpreting these data, remember that the majority of the PIB reserve area is mountainous and forested).

**Table 6.1. Summary of PIB IR 1 Land by Tenure Type**

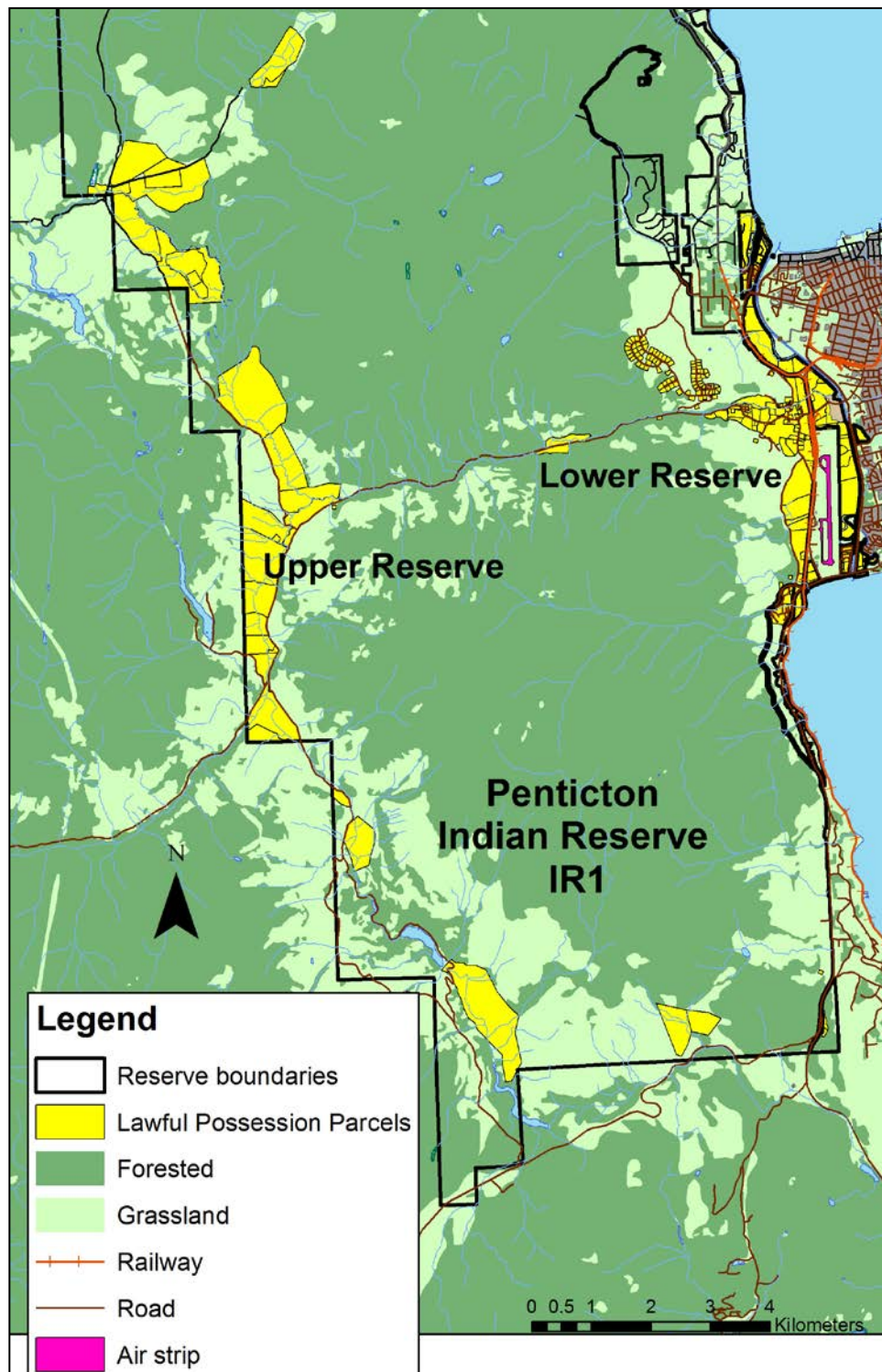
Reserve total area (hectares):	19,346.83
Parcels held as lawful possession	228
Area held as lawful possession (hectares)	1,242.89
% of reserve area as lawful possession	6.42%
Surveyed Band land <sup>20</sup> parcels	504
Area held as 'Band' parcels (hectares)	5,428.55
% of reserve area as 'Band' parcels	28.06%
Leased parcels <sup>21</sup>	369
Total area leased (hectares)	44.75
% of reserve area leased	0.23%
Area of unparcelled Band land (hectares)	12,675.39
% of reserve area as unparcelled Band land	65.52%

Source: AANDC Geomatics Office, 2012.

Note: 'Retired' parcels (parcels that were subdivided or otherwise updated/deactivated) have been removed

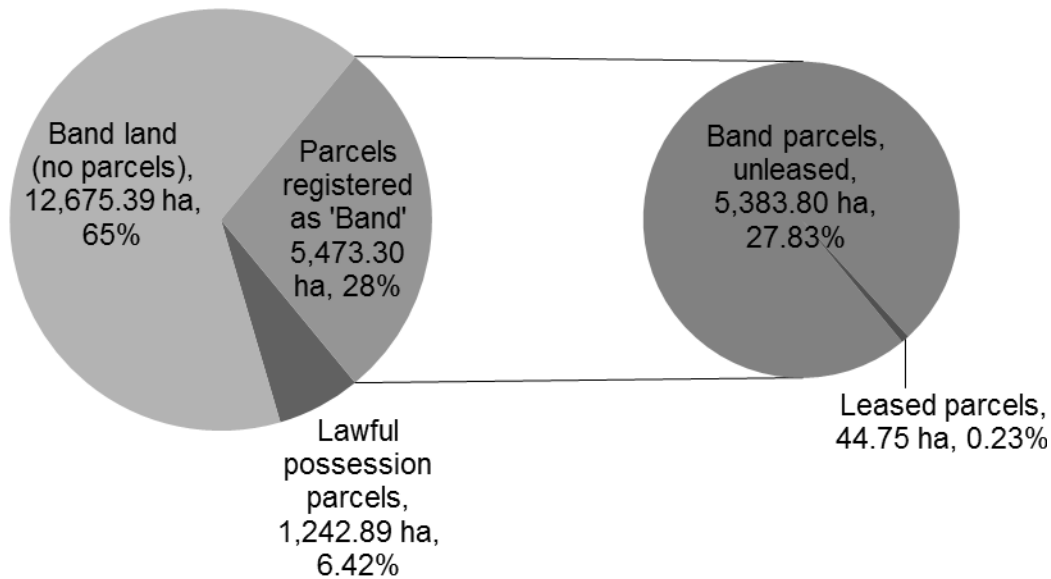
<sup>20</sup> This Band land total has active easements, one duplicate, and one 'to be returned' parcels removed (totaling 89.9 hectares).

<sup>21</sup> In the dataset provided to me, all leased parcels were registered as Band parcels. However, many current leases are by CP holders and so this is an information gap in the dataset, possibly as a result of lease registration procedures at AANDC. This may also mean that some, or all, leased lawful possessions are not properly accounted for in the total of lawful possessions. I was unable to rectify or clarify this with the information currently available. Also note that not all leases are external, many are to other Band members.



**Figure 6.2. Current Lawful Possession parcels, 2012.**

Source: Author generated. Data from PIB Lands Office, GeoGratis © Department of Natural Resources Canada. 2012. All rights reserved.



**Figure 6.3. Percentages of PIB reserve land area by tenure type**

Source: Author generated. Data: AANDC Geomatics, 2012

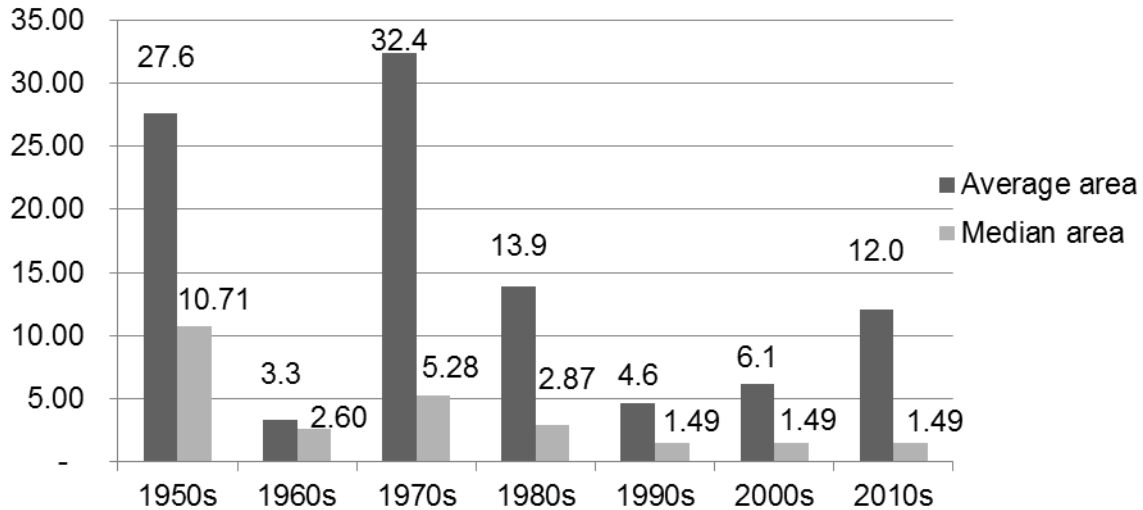
Note: Total Reserve Area of IR1 is 19,346.83 hectares. See footnote 21 for explanation of data on leased parcels.

As well, the AANDC Geomatics (2012) data show that most of the current lawful possession parcels were registered in three decades (for full graph see Appendix D):

- 1950s (43 parcels, 19% of total number)
- 1990s (64 parcels, 28%)
- 2000s (46 parcels, 20%)

A substantial number of the early registrations are still current lawful possession parcels, but these are outnumbered by ones registered in the past three decades. These recent registrations include new lawful possessions registered in Band housing developments, as well as the transfer, subdivision, or other updating of earlier, existing lawful possessions.

Size of lawful possessions at PIB has varied over time. Figure 6.3 graphs average and median size (acres) of lawful possessions registered, by decade,<sup>22</sup> showing that allotments were larger prior to the 1980s and have decreased in size since.

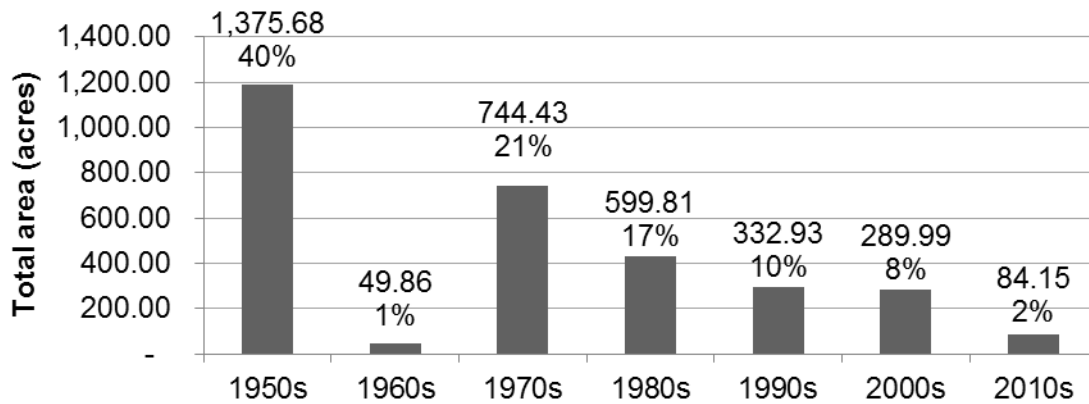


**Figure 6.4. Average and median lawful possession size (acres), by decade**

Source: Author generated. Data: AANDC Geomatics office, 2012.

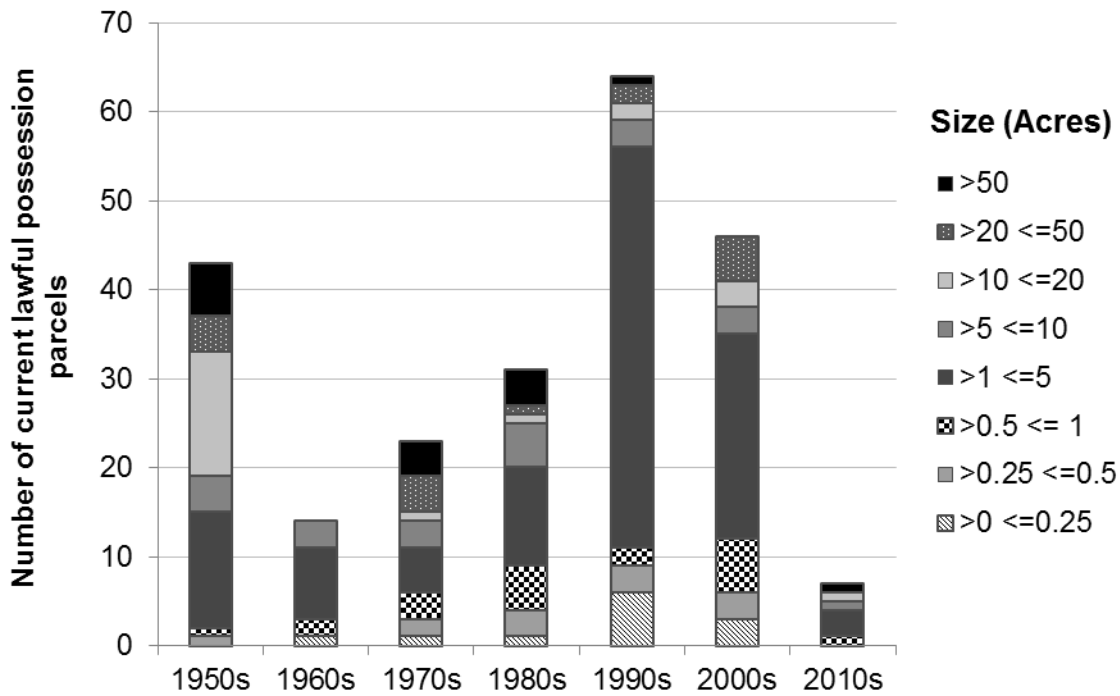
Another way to look at these data is to consider the total area of land under current lawful possessions, by decade of registration. Figure 6.4 shows both the total area (acres) of lawful possessions registered in each decade and how much of the total current lawful possession area this represents. To bring these data together, Figure 6.5 graphs the number of current lawful possession parcels by decade of registration and by size category (acres). This graph shows how most of the current lawful possession parcels are between 1 and 5 acres in area, and the majority of these were registered in the 1990s and 2000s. There are, however, parcels ranging in size from less than a quarter of an acre (mostly from the last two decades) to over 50 acres (mostly from before the 1990s). Table 6.2 summarizes these data numerically.

<sup>22</sup> These data are limited to current lawful possessions only, not past ones that were modified into the currently existing ones, and are for all lawful possessions, those held by individuals and by the Band.



**Figure 6.5. Area of land (acres) under current lawful possessions, by decade of registration**

Source: Author generated. Data: AANDC Geomatics office, 2012.



**Figure 6.6. Current lawful possessions by size and decade of registration**

Source: AANDC Geomatics office, 2012.

**Table 6.2. PIB Lawful Possessions by Size and Decade of Registration**

Average size of current LPs (acres)	# of current LPs (total)	1950s	1960s	1970s	1980s	1990s	2000s	2010s
>0 <=0.25	12	0	1	1	1	6	3	0
>0.25 <=0.5	12	1	0	2	3	3	3	0
>0.5 <= 1	20	1	2	3	5	2	6	1
>1 <=5	108	13	8	5	11	45	23	3
>5 <=10	22	4	3	3	5	3	3	1
>10 <=20	22	14	0	1	1	2	3	1
>20 <=50	16	4	0	4	1	2	5	0
>50	16	6	0	4	4	1	0	1
<i>Total</i>	<i>228</i>	<i>43</i>	<i>14</i>	<i>23</i>	<i>31</i>	<i>64</i>	<i>46</i>	<i>7</i>

Source: AANDC Geomatics office, 2012.

### **6.1.3. Institutional Arrangements: Property Rights and Relationships**

The components of PIB's land management system of most interest for my research are the institutional arrangements that determine authority over land. These include land tenure and property rights, but also the structure of the land management system. I introduced the official *Indian Act* land tenure system in section 2.2, so this section focuses on the system in practice. I summarize current institutional arrangements for PIB lands, based on observed practice at PIB. Unlike the Lil'wat First Nation's largely customary land management system profiled by Nemoto (2002), PIB's land system corresponds much more closely to the *Indian Act* lands regime. However, it appears that most First Nations' reserve land management systems, including PIB's, exist on a spectrum of hybridization between the external, formal *Indian Act* system and local, informal systems (Baxter & Trebilcock, 2009; Flanagan et al., 2011). In my characterization of PIB's lands institutions I include the formal and informal and also document differences between local and legal perceptions of locatee rights.

In the PIB land management system, decision-making authority is shared between Band Council, the membership, locatees, AANDC, and lessees. Depending on the type of decision, and the type of land involved, authority shifts between these actors. Under the *Indian Act*, ownership of reserve land is vested in the federal Crown which has given AANDC the responsibility and authority to ensure the lands are managed and protected for the 'use and benefit' of Bands. As a result, AANDC holds extensive



authority over reserve management, including regulating “the allocation, use, transfer and distribution of rights, responsibilities and restrictions over land” (Rakai, 2005, p. 115). While less involved in local governance now than in past decades, AANDC still acts as a check on local land decisions by the Council or locatees by approving allotments, transfers, leases, Band by-laws, and other transactions or policies. Typically AANDC takes direction from the Band Council and/or locatee(s) and typically only intervenes or withholds approval if requirements are not met (e.g. environmental assessment) or if there are other issues of concern (e.g. conflict of interest). Even so, many Bands take issue with bureaucratic delays and the power of AANDC to overturn local decisions (e.g., a Band by-law). Councils have state-like authority over Band lands (though AANDC must approve most decisions). Likewise, locatees have the equivalent of ownership authority over their lawful possessions, provided they only sell, transfer, or bequeath their interest to another Band member and that AANDC approves the transactions.<sup>23</sup> Most of these powers are transferred to a lessee if a CP is leased. PIB’s land tenure and land management essentially follows this distribution of authority. However, there are rights exercised and respected locally that are not created by the *Indian Act* or AANDC policy. These include responsibilities of individuals to consult their families in land decisions, the widely held view that approval of the community and Council is required for major land changes, and the respect given to Elders’ decisions and advice regarding land.

### **Local Perceptions of Locatee Rights**

Not everyone in PIB, or other First Nations, interprets the *Indian Act* land tenure system in the same way as AANDC. Among PIB members, staff, and council members interviewed and observed at community meetings there was a range of understandings of locatee rights. There was widespread acknowledgement that CP ownership is not the same as fee simple ownership off-reserve, as well as respect for locatees’ individual decision-making authority on their lands (for example, I did not encounter anyone that suggested that locatees do not have authority to make routine use and management

<sup>23</sup> AANDC’s process of review and approval of locatee leases is currently under review following the *Louie and Beattie v. INAC* (2011) case at the Canadian Human Rights Tribunal that found that the department’s lease approval practices were discriminatory and had to be changed (Woodward & Co, 2011).

decisions for their land). Where perceptions of locatee rights vary is regarding long-term or permanent land use changes and the extent to which the Band membership, Council, or the federal government can constrain locatee decisions. Sometimes, the same individual expressed a number of different understandings, which is unsurprising given the contested and legally ambiguous nature of locatee rights in some situations.

Table 6.3 summaries perspectives on these issues, indicating how many and what kinds of interviewees expressed each perspective. I include AANDC's current position on laws and policies involved (as interpreted from the INAC Lands Management Manual). While my interviews and observations did not necessarily capture the full range of perspective across the entire community, they do serve to illustrate many of the commonly held perspectives and differences between them. (Full quotes in Appendix G.)

**Table 6.3. Variations in Interpretation of Locatee Rights and Powers**

	Perception of Locatee Rights	Interviewees
Local	Locatees are caretakers, not owners – they can decide how to take care of the land, but decisions that change it permanently or for a long time require community approval.	Members (3) Band staff (3)
AANDC	Lawful possession is the closest to fee simple ownership of reserve lands currently available to individuals, under the <i>Indian Act</i> . Community approval is required for leases longer than 49 years.	
Local	Locatees have full rights to decide what to do with their land – but they should be responsible and think about the impacts of their decisions.	Members (4) Council (1) Former Council (1)
AANDC	Locatees have rights to use and manage their land, subject to Band by-laws, zoning, regulations, other federal laws (environmental, health etc.).	
Local	Many locatees feel they have right to do whatever they want with their land –this is incorrect, but true in practice because of the lack of regulations.	Band staff (2) Band staff/Council (1) Former Council (1)
AANDC	Locatees have rights to use and manage their land, subject to Band by-laws, zoning, regulations, other federal laws (environmental, health etc.).	
Local	Bureaucratic requirements and community controls constrain locatees in many land use decisions – too much so, infringing on locatee rights.	Members (2) Band staff (1) Former council (2)
AANDC	Chief and Council can create land use regulations (which AANDC approves). Council and AANDC must protect Band interests.	
Local	Bureaucratic requirements and policies constrain locatees in many land use decisions – rightfully so, more are needed to protect Band interests.	Members (2) Band staff (1) Band staff/Council (3)
AANDC	Chief and Council can create land use regulations (which AANDC approves). Council and AANDC must protect Band interests.	

Differences in understanding of locatee rights and responsibilities exist partly because apart from the rights of occupancy, leasing, transfer, devise, bequeathal, or sale to another member “the *Indian Act* does not define what other rights go with an allotment” (INAC, 1982, p. 2) and even courts and legal experts have difficulty defining these rights in all situations. Individuals also vary in their exposure to the intricacies and functioning of the *Indian Act* system. Members involved in Band government and land administration, or those with extensive land leasing and transactions experience, were able to explain more specific limitations and requirements of the CP landholdings than members who had limited or no exposure to the legal and bureaucratic processes. In the absence of clear legal understandings, locatees are protective of their perceived rights and tend to define their rights broadly.

Another reason for differences in interpretation is that the experiences of locatees in the past have made it seem as though they do have very extensive authority over their land. It was suggested to me that a reason that locatees feel as though they have full control over their land is that for generations PIB has had no, or only very limited, land use by-laws, zoning, land use plans, or lease registration requirements (T. Kruger, personal communication, 2012). Locatees have been accustomed to using their land as they choose and not having Band or government officials tell them otherwise. While Council legally has the right to implement and enforce land use by-laws, this right has been largely dormant and in its absence locatees have exercised independent control. Locatees have come to understand this de facto power as a right. Today when Council suggests adopting land use by-laws, zoning, or land use planning, some locatees feel strongly that their rights are being threatened in a power grab by the Band Council, or by the federal government (A. Eneas, personal communication, 2011; C.J. Kruger, personal communication, 2011). However, some interviewees expressed an expectation that if a decision on land use planning, zoning, or by-laws came from the community, with widespread community support, then locatees “would recognize them as a community decision, not something imposed on them by Band Council” (G. Gabriel, personal communication, 2011) and would respect them.

#### **6.1.4. Land Management System**

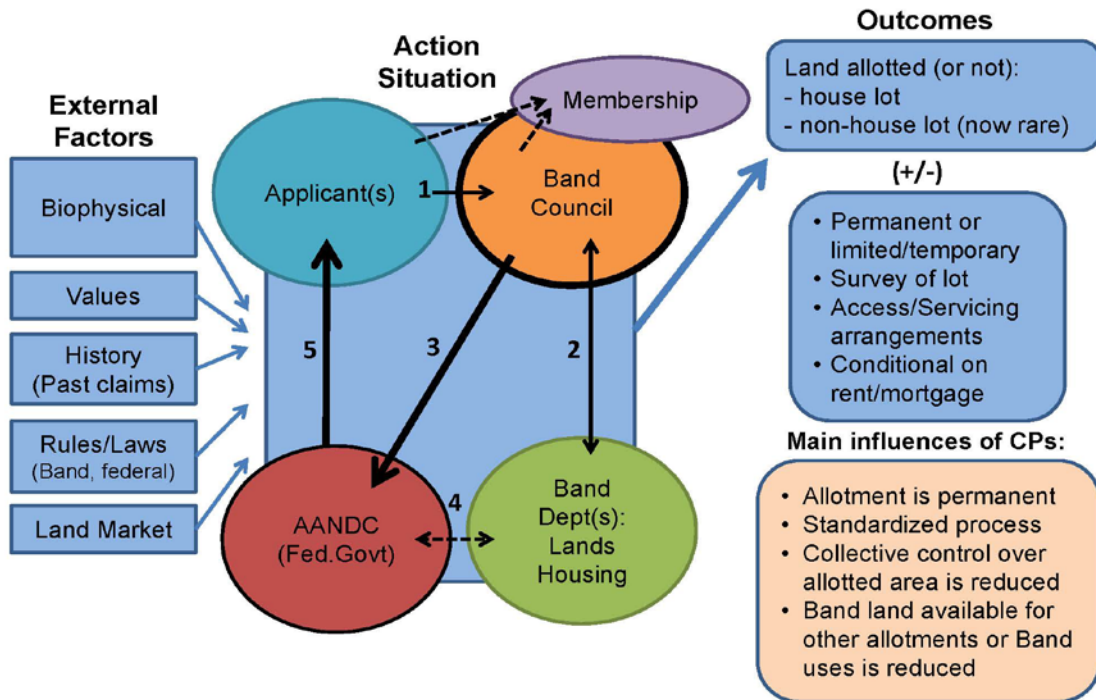
The influence of individual landholdings on collective land management is best illustrated with examples of land management interactions between locatees, Council, AANDC, and other actors. I have identified seven categories of land management activities at PIB ('action situations' to use the terminology presented in section 4.1.4.). I organize these by whether the lands involved are Band land or locatee land. For each activity, the actors and their involvement varies; for example, a locatee may make a decision regarding land use without input from others in one situation, while a different decision may require Band Office or Council involvement, or even a Band referendum. These scenarios are simplifications, but they provide context for the discussion of potential land management impacts of individual holdings in section 6.2.

I use figures and tables to summarize the complexities of the relationships and interactions involved with land management decisions. The figures are included here and the more detailed tables are in Appendix H. I designed my figures using the IAD framework 'action situation.' In an action situation, various actors involved in a decision interact with each other and are influenced by external factors (noted on the left of the figures). In my figures, I outline the actors with the greatest decision-making power in black with varying thickness to indicate differences in decision powers (thicker means more power). Numbered arrows are included to help indicate the pattern of interactions between actors. I list output(s) of the action situation on the right of the figures. In the box on the bottom right, I indicate main influence(s) that the lawful possession system can have on the land management activity (I discuss these further in section 6.2).

#### **Band Lands**

For decisions involving Band lands, Council has direct authority but most decisions require approval by AANDC. I have four categories of Band land management activities: allotment, use and management, planning, and leases and developments.

## Allotment



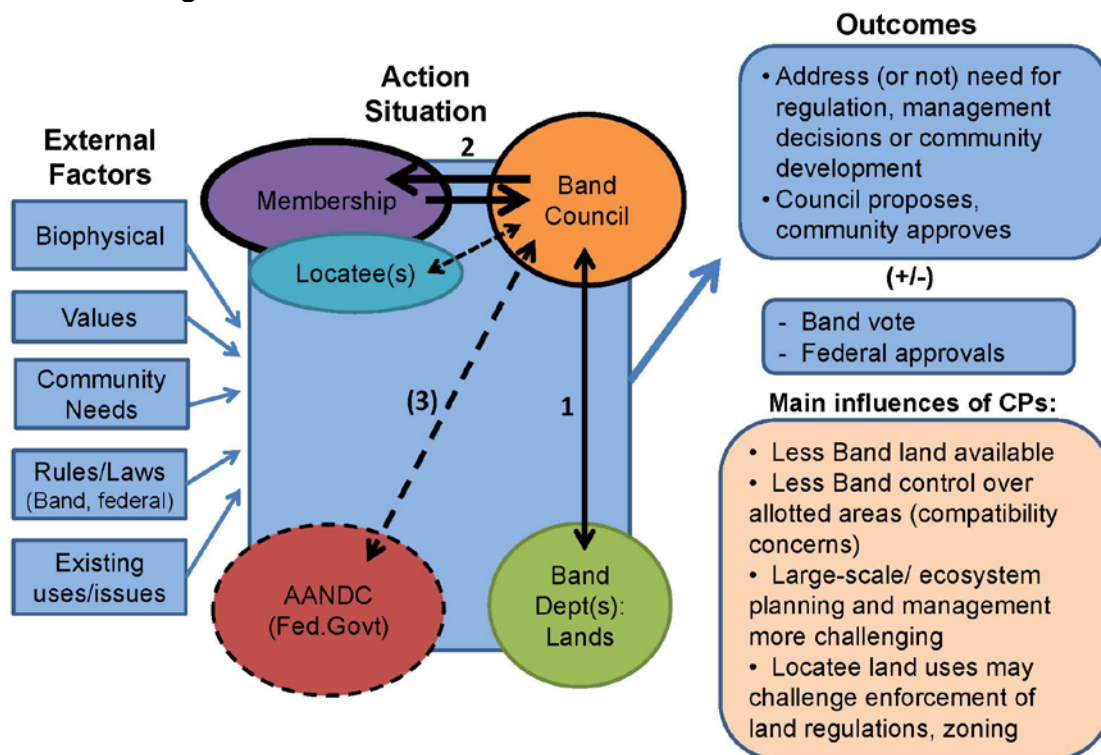
**Figure 6.7. Action situation diagram of land allotment**

1. Applicant(s) ask Council for land allotment and/or Band house.
2. Discussed with Lands (and Housing).
3. If Band Council decides to approve a land allotment (a CP for a house lot that has had its rent or mortgage paid off, or a CP for a non-house lot), a BCR and documentation sent to AANDC for review, approval and registration.
4. AANDC reviews and confirms details with Lands, may request additional information or withhold approval until questions such as lot access or conflict of interest are resolved.
5. If approved, allotment is registered and CP issued to applicant.

Today, PIB very rarely allots land other than house lots in Band housing subdivisions where parcels have been surveyed and laid out with adequate access and servicing. Securing a CP to one of these house lots is dependent on meeting the rent or mortgage payment conditions set out in the initial housing allocation (a separate decision made with the Housing department). When an individual completes their rent or mortgage requirements, the land where their house is located is allotted to them as a CP. In other cases, surveying and access permissions may be required and the allotment may be made as a Certificate of Occupation as a temporary holding conditional upon agreed upon requirements. In the past, Band Council minutes indicate

that in some cases applicants may be directed to take their request to the general membership for consideration. As indicated, the CP system has changed land allotment by making the allotments permanent and standardized. The nature of CPs is such that collective control over that land parcel is greatly reduced and that land is exclusively available to the locatee(s). As a result, and because of PIB's policy to restrict CP allotments, it is no longer as easy to secure a parcel of Band land as it was under the traditional tenure system and allotment process before the late 1970s.

### Use and Management



**Figure 6.8. Action situation diagram of Band land use and management**

0. Use/management issue for Band lands or a need for a community development is identified.
1. Band Council and Lands investigate options to address issue. Lands, or other department, drafts possible solution(s).
2. Band Council proposes a solution or set of options (such as a draft by-law), receives feedback/direction from membership. Specific consultation with locatees may be required if they will be directly affected. A Band vote may be used to secure community decision.
3. If a community decision is reached and a Band bylaw or regulation is passed, it must be sent to AANDC for formal approval (otherwise it remains an internal policy, not protected by the

courts). If the decision is for a community development, this begins a process with AANDC to design development (see 'Leases and Developments').

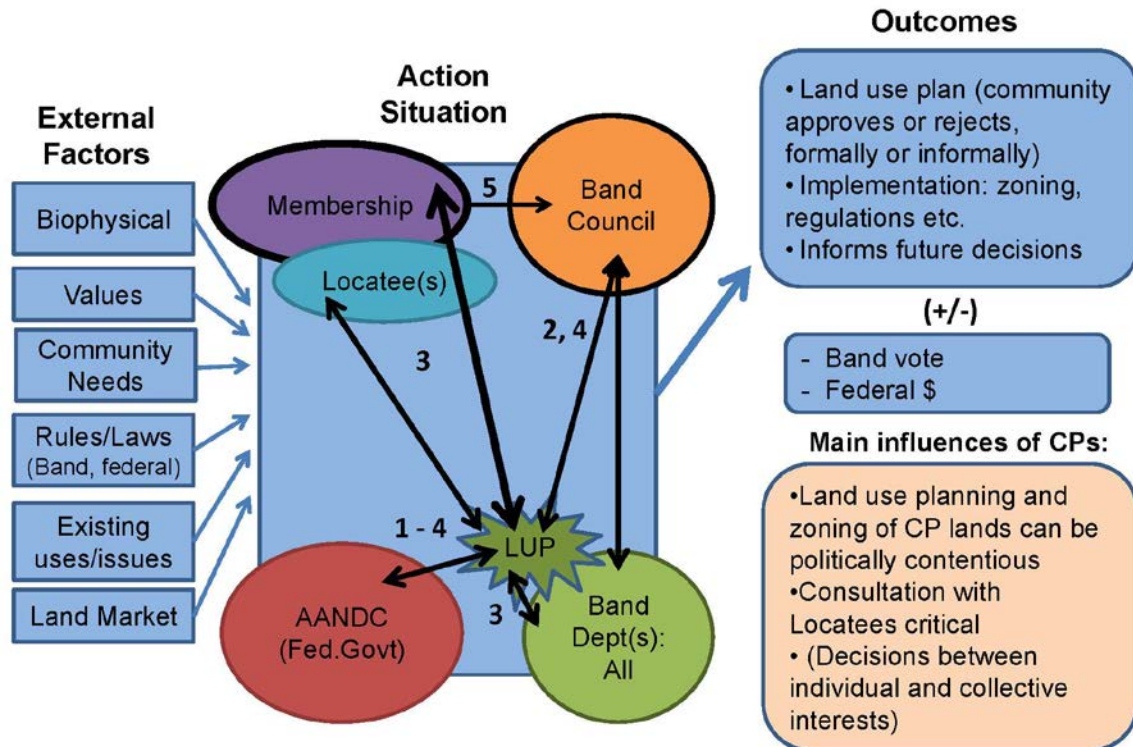
Under the *Indian Act*, Band Councils have the authority to make certain types of by-laws concerning land use, including zoning. However, these powers "have not been widely used," in large part because by-laws must be approved by the Minister, the process is considered inappropriate by First Nations, and by-laws cannot be adequately enforced locally (Olthuis Kleer Townshend LLP & Imai, 2008, p. 198). Local laws concerning permissible land uses, environmental protection, and development controls would help to address many of the gaps that currently exist in the *Indian Act* land regime. Bands can also adopt internal policies that Council follows but these do not have the same legal standing as a Minister approved by-law. Some First Nations are in the process of securing more delegated authority under ss.53-60 of the *Indian Act*, whereby Bands can approve their own by-laws. PIB is approaching this cautiously, as are many other Bands, out of concern that the transfer of authority also reduces the Crown's fiduciary responsibilities and liability. This could potentially expose the Band to greater costs and risks from future decisions and arising from past decisions made by AANDC when they had exclusive authority to approve land transactions and other management activities (Ballantyne & Dobbin, 2000, p. 4.4; NALMA, 2009a, p. 11). The balance of responsibilities and liability is not clear, so many Bands, as well as AANDC, are being conservative in delegation of management powers (INAC, 1982, p. 3).

A Band Council can also make decisions regarding the use and development of Band lands for community developments that benefit the general welfare of the Band. If Council decides on a development of this type, usually with direction or approval from the membership, then it begins a process of working with AANDC to secure funding and secure the necessary federal approvals (e.g. environmental assessment). If leasing is involved, a designation of Band land may be required (see 'Leases and Developments').

Individual landholdings and rules of the CP system impact Band land management primarily by reducing Band control over CP lands and potentially causing complications for large-scale or ecosystem planning. There are also challenges of trans-boundary effects of locatee land uses, and other practical complications of implementing and enforcing Band land management directives. If a community development is

proposed, Band staff may need to consult locatees specifically, especially if their lands are affected, or if access or servicing over locatee lands is required.

### Planning



**Figure 6.9. Action situation diagram of reserve land use planning decisions**

0. Land or community issue/need prompts planning.
1. Band (and LUP team) works with AANDC to secure funding for planning and report progress.
2. Planners/Department(s) doing the LUP take direction from Council and report regularly.
3. Consultation with members, Band departments, and other stakeholders (particularly locatees).
4. Final plan approved by Council.
5. Community decision: Formal vote to approve. If no vote is taken members may informally accept/reject plans through behaviour.

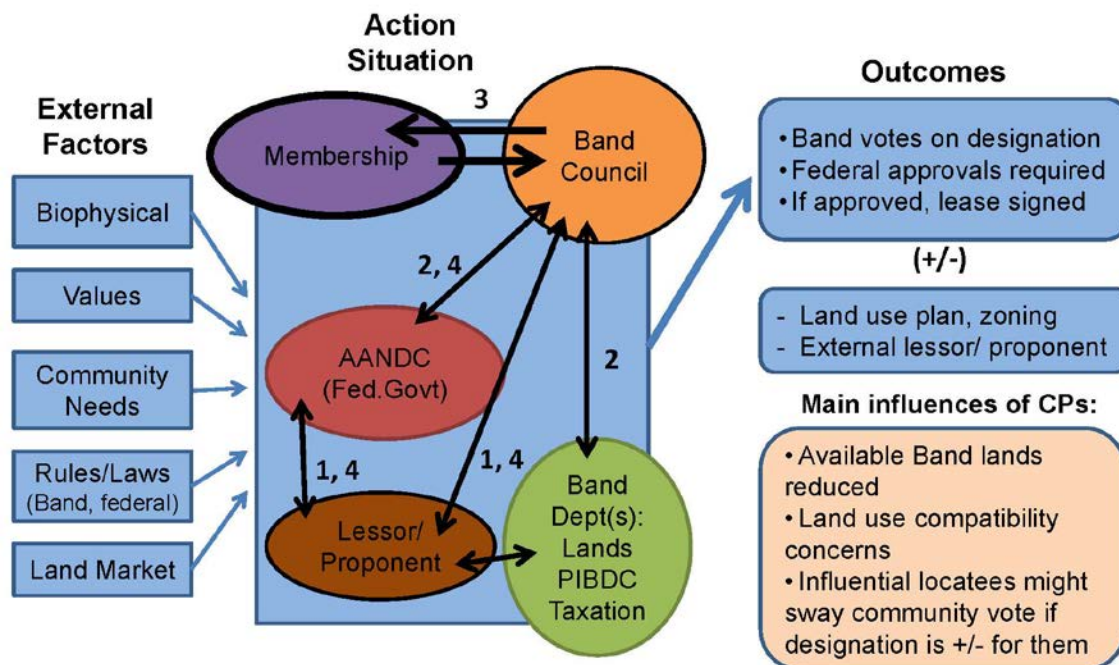
For generations First Nations had their own internal and traditional mechanisms for land and community planning. While some continue today, for most First Nations the changes brought by the *Indian Act* reserve land management system undermined and replaced much traditional planning (Millette, 2011, p. 24). Today, AANDC is less



involved with internal reserve planning. While AANDC provides funding for planning, approval of plans comes from Band leadership and the membership. Specific outcomes of a plan, such as bylaws, regulations, or zoning must still be approved by AANDC to be recognized formally. Plans and zoning have important implications for future decisions by AANDC, Council, and the Lands department as allotments, leases, and development proposals are assessed based on compatibility with plans and zoning.

The experiences of other First Nations and past planning efforts at PIB show that land use planning and zoning can be politically contentious, especially when locatee lands are affected. To prevent locatee opposition and reduced membership support for a plan, special consultation with locatees is often required. As with planning in any community, trade-offs and balancing between individual and collective interests are a difficult part of the process. This appears to be aggravated in communities with locatee lands if there is not a tradition of regulating individual land uses, because locatee rights and responsibilities are often ambiguous and contentious in practice (section 6.1.2).

### Leases and Developments



**Figure 6.10. Action situation diagram of Band land designations and development decisions**

0. Community need or development opportunity identified.

1. Lessee/Proponent begins negotiations with Band Council and AANDC [In case of a Band-led development, Lessee/Proponent may be the Council or a Band entity]. These interactions continue until conclusion of the lease/development.
2. Band Council works with AANDC and Band Departments on details of negotiation and planning for lease/development. Departments may work directly with Lessee/Proponent.
3. Band Council takes final proposal to membership for approval or designation vote if required.
4. If approved, final lease drafted and signed between Band, Lessee, and the Crown.

When a community development for the “general welfare of the Band” (as defined by the *Indian Act*, s.18 (2)) is being planned, or if another development opportunity is identified (often facilitated by the PIB Development Corporation, PIBDC), the Band Council must work with its Departments, the membership, and AANDC to develop the proposal and secure approval to use Band lands for it. While decision-making authority, as well as responsibility, is shared between the Band Council and the membership, in practice the feeling is that Council and Band departments “hold more responsibility... the Band membership doesn’t want responsibility” in case something goes wrong with the deal or development (E. Alec, personal communication, 2011). If the development involves a lease of land then a ‘designation’ of Band land is required.<sup>24</sup> Any of these decisions involves AANDC and numerous reporting requirements, such as environmental assessments, servicing and access agreements, and land appraisals.

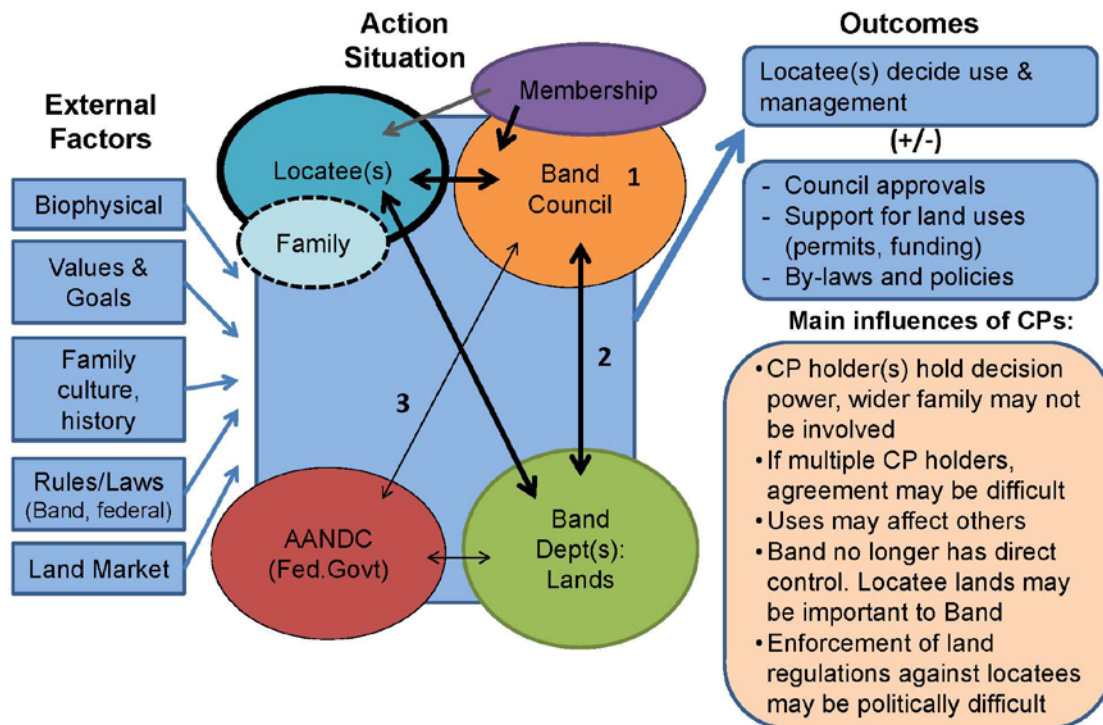
CPs influence these decisions by reducing the amount, type, and locations of Band land that is available. If a Band wants to develop an area that includes CP lands then Council must either include the locatees as partners in the development, purchase the lands, negotiate a settlement, or if the locatees are non-consenting the Council can expropriate land (with compensation) (Poitras, 2004, p. 8). Expropriation is rarely used. Other influences include concerns about locatee land uses conflicting with developments on Band lands, or vice versa, and the influence of locatees on community votes.

<sup>24</sup> Designation replaces the earlier practice of ‘surrender’ of reserve land to the federal government, which permanently removed land from reserve (only used rarely today in cases where a Band wishes to permanently sell some of its reserve land) (Kydd, 1989, p. 10).

## Locatee Lands

The situations involving locatee lands are different from Band lands in that locatees hold the greatest decision-making power, sometimes with AANDC and/or Band Council involvement. I illustrate three situations: use and management decisions, transfers and sales, and leases and developments.

### Use and Management



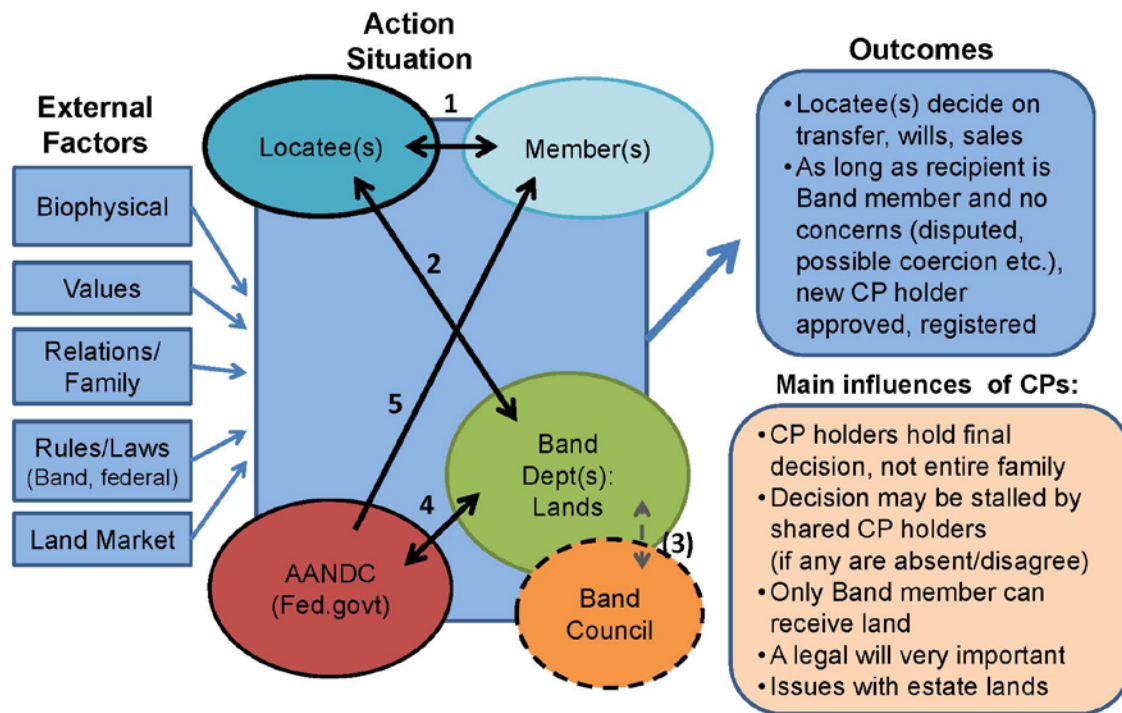
**Figure 6.11. Action situation diagram of Locatee use and management decisions**

0. Locatee(s) decide on land use and management, possibly with information and advice from Lands Department, family, or others.
1. Band Council may decide to pass by-laws or regulations that affect locatee land uses and management. If the locatee use involves a development, additional Council approvals may be required.
2. Band Council works with Lands to develop, implement regulations.
3. AANDC approval required for Band by-laws (or if locatee use decision involves development or lease, see 'Leases and developments').

In essence, the use and management of locatee lands is mainly up to the locatees. The Band Council and/or membership may be able to exercise some authority over these lands if they pass a by-law or other regulation (requiring AANDC approval)

but existing uses are not affected (unless they violate other federal environmental or health regulations). This requires Bands to be proactive in anticipating issues with locatee land uses, but many First Nations do not have many, if any, land use bylaws in place. Even where bylaws are in place, enforcing them can be logistically challenging and politically difficult (section 6.2.4.). This can be a concern for a community if socially or ecologically valuable land elements are located on locatee lands or if locatee land uses are negatively affecting others (section 6.2.4.). The CP system can also influence locatee decisions by shifting the decision-making power to the individuals who are the registered CP holders rather than the wider family group (which in many cases used to be more involved in land use decisions) (section 6.2.4.). Also, if the parcel has multiple CP holders (usually family members, joint tenants, or tenants in common) a single CP holder may stall land use decisions if they disagree or are absent (section 6.2.4.).

### Transfers and Sales



**Figure 6.12. Action situation diagram of Locatee land transfers or sales**

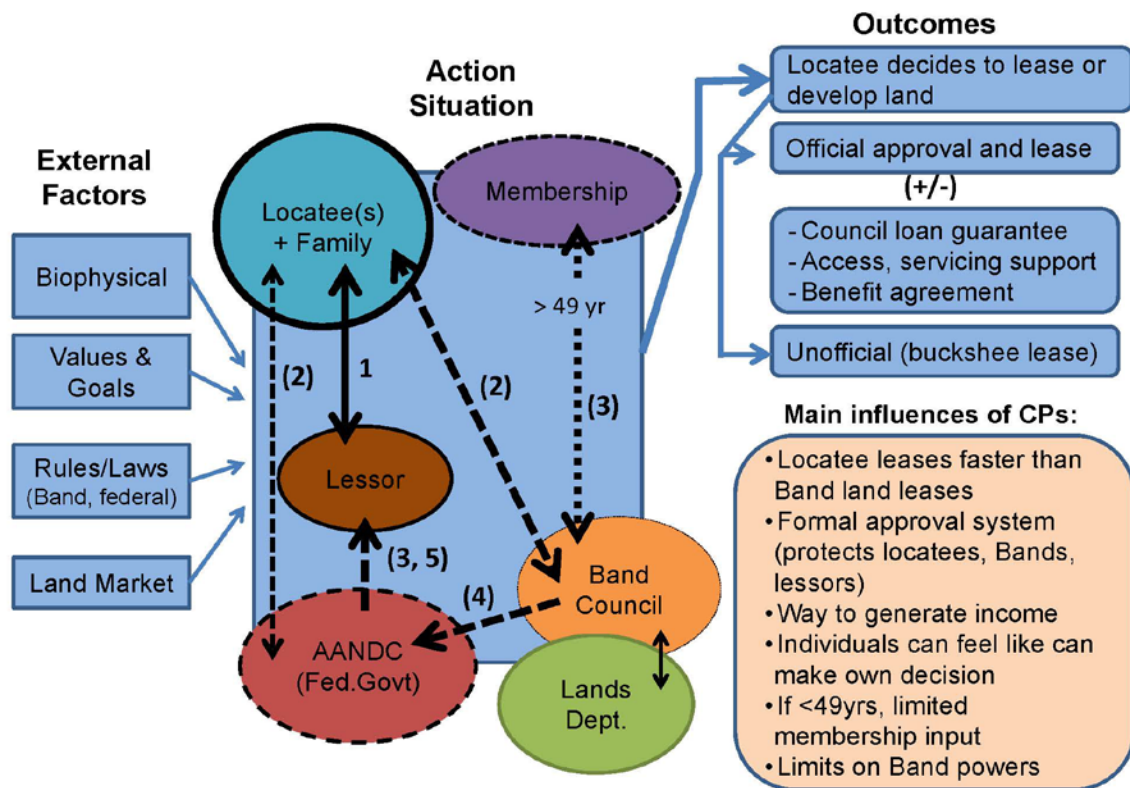
0. Need for a transfer/sale (e.g. bequeathed, loss of membership).
1. Locatee decides on a transfer or sale (recipient may be aware or not, in the case of wills).
2. Locatee registers transfer with Lands Department.

3. Some Councils have a Band policy requiring all transfers be brought to them for approval.
4. Lands Department files transfer documents with AANDC. If any unusual circumstances (e.g. dispute of transfer by third party or concerns about mental capacity of locatee) then these are noted.
5. AANDC reviews the transfer and if approved (any unusual circumstances resolved), registers and issues to new CP holder.

Under the CP system, locatees have the right to transfer, bequeath, or sell their lawful possession interest to another Band member. If they are required to transfer their CP because they are no longer Band members they have six months to complete the transfer or it reverts to the Band. Like land use decisions, sales can be stalled if another CP holder to the parcel disagrees, but a CP holder can still individually transfer their specific interest to another member. Transfers are mostly a result of CP holders bequeathing their interest, transferring it, or subdividing part of it to another family member. There is not much of a land market between members because individuals rarely want to sell their land (G. Gabriel, personal communication, 2011) and most members have limited funds available for purchasing land (J. Phillip, personal communication, 2011) (section 6.2.4.). Because of the official, standardized system for transfers, legal wills have become increasingly important and in cases where a locatee does not create a will, complicated estates situations can result (section 6.2.4.).

### ***Leases and Developments***

The last of my land management activity models is when locatees choose to lease their land or develop it. Locatee leases are one of the more familiar impacts of CPs because First Nations, developers, and AANDC consider locatee leases to be the fastest and easiest way for reserve land to be leased or developed. The CP system and *Indian Act* reserve land regime mean that there is a formal, standardized system for approval of locatee leases, including mandatory community approval for long-term leases. However, the process does have bureaucratic delays and costs involved and so still today some locatees agree to informal leases (discussed in section 6.2.4.).



**Figure 6.13. Action situation diagram of Locatee leases and developments**

0. Locatee decides to consider leasing or developing land (often depends on the size and location of the landholding, if they live on it, and the market for reserve land leases).
1. Negotiations with lessee/proponent (may be a Band member or external). At this stage an informal, unregistered lease may result.
2. If locatee or lessee wants a formal, registered lease then AANDC must be involved in negotiations. Often Band Council is involved as well if locatee/proponent want its support (approval, loan guarantee, or access/servicing arrangements).
3. AANDC develops draft terms of lease with lessee and locatee. If the lease is for longer than 49 years, a community vote is required to approve it. AANDC requires environmental assessment, land appraisal, access arrangements for all leases.
4. Band Council may register concerns with AANDC but it cannot veto a locatee lease. AANDC's policy is to address Band Council concerns and if are 'valid' and unresolvable, lease may be denied.
5. If approved, AANDC drafts final lease agreement between locatee, lessee, and Crown.

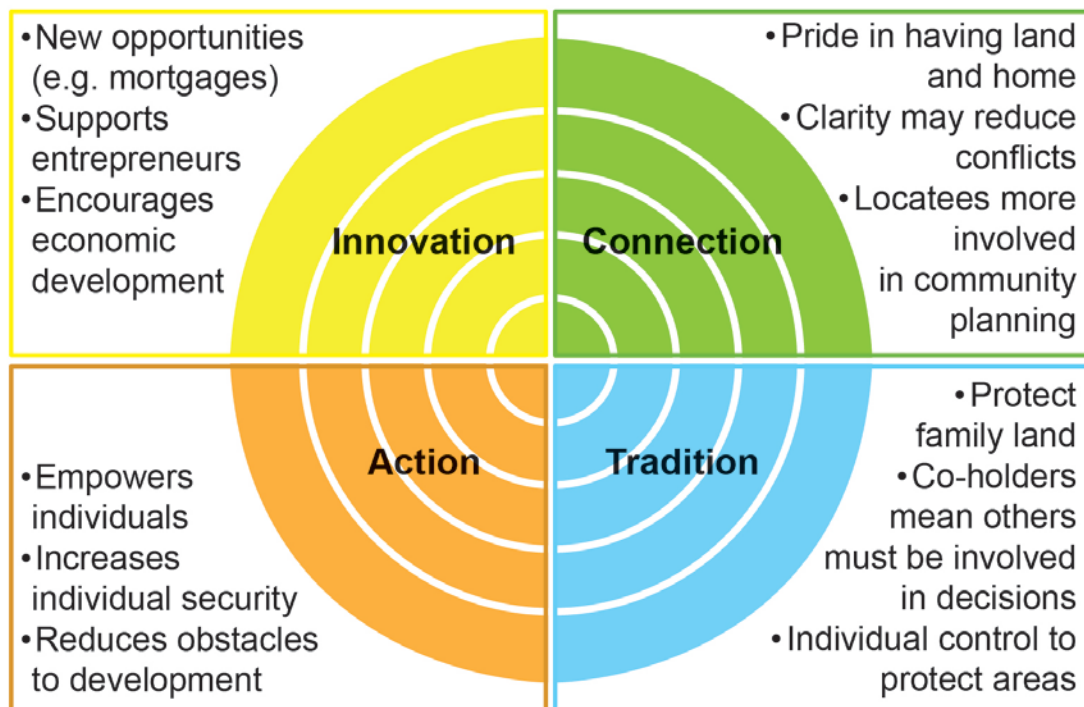


## 6.2. Land Management Implications of Individual Landholdings

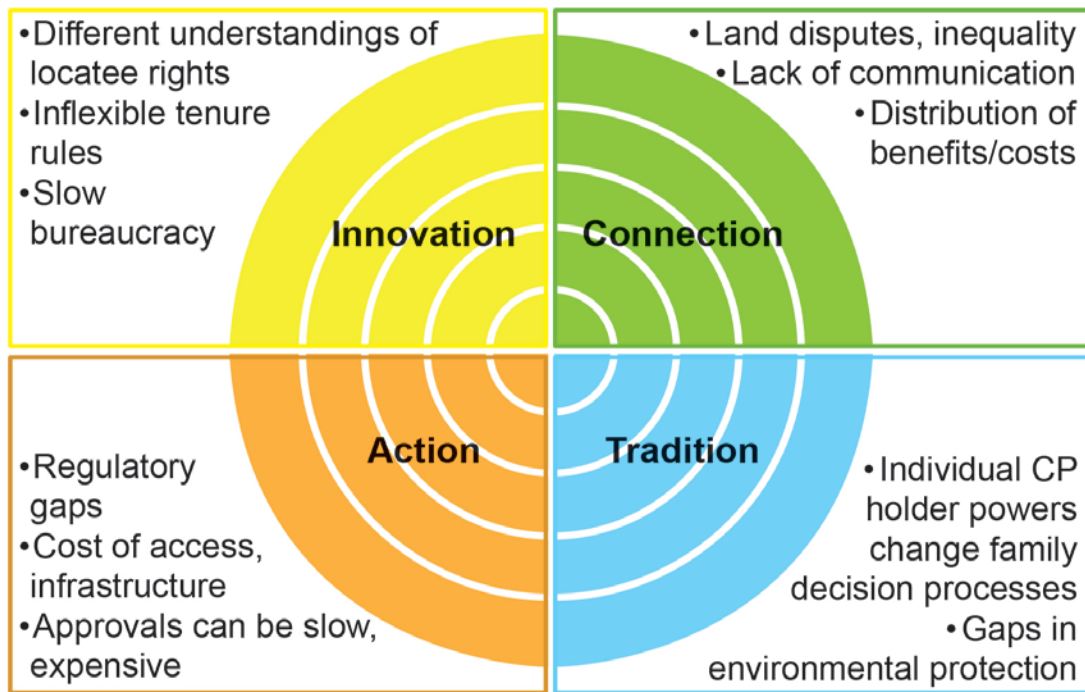
The second half of this chapter discusses implications and impacts that individual landholdings have had on reserve land management at PIB. My findings emerged primarily from interviews, but were also informed by my analysis of Band documents and reports by other First Nations. As this is not a comparative study between tenure systems, I do not present these impacts as being exclusive or unique to the CP system. Instead, these findings are the themes that emerged from my interviews and what I have identified as notable connections between PIB's land tenure system, history and land management today. I structure this section around specific issues and concerns, organized into three sections: Community relations, Band lands, and Locatee lands.

### 6.2.1. Summary

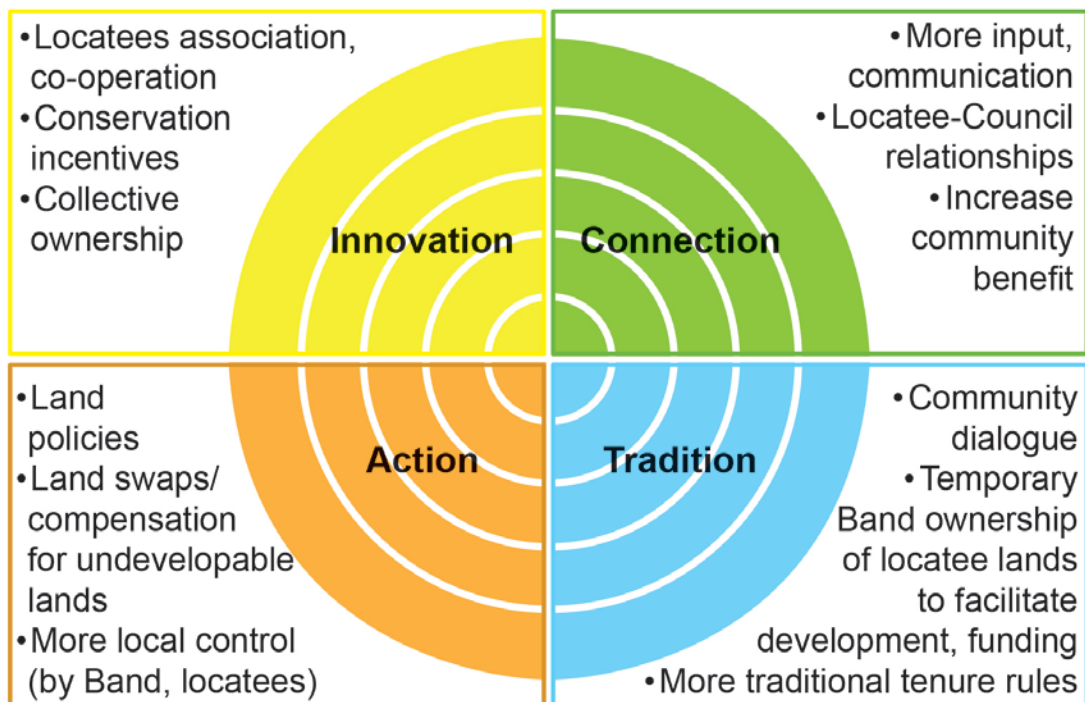
Using the En'owkinwixw framework, three figures below summarize interviewee perspectives on strengths, challenges, and proposed changes to the CP system at PIB.



**Figure 6.14. Strengths of CP landholdings, from PIB interviews**



**Figure 6.15. Challenges of CP landholdings, from PIB interviews**



**Figure 6.16. Proposed Changes to CP landholdings, from PIB interviews**



In addition to strengths, challenges, and proposed changes to the CP system, interviewees discussed land management issues more broadly. Table 6.4 summarizes land management issues identified, with the number of interviewees who discussed them and the number of references made by interviewees (listed by decreasing number of total references). The next sections explore how CPs relate to many of these issues.

**Table 6.4. PIB Land Management Issues, from PIB Interviews**

Land Management Issue	Type of Interviewee							
	Current Council or Band Staff (6)		Former Council or Band staff (3)		Never Council or Band staff (4)		Community & Elder Meetings	Total # References
	# Interviewees mentioned	# References	# Interviewees mentioned	# References	# Interviewees mentioned	# References		
Council-Locatee relations	6	103	3	36	4	21	55	
Conflict related to land	6	84	3	33	4	36	22	175
Access to land	6	61	2	19	4	26	12	118
Balancing conservation and development*	6	39	3	23	3	8	29	99
Land use compatibility	6	43	3	14	2	8	22	87
By-laws needed	6	33	2	5	1	1	13	52
Limited land available on reserve	6	34	2	5	2	7	5	51
More local control needed	4	8	1	5	3	8	30	51
Buckshee leases	6	29	1	2	1	4	4	39
Species At Risk	3	12	3	9	1	3	4	28
Surveying	3	4	1	2	4	14	8	28
Fractionation	6	12	2	2	3	10	3	27
Access to housing	4	6	0	0	4	16	3	25
Taxation	1	4	1	2	1	1	17	24
Regional land management	3	6	2	2	1	1	9	18
Estate lands	5	11	2	2	0	0	2	15
Servicing, access	3	5	0	0	2	4	2	11
Water	1	1	0	0	2	2	1	4

\*This coding node included references to more support for economic development generally, but because these comments were often made in conjunction with the comments on the need for planning of development and protection of certain areas the two were merged.

## **6.2.2. Community Relations**

I decided to begin this discussion with relationships in the community related to land. These issues emerged as an unexpected theme across my interviews and I feel they are the deepest, most crosscutting impacts of the individual landholding system. The issues and impacts in the other sections are also important, but are more technical or logistical in nature. Community relationships both influence and are influenced by many of the other challenges relating to individual landholdings.

There is a real complexity of relations that needs to be worked through. (C. J. Kruger, personal communication, 2012)

Generally, land is “socially, spiritually, emotionally, physically, economically and legally” central to Indigenous communities (Rakai, 2005, p. 23) and is a primary source of identity and community. It is unsurprising that lands issues are intricately linked to feelings of hurt and desire for healing, as expressed by PIB members in their Comprehensive Community Planning (CCP) process. Some of this hurt is a result of history, such as what was described in Chapter 5, when individuals and the community were “victims” of federal policy and abuse of power by Indian Agents (Community member, 2012). Several interviewees emphasized that they felt that their community was “not the culprit” behind problems with reserve lands and landholdings (J. Kruger, personal communication, 2012), and that they do not hold it against past leaders for making mistakes (J. George, personal communication, 2012). However, some of PIB’s relationship challenges today are linked to more recent history and ongoing issues. While this can be frustrating, it also means that there are opportunities to improve situations today, in addition to healing from the past.

### **Inequality**

One of the most outstanding laws of the Syilx is to learn to live and work in harmony with everyone and share with everyone in the community. We were taught in the *cepcaptlk*<sup>w</sup> story of turtle that we must not think only of ourselves as individuals. We were taught that having more than others has to do with power and control of others. We were taught that it is wrong to have more things while others go without in your community or family. Wealth is to be enjoyed by all in times of plenty, and hardship is to be faced by all in bad times. (ONA, 2001)

A widely acknowledged challenge of individual landholdings is that they can create or worsen inequality in a community (Baxter & Trebilcock, 2009; Flanagan & Alcantara, 2002, pp. 16–17; R. de Guevara and L. Vanderburg, personal communication, 2011; A. Bak, personal communication, 2012). This is true for private property generally, but in many First Nations communities there appears to be high sensitivity about unequal distribution of wealth and resources (Rakai, 2005). Other research on CPs across Canada identified that on reserves where CPs are extensive:

...a small number of owners may become quite wealthy by leasing their land rights, while the majority of Band members may be left living on the minority of reserve land that is still communally owned.  
(Flanagan & Alcantara, 2002, pp. 16–17)

An example of this situation exists just to the north of PIB. The Westbank First Nation, a self-governing First Nation with extensive land development projects, has the majority of its reserve land held as CP possessions by a small number of individuals. This means that other members now have very limited or no access to reserve land (J. Phillip, personal communication, 2011; R. De Guevara and L. Vanderburg, personal communication, 2011; Flanagan & Alcantara, 2002, p. 14). Many of the Westbank CP holders have leased their lands for housing developments, rented in 99-year sub-leases primarily to non-Band members (Flanagan & Alcantara, 2002, p. 14). The profit from these leases goes to the individual landholders, except for property tax or servicing fees (L. Vanderburg, personal communication 2011; Flanagan & Alcantara, 2002, p. 14). Given the unequal distribution of landholding, some of which was a result of individuals buying up CP lands from other landholders before the development value was widely recognized (C.J. Kruger, personal communication, 2011), there is “a lot of inequality” and “the rich get richer and the poor get poorer” (R. De Guevara and L. Vanderburg, personal communication, 2011). This concentration of wealth and power over land has created “some resentment... some conflict between members” in the Westbank First Nation (R. De Guevara and L. Vanderburg, personal communication, 2011). While less extreme, similar dynamics are at work in other Okanagan First Nations with CP holdings: Carstens, writing in 1991, observed that in the Okanagan Indian Band “there are most certainly more poorer people and more richer people than there used to be” as a result of the distribution of land resources, particularly leasable land (Carstens, 1991, p. 203).

In PIB there are also tensions over inequalities related to land distribution. In interviews and PIB community sessions it was repeatedly voiced that Westbank's experience was something that PIB wanted to avoid. While in comparison to Westbank there is less concentration of land and wealth (partly as a result of limits on allotment and limited Band support for long-term leases and developments historically), PIB does have an unequal distribution of land, and the resources, opportunities, and security that come with it:

Some people own land and some don't...the people who don't own land get really upset, but the people who do own land, they have no worries- they know they could do something, have a place to have a home, it's their security blanket... (E. Alec, personal communication, 2011)

There are many community members who don't have land interests, other than their house lot. ...I have to recognize that it is unfortunately unfair that some members do have large tracts of land that they have in their possession, as opposed to other Band members who have nothing. (G. Gabriel, personal communication, 2011)

Among landholders there is also inequality of land value and development options, depending on location, size, access restrictions, or other limits to development. There are also inequalities of power that result from both locatees' greater authority over land use decisions and inequality among locatees' knowledge of the process of land leasing or development (C. Eneas, personal communication, 2011; R. De Guevara, personal communication, 2011; L. Alec, personal communication, 2012). Locatees are typically more engaged in community land and development decisions, given that their personal land interests might be affected, whereas at least some members who are without land are "not as connected to the community" and feel isolated (C. Eneas, personal communication, 2012). On the other hand, locatees profiting from their lands can also feel isolated and judged (A. Eneas, personal communication, 2012).

Some of this division in the community stems from differences in values and goals. Some interviewees expressed a strong preference for egalitarianism and conceptions of traditional collective support, while others were supportive of individual success and wealth, seeing it as bringing overall benefit to PIB. In other close-knit communities, similar tensions between traditionalist and individualist values often result in struggles over community norms and efforts by traditionalists to sanction individualist

behaviour (Haagsma & Mouche, 2012, p. 2). In PIB, it seems there is more diffuse self-sanctioning that limits obvious flaunting of wealth, similar to what Carstens (1991, p. 203) observed in the Okanagan Indian Band. Former PIB Chief and current locatee Adam Eneas explained this self-sanctioning, describing locatees who he thinks are

...afraid of rising above the rest, in their eyes. There's a locatee, one in particular, who bought a new vehicle every year or so, but who'd buy exactly the same model, and colour, so no one would notice. It's self-perceived that they can't be different, they don't want to stand out, as progressive, or rich, or successful... (A. Eneas, personal communication, 2011)

Despite apparent cultural and social discomfort with obvious inequality, locatees continue to benefit economically from their land and challenge community norms. This in turn is influencing other locatees and increasing interest in development opportunities (C.J. Kruger, personal communication, 2011). Indeed, a strength of the CP system is that it enables individuals to use land as an economic asset (see section 6.2.4.).

Increasing development will make unequal land distribution more apparent. Already, the divide between those who have developable land and those who do not is a source of ongoing social and political tensions, with several interviewees expressing concern that the increasing number of members without land is building towards conflict between 'the haves and have nots' (J. Kruger, personal communication, 2012; L. Jack, personal communication, 2012). These tensions could prove to be an obstacle for community and locatee development plans where community approvals are required:

...we've seen that, from the membership who are not locatees. They are upset if something is brought forward, they will knock it down. They don't want to see the locatees get ahead. (A. Eneas, personal communication, 2011)

I think people who don't own land believe that anything that happens on the res - Band or locatee land- that they should benefit from big changes or developments. There's a belief that all Band members should benefit equally. Locatees meanwhile think that since it's their land, they should get the benefit. There's a divide in opinions..." (Community member, personal communication, 2011)

Inequality of landholding is not an easy thing to change, but there are ways to mitigate its impact on economic inequality and social and political tensions. The PIB has already taken several steps to do so, including stopping the practice of making large

allotments to individuals and introducing property taxation on non-member residents and leased lands. Access to Band housing is also dependent upon need, so low-income members who do not have a family with large landholdings are priority recipients of Band housing (T. Kruger, personal communication, 2011). As well, several interviewees reported that many wealthy locatees give back to the community through fundraisers and charitable donations. Interviewees and community members also suggested other ways to reduce inequality:

***Change land system or land distribution to be more egalitarian***

While interviewees admitted that removing or changing the individual landholding system was “unrealistic” or an ideal virtually impossible to implement, several still expressed a wish for a fundamental change to landholding that would support equal benefit and opportunity. Others, however, expressed concern that such a change would not be of benefit to the community overall and may even cause greater conflict. (More on distribution of costs and benefits in section 6.2.4.)

***Create more opportunities to access land***

Support for PIB’s policy of only allotting house lots is strong among Band staff and many community members, but there is concern that it is further entrenching inequality between members who inherit large landholdings and those who never will. I discuss options for improving access to land and development opportunities in sections 6.2.2. and 6.2.4.).

***Prevent worsening inequality of power and influence***

Locatees have significant control over their lands and exert a strong political influence on land decisions. Some of the tensions in PIB are a result of members feeling that they lack the same level of influence, in addition to unequal economic benefits. It is important to negotiate specifically with locatees, given that their positions and interests differ from those of non-locatees; however, PIB should avoid further disempowering members without land or only a small house lot. Similarly, Andrew Bak, at the Tsawwassen First Nation, explained that because they have a high number of landholders it became clear that it was very important for the Band government “to show openness, fairness in decisions” (A. Bak, personal communication, 2012). The

community-driven and broadly participatory CCP process is a good example of inclusive community planning that considered specific interest groups but tried to avoid privileging some groups over others. To support more egalitarian decision-making, significant community land management and planning decisions may need to go beyond AANDC's system of majority-rule community referenda. However, simply transferring greater control over locatee development to the general membership without addressing inequality in other ways could worsen political struggles between those with developable lands and those without.

### ***Share and diversify opportunities and support***

Finally, it was also suggested by interviewees that the most feasible, effective, and lasting way to address inequality might be for the Band to offer a diversity of opportunities and supports to members generally to empower them to improve their well-being, such as training, job creation, healing, and personal development (T. Kruger, personal communication, 2012). While landholding itself may not be equal, opportunities and economic security could be made more equitably available to all members (C. Eneas, personal communication, 2011).

### **Land Disputes**

We're still trying to find our way today. So we can find peace.  
A lot of what this land stuff is about – it creates conflict. (C. Eneas)

The biggest fights we've ever had are over land (J. Phillip)

As described in Chapter 5, PIB's history of individual landholdings includes many past and ongoing disputes over land. There were problems with historical inequality, inconsistent allotment and registration practices, boundary disputes, and disputed land deals. There were also conflicts between those who used the traditional, local land tenure system and those adopting and using the federal government's system. The frequency of disputes fluctuated, influenced by political shifts, increasing land values, and changing rules around new allotments. These disputes continue to emerge today in conflicts within and between families, and between individuals and the Band, the severity of which range from strained relations to court cases.

This history of conflict and sensitivity around land ownership has created an environment where individuals and families are defensive and intensely private about

land. There is suspicion of the Band office and federal government. There is animosity and rivalry between families, and struggles over land decisions within families. The lack of openness regarding land constrains community land decisions, such as land use planning, and development of collaborations between locatees. These impacts are not only social and political – some disagreements and disputes hold up or even prevent construction of homes, community infrastructure, other potential developments, and collaborations or leases between members. Efforts, by the Band or locatees, to coordinate land uses to avoid incompatible uses or achieve efficiencies in community infrastructure suffer because some individuals are unwilling to engage with each other or trust each other with information (A. Eneas, personal communication, 211; C.J. Kruger, personal communication, 2011; L. Alec, personal communication, 2012).

Part of the reason why resolving land disputes is so sensitive and difficult is that many are rooted in families' oral histories about what land is rightfully theirs. When historical claims, based on stories of land ownership passed down from grandparents and ancestors, are challenged (often on the basis of the lack of documented evidence) individuals and families feel strongly that the honesty of their ancestors and family is being questioned:

...Grandpa would never have known to go fix papers for that land, he came from a time where your word was law, you didn't need to confirm by paperwork. It was a time when people meant what they said, they were honest. So to have that challenged, it felt like it was calling my grandpa a liar... (Community member, personal communication, 2011)

Here again the gaps between the written registration and oral registration systems are apparent. Some members believe that community recognition of one's family lands should stand as sufficient and legitimate evidence of tenure, especially considering the inconsistent adoption of written registration historically. At the same time, several other community members expressed frustration with ongoing historical claims that they consider illegitimate or opportunistic attempts at land claims or expanding property lines.

Resolving land disputes is a challenge for PIB that likely will continue. Chief and Council and the Lands department spend considerable energy and resources on



researching, mediating, and sometimes legally contesting land disputes. Today, given the legislated protection of CP holdings, in a dispute between individual members Council and the Lands department can “facilitate resolution” but if an agreement cannot be reached through mediation they lack the legal authority to decide it and the dispute goes to Court. In addition, because Council and the Lands department have a legal obligation to protect the interests of the entire Band, they cannot “choose one side over another” in a dispute (J. Phillip, personal communication, 2011). Often the same dispute is settled, then reopened by later family members and resettled, but the potential for it to be reopened is sometimes still there, if families feel their claim was not properly settled or if stories or wills continue to claim the land as rightfully belonging to the family (J. Phillip, personal communication, 2011; C.J. Kruger, personal communication, 2011). In some cases, community members or Elders are involved in the dispute mediation in order to help reach agreement or to verify customary arrangements or unwritten agreements. However, these roles are largely limited to cases where registration records are inadequate, and there are fewer Elders still living who can verify longstanding historical claims.

While Council and the Lands department have expressed a desire to respect what each family believes, the obligation to protect Band interests combined with the difficulty of deciding on legitimate claims to land has led to the PIB adopting the internal policy of requiring documentary evidence of a land allotment. Standardization of rules and land registration, such as requiring surveys, has made it easier to resolve many disputes (T. Kruger, personal communication, 2011; L. Alec, personal communication, 2012) and generally there is community support for this approach (C.J. Kruger, personal communication, 2011). PIB’s experience with this approach to settling land disputes is still ongoing and it is difficult to determine if other approaches would be more effective, acceptable, and feasible. Some suggestions of potential ways to improve dispute resolution include:

***Greater transparency and education***

Several interviewees expressed frustration that so much of the land allotment and landholding history is passed down through stories and is difficult to check against records. Most individual land records are confidential and can be challenging for

members to access and navigate. As well, decisions by past and current Councils are sometimes confusing to members and families, who would like to see more of the evidence or have the decision-process explained to them. For example, during my session with community Elders, they expressed concern that the Band Office was deciding land disputes unfairly by refusing to recognize some historical claims where the Elders felt the families involved had legitimate claim to the area, or relying upon different standards of proof (such as deciding a boundary dispute with a fence line in one case but not others). Many apprehensions about unfair treatment could potentially be resolved with education and openness about the land dispute resolution process, especially now that the procedures for resolving disputes are more standardized and legally determined (and so potentially unfamiliar to many members). Along this line, PIB could possibly lessen some tensions and disputes over land by providing members with more information on the history of lawful possessions and how they were allotted over time, with attention to how requirements and procedures changed over time. This type of historical education may help members understand reasons for differences between holdings, gaps in records, and why different dispute-resolution mechanisms are used in different cases.

### ***Minor allotment adjustments***

Another way to help address the challenges of this history, including inequitable treatment in the past, is to allow for minor adjustments in allotments. While large allotments are very unlikely to be the outcome of land disputes today, given the reluctance of Council and the membership to make large allotments possible again, minor adjustments to boundary lines or corrections to past registration gaps and errors will likely be needed for some time. Some locatees have taken initiative to ensure that all their records and surveys are in order and up to date, such as officially registering past informal agreements, but others may not have done so or may not realize that adjustments are necessary. Co-operation between locatees, and between the Band and locatees, to resolve survey errors and minor record gaps is occurring (J. Phillip, personal communication, 2012) and this will likely help to rebuild community trust and openness.

### ***Community involvement in dispute resolution***

Council and the Lands department are already working to involve Elders and other community members in dispute mediation in cases where it is a viable option or where records are inadequate to establish a legal title. Many interviewees expressed support for involving Elders or the membership in the resolution of some disputes, especially where other avenues of resolution are not working. For Greg Gabriel, Band Manager, involvement of the Band is also attractive because it could give greater local control over the resolution of disputes:

we would address a lot of these disputes- we recognize which claims are valid and which are not. It infuriates me where there's a family dispute and we all know who the rightful owners are, but we can't have any involvement. (G. Gabriel, personal communication, 2011)

There was also skepticism about the feasibility of using community dispute resolution more generally. Former Chief Adam Eneas felt that legal decisions based on available documentation may be the fairest and most feasible in many cases because "the knowledge and sense of community has disappeared" and "individuals themselves don't want to listen to the will of the people" (A. Eneas, personal communication, 2011).

### **Access to Land and Housing**

For some individuals, inequality of land distribution is aggravated by challenges of accessing land for housing and other land uses. Many reserves struggle with limited land availability because when reserves were created populations were smaller and reserves were not intended as permanent, sustainable land bases. In some reserves where large amounts of land were allotted to individuals, the existence of these CP holdings limits the land available for other members and Band housing today (NALMA, 2009b, p. 5). While many First Nations individuals are able to access economic opportunities and land off-reserve, not all members can do so. All Band members share a collective interest in reserve lands and access to land and housing on-reserve carries social, cultural, and psychological importance for many individuals. Having a parcel of land and/or a home on-reserve can be a source of great pride:

for a person to have even half an acre, it makes them feel part of the community ...And there's neighbourhood pride, bringing people together... (PIB Lands staff member, personal communication, 2011)

The fact that many PIB members do not have land or their own home is a concern for members, Band staff, and Council members alike. PIB has a history of investing Band funds into housing and housing is in good condition relative to other reserves in Canada (T. Kruger, personal communication, 2012). However, with a growing population and limited Band land available for housing developments, the restricted availability of land and housing is an ongoing issue.

PIB intentionally restricted individuals' access to Band lands in the late 1970s when the community agreed to limit the size and number of allotments. Part of the motivation for this policy was to ensure that future members would be able to have a home on the reserve if they wanted to live there (E. Alec, personal communication, 2011; C. Eneas, personal communication, 2011). However, interviewees expressed concern that the Band is not keeping up with the demand for housing, creating tensions:

...it is upsetting now, we're not keeping up with housing, with young people- many think they can never realize owning a house. ... Everyone deserves a house. I'm worried that there will be huge numbers of those without a house. ... there is so little housing now, for younger people – how will they own a house, how will they own land? It's not like before, when we had more social housing and affordable options. What hope is there now? (J. Phillip, personal communication, 2011)

There's an issue with a growing number of people with no land – the young and upcoming, some are jealous of those who have lands - and that there's no more land to be allocated...(A. Eneas, personal communication, 2011)

While allotment of land to individuals has reduced overall Band lands available for housing, allotment is not the only, or even primary, reason that there is not enough housing. Federal government rules on funding for housing have limited how many housing units the Band has been able to build and how the Band can manage its housing stock (J. Phillip, personal communication, 2011). The Chawathil First Nation raises another concern in their Community Land Use Plan, where they explain that the federal government does not “provide funding to build residential homes or community buildings on land held by a CP” (CFN, 2010). For Nations like Chawathil, where significant areas of reserve have been allotted as CPs this policy appears to present a serious challenge to raising sufficient capital for infrastructure and housing.

### ***Lot infill***

Over the past several decades at PIB, one of the main ways to access land was from family members who held land. Subdivisions began to increase in the late 1970s and many of the larger landholdings were gradually broken up into smaller parcels for family member to build houses (T. Kruger, personal communication, 2011). Some interviewees expressed the view that this was part of the original intent of land allotments, to be able to provide space and opportunity to family members in the future (L. Jack, personal communication, 2012; L. Vanderburg, personal communication, 2011). Several others reported either receiving or buying land from family or giving land to family members who needed land for a house (L. Alec, personal communication, 2012; L. Jack, personal communication, 2012). This continues today and some locatees expressed the intention to share land with family in the future. The Band Office is also officially encouraging lot infill and subdivision of holdings. However, many locatee lots are now fragmented into holdings that are, or will soon become, too small for further subdivision. As well, PIB Lands staff member Travis Kruger explained that because house lot allotments have decreased in size (to 0.25 acres currently), this option is not available to holders of newer small house lots (T. Kruger, personal communication, 2012). Over time if PIB's population continues to increase, PIB will need other lands for housing and/or density of housing will have to increase (T. Kruger, personal communication, 2012).

### ***Planned housing subdivisions***

To help manage the need for land and housing in a sustainable and cost-effective way, PIB has developed several housing subdivisions. Lots are standardized and laid out to facilitate efficient use of space and community infrastructure and plan for future growth and expansion. Some members are dissatisfied with the subdivision approach, expressing concerns about being so close to neighbours, not being able to choose the location of one's house, and not being able to choose one's neighbourhood, but the Band Office sees subdivision development as necessary for long-term housing availability and protecting the Band's collective interests (J. Phillip, personal communication, 2011; T. Kruger, personal communication, 2012). For some members, subdivision lots are inaccessible because allotment of a house lot is dependent upon building a house on it, using either your own funds, a Band mortgage, or paying rent to

the Band, and not all members are able to do this (E. Alec, personal communication, 2011; Community member, personal communication, 2011). Otherwise, members must share housing with family members or seek more affordable housing options off-reserve.

### ***Other ways to access land***

Apart from a house lot allotment, avenues to access land on reserve are limited. This is a challenge for members who wish to acquire land outside of a housing development, either for building their own house or for other uses or developments. Partly this is a result of the lack of a land market for sale or exchange of land parcels, discussed in section 6.2.4. When parcels do become available, the Band Office is often interested in acquiring them in order to facilitate Band developments and housing or to make more lands available to members, but currently the sale process is administered under AANDC rules and the Band does not have first option (J. Phillip, personal communication, 2011).

Currently, if an individual member has a development proposal but lacks the necessary land, he or she can approach the Band to lease Band land (either a Band held lawful possession or a parcel of designated Band land). If the land requires designation this process can be lengthy (6 months or more) and community approval is not guaranteed, but other existing parcels are limited and often small. Some interviewees expressed dissatisfaction with this arrangement, suggesting instead that individuals should be able to receive an allotment of land if they put together a viable development proposal (A. Eneas, personal communication, 2011; L. Jack, personal communication, 2012). There is concern that the difficulty of accessing land for development opportunities is discouraging individual initiative, entrepreneurship, and independence, especially among young people:

...the strength should be is to be implemented towards our young ones. That when they get to a certain age they know they can get land. They know they can have a piece of land that they can take care of, that is the strength. ...That gives them incentive...they have something that they're looking forward to. (Community member, personal communication, 2012)

Because of concerns like this, and the growing number of young members who were children or not yet born at the time of the original Band decision to ban non-house

lot allotments, there may be cause for PIB to re-examine their allotment policies, or re-engage the entire community in a conversation about access to land. Community land use planning may provide an opportunity to plan for land allotment in a way that will not result in the same mistakes of past allotments, while also addressing the frustration of young people and members who may not understand or agree with the current land allotment policies. Rules that define access to land “reflect the balance, or imbalance, of power as much as anything else” (FAO, 2002, pp. 30–31) and as PIB’s population grows and changes, inflexibility or unwillingness to engage with members’ concerns may lead to conflicts or political struggles. There is a need for community education and engagement in land use planning, both to help members understand the benefits of having land held by the Band and developed for collective interests, and to demonstrate respect for community concerns and ensure that members support the Band policy.

### **Band Office - Locatee Relations**

The most frequent concern related to individual landholdings mentioned by interviewees and in Band documents, is dysfunction between the Band Office and locatees. To some extent, tensions between a governing authority and individuals exist in any land tenure situation. For PIB, these challenges are apparent in poor communication between the Band Office and locatees, many locatees’ distrust of the Band Office, and power struggles over land decisions. These challenges also stem from historical shifts in land tenure rules and authority, as well as many decades of limited formal local regulation of locatees.

#### ***Insufficient communication between Band Office and Locatees***

Locatees, community members, Band staff, and Council members all expressed concerns over the lack of communication between the Band office and locatees (and the membership generally, but particularly locatees, given their control over parcels of land). Many of the avenues that Band staff and Council use to communicate with membership, such as the newsletter and general community meetings, are not effective channels to reach locatees. Locatees interviewed expressed frustration with community meetings, especially when lands issues are in question, partly as a result of the community tensions over inequality mentioned previously and partly because they felt that most decisions and planning that they want to be involved with are not made at community

meetings. Many expressed the view that they would prefer individual or small-group communication, and appreciate being sought out specifically. For certain land issues, the Lands department has reached out directly to the locatees that will be affected by decisions (T. Kruger, personal communication 2012). There is also a need for more engagement on the part of locatees as Lands staff report that it is a challenge to get all locatees to respond or participate in engagement opportunities. Some locatees do make an effort to engage with Band Council, particularly on development proposals, and expressed frustration with what they perceived as a lack of response to past inquiries and proposals. Locatees want to have more regular communication from the Band office, particularly with overarching development and planning decisions, not only regarding issues involving their lands. There is also interest in improved access to information and guidance on land management and development (see section 6.2.4.).

### ***Distrust of governments***

The lack of communication and negative past experiences with the Band Council and federal government have combined to make many locatees distrustful of the motives and decisions of the Band Office and AANDC. Repeatedly in interviews and community planning sessions I observed, locatees and members would ask questions about the purpose of land use planning, of proposing land use by-laws and regulations, and even how my own research project was going to be used by the Band Office. There is widespread wariness about government powers and efforts to control locatees. In interviews, the Band Office was criticized for being too much under the influence of AANDC, for not being open about land and development plans or records, for unfairly limiting locatee rights, and for protecting their own power rather than assisting locatees.

### ***Lack of clarity on rules and policies***

In the current absence of comprehensive land use by-laws, zoning, and plans, PIB Council and Band departments operate largely on a case-by-case basis when it comes to applications by locatees to develop or use their lands in a new way, or when reviewing locatee leases or other transactions. This can create a “reactionary” or “crisis” response to locatee applications that raise concerns at Council (C. J. Kruger, personal communication, 2011). Frustrated locatees then criticize Council’s decisions as being



inconsistent and arbitrary. Locatees, Band staff, and Council members all recommended that there be consistent and clearer policies, rules, and procedures for land decisions.

Among interviewees, awareness of these issues was high and interviewees reported that efforts are underway to improve relations between the Band Office and locatees. In interviews, Band staff and Council members acknowledged that some interactions with the Band Office and AANDC can be very frustrating for locatees and that Council and the Lands department are trying to be more accessible and open in land management decisions. However, they also put responsibility on locatees to be open to changing dysfunctional relationships and be willing to collaborate with the Band office and other locatees.

### ***Commitment to collaboration and support***

Increasingly, locatees and the Band office are realizing the benefits and strengths of collaborating. Not only does collaboration help to guard against the types of mistakes made in past leases and developments but also there is growing awareness among locatees that collaborating on land use planning and development can be of direct benefit to them. Chief John Kruger, Council members, and Lands staff regularly stress that they support locatees and want to assist their land use plans and management or development efforts:

We don't want to tell locatees what to do with their land, but to say 'please- can we have a theme in the developments, make sure they are compatible', so we can better play off opportunities and advantages with a coordinated development. ...[locatees] have a lot of power. We have to acknowledge that. It's not a bad thing, it's a good thing. If we can work together. (C.J. Kruger, personal communication, 2011)

...we have to walk with the people. If they're not ready, we have to help get them ready." (J. Phillip, personal communication, 2011)

Similar commitments were voiced by staff at the Westbank First Nation, and they reflected that collaborating and supporting CP holders in development planning has built "a pretty good relationship overall" and prevented conflicts over land use planning (R. De Guevara and L. Vanderburg, personal communication, 2011).

### ***Locatees association***

In order to build collaboration among locatees themselves, PIB locatees could form an association, or at least have regular meetings to share plans and learn from each other. Some locatees expressed skepticism that such an association would work given the ongoing reluctance to discuss land development plans and the past disputes and tensions between locatees that would have to be overcome. Other locatees expressed support for such an initiative, primarily out of interest in learning from others' experiences with leasing and development (Community meeting, 2011). The Chief and Lands staff expressed hopes that locatees will self-organize to make this happen, seeing it as a way to "build respect, and find common interests ... [and] make sure land uses and development were compatible" (C.J. Kruger, personal communication, 2011). It would also give locatees an avenue to voice their concerns and suggestions for land use planning and land regulations (T. Kruger, personal communication, 2012).

### **6.2.3. *Band Lands***

While the focus of this research is on individual landholdings and reserve land management, use and management of Band land are also influenced by individual holdings, two of which are discussed in this section: community infrastructure development and Band-led development projects. I consider other aspects such as environmental protection and managing for land use compatibility in section 6.2.4.

### **Community Infrastructure**

Individual landholdings on some reserves have resulted in challenges with ensuring access to lots and providing infrastructure and servicing (Chawathil First Nation, 2010). Larry Parady, Manager of Lands, Environment and Natural Resources in AANDC's Atlantic region, attributes many of these issues to the lack of planning when holdings were originally allotted (L. Parady, personal communication, 2012). In many reserves, allotments were made based on existing uses of areas, which tended to be agricultural historically. Social and cultural preferences also influenced land allotment and settlement; for example Carstens (1991, pp. 142–143) describes how social relationships and traditions meant that members of the Okanagan Indian Band preferred to build houses spaced well apart from each other. Both of these factors likely

contributed to the large size and dispersed layout of early allotments. The original spatial layout of lots often persists today, or at least influences current lot layout. This has repercussions for planning access and servicing infrastructure. Large, dispersed lots that were once attractive for agriculture or privacy are today often landlocked, difficult to access by vehicle, and/or require extensive infrastructure to service.

Historical changes in land use in combination with existing parcel fabric (the spatial layout of surveyed lots) can create planning challenges in many contexts (Home, 2007; van der Krabben & Needham, 2008); however, the impact of existing parcel fabric is compounded on reserves for several reasons. Off-reserve, challenges resulting from underlying parcel layout can often be resolved through subdivision, sale, land consolidation, or expropriation, but on reserves many of these mechanisms either do not exist or are very rarely used, resulting in parcels remaining relatively static over time. Subdivision might be an exception, as it appears that at least on some reserves, like PIB IR1, individual landholdings are regularly subdivided into smaller parcels and transferred to family members. However, subdivision of parcels is shaped by the layout of original allotments and in some cases may even worsen access and infrastructure challenges. PIB has addressed some of these issues by ensuring that new allotments and lot subdivisions are planned with infrastructure and access in mind. Still, infrastructure and access issues are leading concerns among locatees who are interested in developing their lands. Apparently, the current lack of servicing to lots is a primary reason why many developments on locatee lands have not yet occurred (T. Kruger, personal communication, 2011; E. Alec, personal communication, 2011). As availability of servicing is expanding and PIB begins sharing infrastructure and servicing needs with the City of Penticton, there is concern among Band staff that there could be a flurry of development without sufficient land use planning and regulations in place.

Another concern is that individual landholdings can inhibit or delay development of community infrastructure. For example, past attempts by PIB to make roads safer on the reserve, by widening them and putting sidewalks in, were met with opposition from locatees who would have had to move their fence lines. Opposition created reluctance on the part of Band staff and Council to push the issue; however, with continued community demands for safer roads, there is talk of reopening negotiations:

I know that would be asking a lot from our Band members, but it would be a great benefit. I would have to go talk to every one of those locatees to do that... still today about half would refuse. (C.J. Kruger, personal communication, 2011)

Even in cases such as this, there is a strong reluctance by Council to resort to expropriation of locatee land. While legally PIB Chief and Council can expropriate land (through the Minister), expropriation is a land governance tool that does not align with PIB's local and cultural values. There is historical sensitivity about governments' abusing their power and taking lands from the Band and locatees, and respect for individuals' decisions and not using force against them is a deeply embedded cultural value. Therefore, expropriation would be politically costly, as well as fiscally costly, meaning that in practice it is not a functional power for PIB. Instead, Council members and Band staff prefer an approach of building agreement by educating locatees on the benefits of community infrastructure development, but this approach can be slow and can hold up infrastructure and developments (C.J. Kruger, personal communication, 2011). In his interview, Chief Jonathan Kruger suggested that it might be beneficial to have a clear Band policy or procedure for situations where locatee lands or permissions are required for community infrastructure, something "less abrupt, less contentious" than expropriation but a more effective negotiation and resolution process than currently available (C.J. Kruger, personal communication, 2011).

### **Band Development Projects**

Individual landholdings have had both positive and negative impacts on Band-led developments. As was the case with housing issues discussed previously, CP land decreases the Band land available for Band development initiatives. The majority of PIB's prime developable land is held by locatees (A. Eneas, personal communication, 2011), though there are negotiations ongoing for economic developments on large parcels of designated Band land. Given PIB's large reserve land base it may not be as constrained by locatee lands as other First Nations (J. Phillip, personal communication, 2011). Andrew Bak from Tsawwassen First Nation explained how his community was challenged by the lack of Band land suitable for community developments, as the available land primarily consisted of ecologically or culturally sensitive land that had not been appropriate to allot to individuals. However, the Tsawwassen First Nation

government could not afford (politically or financially) to buy or expropriate lands from locatees, so the Nation has focused on acquiring developable lands outside of their reserve lands (A. Bak, personal communication, 2012).

As with the infrastructure challenges noted in the previous section, some Band-led economic developments can be constrained or delayed because certain lands, access, or permissions required from locatees are difficult to obtain and expropriation is unattractive. In addition, Band Council and staff have encountered challenges when negotiating with developers and municipal and provincial government bodies because these actors are waiting to see what locatees want to do with their lands before agreeing to developments or service agreements (C.J. Kruger, personal communication, 2011). At the same time, PIB Chief Jonathan Kruger also stressed that the influence of locatee lands on Band-led developments has also been positive:

Locatees have influenced more, and better development. They're challenging Chief and Council to do development themselves. Even though we have issues with locatees, they have influenced change, business developments. They tell us 'we have all this land, we could do something with it' – we're learning how to do that now, learning from those with experience from their own lands." (C.J. Kruger, personal communication, 2011)

There are many benefits of CPs (explored more in upcoming sections). However, Band-led developments on Band land rather than locatee developments mean that benefits are shared more evenly across the community. In Band-led development, there is also more community control over the planning and approval, and certain challenges with locatee developments are avoided (see section 6.2.4.).

#### **6.2.4. *Locatee Lands***

The mix of strengths and challenges that come with individual landholdings is even more apparent when looking specifically at these lands themselves. This section includes the largest number of impacts, strengths, challenges, and suggestions to change the CP landholding system, organized into three categories: use and management, family lands, and economic benefits and challenges.

## **Use and Management Decisions**

The day-to-day use and management decisions of locatees, as well as more unusual lease and development decisions, affect several important aspects of reserve land management. This section considers ecological and cultural protection, land use compatibility, by-laws and their enforcement, and locatee information gaps.

### ***Planning for cultural and ecological protection***

Nature is an integrated whole, and it remains integrated before privatization and after. ...What has been divided, of course, is not the land but authority over the land, particularly the power to make decisions about it. Privatization is not chiefly a physical act but instead a matter of fragmenting rights and responsibilities among people.  
(Freyfogle, 2003, pp. 167–168)

An obvious impact of the CP lands system on reserve land management is that the Band Council and staff do not have the same degree of authority over use and management of individually held lands. This creates a landscape of fragmented control and planning for landscape-level issues such as ecosystem protection and watershed management. As well, land use regulation and community planning are made more complicated. Environmental concerns such as habitat conservation and water pollution are classic examples of conflicts between collective and individual interests. Lawful possessions may introduce or exacerbate these conflicts in the context of reserves by granting individuals exclusive land use and management powers and creating an incentive for individuals to intensify use on a particular parcel of land. If an allotment was or is made without consideration of ecological values associated with that land, or detrimental effects on nearby lands, or if ecological elements on locatee lands have since become important for management, a Band may face difficulties managing uses that negatively impact those values. Band Councils can pass by-laws, zoning, and land use plans that restrict certain land uses or changes on locatee lands, but even in contexts where these tools are more familiar and widely used, landscape and ecosystem level planning is made more difficult when land is fragmented into private ownership (Freyfogle, 2003, p. 169).

In PIB, there are differing opinions about how to protect ecologically and culturally important lands. Some agree with strict regulatory controls, such as the

*Species At Risk Act* (S.C. 2002, c. 29) that Environment Canada applies to reserve lands. Others think that more innovative, nuanced, and locally controlled options are preferable. As well, many feel that most locatees are responsible caretakers and may in fact offer the best protection for these important places. In interviews and observations, several locatees indicated that having lawful possession of an area of land generates feelings of greater responsibility to that land and provides them with the power to protect it by controlling access to and use of the land, regardless of changes in political leadership or land development plans. This argument is consistent with some theories about private property and land stewardship incentives more generally (Anderson and Leal, 2001) but greater investigation of relationships between lawful possession and improvements in stewardship is required before this can be identified as a widespread or consistent impact of CPs. However, the fact that several individual landholders expressed this attitude points to the potential that CPs may positively influence individual's land use and management decisions.

Relying solely upon individuals to protect ecologically and culturally important lands has downsides. For one, voluntary protection is not guaranteed or permanent. A locatee, or future heirs, could change their minds about protecting lands and do damage to an area that the community wants to protect. On the other hand, conservation regulations might impose unfair burdens on certain individuals if they hold lands in protected areas (Freyfogle, 2007). Under the current *Indian Act* lands regime, it is not clear how to address this issue. If land is expropriated from individuals with lawful possession, they are entitled to compensation. However, if land use is regulated or constrained in such a way as precludes certain economic activities, there is no clear legal requirement that individual landholders be compensated or have the opportunity to exchange their land.

There have been multiple cases of locatees in PIB and other Okanagan reserves who have been unable to develop their land because of environmental protection measures (setbacks from waterways, endangered species or habitat, etc.). This can cause locatees a great deal of frustration, given that their landholding is likely the only land they have access to due to the general lack of reserve land for sale, reluctance of Bands to allot additional lands, and the expense of off-reserve lands. In informal conversations, several interviewees and community members told me about a locatee

on another reserve who was blocked from developing his land because it contained endangered habitat. Out of frustration with this top-down decision by the federal government, this individual bulldozed the area. Outcomes like this signal that interventions to protect ecologically and culturally sensitive areas on locatee lands need to be sensitive to cultural, historical, political, economic, and legal contexts. Three suggestions were proposed in interviews and community meetings with PIB members:

### **Land swaps**

Locatees who have plans for development but whose lands are undevelopable or constrained because of ecological concerns have proposed that they be able to exchange their land for another parcel of Band land elsewhere that is developable:

Our land is undevelopable because of a salamander, and because it is precious to the Band. So then I say, if we want to protect it, then trade me – trade me for developable land. ... The Band is the one who should be taking care of that, and medicine, our *captiklxw* – maybe it's the reserve that should be taking care of it, should belong to the reserve. (Community member, 2011)

The Tsawwassen First Nation holds environmentally and culturally sensitive lands as Band lands, which has helped to minimize conflicts between environmental protection goals and locatee development plans (A. Bak, personal communication, 2012). At PIB however, it may not be feasible for the Band to acquire all the ecologically and culturally significant lands. There is limited developable Band land left, and much of that is of great value to the Band for Band-led community projects or economic development initiatives that would share benefits with the whole community. As well, there are concerns about how to swap lands fairly, such as whether an equitable swap would be based on area or market value (T. Kruger, personal communication, 2011). Another option may be for the federal or provincial government to provide a non-reserve land parcel in exchange for a guarantee of protection of the locatee's original area on the reserve, but this approach is speculative and has not been used, to my knowledge.

### **Conservation easements and/or payments**

Another option that avoids concerns about losing developable Band land is to use conservation tools, such as voluntary conservation easements or conservation payments, that may protect lands more reliably than voluntary conservation and more



fairly than regulations. One such initiative is the Locatee Lands Project of the Enowkin Centre, an environmental and cultural learning organization located on the PIB reserve. The Enowkin Centre is working with neighbouring locatees to develop conservation agreements that protect endangered habitat on locatee lands. In exchange, the Enowkin Centre provides annual payments to compensate the locatees for the loss of the use of their land and provide incentives for conservation (Armstrong, personal communication, 2011). This arrangement is still under development. Essentially, it is a hybrid between a conservation easement and conservation payments, two mechanisms that are regularly used in conservation efforts off-reserve. This initiative is unique in the context of First Nations reserves in Canada, both in its legal mechanism of a locatee easement but also in that it generates a sustainable income to the landholders in exchange for preserving the land, something that outright purchase or regulation of the land would not do (J. Armstrong, personal communication, 2011). The Locatee Lands Project has met with support from the locatees involved, other community members, and Chief and Council, who are looking into ways to further support and expand the program.

Advantages of the Locatee Lands Project approach include that the easements are voluntary and that locatees are rewarded for protecting the land. PIB Band staff members are reluctant to consider other options such as protective covenants that would force Band control over a locatee's property, both out of respect for locatees and because they could be changed by subsequent administrations if they became a political issue. Some interviewees also explained that there is sensitivity to having Bands and locatees bear the cost of species protection when it is the lack of protection off-reserve that is endangering many species and habitats. A challenge of conservation payment programs on reserves is that funds that are available for similar efforts off-reserve are currently not available for equivalent on-reserve efforts and Bands may have difficulty funding extensive conservation payments.

### **Participatory community land use planning**

A third, more general approach to protecting ecologically and culturally sensitive areas and achieving overall ecosystem and landscape level planning objectives is to involve the entire community, especially locatees, in developing land use plans focused on protection. This has been the primary approach of the PIB so far, and while the land

use plan process is still ongoing, it appears to be succeeding. Certain ecological and cultural planning approaches, such as the inclusion of greenbelt-protected areas in housing developments, have been used by PIB since the early 1980s, well ahead of their popularity in most Canadian cities and towns (T. Kruger, personal communication, 2012). Important components for the success to date are: inclusivity; respect for different members' and locatees' concerns and values; education of members and locatees on the need and benefits of balancing conservation and development; and a commitment by the Band Office that it will work with locatees to defend their interests and find equitable solutions. The Band Office is also negotiating with the federal government to set aside large areas of Band land for environmental and species protection, provided that locatees be given more permission to develop their lands (C.J. Kruger, personal communication, 2011; J. Phillip, personal communication, 2011). A participatory, relationship-building approach to environmental and cultural protection planning appears to be working well for the PIB so far, and in other First Nations that have used this approach (R. De Guevara and L. Vanderburg, personal communication, 2011; A. Bak, personal communication, 2012).

Property lines are drawn on a map, not on the land, not on the animals... they're drawn by people, so it's the relationship between people that matters the most... (C. Eneas, personal communication, 2011)

### ***Land use compatibility***

Individual landholdings increase the need for land use planning, especially if there is high potential for leasing or development. Lawful possession gives individuals powers to decide how to use their land, including developing it themselves or leasing it to a third-party user or developer. If a Band lacks land use planning tools such as zoning or land use by-laws (as many currently do) it runs the risk of having incompatible land uses and negative transboundary effects between land parcels. This is a leading concern of PIB Band staff and of locatees, who are concerned that decisions by other locatees or their lessees might negatively affect their own land uses or development potentials. The concern is largely preventative, given that there has not been a high level of locatee developments, but PIB does already have some existing uses and leases, including industrial and commercial uses, that will shape land uses and developments around them.

PIB's main strategy for addressing these concerns is land use planning, not only to develop binding land zoning and regulations but also to help educate locatees about the benefits of coordinating developments to avoid conflicting uses and maximize opportunities, and to develop themes for developments that the entire community supports (T. Kruger, personal communication, 2011; C.J. Kruger, personal communication, 2011). The locatees association (section 6.2.2.) is also a proposal to help locatees coordinate and avoid negative transboundary effects. Locatee responses to zoning and land use planning implementation at PIB remain to be seen.

### ***Issues with by-laws and enforcement***

An extension of the land use compatibility issues and reserve planning more generally is the need for land use regulations and their enforcement. Many First Nations across Canada are approaching land use and management issues through land use planning, but not enacting legally binding laws or policies to enforce the decisions made in planning (L. Pardy, personal communication, 2012). While land use planning is certainly a positive step, and does influence approvals of developments and leases, it can be difficult to enforce in cases where an individual Band member or lessee does not comply. With by-laws or other legally binding regulations and policies, members or lessees can be fined for non-compliance and made to change use and management practices. PIB is having issues with some incompatible land uses, transboundary effects, and pollution from locatee land uses but they currently lack the tools to address this and prevent similar situations from occurring. Many interviewees identified the need for clear, specific land use regulations to support implementation of community land use goals.

Regulating locatee land uses is complicated by struggles over what the legal rights of locatees are, and should be, as explored in section 6.1.3. Until recently, there have been few regulations or constraints on locatees, except some from the federal level. Another obstacle is the size of the undertaking and the political, technical, and legal resources required because there is such a minimal framework in place for land use planning and management on reserves compared to off reserve situations (L. Pardy, personal communication, 2012). However, PIB Band staff report that generally the community is in favour of land use regulations and by-laws because they have "woken up" to the need for them (J. Phillip, personal communication, 2011). The PIB Band

Manager Greg Gabriel reported that this awareness has increased largely as a result of members seeing impacts of past mistakes and realizing that future developments and a growing population will increase the potential for more mistakes if planning and regulation are not put in place (G. Gabriel, personal communication, 2011).

The other piece of the land regulation puzzle on reserves is implementation and enforcement. PIB has had difficulty taking a direct stand against certain land use issues because of insufficient enforcement capacity to monitor sites and insufficient resources to support ongoing environmental protection (C.J. Kruger, personal communication, 2011). There is also political opposition to having other agencies enforce provincial or federal regulations on reserve. However, local enforcing of rules is also challenging and contentious because in a small, close-knit community it may require enforcement against one's family, friends, or other close relations. Some past attempts to deal with land use issues have met with co-operation, but others have been left unresolved if the situation became too hostile (C.J. Kruger, personal communication, 2011).

The approach the PIB Council wants to take instead is to involve the community in the development of policies and land laws that do not single out anyone and that are supported and enforced by the community (C. Eneas, personal communication, 2011; C.J. Kruger, personal communication, 2011). This approach also extends to addressing non-compliant existing uses. PIB plans to try to work with the locatees and lessees involved to encourage them to become willingly compliant (G. Gabriel, personal communication, 2011). For leased lands, one interviewee also recommended that PIB develop a Band policy to create safeguards for situations where a lessee sublets or transfers a lease to ensure that conditions and restrictions of the original lease are respected (L. Jack, personal communication, 2012).

### ***Information gaps***

A far-reaching issue that locatees and Band staff touched upon is the need for more, clearer information about land uses and management, specifically for locatees. The issue of information gaps and needs relates to issues of not understanding locatee rights, *Indian Act* and AANDC rules and procedures, Band land policies and procedures, or the complexities of land leasing and development.

Locatees, Band staff, and AANDC staff identified the need for locatees and families to understand clearly the nature of CP holdings and the rights and obligations that go with them under the *Indian Act*. One example of this is awareness of the requirements and proper process of making legal transfers and transactions. The lack of understanding of the legal and policy environment of CP holdings means that some locatees are “very reactive” to things that they think are limiting their rights, making it difficult to collaborate or move forward together (C.J. Kruger, personal communication, 2011). Locatees are also frustrated that requests that seem quite simple, such as getting a survey of a landholding, have been unreasonably complicated in practice. In several community meetings members suggested that locatees who have experience navigating the formal processes of CP holdings could share this knowledge with other locatees and work with the Lands department to develop guidelines and educational resources for locatees. As well, Council members and Band staff have identified the need to make clearer procedures and informational resources for locatees.

A major gap in understanding involves locatee leasing and development proposals. Issues of particular concern to locatees are how to ensure leases are negotiated for fair market value, putting environmental protection clauses in leases, the various reporting requirements of the leasing or development process, how to protect oneself and the Band against abuses by a lessee, and where to turn for information and advice. According to Lands staff, much progress has been made on educating locatees on the benefits of registering leases and familiarity with lands procedures is gradually improving (T. Kruger, personal communication, 2012). A specific recommendation from locatees is for the Lands department to develop a simple, clear step-by-step handbook for locatees explaining land and taxation rules and procedures, “with a checklist for getting different things done...the dos and don’ts” (Community member, 2011). There are wide-reaching benefits to having locatees, and members generally, more informed about land policies and the land management system, though building this awareness may require a great deal of outreach and education for members, as it can entail “really changing peoples’ worldview around property, [and] there’s a real steep learning curve” (A. Bak, personal communication, 2012).

## **Family Lands**

Like many First Nations that use the CP system, the vast majority of transactions involving locatee lands at PIB are between family members: transfers, inheritances, and subdivisions. Since land sales or exchanges with non-family members are rare occurrences, most land stays in the family, handed down through generations. In PIB most large land allotments were made during the reserve's early history. As a result, many families identify strongly with their landholdings as pieces of family heritage.

Many in PIB consider the ability to bequeath land and have it securely transferred to one's children and families, rather than having it revert to the Band, as one of the great advantages of the CP system, in comparison to many traditional or customary systems. With the CP system, if a landholder does not make a will and dies intestate, their land is transferred to their spouse and/or any children. However, interviewees did identify ways that CPs have affected family land dynamics, which I present in three sections: family disputes, fractionation, and family decision-making.

### ***Family disputes***

Most holders of non-house lot CPs at PIB inherited their land from family, or married into a family with land. In the past, it was traditional in most families for land to be inherited by the eldest son, though sometimes a different child was chosen to inherit or land was divided up among siblings (L. Alec, personal communication, 2012; J. George, personal communication, 2012; L. Jack, personal communication, 2012). The practice of land being passed in its entirety to one child has continued in some families, but now it is more typical for land to be divided up or to make all children CP holders of the parcel (J. Phillip, personal communication, 2011; Community member, personal communication, 2011). It was also reported in several interviews that some families still have a tradition of land being passed down the male line only, but this seems to be increasingly uncommon (E. Alec, personal communication, 2011; J. Phillip, personal communication, 2011). Family tensions over inheritance, such as contested wills, multiple wills, and concerns of coercion or unfair influence over the making of a will, can create divides and conflicts within families (A. Eneas, personal communication, 2011; E. Alec, personal communication, 2011). These types of internal disputes have been observed to influence community politics in other Okanagan Bands (Carstens, 1991, p.

165). Typically, the Band Office avoids involvement with internal family disputes over land, except in cases where an individual's rights or interests need representation (G. Gabriel, personal communication, 2011; J. Phillip, personal communication, 2011). Band staff may also get involved in situations where logistical or mediation support is requested, such as cases where the administrator of a will is uncooperative or cannot be found, leaving CP lands in limbo until all the heirs can be contacted and reach an agreement (J. Phillip, personal communication, 2011).

The fact that some CP holders do not make legal wills is an ongoing challenge that "causes all sorts of inner turmoil and family fights" (C.J. Kruger, personal communication, 2011). Disputes over estates can also make parcels undevelopable until the dispute is settled because the heirs do not agree on a land use (L. Alec, personal communication, 2012). Even in cases where there is no active dispute but the land is still in limbo and the estate unsettled, it is unattractive to developers, new CPs cannot be issued for it, and it cannot be leased (G. Gabriel, personal communication, 2011).

Sometimes individuals make no will as result of oversight or misunderstanding of the system, but others choose to avoid the complicated process and family politics of making a will and instead let their estate be divided according to the *Indian Act* s.48 rules (J. Phillip, personal communication, 2011). Locatee Louie Alec explained that some people, mostly elderly members, feel superstitious about writing wills, fearing that writing a will is a sign that you will soon die (personal communication, 2012). As well, misunderstandings of the *Indian Act* process and requirements can lead to AANDC declaring wills void. PIB Band staff try to take a preventative approach to family land disputes by educating locatees on the process and benefits of making wills, such as ensuring land is kept in the family and avoiding complex estates situations (J. Phillip, personal communication, 2011; T. Kruger, personal communication, 2011). Staff highlighted other ways to avoid family conflicts over land:

We try to instill into everyone's minds that they need to have all their affairs in order if they do own land... even with a will it can get complicated- people don't think through the consequences of doing something like leaving land to a non-family member. When land gets distributed, it can cause grief and hardship when someone gets land that they were not really born into. (G. Gabriel, personal communication, 2011)

AANDC staff also work with Bands and individuals to explain the inheritance procedures for CP lands but can only provide information, not legal or financial advice (C. Walton, personal communication, 2012).

### ***Fractionation of landholdings***

One of the most obvious outcomes of intestate devise of CP lands is fractionation, “the problem of multiple co-owners sharing many miniscule, undivided interests in a single tract of land” (Shoemaker, 2003, p. 729). Parcel fractionation is separate from fragmentation, the subdivision of a parcel into smaller and smaller parcels, although this is another concern (Community member, 2011). Instead, fractionation occurs when individuals inherit a share of an interest in a parcel as a result of tenancy-in-common laws. When an individual who holds land under joint-tenancy dies, his or her share is transferred to the surviving joint-tenants (Kydd, 1989, p. 31). If the land is held under tenancy-in-common, the share is divided among the deceased’s heirs (Kydd, 1989, p. 32). Tenancy-in-common is assumed in the case of multiple CP holders of a parcel, unless a joint tenancy statement is registered (Kydd, 1989, p. 31). In the case of intestacy, tenancy-in-common shares may be split among a large number of family members and over generations of this occurring the tenancy-in-common interests become further and further divided.

In extremes, fractionation can result in more than 1000 individuals all holding shares in a single parcel of land in as little as six generations (Indian Land Tenure Foundation, 2012a). This can severely reduce the per-capita economic value of the land involved (Deaton, 2007; Indian Land Tenure Foundation, 2012a; Shoemaker, 2003) and makes the land parcel essentially impossible to use, given that land laws require that either the majority or all of the undivided interest owners must consent to any proposed land use (Indian Land Tenure Foundation, 2012a). Fractionation has been recognized as a serious issue in areas of the United States, particularly on Native Reservations and areas where intestacy is high (Deaton, 2007; Indian Land Tenure Foundation, 2012a; Shoemaker, 2003) and in New Zealand on Maori landholdings (I. H. Kawharu, 1967; M. Kawharu, 2001). Levels of fractionation on reserve lands in Canada have not reached these extremes, likely because of the still relatively low number of individual landholdings and the fact that many holdings have only existed for a few generations.



However, fractionation of CP holdings is occurring and there are cases of parcels with as many as 40 individuals who have a tenants-in-common interest (C.J. Kruger, personal communication, 2011). AANDC individual landholdings specialist Colleen Walton explained that while the decision to hold land as joint-tenants or tenants-in-common has important implications, particularly in the division of estates, it is up to individuals and families to decide which arrangement is best for them (C. Walton, personal communication, 2012).

In PIB interviews, individuals reported issues with lands where even as few as three co-owners are involved (A. Eneas, personal communication, 2011), and cases where an initial lack of agreement between family members has led to further fractionation and growing challenges to agreement (L. Jack, personal communication, 2012). For families that hold fractionated land parcels, all of the individuals with an interest must agree on development proposals or leases, meaning that a single individual with a fraction interest can prevent the land from being used (G. Gabriel, personal communication, 2011). This is occurring at PIB, either because individuals disagree with the proposal, cannot be located for their decision, or are not interested in participating (such as grandchildren who inherit a small fractionated interest but do not live on the reserve and are not interested in the land decisions) (J. Phillip, personal communication, 2011). In addition, further complications can arise when a non-Band member inherits a share of these parcels because, unless they agree to transfer or sell their interest, their share is opened to bids from all members, and non-family members can acquire interests in fractionated parcels, exacerbating disagreement (J. Phillip, personal communication, 2011).

Interestingly, not all interviewees considered tenancy-in-common as a negative situation. In some cases, locatees want their parcel or interest to be divided up between their children to ensure they have a share or to keep the entire family involved in decisions about the land (J. Phillip, personal communication, 2011):

My Grandmother refused to write a will, even when she was asked to so as to avoid conflict. She said 'if you can't do anything together and work it out within a certain length of time then give it all back to the Band. You have to learn to work together.' (C.J. Kruger, personal communication, 2011)

Some PIB members today see the requirement of group decision-making and consensus as a strength, both for family dynamics and for the protection of land against damaging or short-sighted decisions (J. Armstrong, personal communication, 2011; E. Alec, personal communication, 2011; L. Jack, personal communication, 2012). One interviewee explained that he intended to use the tenancy-in-common arrangement to ensure that “no one person can do something without the others saying” and so protect the land for future generations:

That's one of the safety deals of CPs, in order to keep them from selling [or leasing]. See, if there's one in charge, that's who the people that wanna lease land look for. They look for the one person in charge, the one, not the one that has ten or twelve (Community member, personal communication, 2012)

Despite the potential benefit of preventing development or leasing of certain parcels, overall it seems that fractionated landholdings create undesirable situations and cause conflicts that are difficult to resolve. A goal of the current PIB land use planning process is to identify which lands are held by large groups of co-owners and work with them to resolve disagreements or legal barriers preventing the land from being used. Three approaches to addressing fractionated landholdings were identified in interviews. There are also approaches used in the US and New Zealand to consider.

### **Subdivision**

If the co-owners agree, tenancy-in-common parcels can be subdivided into separate lots and individuals receive their own lot. This has been done with land at PIB, but it requires full agreement and so may not be possible in all cases (J. Phillip, personal communication, 2011). One reason that co-owners may be unwilling to subdivide their parcel is that for small parcels, dividing it would result in tiny, unusable and/or less valuable pieces (C.J. Kruger, personal communication, 2011).

### **Buy-backs or land consolidations**

At a community meeting of locatees, several locatees proposed that in order to resolve conflicts over some of the most complex estate and/or fractionation situations, the Band could buy back the land, split the sale monies among the co-owners, and then protect the land or develop it as a Band development (C.J. Kruger, personal

communication, 2011). Co-owners could also arrange a land consolidation deal among themselves, but in some conflicts having a neutral third party as the recipient of the land may facilitate resolution. The challenge of getting the co-owners to agree to land consolidation or buy-back is still a major obstacle, however, and the Band has limited funds available to purchase lands from individuals (C.J. Kruger, personal communication, 2011). Related to this option is the possibility of changing AANDC policies in order to give the Band the first option to bid on an interest in a fractionated property if it comes up for sale, in order to gradually acquire the fractionated interests (C.J. Kruger, personal communication, 2011). At a minimum, the co-owners should have first option ahead of non-family members (J. Phillip, personal communication, 2011). Land consolidation plans are recommended for resolving or at least preventing further fractionation in US Reservations (Indian Land Tenure Foundation, 2012a)

### **Estate planning supports**

A third, more gradual approach is to support co-owners of fractionated lands in their estate planning in order to avoid a worsening of the fractionation situation. Co-owners could help to reconsolidate landholding by switching to joint-tenancy (although this means that the interests of deceased co-owners are consolidated into the surviving co-owners' interests and any children of the deceased do not inherit an interest). In addition, support for estate planning can help prevent fractionation from starting in the first place if landholders create wills and avoid intestacy and tenancy-in-common. One PIB member suggested that he plans to lease his CP land in order to preserve it as an intact economic asset while still providing benefit to heirs in the form of lease payments (Community member, 2011). These and other strategies in estate planning can help to reduce or prevent fractionation (Indian Land Tenure Foundation, 2012b) and should be further investigated for CP lands.

### ***Family decision-making***

In PIB's past, decisions about the use of family lands were heavily influenced, if not fully decided, by the family, especially Elders and family patriarchs (J. Phillip, personal communication, 2011; J. George, personal communication, 2012). This was also the case for political decisions, such as voting, where family Elders would make, or heavily influence, family members' decisions (T. Kruger, personal communication, 2011;

J. Phillip, personal communication, 2011). Increasingly, more individualized decision-making is replacing family processes (J. Phillip, personal communication, 2011):

Sometimes the family would influence land decisions, more so before than now, pressure was brought to bear. It's more individual now though. Before there were powerful matriarchs who could control actions of their family... the families themselves don't pander to the rights of the individual land owner, they would have to accept the family's decision. But that's becoming less and less now. (J. Phillip, personal communication, 2011)

For generations, land allotments were made as allotments to a family and landholders were expected to consult widely with their family on land use decisions, especially long-term ones such as developments or leasing. The family decision-making process helped to balance individuals' short-term interests with long-term and wider considerations; it was, potentially, a form of land use planning, particularly where family Elders were concerned with overall community welfare and values. With the introduction of CPs registered to an individual, power dynamics shifted towards individual decision-making:

It's like it [a CP] told them that they were the sole owners, it didn't belong to their whole family, you know, if just their name was on it, that it just belonged to them, it didn't belong to their brother or sister or cousins or nephews, it belonged just to them. (Community member, personal communication, 2012)

...in some instances it has changed things- in cases where the individual says 'yeah, I'm the owner of this land, I want to do a deal, let's go' but the family may disagree. But as long as that individual has the CP, he can do what he wants. That's happened before. (G. Gabriel, personal communication, 2011)

Some individuals welcome this change as it gives them greater control of their land and can avoid family conflicts over land and make development or leasing decisions simpler. However, in practice it seems that decisions are not always made by the individual CP holder alone, and family, particularly immediate family members, are still involved (J. Phillip, personal communication, 2011; E. Alec, personal communication, 2011). As well, in cases of co-ownership (as with fractionated holders, described above) the CP is held by many family members and decisions must still be made by a group (J. Phillip, personal communication, 2011).

## **Economic Benefits and Challenges**

The most widely discussed benefits of CP landholdings are the economic opportunities they can enable. PIB interviewees and community members had many positive things to say about CP holdings in this respect, but they also identified economic challenges with the CP system.

### ***Benefits and opportunities***

Individuals with land enjoy increased economic security and have opportunities for economic benefit that can provide an incentive for individual initiative and investment into development projects (FNTC, 2010). Most interviewees thought that a main benefit of CP landholdings is that landholders have a way to help take care of their families, by having their own home and in some cases earning an income from land (Community member, personal communication, 2011; E. Alec, personal communication, 2011; C. Eneas, personal communication, 2011; Community member, 2011)

I see potential in the land, to generate wealth, I see the opportunity... when my grandparents were alive, they had pieces of property that they used. My grandma had some that she land leased... for some extra cash flow for her family, so not to be dependent... (Community member, personal communication, 2011)

Any Band member can be allocated a house lot, and at the end of the day they can have something that they can call their own- that's leverage for financing and borrowing ...It feels great, to own that house and parcel of land. (G. Gabriel, personal communication, 2011)

As well, the nature of CP holdings allows landholders to use them to leverage a mortgage or loan, or retain them as assets for the future, unlike traditional or customary systems where the interest can expire if the land is not used for the purpose of the original allotment (T. Kruger, personal communication, 2011; J. Phillip, personal communication, 2011; R. de Guevara, personal communication, 2012). Another unique benefit of the CP holding is also that it enables an individual to lease a parcel of reserve land for income or to support an independent development project, which would be impossible without a CP (G. Gabriel, personal communication, 2011).

Even though there are limits and controls on locatee land leases and developments, both from AANDC and the Band, CPs are unique in their transfer of

decision-making power from the collective to the individual. For long-term leases and development proposals, locatees can feel frustrated by anti-development sentiments or opposition from the Band (A. Eneas, personal communication, 2011) or family politics (E. Alec, personal communication, 2011) that can prevent leases and approvals. However, the CP system gives individuals some independent control for shorter-term leases. If approvals and locatee developments become easier, informal, unregistered leases will be less attractive and locatees may be more willing to collaborate with land planning.

Economic development on CP lands can also benefit a Band as a whole. On many reserves, development centres around individual landholdings (C. Walton, personal communication, 2012). Successful efforts of locatees can support Band-led developments and job creation for members (E. Alec, personal communication, 2011; G. Gabriel, personal communication, 2011). Bands that have adopted property taxation, like PIB, also stand to benefit from increased tax revenues if non-members lease and/or occupy their reserve lands and this revenue in turn can fund community infrastructure, services, and programming and reduce dependence on federal funding (T. Kruger, personal communication, 2011). In PIB's experience locatees provide initiative and experience that support economic development, and many community members, Council, and staff are proud of this (C.J. Kruger, personal communication, 2011).

Many Bands struggle with legal and administrative obstacles that frustrate land development initiatives on Band lands. These obstacles are less if the land involved is lawful possession land. Leases of individually held land avoid the "complex and time-consuming" process of designating Band land for leasing (Gailus and Chunick, 2009: 1.1.6). The greater independence associated with locatee lands can translate into greater local control over land use and development decisions, and some Bands and locatees, including individuals at PIB, are investigating options for leasing land to themselves and family members in order to take advantage of the even greater control that lessees can exercise over reserve landholdings. The recent Canadian Human Rights Tribunal case of Louie and *Beattie v. INAC* (2011) is one example of locatees pushing for increased local control of the governance of reserve lands.

## **Challenges**

Here, I summarize several challenges of the CP system. The next two sections look at larger questions of the locatee land market and distributing benefits and costs of locatee leases and developments.

### **Bureaucratic delays and constraints**

Locatees and Band staff expressed frustration at ongoing constraints and delays created by the bureaucratic process of CP land transactions, particularly leases and developments. Several locatees reported working through complex, expensive multi-year processes of having their land surveyed, appraised, environmentally assessed, and negotiating lease terms, only to be prevented by a single requirement, such as access limitations to their lot or ecological set-back requirements. While many community members and Band staff recognized the need for oversight and approvals from the Band and AANDC to protect the membership's collective interests, they also recognized that there could be many improvements to the process to make it more efficient and support locatees. One approach would be for the Band Office to have more local authority over assessing and deciding on proposals (G. Gabriel, personal communication, 2011; community member, personal communication, 2011; A. Eneas, personal communication, 2011). Securing greater delegated authority under s.53-60 of the *Indian Act* is one avenue for this, as is having more local land use planning and management infrastructure in place, such as zoning, surveying, by-laws, and servicing plans. These changes could speed the process, reduce costs and barriers for locatees, and give PIB more authority over shaping developments (G. Gabriel, personal communication, 2011).

Some locatees have used informal unregistered leases, out of unfamiliarity with requirements or more commonly out of frustration with the approval process and rejection of a system that removed their local control over land decisions (Carstens, 1991, p. 170). AANDC and Band Councils strongly discourage buckshee leases because they offer little legal protection to locatees, lessees, or the Band. PIB has taken steps to discourage buckshee leases, such as a by-law that requires a registered lease for the Band to permit utility companies to extend servicing to the site (J. Phillip, personal communication, 2011). As well, PIB Council and Lands are encouraging locatees to work with the Lands department and learn about the benefits of legal, registered leases

(G. Gabriel, personal communication, 2011; T. Kruger, personal communication, 2011). A PIB Lands staff member reported that over the past 20 years, buckshee leases have decreased dramatically, from “almost all” leases to just “a handful” (PIB Lands staff member, personal communication, 2011). However, buckshee leases continue to cause concerns for environmental protection, community land use planning, and locatees are being “swindled” (C.J. Kruger, personal communication, 2011).

### **Inexperience with complexities of developing reserve lands**

Related to the information gaps discussed in section 6.2.4, PIB Band staff and locatees identify that they need more experience with and capacity for navigating the complexities of economic development projects on reserve lands. Locatees often referred to the fact that many of them have little or no familiarity with successful leases or developments. Many locatees are intimidated by the demands of negotiating and managing a development. It is also difficult to attract developers to reserve lands, given that many find the legal context of reserve lands unfamiliar and uncertain (C. J. Kruger, personal communication, 2011; community member, 2011; L. Alec, personal communication, 2012). These challenges are related to the lack of reliable market information for reserve lands (see section 6.2.4.). Because of these challenges, over the last several decades locatees have preferred leasing instead of managing their own developments. However, experiences with poor deals, uncooperative lessees, and the loss of control that comes with long-term leases is shifting locatee interest towards doing their own developments or leasing to family or other members. There is also a desire to have Lands and economic development staff work more closely with locatees and “help to empower them, show that this is a team effort, [and] provide information and capacity” (C.J. Kruger, personal communication, 2011).

### **Fragmented ownership**

One challenge that PIB faces is that many of the prime developable lands are divided into parcels held by many different owners. For large-scale developments, such as retail or commercial areas, or large housing developments, this requires that multiple locatees agree on the development and coordinate the negotiations and planning. When comparing two ongoing development negotiations, one entirely on Band land and the



other involving multiple locatees, a PIB Lands staff member observed that developing on lands held by many locatees

makes more obstacles, because you need all these people on board to sign on to the whole thing ...just to get it started ...and you're never going to get all of these people to agree to one thing. You're never going to get half... you never will have them signing off on certain things that would make it a reality. (PIB Lands staff member, personal communication, 2012)

In these situations, the Band's approach has been to propose multiple arrangements and negotiate with all locatees involved to try to reach agreement. Also needed is outreach to explain benefits of developments and demonstrate how concerns, such as ecological protection, will be addressed (T. Kruger, personal communication, 2012). PIB's land use planning process will be important for addressing this issue.

Many communities around the world face similar challenges of fragmented ownership of strategic land areas and have devised methods of 'land readjustment' (also referred to as 'land pooling,' 'replotting,' 'land reassembly,' 'parcellation,' 'repartition,' 'kukaku seiri,' or 'umlegung') to facilitate development of land that has been fragmented into many private parcels (Brinkhurst & Roseland, n.d.; Home, 2007). This approach brings together landowners in a targeted area who stand to benefit from development to "transfer voluntarily ...the property rights over land ...temporarily to the municipality" so that development can happen more smoothly and efficiently (Van der Krabben & Needham, 2008, p. 661). Land parcels are temporarily pooled together and then redevise amongst the original owners after the development, based on negotiated terms. In some cases, owners receive a new land parcel and other times they receive a share in the new development. Land readjustment can also support community development in cases where existing land patterns present obstacles to projects, such as public transportation networks, or when the costs of a redevelopment cannot be fully-borne by the local government (Brinkhurst & Roseland, n.d.). Land readjustment provides an alternative to purchase or expropriation by a government. Instead, land readjustment facilitates development by combining and re-parcelling land, and sharing financial costs and benefits of redevelopment between landowners, government, and developer (Home, 2007). This process has advantages over government purchase of

lands, especially when funds are limited or when landowners would benefit substantially from community developments (Home, 2007; van der Krabben & Needham, 2008).

Land readjustment has not been formally used, to my knowledge, on First Nations reserves. However, a similar option has been used by several First Nations in B.C.: CP holders temporarily return holdings to the Band to facilitate development of federally-funded housing or a community project, because funding cannot be used for projects on individually held land (Chawathil First Nation, 2010, p. 49). CP holders and the Band agree that following development, land will be reallocated or another parcel provided, depending upon terms negotiated (Chawathil First Nation, 2010, p. 49).

### **Decreased community control of the reserve**

One of the benefits of the CP system is that individuals can exercise greater authority over many of their land use decisions and not be constrained by requiring community approval. However, the other side of this freedom is that the community has less input into individual decisions. Some interviewees considered this a serious disadvantage. Much of the concern comes from bad experiences with past locatee leases or developments that caused environmental damage or restricted access to parts of the reserve, for what is perceived as little community benefit (C. Eneas, personal communication, 2011). I have discussed some of these dynamics earlier, but one outstanding issue related to leasing and development specifically is the concern about loss of community control over who can access and occupy reserve lands.

Many Band members value the reserve as a sanctuary and close-knit community (C. Eneas, personal communication, 2011; T. Kruger, personal communication, 2012). There is some concern that long-term leasing and developments for housing open to non-members and non-Aboriginal people will disrupt the feeling of community:

... we have family connections, we take care of each other. We'd lose that if strangers moved here, we'd lose our way of life and practices, our family practices. (PIB Lands staff member, personal communication, 2011)

There is also a fear that with commercial and housing developments, Band members will be disturbed from their current enjoyment of the community and landscape and feel that they have lost their privacy:

...you have that familiarity with being on the reserve and it being separate from town. ...They don't want to be driving by and doing whatever, doing everything that they've done since they were born and have people look at them as they drive through. (PIB Lands staff member, personal communication, 2012)

PIB members look to the experience of Westbank, where commercial and housing developments have displaced members and open space, and see it as a loss of community that should be avoided at PIB (J. George, personal communication, 2012). Westbank staff acknowledged that the CP landholding system, even when allotments were made solely for housing, resulted in a loss of community control:

...once your house is paid for and the CP is processed over to you, then you can lease it- you're eligible, allowed to- but it isn't good because we can't prevent it, and then our tight-knit community gets opened up to non-members living there. ...so in the core of our community, there are parcels that were established for housing... with the CMHC mortgages - the agreement was that once it was paid up it would become a CP. (R. de Guevara and L. Vanderburg, personal communication, 2011)

Leasing to non-members, whether of a house lot or a larger parcel, can make it feel like the land is no longer part of the reserve, and no longer under community control, even if it is not permanent. Leases are, essentially, a form of temporary, legal encroachment on reserves. In the cultural, social, and historical context of reserves, this can be very threatening and concerning to individuals:

These long leases they're 90 year, you've lost the land altogether. Like that one lease there, 90 year lease, that's just too dog-gone long, you've lost it altogether. In other words it's worse than selling - you still think you own it, and then you don't. It's leased out for 99, 90 years. (PIB Elder, personal communication, 2012)

...[Some locatees] have that weakness, and it's to make a fast dollar. And to do that, you have to lease your land. That's what they think. But it's not the best route, because when you lease land, that land you don't have control of it. (Community member, personal communication, 2012)

Similar concerns were apparent when discussing changes to the CP tenure system to make it more like fee simple property. Band staff and members opposed changes that could result in reserve land being owned permanently by non-members.

### ***Locatee land market***

Related to several of the challenges associated with CP landholdings is the constrained market for locatee lands. The *Indian Act* requires that only Band members can hold CPs, apart from leases, so the pool of potential owners is limited. In PIB and other First Nations, land sales are very rare. Most landholders prefer to hold onto their land or transfer or subdivide it to family members (G. Gabriel, personal communication, 2011; J. Phillip, personal communication, 2011; A. Bak, personal communication, 2012). In some cases, when a Band member loses or gives up his or her membership or a non-Band member inherits land, they have to transfer or sell the land to a Band member within six months. Otherwise, there is an open auction of the property to the whole membership, administered by AANDC (J. Phillip, personal communication, 2011). The land market is limited partly because of a reluctance to sell landholdings and because many Band members do not have the funds available to purchase land (G. Gabriel, personal communication, 2011; J. Phillip, personal communication, 2011). The Band is sometimes interested in buying properties that do come up for sale, but disputes and past relationship issues between individuals and the Band can mean that individuals are reluctant to see the Band acquire more land (J. Phillip, personal communication, 2011). Two interviewees reported that some sales do occur, of house lots and other small pieces of property, but the market is essentially non-existent (G. Gabriel, personal communication, 2011; J. Phillip, personal communication, 2011).

The lack of a land market makes it difficult to acquire land outside of allotment. This is seen both as an advantage and disadvantage. However, the lack of a land market also means that much of the information and bureaucratic infrastructure that is required and generated by a land market is not available (L. Pardy, personal communication, 2012). One of the common requests of locatees is for advice on determining the fair market value of their land. Although AANDC requires a formal land appraisal before approving a lease, many locatees have stories of beginning negotiations with potential lessees or developers only to discover that the potential lessee expected to get the land well below prices off-reserve:

Just within the month, I was approached by someone who wanted lots of land... He wanted 30-40 acres of land for a vineyard, but he didn't have the money or a backer – and he wasn't willing to pay the fair price. And when I asked him, he said 'but it's Indian land' – he thought

I would give it away for \$25 an acre. (A. Eneas, personal communication, 2011)

People still think that they can get Indian land for a song – or a jug of wine, like they used to with my dad. (Community member, 2011)

Many others are less confident about what their land is worth but are worried about signing bad deals, making the process of leasing or developing more intimidating, and also complicating land deals between members:

The only [land] value [estimate] here is what I can offer another Band member, if he accepts it then he accepts it. You can have it appraised, but it's whatever the parties agree on. ...it's whatever you accept as fair value, and what people are able to offer. (G. Gabriel, personal communication, 2011)

This type of private negotiation about the price of land can limit the amount of information available to Band members about lands that are, or could be, available for purchase. Several interviewees expressed concern that some land sales occur between members without there being public information on the land's availability:

...that sort of selling information should be open publicly, equally to everyone. I would like that opportunity, and others might. It doesn't seem fair that one person ...was privy to that information. (Community member, personal communication, 2011)

... people are buying up parcels of land, house lots, from other members...and it's being done surreptitiously, with no Band approval. No one is given any acknowledgement, not other locatees, or others who could purchase the land, other Band members- they're not given a heads up- no one knows about it except the buyer and seller and the Lands Department. (A. Eneas, personal communication, 2011)

Some reluctance to facilitate a land market in locatee lands arises out of concerns that it will mean further concentration of landholding, as occurred in Westbank, or that desperation sales will result in individuals permanently losing all their land (J. Phillip, personal communication, 2011; T. Kruger, personal communication, 2011). While there is potential for inequality when only some members can buy land, unfair access to information about land availability could exacerbate this inequality.

Another effect of a land market, and the lack of one, concerns the ability of individuals to access land that is most appropriate for their land uses. Because land

parcels are different in their characteristics and suitability for different uses, without a viable way to exchange land parcels easily, an inefficient distribution of land can result. This is particularly so in reserves where individual landholdings were allotted for primarily agricultural and residential purposes without sufficient thought to future land use or development options. Off-reserve, when land has a higher valued use than its current use, exchange is usually possible through the land market. In PIB's experience, some members complained about wanting to develop but having their land be unsuitable for it, and others complained about locatees or family members who hold land that has high development potential but who do not want to develop, with the result that the land is under used or sitting idle. These situations will be difficult for PIB to intentionally change, given the small number of potential buyers. However, if and when more members do accumulate economic capital or have more access to financing, there may be potential for many parcels to be exchanged. PIB may want to have more information infrastructure and possibly financing capacity in place to support a fair land market.

### ***Sharing benefits and costs***

Another implication of individual landholdings concerns distribution of benefits and costs from locatee leases and developments. By their very nature, individual holdings transfer an asset, land, from the community to individual members. Inequality in individuals' access to land and the revenue it can generate can fuel conflicts and feelings of resentment between individuals and families. In addition, individual landholders may benefit disproportionately from Band investments into infrastructure because they are able to capitalize on those investments in ways that non-landholders cannot. This is a challenging aspect of individual landholdings for Bands to address, but there are mechanisms available, some of which PIB is using and others that are being considered: taxation, community benefit agreements, and collaboration and planning to increase community benefits and opportunities.

### **Taxation and Band fees**

Taxation is the main conventional mechanism used off-reserve to redistribute wealth between individuals and communities; however, it is relatively new and still uncommon on reserves. A number of First Nations and organizations (such as the First Nations Tax Commission) promote Band taxation. Without such laws, tax monies

collected from lessees and developers go to external governments and the Band does not benefit (T. Kruger, personal communication, 2012). PIB adopted taxation of leased lands and non-member residents in 2007. There was some initial opposition from members, but today most members have accepted taxation and implementation is going smoothly (T. Kruger, personal communication, 2012). Alternatively, some Bands collect a percentage of CP revenue, but this can be seen as punitive or discouraging of individual development efforts (R. de Guevara and L. Vanderburg, personal communication, 2011). Others thought administration or servicing fees are reasonable, especially if they offset community costs (C. Eneas, personal communication, 2011).

### **Community benefit agreements**

PIB is also beginning to work with potential developers to include community benefit agreements in leases or development negotiations (T. Kruger, personal communication, 2012). Tools like this are standard practice in many cities and communities in Canada, where a municipality negotiates with a developer to include community amenities in development design, such as landscaping, sidewalk improvements, or recreational space. Community benefit agreements could be included in Band-led and locatee developments to help create tangible benefits for all members.

### **Planning for community opportunities**

Finally, a more general approach is to adopt land use and development planning processes that are collaborative and include a focus on creating opportunities and benefits for community members. With collaboration and information sharing among locatees, the Band, and community members, the power that locatees have to influence economic development on their reserve can be directed towards increasing opportunities for the whole community. Benefits could include working with a developer to open or support development opportunities for neighbours or the Band or planning a development that could create job opportunities for Band members (E. Alec, personal communication, 2011; G. Gabriel, personal communication, 2011). This approach to planning goes beyond community regulations and controls on development and instead fosters partnerships between landholders and the Band to work for everyone's interests (T. Kruger, personal communication, 2011; A. Bak, personal communication, 2012).

## **7. Research Implications & Recommendations**

This study is a single, in-depth case study of one First Nation's history and experience with individual landholdings and reserve land management, informed by a broader history and experiences of other Nations. While the generalizability of some findings is limited by context, others are more general and of interest to a number of audiences. In particular, a finding of interest to other First Nations and government is the need to match land tenure to land management. In situations, like in PIB, where CPs exist but there are very few federally approved local land use planning or regulations (perhaps only informal, local ones) there is a legal and institutional gap. This points to the need for empowering local land management systems, particularly if CPs are used.

Overall, findings of this study highlight the complex histories of reserve land tenure and management systems and how historical perspective can help to explain the unique and contested nature of reserve land tenure today. As well, this study demonstrates how individual landholdings exert significant influence on many aspects of reserve land use, planning, and management. Some influences arise from historical decisions, others stem from contemporary policies and practices in reserve land tenure and management. Some positive and negative impacts are well recognized; others are only now becoming apparent. Old and new, these influences are important to consider in decisions and policies concerning reserve land tenure and management, at both local and national levels. All of these dynamics should be learned from and explored further.

### **7.1. PIB**

When assessing the implications of this research and findings for PIB, an important caveat is that given the limitations of this study, it cannot claim to be inclusive of every perspective across the community. This study is not equivalent to a comprehensive and participatory planning project, but findings can contribute to land use



planning and management efforts and identify issues relating to locatee lands that can inform further exploration and community discussion.

Because I discussed influences and implications of the CP landholding system in detail in Chapter 6, this section will reiterate and summarize only a few main themes and significant implications for PIB. Like many First Nations, PIB's experience with the federal land tenure system is a mixed one. The PIB Lands department, Council, and members are already taking many steps to address challenges and enhance benefits related to CPs, including steps such as infrastructure and greenbelt planning, limiting large land allotments, and encouraging collaboration between locatees. These actions have prevented some of the challenges that other First Nations have encountered with CP lands. Yet other challenges with CPs remain as ongoing or emerging issues, and some benefits of the CP system are not fully utilized. This research has identified several relatively small changes that could help further, as well as other larger and longer term ideas that could be included in land use planning and management considerations.

### ***7.1.1. Healing Divides Over Land***

As has been stressed, the impacts of land disputes on PIB's community relations and land management have been serious and longstanding. The types of land disputes range from specific conflicts over claims to land, past land deals, and property lines to more diffuse rivalries, tensions, and distrust between individuals, families, the Band Office, and the federal government. In a community that is working to heal from the past and rebuild community connection and pride, it is a widespread concern that land disputes are sensitive sticking points that continue to divide.

The FAO guidelines on responsible tenure governance recommend that governments “strengthen and develop alternative forms of dispute resolution, especially at the local level” (FAO, 2012a, p. 33). PIB is already devoting many resources towards resolving land disputes, both through the courts and internally. In some cases records are sufficient to inform fair decisions, but in others a lack of records or considerations related to historical factors (such as unequal access to registration, misuse of power, or the existence of oral and informal land records in parallel or hybridized with the federal records system) may require alternative dispute resolution mechanisms. PIB Lands and

Council have already worked with community Elders and circle discussions to help decide or mediate disputes in the past, and this approach may be effective at addressing some of the more diffuse tensions and disputes between individuals and between and within families that continue to cause social, political, and land use issues. The land tenure and land management literature documents many cases where special land resolution committees (Ballantyne & Dobbin, 2000, p. 42), tribunals (FAO, 2002, p. 30), and traditional courts (Morad & Jay, 1997, p. 46) are used to reach lasting resolution and healing of land disputes, for example:

...the main function of the Maori Land Court is not to find for one side or other, but to find social solutions for the problems that come before it: to settle differences of opinion so that co-owners might co-exist with a measure of harmony ...to reconcile family groups.

(Morad & Jay, 1997, p. 46)

These models and techniques may provide tools that PIB could adapt to local conflict resolution. In addition, given how widespread these types of land disputes are, across Canada and internationally, PIB may want to consider sharing experiences and models of community conflict resolution as they develop.

### **7.1.2. Addressing Inequalities**

There are also divides in the community between those who have land and those who do not, especially developable land. Inequalities of resources, security, pride, and influence between individuals and families are at least partly linked to inequitable distribution of land. There are many historical reasons, some fair and others not, that some families received more land than others did. PIB leaders and membership decided to try to prevent worsening inequality and conflicts over land by halting the allotment of large areas of land to individuals. This has preserved areas of Band land that are very important today for PIB's community development, but has also had the unfortunate consequence of creating a divide between those whose families secured land prior to the policy being adopted and those who did not (or those whose allotment was temporary or in dispute). Today in PIB, the prevailing sentiment is that either you (and your family) have a large landholding or you do not, and very little of that distribution will ever change. This history, the current inequalities in landholding, and the difficulty of

securing a new allotment even for a house, are a cause of political and social tensions in the community.

In virtually all communities, historic patterns of land distribution create at least some inequality. This inequality is sometimes addressed through land reform, though the need for land reform (which can be costly and politically and socially contentious) can be reduced through other social, economic, and political efforts that lessen the ultimate inequality of resources, opportunity, and influence (Godden & Tehan, 2010, p. 10). A range of government actions may be required to empower marginalized individuals and “to promote equitable tenure rights and access to land” (FAO, 2003, p. 5). PIB may decide in the future to reopen community conversations about land allotment policies and access to land. While this could lead to mechanisms for adjusting land distribution, there are also other ways to address inequalities. Collaborative, participatory planning for community development, the growth and support of programs and opportunities for individuals and families, and a sharing of the benefits from locatee developments are ways that could help to reduce inequality broadly.

A particular area of interest may arise if a local market for locatee land emerges, and there are some signs that this might occur if individual members and families access financial capital that would enable them to purchase land. A land market could substantially change the currently static nature of land distribution at PIB, and if land sales continue or increase PIB may want to take steps to be proactive in guarding against land concentration by a minority of members. One area of particular concern is ensuring equitable access to information about land values and sales. The FAO land tenure guidelines recommend that governments play a role in facilitating “fair and transparent sale and lease markets” and help “prevent uncompetitive practices” (FAO, 2012a, pp. 19–20). PIB could work with locatees and AANDC to improve members’ access to this type of information, and possibly even assist with access to financing mechanisms, so that existing inequalities of resources, information, and influence are not further entrenched. There are models that PIB can learn from in this regard, from simple ways to share land market information to as far as developing “internal rental and transfer transaction systems” for land that include “equity criteria,” as seen in some Indigenous communities in Latin America (Hvalkof, 2008, p. 12).

### **7.1.3. Accessing Lands Information**

Many members expressed a desire to have more access to land information and records. While certainly some sensitive personal lands information will need to have restricted access, greater accessibility of land records and land policies more generally will likely help to reduce distrust of Band Office handling of lands issues and encourage greater information sharing and collaboration. Accessibility of land information is an issue that many other places grapple with. Having land information that is “transparent and equitable... [and] freely accessible” helps to prevent manipulation and misuse as it enables individuals “to check their tacit and local knowledge against what is documented, without using external help ...” (Zevenbergen, Augustinus, Antonio, & Bennett, 2013, p. 5). Transparency and accessibility of land tenure and land policies, laws, and procedures is one of the United Nations recommendations for responsible land tenure governance (FAO, 2012a, p. 5).

While individuals can access information about their landholdings through AANDC, and even through tools like GoogleEarth™<sup>25</sup>, many individuals expressed a desire for greater accessibility and openness from the PIB Lands department. While PIB Lands staff already regularly assist members and strive to be accessible, staff and resources are limited. With this in mind, PIB could create a more efficient and accessible way of making lands information available to members, such as through the PIB website, a guide to using the various resources that Band members can access independently, or in information sessions for members.

### **7.1.4. Supporting Lands Skills and Understanding**

Along with access to lands information, there is a need for education and outreach to empower locatees in their land decisions. Many locatees requested information resources on land policies and procedures at the local and federal level to assist them in navigating land use and development decisions. Members emphasized the need for information and guidance on leasing and negotiating developments in

<sup>25</sup> A publicly-available data layer that shows on-reserve parcels is available for use with GoogleEarth™ from Natural Resources Canada at <http://clss.nrcan.gc.ca/googledata-donneesgoogle-eng.php>

particular. Estate planning is another area where education and support would assist landholders and help to reduce land management issues such as fractionation and estate conflicts.

Differences in understanding of the rights and responsibilities of locatees, Band Council, and other actors, combined with a lack of clarity on land policies and procedures can result in frustration, disputes, and land management issues such as buckshee leases or by-law non-compliance. While there are legal ambiguities for some aspects of the CP system, many of the local differences in understanding are a result of unfamiliarity with the *Indian Act* lands system and conducting land transactions and developments. Working with locatees to build their skills and familiarity with policies and procedures would also have the benefit of encouraging economic development initiatives by locatees and building collaborative relationships between landholders and the Band Office. Another part of the learning and relationship building that the Band Office and Lands Department could facilitate through land use planning or other outreach efforts is with the history of land allotments and land management. Historical perspectives may help members understand how land management practices have changed over time, who was involved and how, and historical factors that have influenced the way lands are distributed and managed today.

#### **7.1.5. Planning For Community**

PIB staff and members identified the importance of land use planning for addressing challenges in the use and management of all reserve lands – including Band land and locatee land. For several decades, PIB has been building local planning capacity and the recent CCP and LUP initiatives mark a new commitment to participatory, inclusive, and collaborative community planning. Some of the expected outcomes of these planning efforts are local land use laws and policies, including by-laws and land use regulations. These tools should result in improved clarity and consistency in land use decisions for all parties involved and help to protect ecological, cultural, and social values in land management.

Perhaps even more significantly, land use planning also creates opportunities for collaboration. Today, PIB Council and staff are emphasizing relationship building with all

members, and particularly locatees. Working closely with locatees is important for avoiding land use compatibility issues and optimizing development opportunities. Especially in large-scale infrastructure projects and other developments, Council and staff may need to play a major facilitation role to help find arrangements that numerous locatees can agree with. While specific collaborations with locatees are needed, care should be taken to ensure that all community members, locatees and non-landholders, feel included in planning decisions.

## **7.2. Other First Nations**

The particular findings of this project are specific to PIB and its historical and cultural context; however, there are broader themes that apply to many First Nations. As well, the experiences of PIB are valuable for other First Nations working on management of individual landholdings, and First Nations considering adopting or expanding their use of individual landholdings. This research project has identified a range of advantages, disadvantages, opportunities, and challenges related to ILHs and land management. In addition to the land management impacts discussed in Chapter 6, this section presents wider themes and considerations for other First Nations and land managers.

### **7.2.1. *Matching Land Tenure and Land Management Authority***

It appears that one of the main reasons that many First Nations have not adopted the CP system is concern over how it reduces local control over land. Under the *Indian Act*, a Band has always held the authority to choose whether to allot land and centrally register it as a lawful possession under the *Indian Act*, but once the holdings are created and registered, the Band's land tenure system is tied to the federal system. As a result of this fusion, and because of asymmetries of power between local and federal systems of law and policy, the balance of control over local land tenure shifts to the federal government. If the CP system changes through AANDC policy or court decisions, a Band does not have the choice of adopting those changes or not. Likewise, while a Band can create local land policies that shape its land tenure, these policies generally require federal approval if they are to be upheld when legally challenged. Currently, a Band that has CPs can only officially change its land tenure system through negotiating a

delegation of powers from the federal government or an alternate governance arrangement (or, theoretically, all of a Band's locatees could voluntarily relinquish their landholdings and accept instead a local, customary system).

A Band with CPs need not secure full local control of its land tenure in order to address many local land management concerns. A Band may have significant, if not full, local control over land management internally, using customary land use laws, land decision processes, and land use planning. If a Band uses customary land tenure, then these local processes may provide enough local (and externally recognized) authority to govern the local land tenure system. However, if there are CPs on the land this weakens internal management authority. The legal power of customary management rules and processes is not matched to the level of legal protection that CPs receive from the federal government and Canadian courts. If a locatee challenges a Band on an informal policy, or ignores it, the Band may not be able to defend its practice to the government or in court, where the locatees' rights are protected.

If a Band has CPs, its land management tools need to be enforceable against landholders whose rights are externally protected. A Band could do this by adopting land regulations that are federally approved, such as by-laws and zoning regulations. Alternatively, a Band could secure external, legal recognition of its land management authority, such as through a ss.53-60 delegation of land management powers, a self-governing agreement, or a *First Nations Land Management Act* land code. Even if a Band does not define and administer its land tenure system, it needs tools to shape the use and management of individual landholdings.

### **7.2.2. Land Management Considerations**

As this research has shown with PIB's experience, there are numerous land management impacts and implications of CPs that merit consideration by First Nations deciding whether to adopt or expand their use of CPs. CPs are attractive to some Bands and individuals because they can empower and encourage individuals. Many Bands, like PIB, are actively supporting the rights of individual landholders. Enabling individuals to hold reserve land, develop it, and accumulate and pass on wealth are not necessarily incompatible with collective interests, and as Rafoss (2008, p. 200) observes, "traditional

views that the rights of the individual are somehow subordinate to the rights of the community” are changing in many Aboriginal societies. CPs create legal security and economic opportunities that appear to be less available under customary systems. With CPs, individual’s land tenure security is not dependent upon the will of Council or the community. CPs can also allow individuals to lease their land, use it for a mortgage, or invest in it for future generations, and they encourage individuals’ initiatives to support their families and communities. CPs are also attractive for developments and leases because their approval process can often be faster than approvals for use of Band land.

Alongside advantages there are also challenging political, social, economic, and land management impacts. Two main challenges of CPs are their impact on community land use planning and the potential for inequality and conflict over land, both of which I discuss in the section above and in Chapter 6. Essentially, CP allotments reduce the Band’s collective influence over that land and limit a Band’s flexibility for changing land uses and community developments (Chawathil First Nation, n.d.; C. Walton, personal communication, 2012). This is especially the case when lands were allotted in “incoherent patterns... scattered around rather than planned together” (L. Pardy, personal communication, 2012) because the land base is internally fragmented and costs, such as infrastructure and servicing or surveying, are much higher. Land use planning and management becomes a negotiation between the Band and individual landholders. Individuals can have significant influence over community development (A. Bak, personal communication, 2012). The result can be inequalities of resources, opportunities, and influence. Several of PIB staff and Council members expressed the view that the CP system has caused more complications and trouble than benefit, at least so far. Staff at Westbank First Nation, a Nation widely lauded for its economic development success, also considered development on community-held lands to be “much better” because the benefits and costs of development are shared more fairly and decision-making power remains with the community as a whole (R. de Guevara and L. Vanderburg, personal communication, 2011). Many of the recommendations in Chapter 6 offer potential ways to address or mitigate these concerns.

Impacts of CPs, both positive and negative, appear to be heightened in contexts where reserve land is limited or fragmented, as Chawathil First Nation has found (Chawathil First Nation, 2010), or economically highly valuable for development, as with



the Tsawwassen First Nation (A. Bak, personal communication, 2012). Therefore, depending on a First Nation's context, it is likely that the balance of advantages and disadvantages of the CP system varies. Likewise, there are advantages and disadvantages of both local and federal reserve land tenure systems, such as local control and adaptability versus greater individual tenure security and access to external financing. The balance of local and federal tenure control also has different implications for land management, such as which government bears the costs of establishing and maintaining a land information system and who bears legal liability for land decisions.

### **7.2.3. Other Land Tenure Models and Innovations**

Given differences between First Nations and the context-dependent nature of advantages and disadvantages of the CP system, it is no surprise that there is a great diversity of land tenure systems used by First Nations across Canada. Even for those that do use the CP system there are local differences in how much land is allotted, for what purposes and to whom, and how individual landholdings are controlled locally. This case study examined a Band that has fully adopted the CP system. However, Bands operate on a spectrum between the CP system and full customary systems, with some Bands using a mix of federal and customary tenure rules.

There is also potential for Bands to change their tenure systems. Nemoto (2002) profiles the experience of the Lil'wat First Nation and the development of their customary land law. The *First Nation Land Management Act* has created the opportunity for First Nations to explore various modifications to their existing land tenure through the creation and administration of their own land code. Self-governing agreements and treaty negotiations have given some First Nations control over the legal nature of their land tenure, such as the Nisga'a land title and the Tsawwassen First Nation's Tsawwassen fee simple interests (Flanagan et al., 2011; A. Bak, personal communication, 2012). Many of these changes are recent and it is too early to evaluate impacts. However, it is clear that these models and innovations create space and legal recognition of the tenure pluralism (section 2.1.7) that exists in many First Nations. These models may give First Nations options to reduce the tenure Eurocentricity (section 2.1.6) of their current systems and fit them more closely to local needs, values, and goals.

In addition to these currently used tenure models and reforms, other tenure innovations are being explored and adapted to the context of reserves. Some, like the proposed “First Nations Property Ownership Act” (discussed in the next section) could bolster the individualistic nature of CPs, others increase local flexibility and control, and others are proposed as a complete alternative to the CP system. The feasibility and attractiveness of these various options will differ widely for First Nations, but they should be of interest and create opportunities for dialogue about land tenure reform and innovations in land tenure governance.

### **First Nations Property Ownership Act**

The proposed “First Nations Property Ownership Act” is an initiative of the First Nations Tax Commission and supported by several First Nations leaders and property rights researchers (Flanagan et al., 2011). The proposal is to create opt-in legislation that would give Bands the option to hold the title of their reserve lands and therefore have authority over their land tenure system. Opting into this arrangement, likely by community referendum, would mean that Bands could modify their land tenure system. This could result in a new set of reserve land tenure forms, from fee simple interests to legally protected customary holdings. The proposal has sparked renewed interest and debate about First Nations property rights across the country, but it remains highly controversial among First Nations. Some First Nations are opposed because of fears that the proposal would increase political conflict and inequality in communities where land was not held equally (T. Kruger, personal communication, 2012) or could result in reserve lands being owned by non-members (G. Gabriel, personal communication, 2011). Others are concerned that the proposal has not been discussed widely enough with First Nations and so fails to address all concerns and is not representative of the goals and values of many First Nations. The proposal is also criticised for presenting simplistic solutions to First Nations poverty and ignoring more systemic issues (Palmer, 2010, 2012). Nevertheless, these debates point to widespread interest from First Nations in options for land tenure reform and innovation.

### **Voluntary Conservation Easements and Incentives on Reserves**

PIB’s Locatee Lands Project is an innovation in reserve land management and environmental conservation in the context of individual landholdings. Discussed in

section 6.2.4. this project uses a model where individuals retain their landholdings but agree to protect ecologically or culturally sensitive areas and receive compensation for losing the use of that land. This type of approach to addressing land management concerns while remaining within the *Indian Act* tenure system could potentially be used by many First Nations who are not interested in more extensive tenure reforms.

### **Community Land Trusts**

Rose (2011) suggests another example of an innovative model of contemporary Indigenous land ownership and management – in this case on Native American reservations in the United States. Rose (2011) considers how community land trusts could be adapted by Native nations to support goals of self-determination in housing and economic development. While the context of First Nations in Canada is different, Rose's work describes an institutional framework that First Nations could potentially adapt as another model for land ownership on reserves. Theoretically, if a collective, community-controlled organization such as a land trust could be allotted land in lawful possession, or be formed from an assembly of willing individual landholders, that organization could capitalize on benefits of lawful possessions (such as the reduction in required land use approvals and the ability to leverage land assets) while retaining land in a collective-ownership model and sharing the benefits of land use amongst many or all members of the community. I did not identify any examples of this model in Canada, but the concept presents an interesting potential reserve land tenure arrangement.

### **Temporary Reversion to Band Ownership**

In the Chawathil First Nation Community Land Use Plan (2010, p. 49) several options to address issues related to individual holdings are explored, one of which is the temporary relinquishment of whole or partial individual holdings to the Band, for a specified period of time, so that development projects can access federal funds. Once development is complete, the land would be re-allotted to the original holders. The Chawathil First Nation reports that while other First Nations have used this arrangement successfully, Chawathil is uncertain whether their community is ready for it. A similar technique is used in scenarios where an individual landholder wants to mortgage their landholding but lending institutions are reluctant to lend without a guarantee from the Band Council, as reserve lands cannot be seized in the case of a loan default. In these

cases, individuals temporarily transfer their lawful possession to the Band in return for a guarantee on their loan. Once the mortgage is repaid, the individual is re-allotted the land. PIB and many First Nations use this.

### **Retain or Readopt Traditional/Customary Holdings**

Another tenure reform option considered by some First Nations is for individuals to transfer their lawful possessions back to Band ownership. The Chawathil Community Land Use Plan describes such a process whereby “the amount of land held by individuals or families would be maintained as customary landholdings” but not as lawful possessions as regulated by the *Indian Act* (Chawathil First Nation, 2010, p. 49). This would enable the community to have more land in “concentrated areas which would be most cost effective for developing new housing and would be eligible for funding” (Chawathil First Nation, 2010, p. 49). A similar change is described in the proposed Land Law for the Lil'wat Nation described by Nemoto (2002). There are also many Bands in Canada that have never adopted lawful possessions under the *Indian Act*, instead opting to use only traditional or customary forms of landholding (Alcantara, 2003; Baxter & Trebilcock, 2009; Nemoto, 2002; Rakai, 2005). These communities have found ways to use their own traditional land tenure system within the context of Canadian law and policy. As well, internationally communities are developing ‘hybrid’ systems that combine the advantages of multiple land tenure systems, such as the ‘start-title’ model used in Namibia (Baxter & Trebilcock, 2009, p. 121) or the internal equity rules used by Indigenous communities in Latin America (Hvalkof, 2008). These experiences could provide innovations and lessons for First Nations in Canada, and the experiences of First Nations could likewise offer models and insights useful to other communities internationally (Godden & Tehan, 2010). These experiences provide examples of alternative land tenure systems to consider as part of ongoing debates over individual landholdings on reserves. As Rakai (2005) has argued, it is overly limiting to attempt to fit Aboriginal tenure systems within European concepts of distinct categories of collective title and individual title. The communal-individual split is yet another extension of Eurocentric concepts of property rights, ignoring the principles and relationships that continue to inform the social institutions of Aboriginal communities (RCAP, 1996).

Overall, it is apparent that there is great diversity in the land tenure systems and experiences in First Nations across Canada. There is much benefit in sharing and learning from First Nations' experiences with various reserve land tenure systems and best practices for addressing common land management challenges.

### **7.3. AANDC & Federal Government**

Findings of this research project also relate to the federal government, particularly AANDC. Overall, this research demonstrates the importance of linking policy to the practical experience of First Nations, land managers, Councils, and individual locatees. Regular connection to on-the-ground realities and perspectives points to gaps, best practices, and unanticipated complications that can arise from policy and bureaucratic processes. By presenting a detailed case study of one First Nation's experience, my goal is to illustrate some of the dynamics and outcomes of the *Indian Act* land tenure system in action and contribute information and considerations to AANDC's policy and practice. In the light of the findings of this case study, this section discusses three broader aspects of the federal government's role in reserve land tenure: current considerations, the shifting of roles and responsibilities, and the development of policy affecting reserve land tenure and management.

#### **7.3.1. *Considerations for Current Policies and Practice***

The AANDC of today is an agency with the mandate of working for and with Aboriginal peoples in Canada, with AANDC operating primarily as a funding and support agency, as well as a check-and-balance system on local decisions that could affect a Band's collective interest, such as land transactions. The nature of the department has shifted dramatically over time, and while there are still many criticisms levelled at it today, AANDC staff and policies make it clear that its authority is restricted and that direction should come from Aboriginal communities, not from the top-down (L. Pardy, personal communication, 2012). With this in mind, the experiences of First Nations like PIB with the *Indian Act* land tenure system can help to inform AANDC's current policies and practices regarding land tenure. In particular, there are consequences of the current system that require attention:

## **Land Tenure History and Resolving Land Disputes**

Policies and practices of federal government agents and officials in the past have contributed to many of the ongoing land disputes that trouble First Nations today. While AANDC acknowledges this and works with First Nations and individuals to assist in disputes by providing records and information about the tenure system and policies, there may be further scope for assisting with dispute resolution. The FAO guidelines for responsible tenure governance recommend that States work to provide and improve access to dispute resolution mechanisms, including local and alternative systems (FAO, 2012a, p. 7). For First Nations reserves, in cases where land records are inadequate, alternative land dispute resolution processes may be required. This may also include situations where AANDC and Canadian courts are satisfied with the available documentation but the First Nation or individuals/families involved are not and the dispute continues to fester. In such cases, legal decisions may not actually resolve the conflict. AANDC could support First Nations that struggle with land disputes in learning about alternative dispute resolution models and provide supports for building local conflict resolution capacity through training or funding local initiatives.

In some disputes where individuals or families were wrongly denied land or lost land historically as a result of problematic decisions by federal officials, AANDC could consider facilitating the addition of lands to the reserve with the goal of the individual or family receiving land in order to resolve the dispute. In other disputes involving estates lands, AANDC could be better equipped with resources and guidance on land dispute resolution mechanisms and techniques (such as land readjustment, section 6.2.4.) that could be offered as an aid to resolution, rather than leaving Bands and individuals struggling with seemingly intractable situations.

## **Fractionation Issues**

A sub-set of land conflicts are issues with land fractionation, discussed in section 6.2.4. Experiences with land fractionation in Native American reservations and Maori landholdings serve as warnings of what can happen when the underlying causes of fractionation are not addressed. It is troubling that First Nations in Canada are reporting cases of land fractionation, with some parcels already with 40-60 co-owners. AANDC should take steps to prevent and reverse fractionation (at least so fractionation does not

become extreme) so that fractionation does not restrict the use or value of parcels of reserve land, which are limited and valuable resources in most reserve communities. Assisting with estate planning, providing information and guidance on land fractionation issues, working with extreme fractionation cases to develop land consolidation plans, or changing the underlying policies that create situations of fractionation would be examples of ways that AANDC could work to address these concerns.

### **Lack of Clarity and Understanding**

PIB and other First Nations are facing an underlying issue of locatees and Bands not fully understanding the rights and responsibilities associated with individual landholdings (C. Walton, personal communication, 2012). Differences in understanding underpin many local conflicts over land management and locatee and Band frustrations with the CP system. While there are ongoing legal ambiguities associated with CP landholdings, AANDC should have the most institutional knowledge of how the CP system functions and the rights and responsibilities of locatees and should work to provide more information and accessible resources for educating Bands and individuals, and support Bands' efforts to do so among their own membership. The FAO recommends that States provide accessible explanatory materials on land tenure and the rights and responsibilities of land tenure forms (FAO, 2012a, p. 9). The same report points to "overly complex legal and administrative requirements" as a cause of informal tenure arrangements (like buckshee leases) and recommends that "requirements and processes should be clear, simple and affordable" (FAO, 2012a, p. 17).

### **Need for Flexibility**

AANDC could possibly reduce some negative impacts and challenges by allowing for greater flexibility in policies concerning CP lands and Band land management decisions generally. Social and cultural factors impact local land management, such as the cultural inappropriateness of using expropriation powers, or the barriers to enforcing legalistic by-laws and regulations against family members and friends in a small community. These types of local level dynamics need to be factored in to policies and assessments of reserve management. Bands may need a different set of land management tools and policies than what is familiar in off-reserve contexts.

In addition, greater awareness of local impacts of policies is needed. Some current policies and funding programs can incentivize, require, or even penalize CP landholdings. This occurs even though AANDC does not officially promote CP landholdings over other forms of landholding (C. Walton, personal communication, 2012; L. Pardy, personal communication, 2012). For example, some funding sources require that houses built with the funds be allotted as CPs. First Nations, such as Westbank, have expressed concern that this effectively removes a Band's control over land allotment because Bands are desperate for housing funds (J. Phillip, personal communication, 2011; L. Vanderburg and R. de Guevara, personal communication, 2012). Another example of inflexibility concerns AANDC's policy that federal funding cannot be used for a community development on individually held land. While the intention of this policy is clear, it presents a major hardship for those First Nations that have most of their lands, especially land suitable for developments, allotted to individuals. Currently, some First Nations are working around this requirement by having individuals transfer lands back to the Band for the course of the development and then realloiting the lands to the previous landholders (Chawathil First Nation, 2010). Rather than having the policy undermined and creating unnecessary bureaucratic load, AANDC could consider offering some flexibility in these situations whereby an agreement could be negotiated between the Band, the locatee(s), and AANDC to ensure that individuals are not unfairly benefiting from federal funding but that community development needs are not being frustrated.

## **Environmental and Species Conservation**

As discussed in section 6.2.4., some of the major concerns with individual landholdings are loss of local land management controls to protect against environmental damage and destruction of species or habitat. Many of these concerns could be addressed by First Nations developing their own land use by-laws and regulations and AANDC is working to support capacity building for local land management, as well as working with Environment Canada to close regulatory gaps for reserve lands. However, there are other models and tools that AANDC, perhaps in partnership with Environment Canada, could consider using. This could include funding for conservation payment programs, assisting Bands to acquire locatee lands with



ecological value, or facilitating additions to reserves that would allow Bands to swap land with locatees.

### **Local Land Management Gap**

Taken alone, the *Indian Act* and AANDC policy do not provide an adequate framework for effective local land management. There are problematic regulatory gaps and federal oversight of land transactions and management decisions is often slow and ill matched to local needs and context. AANDC strives to play an oversight role through its assessment of land transactions and development applications but this role is difficult and expensive for AANDC to fulfill effectively, given the number of applications that AANDC must assess and AANDC's distance from the local context. Federal assessments of leases or developments, particularly environmental impacts do not always match with local assessments of impacts. Cases where AANDC delays or denies applications based on land management concerns can cause significant frustrations and tensions between AANDC and First Nations Bands and individuals, who may question the authority and assessment of government staff. As well, individuals and Bands are often frustrated by delays in AANDC's approval system.

A missing piece in many situations is that Bands have not enacted local land use by-laws and regulations. These tools give Bands more of a say in how AANDC assesses transactions and developments, and they make it easier for AANDC to complete their assessments. The FAO guidelines on responsible tenure governance recommend that land tenure and management responsibilities be placed "at levels of government that can most effectively deliver services to the people" while clearly delineating roles and responsibilities and coordinating between agencies (FAO, 2012a, p. 8). In the context of First Nations reserves, it seems the more effective route is to empower First Nations to establish and administer their own land management systems. AANDC has been working with many Bands through the RLEMP (Reserve Land and Environmental Management Program) and ss.53/60 delegated authority to achieve this (although PIB Lands Manager Joan Phillip reported that AANDC is currently not offering ss.53/60 delegations). This model of gradual, Band-tailored empowerment of local land management seems to be effective, and there is growing demand for more local capacity training and support. These options should be expanded, not reduced. In

addition, some First Nations are concerned about the liability implications of delegated authority (J. Phillip, personal communication, 2012) and AANDC should work to provide more clarity on this.

### **7.3.2. *Shifting Roles and Responsibilities***

The role of the federal government with individual landholdings presents difficult legal and policy questions, particularly concerning AANDC's role in leasing approvals and land management decisions. While Band Councils and their staff make most local land management decisions, under the *Indian Act* land regime the federal government retains authority, and liability, for decisions and transactions involving reserve lands. The federal government is in a challenging position: it has a fiduciary obligation to protect a Band's collective interest in its reserve (NALMA, 2009a, pp. 3, 6) and must follow legislation such as environmental laws, but it has also created a system of permanent, legal individual interests in reserve land which it is obligated to protect. As a result, the federal government must balance potential competing obligations when considering the approval of reserve land transactions, but the legal nature of these various obligations remains ambiguous and contested (Bartlett, 1990, pp. 124, 210).

Further fuelling debate over the role of the federal government, a 2011 Canadian Human Rights Tribunal (CHRT) case *Louie and Beattie v. Indian and Northern Affairs Canada* challenged the federal government's process for approving leases of individually held lands. The plaintiffs charged that the federal approval process was discriminatory because it differentiated adversely in the provision of leasing services on the basis of national or ethnic origin (CHRT 2, 2011, sec. 51). The Tribunal judge found that "the [Indian] Act has become an anachronism that is out of harmony with the guaranteed individual liberty, freedom, and human rights enjoyed by all Canadians" (CHRT 2, 2011, sec. 53). As a result, the government was ordered to amend its land management policies so that individual landholders can determine for themselves if a transaction is to their individual benefit, a determination that must be accepted and not subject to unilateral Ministerial discretion (CHRT 2, 2011; East, 2011; Sorensen, 2011). The decision is under judicial review; but if upheld, East (2011) explains that this case will likely reduce the government's role from one of a fiduciary obligation to "an 'enabling administrative function' of processing leases." While the full outcome of this case is yet

uncertain, it could have major implications for federal policy concerning the management and regulation of individually held reserve lands. Already, AANDC is revising parts of its Lands Management Manual to respond to the CHRT decision to ensure that fiduciary obligation concerns are triggered only for the whole membership, not individual locatees (L. Pardy, personal communication, 2012). This decision makes it all the more important for Bands themselves to have local land management systems and capacity in place as AANDC reduces its oversight and intervention in locatee land leasing decisions.

### **7.3.3. Reserve Land Tenure Policies and Reform**

Finally, as mentioned in 7.2, reserve land tenure is a topic of ongoing debates and policy development within AANDC and the federal government. The *First Nations Land Management Act* is an example of legislation that has created the potential for land tenure change in First Nations, and current proposals could create avenues for Bands to shape their local land tenure even more significantly. What case studies like this demonstrate is the importance of assessing land tenure as an institution that is interwoven into social, cultural, historical, biophysical, political, governance, and economic systems, which in turn shape local needs and goals. Many of the challenges that First Nations face with economic development, land management, and poverty are not a result of inherent failings of the CP system. Rather, these challenges are linked to historic and systemic challenges (Palmater, 2012) and the wider context of uncertainty, land conflicts, limited local land management capacity, and bureaucratic delays. It is noteworthy that a research project on economic success on reservations in the US found that “there is no compelling argument either way” for individual or collective land tenure contributing to economic development; instead, it concluded that economic success is determined by “the nature of the institutions which are established to deal with land in the particular context” (Hickling Arthurs Low, 2001, p. A–9).

In light of these complexities, policies that target only land tenure are too narrow, will likely not address the underlying challenges, and risk unanticipated impacts. Larry Pardy, Manager of Lands, Environment and Natural Resources in AANDC’s Atlantic region, emphasized this:

The interrelationships between Indian status, land, trusts and governance are intricately woven into reserve life and have been in place for generations. ...To arbitrarily change *Indian Act* land provisions or the underlying beneficial interest in common to these lands to a system more compatible to off reserve land ownership concepts, may exacerbate the challenges faced by First Nations. (L. Pardy, personal communication, 2012)

Reserve land policies and laws require great cultural sensitivity and awareness of the diversity across and within First Nations. Concepts that are second-nature to non-Aboriginal policy-makers and bureaucrats, like private ownership of property and the relationship between government and property holders, are still unfamiliar or at least new to many individuals and communities who come from different land tenure traditions (Hickling Arthurs Low, 2001, pp. 9–10; A. Bak, personal communication, 2012). When proposing reserve land tenure reforms, even if they are through opt-in legislation or policies, it is critical to consider diverse linkages and impacts, such as local-level political dynamics, social issues like inequality, shifts in legal liability and responsibility, and practical land management challenges. This is especially important considering the costs and far-reaching and sometimes unanticipated impacts associated with land tenure reform (Dekker, 2003; Stephenson, 2010, p. 112). Full consideration of these local-level impacts and perspectives requires extensive consultation with and direction from First Nations leaders, communities, land managers, and individuals.

## **7.4. Researchers & Practitioners**

Interest in the impacts and implications discussed previously also extends to researchers and practitioners working on First Nations land tenure and management issues, or fields affected by them such as planning or economic development. This final section of Chapter 7 explores implications and recommendations linked to research and concepts explored in the literature review (Chapter 2). Several methodology-related reflections are included in Chapter 8.

### **7.4.1. *Lessons of Reserve Land Tenure Systems***

Experiences of First Nations like PIB have much to teach the communities of land tenure and management researchers and practitioners. These experiences illustrate cadastralization (section 2.1.5) and Eurocentric bias (section 2.1.6) in colonial land tenure policies and administration and provide a richness of experience for exploring dynamics and outcomes of these policies in retrospect. These dynamics are not only historical; they continue today and are in some ways even more interesting because of their hybridization with local tenure concepts, practices, and administration. The use and influence of different land tenure narratives (section 2.1.8) are apparent in the ranging perceptions of individual landholder rights and in the contested histories of individuals' lands and communities' land tenure changes. These experiences also illustrate the central importance of power and control over land tenure and management (section 2.1.8), in particular how imbalances in power shift voluntary adaptation of foreign tenure concepts towards external control, and how external control can be resisted by de facto practices on the ground. Tensions between local and external systems of tenure law and administration on reserves have created numerous situations of legal pluralism (section 2.1.7), the specific nature of which varies with historical, social, cultural, and political context. Legal pluralism in land tenure and management has existed for centuries on many First Nations reserves, but only recently has this been recognized outside of these communities. Navigating this pluralism and supporting effective land management in these contexts will continue to be a leading challenge for First Nations, policy-makers, and other practitioners and researchers.

### **7.4.2. *Need for More Learning and Sharing***

Learning from the diversity of land tenure histories, experiences, models, and innovations among First Nations in Canada will be critical to supporting decentralized reserve land management and tenure pluralism. This type of research on local experiences needs to be expanded across Canada. In particular, there are opportunities to do comparative studies between reserves that have different percentages of their land held as CPs, and between Bands using CPs and other customary systems. In this project, I have looked at a detailed history and outcomes for a particular community, but we need to look at other communities to further explore and test for causal relationships

between tenure systems and land management outcomes to determine if some impacts are unique to the CP system.

Many land tenure contexts can provide insights and tools for First Nations, across Canada and in international and off-reserve contexts. Learning from First Nations experiences could also assist other communities around the world, Indigenous and non-Indigenous (Stephenson, 2010; Woodward & Company, 2010, p. 2). Many communities share similar concerns, such as fractionation (section 6.2.4.), contested rights (section 6.1.3), and balancing public and private interest in land (section 2.1.4). To paraphrase Rakai (2005, p. 4), the limited or modified adoption of Eurocentric land tenure institutions by First Nations is something to explore further and learn from. This ongoing “resistance to viewing land ... as commodities” (Rakai, 2005, p. 4) and awareness of the trade-offs and costs inherent to private land ownership should be recognized as a summons to re-examine dominant land tenure paradigms and explore alternative land tenure models.

There is much potential for more extensive and in-depth investigation of this topic. There is also a need to expand the scale and scope of empirical research to include the experiences of more First Nations and reserves and incorporate more comparison across communities, within Canada and internationally. The diversity of land tenure and management models and innovations in First Nations, and communities generally, should be further explored and shared. Not only is there demand by Indigenous peoples around the world for sharing experiences and best practices from other Indigenous communities “with respect to land tenure, land management and land administration” (Rakai, 2005, p. 194), there is much that non-Indigenous communities can learn concerning land tenure systems, concepts of property, and individual and collective ownership models. In both Indigenous and non-Indigenous contexts, the institution of property is ultimately an instrument that societies can, and should, continuously adapt and improve (Freyfogle, 2007; Nemoto, 2002).

## **8. Final Reflections and Conclusions**

In this final chapter, I offer reflections on key research lessons and methodological observations and end with a brief summary of overall conclusions.

### **8.1. Lessons**

Like any graduate student, I learned many personal and professional lessons over the course of this project. Here, I reflect on several that are specific to the subject and context of this research and likely of interest to others working in similar areas.

#### **8.1.1. *Navigating Community Relationships***

The issue of relationships between researcher and research participants raised some concerns for this project, both where relationships were limited and where they were well developed. Given my social identity as a non-Aboriginal researcher, I encountered challenges in building relationships and trust in some situations. While I was able to build relationships with many PIB members, there were many more community members who I never met or only met briefly. This dynamic was also apparent in group settings, such as community meetings, where it was very important for me to explain my presence in order for community members to feel comfortable discussing internal lands issues with me in attendance and taking notes. It is likely that my brief introduction and explanation was not enough to put all community members at ease and therefore the discussion, and my notes, likely did not reflect all the views present in the room. On the other hand, my relationships with several individuals, particularly the PIB planning team and Lands Manager, developed into personal friendships and mentorship relationships for me. I learned a great deal from conversations with these friends and these relationships have continued after data collection. I acknowledge that these relationships shaped my research through their

influence on my learning about the community and my personal development, as well as my wish to have the depth of my learning reflected in the outputs of my research.

While I feel these relationships have been overall very positive for my research project, I expect that in some ways they have also biased me to certain interpretations and perspectives. For example, I have had to navigate how to interpret and include critiques of the PIB lands department while also feeling great personal respect and friendship for staff who work there. However, as my pool of interview participants expanded beyond PIB Band Office staff I began to appreciate the diversity of experiences and values that existed between members and so was better able to balance the information I received from staff and my friends with information from other sources. My opportunities to spend time with Band staff greatly enhanced my inside understanding of the reserve land management context but it also means that I am more sympathetic to the challenges that Band staff face while navigating the system. To community members who are less familiar or sympathetic with this context, my findings may seem favourably biased towards Band staff and Council.

As well, during my data analysis I identified that my interviews were not fully representative, especially of members who do not hold any land. During interviewing, I was not fully aware of internal inequalities of landholding in PIB and so did not explicitly seek out members who have no land. This experience taught me about challenges of identifying internal power structures, especially as an outsider and newcomer to a community. These challenges can significantly influence researcher access to different perspectives and add a bias to research findings.

To counterbalance these influences, I did seek out perspectives critical of the Band Office. It was not my intent to cause conflict or give the impression of internal discord or mismanagement, but I felt I needed to seek out a diversity of perspectives to strengthen my findings. I also hope that giving voice to both Band Office and critical community member perspectives may help to bridge divides in understanding and communication. These gaps in communication seemed to underlie many of the differences in opinion that I encountered.



### **8.1.2. *Navigating Contested Narratives***

As discussed in section 2.1.8, research on land tenure and property often involves a range of (sometimes conflicting) perspectives and narratives from research participants. I encountered this in my efforts to reconstruct the land tenure history of PIB. There were many versions of the local history (in both interviews and documents), particularly in cases where individuals were or had been involved in land disputes or where individuals felt historical allotments or dispute decisions had been unfair. In these situations, I viewed my role as presenting the range of perspectives while attempting to identify similarities and historical patterns. The resulting history is still my interpretation, and does not support all perspectives equally, and therefore some may see it as yet another narrative competing for the truth. While it was not my intention to prove or disprove certain historical accounts, and I doubt that would even be possible, navigating these narratives proved to be more challenging than anticipated.

I also encountered contested narratives when investigating land management implications of individual landholdings and their perceived advantages and disadvantages. I had anticipated a range of responses and for some to be in direct opposition, but I was surprised by how extensive this was and how difficult it was to interpret responses. It was not until reading more into the concept of contested narratives that the influence of power dynamics and narratives vying for influence became clearer. For example, many locatees were defensive of the CP system and their rights under it and praised aspects that other respondents criticized strongly. I faced the challenge of attempting to interpret responses in the context of larger debates over locatee rights, Band Council – locatee relations, and power struggles over land management authority. For every topic identified as an implication, impact, or issue there were numerous, often opposing, perspectives to consider. As a result, for many of the impacts, to label them as solely an advantage or disadvantage became an impossible task and instead I tried to consider the full range of perspectives for each topic.

### **8.1.3. *Navigating Language and Power***

One of the cultural differences between research participants and myself that emerged as significant is that I do not speak Nsyilxcen, the language of the Syilx

(Okanagan) peoples. Frequently in interviews, especially with Elders, concepts were initially expressed using Nsyilxcen words and I was unable to comprehend the full meaning. This was further highlighted in classes with Dr. Jeannette Armstrong concerning Syilx culture and ethics where I came to appreciate the complex and multi-faceted meanings of Nsyilxcen words. I learned that for many members, retaining and using one's own language rather than the language of colonizers is an act of resistance that reclaims power for those disempowered by colonization. For me, this was an insight into the influence of balances of power and efforts to reclaim it that applied to land tenure as well as language and informed my analysis of power dynamics in PIB's land tenure history and contemporary interactions with the federal government and internally.

At several points during this study, I was reminded of the power inherent in my position as a researcher, and its positive and negative implications. On the positive side, in some ways my position as an external researcher made it easier for me to explore topics that were locally sensitive, such as historical disputes over land between families. As well, I was told that the collaboration between the PIB planning office and myself as a university researcher was strategic and beneficial for the PIB when reporting to government agencies and applying for more planning funding, as I represented a successful initiative to work with outside organizations. Several PIB members remarked to me that they liked that I was researching their community because it made them feel "famous" and made them feel that PIB's story and experiences were important.

A downside is that my perspectives and decisions mostly determined the course of this study, even though I used a collaborative approach. An example of this influence became apparent to me when I encountered some suspicion of my use of written documents, especially historical ones, and even of the fact that I was writing down this history and my research findings. For people rooted in an oral culture and who felt their families had been wronged and deceived by written documents in the past, my emphasis on written documentation appeared to be an alien and concerning approach to historical questions, at least for some individuals. In an oral culture, historical truth is created through the retelling of stories passed down generation to generation. Some saw my writing of my historical interpretations as a powerful action that could potentially undermine what they considered true history and what they wanted their children and future generations to learn.

A similar challenge emerged during interviews and later analysis. Several interviewees and community members expressed the importance of having their own words properly represented and not modified or misused in my analysis and presentation of findings. While I had already been aware of the challenges of interpretation and researcher bias in analysis, these concerns amplified this challenge. My training as a qualitative researcher had stressed the importance of not only reporting descriptive findings but also reporting analysis and deeper interpretations of data (Richards, 2009). It was challenging to reconcile what I considered sufficient analysis with my participants' expectation that I represent their words fully, truly, and without misinterpretation. In the end, I decided that including extensive quotes from participants would help to ensure that I properly represent their words and original voice.

#### **8.1.4. *Navigating My Role as Researcher***

Finally, at numerous points during this research I struggled with determining my appropriate role(s) as an outside researcher and student. I was troubled by the power dynamics discussed above, the challenges of understanding community relationships, and appropriately representing contested narratives. For many of these I was surprised at how difficult they were to resolve within myself. I am thankful for the guidance of my community partners and research supervisors, and for the experiences and reflections shared by other researchers who have found themselves in similar situations. I have come to understand, gratefully, that the primary benefit of this project has been my own learning, but I hope that I have been able to give back to PIB a research product that is both useful and suitably humble and of interest and use to others as well.

## **8.2. Methodological Reflections**

One of the goals of this research was to attempt application of the Institutional Analysis and Development (IAD) framework in a First Nations reserve context. Another framework, the En'owkinwixw process, emerged later in the project and shifted my focus away from using the IAD framework alone. I offer some reflections on my experience of using various frameworks and theoretical constructs for this project.

### 8.2.1. *Original Theoretical Frameworks*

I came to this research with several theoretical frameworks guiding me. The IAD framework was attractive for my project framing and analysis techniques (primarily qualitative coding) because of its focus on institutions (e.g. property rights), its attempt to include a wide range of external influences, and its seemingly straightforward approach to building models of action situations and labelling the various components involved. Over the course of this project I also realized that I had been heavily influenced by Alchian and Demsetz's (1973) approach to researching property rights based on three key areas of investigation (Table 8.1), which I learned as an undergraduate student.

**Table 8.1. *Approaching a Property Rights Issue***

Existing Structure	Implications/Consequences	How it came to be
E.g.: <ul style="list-style-type: none"> <li>• Legal system</li> <li>• Rights, duties, powers</li> <li>• Pressures to change</li> </ul>	E.g.: <ul style="list-style-type: none"> <li>• Winners/Losers</li> <li>• Transaction costs of change</li> </ul>	E.g.: <ul style="list-style-type: none"> <li>• Creation, evolution of current structure</li> <li>• Linking structures or changes to effects</li> </ul>

Source: Alchian and Demsetz (1973), Deaton (2008)

Both of these frameworks and models continue to influence my thinking about land tenure, but I found that operationalizing them in the context of this case study presented challenges. For the Alchian and Demsetz approach, I found most aspects very useful and compatible with the project, such as the emphasis on understanding the history and evolution of the current land tenure situation. However, certain parts of their approach were problematic, such as the framing of implications as winning or losing, which was a divisive framing that many of my research participants did not agree with and felt that it oversimplified the situation. Also, I found I benefited from the more comprehensive approach to understanding land tenure context provided by Rakai (2005) that included worldviews, values, and goals of the local community or society and concepts and perceptions of land and land tenure in addition to the institutions that influenced the tenure system and the specific land tenure structures themselves.

The IAD framework informed my initial research design and coding but I soon encountered challenges using it. First, given the breadth of topics involved in this case study, the large number of IAD variables for each topic multiplied my coding

unmanageably. When I simplified the variables, I lost some of the insights and clarity of the framework. I also found that the IAD framework categories were not flexible enough for me to capture the emerging themes and relationships in my coding. Ultimately, the IAD model informed my thinking more diffusely by expanding out the types of influences, situations, and actors that I considered. Also in my Chapter 6 descriptions of land management activities, I use the IAD concepts of Action Situations, Actors, and external influences. Overall, the IAD framework was not ideal for this exploratory case study; I anticipate it would be much better suited to other settings, such as a comparative study or a focused study of a specific aspect of a land management system.

### **8.2.2. *Applying Culturally Relevant Research Frameworks***

I learned an additional framework during the course of my fieldwork with PIB: the En'owkinwixw framework (described in section 4.1.4. and Appendix C and applied in section 6.2.1). Including the En'owkinwixw framework in my project greatly enriched my data collection and analysis. It was especially helpful as I uncovered the extent to which I could not treat PIB as a homogenous 'community' or as being "internally coherent or consistent" (Rakai, 2005, p. 191) when it came to questions of land, but rather I had to include a range of perspectives and sub-communities. The En'owkinwixw process requires consideration of multiple perspectives on a variety of aspects of a topic or question and assists with the organization of this information, and so was very helpful as I explored ranging worldviews, values, goals, and narratives of my research participants

As well, applying the En'owkinwixw framework was significant to my community partners and PIB community members because it is a culturally appropriate technique to use when investigating complicated questions and when communicating findings. By explicitly including this framework, I acknowledge its highly beneficial contribution to my personal appreciation and understanding of Okanagan culture and show respect to this skillful technique for interpretation and exploration of emotionally charged or controversial topics where there are multiple perspectives of reality or multiple accounts of a particular history.

### 8.3. Conclusions

First Nations across Canada operate under a great diversity of land tenure and management systems; some are uniquely customary, others are variations of the federally administered system. All have experiences to share and challenges that could benefit from the experiences of others. Non-Indigenous communities also face numerous challenges related to land tenure and land management and therefore can and should learn from the experiences of First Nations.

There is a need for more empirical research and evaluation of land tenure and management on First Nations reserves in Canada, as well as Indigenous land tenure and management systems more generally. We need to document, discuss, and learn from these varying experiences of land tenure and management systems. Not only are there management issues to address; these tenure systems are also under pressure to conform with dominant land tenure systems and economies. While local communities and individuals may welcome some changes, others reflect imbalances in power and may undermine local values and goals. Without understanding Indigenous land tenure systems, adaptations, and local needs, values, goals, and practices, we risk continuation of Eurocentric and ill-fitted land tenure reforms (Rakai, 2005, p. 195).

The findings of this research project illustrate many influences of the individual landholding system on reserve land use, planning, and management. These influences are significant to individuals, families, community leadership and land managers, the community as a whole, and neighbouring communities. Though based on detailed examination of one First Nation's experiences, my findings and conclusions are relevant more widely. This research highlights the importance of considering wide-reaching implications of land tenure systems. In particular, this research illustrates the impacts of institutional mismatches and gaps between the federal individual landholding system (Certificate of Possession, CPs) and reserve land management as it operates currently under the *Indian Act*. Bands, like PIB, that use the federal CP system without an effective and legally-matched local land management system in place run the risk of causing or worsening local land management challenges and reducing the benefits that the CP system may provide.

Bands need to be empowered in their local land management. The federal government has responded to concerns of managing individual landholdings on reserves primarily by centralizing approvals and administration, but this has not addressed underlying regulatory gaps and other local land management challenges. To echo the recommendation of Alcantara (2003, p. 419), First Nation governments should have a greater role in land management decisions. Proponents of sweeping, top-down land tenure reforms promise breakthroughs in community economic development but downplay risks and costs to Bands. Administering land tenure systems, and land management generally, are costly, politically charged, and require diverse and empowered capacity. While many First Nations may support the ultimate goal of increasing local control of land tenure, what is needed first are gradual and voluntary transitions to decentralized, local control over land management, informed and directed by First Nations themselves. The federal government's primary role in this process should be to provide resources, support, and flexibility in First Nations' unique and diverse trajectories. Empowered in their local land management, First Nations will be better positioned to decide, design, and administer their own land tenure systems that balance individual and collective interests and goals in ways that are compatible with local needs, values, history, and culture.

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## **Appendices**

## Appendix A.

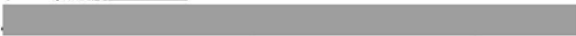
### PIB - SFU Research Agreement

#### RESEARCH AGREEMENT

Project title: Community land-use planning on First Nations reserves and the influence of land tenure: A case study with the Penticton Indian Band.


THIS RESEARCH AGREEMENT is made as of May 16, 2011,  
BETWEEN:

**Principal Researchers(s)** (*hereafter 'the researchers'*)

Name(s): Murray B. Rutherford, John R. Welch, and Marena Brinkhurst  
Supporting Agency: Simon Fraser University  
Address: School of Resource and Environmental Management  
Burnaby, B.C. V5A 1S6  
Telephone: (778) 782-4659  
Facsimile: (778) 782-4968  
Email: 

AND

**Penticton Indian Band**

Contact person(s): Joan Phillip  
Organization: Penticton Indian Band, Lands Manager  
Address: 200 Westhills Drive, RR#2 Site 80  
Penticton, B.C. V2A 6J7  
Telephone: (250) 493-0048 ext.112  
Facsimile: (250) 493-2882  
Email: 

The Penticton Indian Band and the researchers agree to the research project in accordance with the terms and conditions described in this agreement.

#### 1. Nature of Research Project

(a) The nature of the collaboration between the Penticton Indian Band and the researchers with respect to this research project is as follows:

A jointly developed and managed project, spanning May 2011 – December 2012, to study the influence of land tenure on land-use planning and management in a First Nation context.

(b) This research project is being conducted for the following purpose(s):

- Academic
  - instruction-focused **and**
  - research-focused
- On behalf of a government
- On behalf of a business
- On behalf of a not-for-profit entity
- Personal interest

X Other: To contribute to Penticton Indian Band efforts to develop a sustainable and effective land-use and management plan.

(c) The research is being conducted for or in connection with the following academic institution, government, business or not-for-profit entity:

Simon Fraser University ("SFU")

## **2. Purpose of the Research Project**

(a) The purpose of this research project, as discussed with and understood by the Penticton Indian Band, is to investigate:

1. Potential influences of land tenure, specifically Certificates of Possession (CP) or Locatee lands, on the management and planning of Penticton Indian Band reserve lands
  - a. Biophysical effects and/or implications
  - b. Institutional effects and/or implications.
2. The processes and policies involved with Penticton Indian Band lands management, currently and over time.
3. Potential options for lands planning and management of reserve lands under CP tenures.

(b) The results of this research may be used to:

1. Increase awareness of and knowledge about Penticton Indian Band lands management and stewardship, currently and over time, both within the Penticton Indian Band community and in regional, academic, and resource management communities.
2. Document and exchange lands and resources management knowledge and experiences among Penticton Indian Band members and researchers.
3. Contribute to stewardship tools and techniques for use by Penticton Indian Band and others.
4. Advance the careers and professional objectives of Penticton Indian Band and non- Penticton Indian Band students, researchers, and managers.
5. Mobilize resulting knowledge through scholarly and popular publications, websites, podcasts, videos, and other work products.
6. Sustain meaningful partnerships between the Penticton Indian Band and the SFU School of Resource and Environmental Management.
7. Advance Penticton Indian Band goals of self-governance and self-determination.
8. Seek additional funding for related training, research, and stewardship initiatives.

## **3. Scope of the Project**

(a) The project has the following objectives and/or aims to answer the following questions:

The objectives of this project are:

1. Contribute to First Nations' efforts to develop their own sustainable and effective land management systems.

2. Enhance understanding of land tenure on reserves and particularly possible implications of Certificates of Possession tenures for contemporary First Nations' reserve land use planning and management.
3. Document governance adaptations or 'best practices' in First Nations' management of lands that include CP tenures.

We aim to explore the following questions:

1. How can contemporary governance of First Nations' lands and resources be better understood and represented in research?
2. What are the institutions, policies, and processes that influence governance of First Nations' reserve lands and resources?
3. What are the influences and/or implications of Certificate of Possession tenures on reserve lands management and planning?
4. What are similarities and differences between Western and First Nations' approaches to contemporary land-use planning and how does the sociocultural and institutional context of First Nations communities and reserves influence the effectiveness of different planning approaches?
5. Spatial Analysis of Landscape Change: Can GIS and other digital tools assist in identifying and managing the ecological and biophysical influences of land tenure patterns on reserves? Are such analyses useful and practical tools for reserve lands managers?

(b) The following types of information will be gathered:

1. Interviews with individuals (primarily current or past Penticton Indian Band staff) involved with reserve land management, stewardship, and planning, to investigate:
  - Current and/or historical lands management, in particular the structure and process of lands governance, lands policies and objectives, interactions with other institutions and agencies
  - Individual experiences and perspectives on lands management, issues of concern, and specifically influences and/or implications of Certificate of Possession tenures for reserve lands management
  - Follow-up interviews will discuss preliminary research findings and analysis regarding potential influences and/or implications of CP tenures for lands management, experiences of other communities with CP lands
  - Perspectives on potential lands management approaches for addressing issues or concerns identified.
2. Description of current Penticton Indian Band lands management and planning processes, programs, and policies, from participant observation and document review.
3. Spatial data (landscape imagery and geospatial data) of the Penticton Indian Band reserve and tenure patterns.
4. Data regarding the number, distribution, and percent land cover of Certificate of Possession land tenures over time, as available and appropriate.
5. Documents and other media relating to all of the above.

(c) If the scope of the research project changes or expands, the researchers must advise the Penticton Indian Band and, at the request of the Penticton Indian Band, the parties will renegotiate this agreement.

(d) The researchers will advise the Penticton Indian Band if this research project is likely to result in future research proposals from the researchers or others.

As part of developing meaningful partnerships between the Penticton Indian Band and the SFU School of Resource and Environmental Management, it is likely that future collaborations between the Penticton Indian Band and graduate students and other researchers will be encouraged, particularly if there is interest from the Penticton Indian Band.

#### **4. Methods and Procedures**

(a) Information will be gathered using the following methods or procedures:

1. Participant observation of land-use planning and lands management processes;
2. Unstructured interviews with lands and planning staff and other knowledgeable persons;
3. Document and policy analysis;
4. Archival and database research;
5. Site visits with participants, as recommended and permitted by the Penticton Indian Band;
6. Geospatial analysis and mapping techniques.

These methods will generate information regarding the context of and approaches to reserve land management currently and over time, issues of concern, and landscape changes, and will be used to explore the relationships between land tenure and lands management.

(b) Penticton Indian Band members will assist or participate with the research in the following ways (to facilitate training and skills/capacity development):

Project goals, methods, and activities are to be pursued by understanding and incorporating Penticton Indian Band interests, needs, and participants at each step, particularly with regards to integrating this research with the Penticton Indian Band land-use planning process. As well, we seek, wherever appropriate, to integrate Syilx ideologies, epistemologies, and methodologies relating to lands, resources, stewardship, and governance. The work can succeed only through full participation by Penticton Indian Band leaders and community members.

Penticton Indian Band collaborators will have opportunities to participate in development of the research project; analysis of interviews (to the extent permitted by the informed consent given by the interviewee at the time of the interview), documents, and spatial data; and shared writing and production of reports and potentially presentations. There may be opportunities for joint conference presentations if there is interest from Penticton Indian Band collaborators.

(c) Individual consent to participate in the project will be obtained in the following way:

A signed informed consent form completed by each individual invited by the researchers to provide knowledge and perspectives. In cases where paper forms are impossible, a verbal informed consent script and documentation process is also available.

(d) The researchers agree that they may only use consent forms approved by the Penticton Indian Band's named contact person.

(e) Participants (*e.g. interviewees, guides, individuals providing access to lands*) will be fairly compensated for their services as follows:

As this is a relatively small and exploratory research project, funding for honoraria and compensation is not available. However, all participants will be acknowledged for their contributions, and collaborators will be invited to be co-authors on publications. The involvement of a graduate student as an intern with the Penticton Indian Band community planning process, and the production of information of value to that process are also intended as ways to compensate Penticton Indian Band staff for their time and services contributed to this project.

(f) Participants have the right to withdraw from the project at any time for any reason. In this case, the recorded information obtained from that participant will be destroyed (unless it has already been pooled with anonymous data from other participants, or released to the PIB or the public, or published).

(g) Recorded participant information will be stored in the following ways:

All primary data will be kept secure at the research team's field-season residence and subsequently at Simon Fraser University. Hard-copy data and electronic data on a memory stick will be stored in a personal locked cabinet. No servers or online data platforms will be used for the storage of data. All data will be retained for a minimum of 2 years, unless a participant withdraws from the project as described in 4(f) above. Confidential and sensitive data that would result in a breach of participant confidentiality if released (*e.g.*, the key to identity codes attached to interview transcripts; restricted spatial and property data) that have been shared with the researchers will be destroyed after 2 years (all electronic copies deleted and paper copies shredded). All other data may be retained by the researchers and PIB collaborators indefinitely, subject to the terms of the Non-Disclosure Agreement between SFU and the Penticton Indian Band Development Corporation (the "Non-Disclosure Agreement," appended). Copies of the notes and/or transcripts of interviews will also be held in the Lands Department records of the PIB administration (to the extent permitted by the informed consent given by the interviewee at the time of the interview). These will be filed as confidential and access to the files will be restricted to the PIB Lands staff, Band administration and their permittees.

(h) The following individuals or categories of individuals (*e.g. department/position*) will have access to recorded participant information:

For participants who request to remain anonymous, only the researchers will have access to information that identifies the individual participants. Other recorded information, including interview transcripts and notes will be accessible by the researchers, future students under supervision of one or more of the researchers, and the PIB administration (Lands Department, Band Records, and Band Manager), to the extent permitted by the informed consent given by the interviewee at the time of the interview. If participants have requested anonymity, personal identifiers will be removed from transcripts and notes to the extent possible before they are shared beyond the researchers. Interview participants will be asked to consent to having transcripts/notes/summaries retained by the PIB. PIB copies will be filed as confidential and access to the files will be restricted.

(i) Confidentiality of recorded participant information (if desired) will be ensured in the following ways:

The confidentiality of participants wishing to remain anonymous will be assured through the use of alphanumeric codes to label interview transcripts or notes, with only the researchers having access to the code key. For these participants, personal identifiers will be removed from transcripts or quotes shared outside the researchers, to the extent possible. Participants will be given the chance to review and comment on interview transcripts or notes before they are shared beyond the researchers and will also have the chance to review and comment on the analysis and summary of research before public release.

Other information (Band records, datasets) identified as confidential will be managed according to the Non-Disclosure Agreement.

All primary data and interview records will be stored securely, see 4 (g).

(j) Research results will be analyzed or interpreted through the following methods:

Research will be integrated and interpreted through:

- Several analytical frameworks will be explored, including the Institutional Analysis and Design framework, the Policy Sciences framework, and an existing Aboriginal land tenure research framework;
- Application of Syilx ideologies, methodologies (e.g. En'Owkinwxw process), epistemologies, and land stewardship and use policies and practices, assisted by guidance from Penticton Indian Band collaborators;
- Syntheses of interviews, document analysis, and spatial data bearing on lands management;
- Spatial analysis techniques applied to geospatial data and landscape imagery

(k) Penticton Indian Band researchers/participants will participate in the analysis of information/research results, or the verification of results, in the following ways:

1. Ongoing guidance from and consultations with collaborators;
2. Follow-up interviews with participants to discuss findings and analysis;

3. Commitment to inclusion of Penticton Indian Band individuals as co-authors on publications where possible and if/when there is interest;
4. Ongoing efforts to involve Penticton Indian Band staff in research design and analysis.
5. Joan Phillip, the Penticton Indian Band Lands Manager is a member of the graduate student researcher's supervisory committee.

(l) Final research outputs will be submitted to the Penticton Indian Band for review and comment.

The Penticton Indian Band and collaborators may alert the researchers to concerns regarding the release of specific findings and the researchers will attempt to address concerns. Publication and copyright of research results shall be governed by the *Internship Terms for Graduate Student Educational Projects at Simon Fraser University (SFU) Funded Through the MITACS Accelerate Internship Program (MITACS ACCELERATE) As Administered by the Mathematics of Information Technology and Complex Systems Inc.* (the "SFUMITACS Internship Terms," appended).

(m) Research findings will be presented to the Penticton Indian Band in a language and format that is clear and comprehensible to Penticton Indian Band members.

(n) Research findings will be presented to the Penticton Indian Band in the following formats:

Printed and digital, with other formats (such as a presentation) to be decided in consultation with collaborators and other Penticton Indian Band leaders.

(o) Research findings will be presented to the general public and/or any other audience in the following formats:

A REM 699 Major Research Project report submitted in print and electronically to the Simon Fraser University library and School of Resource and Environmental Management. Printed and digital publications will also be pursued, including academic journals and conference presentations. Other formats may be decided upon in consultation with Penticton Indian Band collaborators and leaders.

## **5. Expected Outcomes, Benefits and Risks**

(a) The expected outcomes of this research project are:

At this point the expected outcomes are the same as the goals, primarily insight into potential implications of land tenure for reserve lands management and effective management strategies for lands under different forms of tenure. We will continue consultations to assure that outcomes maximize benefits to the Penticton Indian Band and the Penticton Indian Band planning process.

(b) The project will benefit the principal (external) researchers in the following ways:

Personal and professional satisfaction, as well as meeting job requirements for preparing graduate students. The primary motivation involves establishing meaningful



research partnerships across institutions, communities, and disciplines to support quality publications and effective stewardship policies.

The graduate student researcher (Brinkhurst) benefits from this project through gaining research experience, personal and professional learning, completion of a necessary component of a Master's degree, and personal income through student research stipends and scholarships.

(c) The project will benefit the Penticton Indian Band and its members (individually or collectively) in the following ways:

Although much or all of this will be determined by Penticton Indian Band collaborators and leaders, rather than by the researchers, we predict several benefits:

1. Self-governance: Information and analysis pertaining to effective lands management strategies for lands under different tenures, including learning from the experiences of other First Nations communities
2. Self knowledge: Contribution to the land-use planning process of information and data (archival and spatial) concerning stewardship and management of Penticton Indian Band lands historically and currently;
3. Self-determination: Data and analysis on opportunities and management strategies for future of lands management.

(d) The project poses the following risks to the Penticton Indian Band:

The project will collect information from individual PIB staff members and individual PIB members. Some of this information may concern past land disputes and other sensitive information. Transcripts of interviews will be held in PIB administration records indefinitely and may be accessed by Band administration in the future (to the extent permitted by the informed consent given by the interviewee at the time of the interview). The project will generate public information about the Penticton Indian Band lands and their management, though without focus on specific sites or developments.

The risks to participants concern potential damages to political or personal reputation, in the event of a breach of confidentiality or release of information that leads to identification of an individual participant's contributions to the study. These risks to participants are considered to be of the same level as those encountered by participants in their everyday life as Band employees or volunteers with lands management initiatives.

(e) Measures that will be taken to minimize these risks are:

Ongoing consultation and guidance from Penticton Indian Band collaborators; good will and respect; and professional standards of care and ethics, including ensuring participants and the Penticton Indian Band have the opportunity to review research findings prior to public release.

Risks are minimized by ensuring that Penticton Indian Band collaborators are involved with the research project throughout its stages and by requiring the review of the

Penticton Indian Band before research results are shared publicly. Details concerning the ownership of research findings and public dissemination of findings are described in the Non-Disclosure Agreement and SFUMITACS Internship Terms.

Given that the intent of this research is to explore potential institutional influences of tenure arrangements broadly, there is minimal risk of negative implications of results for individual participants. Analysis will not focus on any specific land holding or development (existing or proposed). Risk to the wider PIB community is also minimal, especially as PIB administration will be involved in the final release of results and any information identified as confidential when collected will be governed by the provisions of the Non-Disclosure Agreement.

Risks to individuals will be minimized by providing participants the opportunity to request to remain anonymous in which case personal identifiers will be removed from transcripts to the extent possible. PIB administration copies will be filed as confidential and access to the files will be restricted. The utmost care will be taken by the researchers to avoid a breach of confidentiality and participants will be given the opportunity to review and comment on the transcripts of their interviews and the findings of the research project prior to public dissemination.

## **6. Funding**

(a) The researchers have acquired funding and other forms of support for this research project from these sources:

1. Simon Fraser University
2. Social Sciences and Humanities Research Council of Canada
3. MITACS-Accelerate Internship program: Penticton Indian Band and MITACS

(b) The amount of funding and other forms of support that the principal researchers have acquired or will be acquiring for this research project are as follows:

1. Simon Fraser University: in-kind and office support
2. Social Sciences and Humanities Research Council of Canada, Master's student award: \$17,500
3. MITACS-Accelerate Internship program: \$15,000

(c) The principal researchers' budget proposal for this research project is attached as Schedule A.

(d) The funding agencies have imposed the following criteria, disclosures, limitations and reporting responsibilities on the principal researchers:

- Publication of research results
- Student training
- Professional development of student intern and completion of MITACS exit survey

(e) The Penticton Indian Band partner has the following responsibilities with respect to funding requirements\*:

- Opportunities for meaningful involvement and professional development of student intern
- Completion of MITACS exit survey
- Collaboration in research design and completion, participation in interviews, permission to access records and archival materials, and identification of relevant interests and goals

*\*In most cases, responsibility to fulfill funding and reporting requirements falls primarily to the principal researchers, so this may not be applicable.*

## 7. Dissemination of Results

(a) Research results will be disseminated to the following stakeholders:

Research results will be shared with Penticton Indian Band collaborators and leaders through the circulation of draft and final reports and proposed publications. Additional sharing, such as with the wider Penticton Indian Band community, may be discussed with collaborators. Results will also be shared through academic publications and presentations.

(b) Research results will be disseminated in the following manner:

- Academic instructional material
- Academic research (Master's project, conference presentations, research workshops etc.)
- Report to researcher's client or employer
- Research paper intended for publication
- Research to be posted on a website
- Other (describe): Community report(s)

Describe more fully:

It is not possible to specify all project results at this stage. The following are anticipated outcomes:

1. Marena Brinkhurst REM 699 Major Research Project on Certificates of Possession and reserve land management (archived in SFU library and online)
2. Academic and/or planning journal article(s) on land tenure and reserve land management and planning
3. Academic conference presentations/workshops on the above
4. Community report(s) to the Penticton Indian Band and/or Penticton Indian Band community planning process

(c) If any of the research findings are going to be used for academic purposes, such as a thesis, the researcher must provide an abstract of the thesis.

Abstracts will be provided as they take shape and are approved by student committees or are submitted for publication.

(d) Publication or dissemination of research results that include confidential information shared by the Penticton Indian Band administration or individual members, shall be governed by the terms of the Non-Disclosure Agreement (appended).

#### **8. Access, Ownership and Intellectual Property Rights**

(a) The researchers agree that they will not require the Penticton Indian Band to pay for access to information obtained from Penticton Indian Band members, other than reimbursement to the researchers for the actual time spent preparing the information for delivery where such costs are not already being covered by another body.

In the case of draft articles summarizing research findings and analysis, the researchers may request they not be shared beyond Penticton Indian Band collaborators for up to two years for the purpose of publication.

(b) Individual Penticton Indian Band participants own their knowledge and information. The Penticton Indian Band owns the collective knowledge and information of the community.

Ownership and use of intellectual property, data and results, and publication and copyright of research results shall be governed by the SFUMITACS Internship Terms and the Non-Disclosure Agreement.

The Penticton Indian Band and collaborators will be acknowledged in all final reports and published works. In the case that a collaborator directly contributes to the preparation of a published work, they will be recognized as a co-author. Final results will be shared with collaborators and the Penticton Indian Band community in a summary report presented to collaborators and the Band Office. Options for additional research dissemination, such as a presentation or community newsletter article, will be explored and decided upon by the researchers and Penticton Indian Band collaborators.

(c) The researchers and the Penticton Indian Band will address any intellectual property rights issues (such as copyright) through a separate confidentiality agreement, relevant to the context of the particular research.

Ownership and use of intellectual property, data and results, and publication and copyright of research results, shall be governed by the SFUMITACS Internship Terms and the Non-Disclosure Agreement.

#### **9. Communication**

(a) Communication on all aspects of the research, including progress reports to the Penticton Indian Band, will be ensured in the following ways (*e.g. mid-term or quarterly reports*):

Regular progress meetings with research team member(s) during summer research seasons. Meetings will continue with collaborative assessment of research findings and

analysis. A summary report will be provided after the first summer of research (2011) and drafts of the final research report(s) and potential publication will be shared with the Penticton Indian Band.

(b) In the case of media inquiries during or after the project, designated spokespersons are:

The Penticton Indian Band's named contact person and the researchers.

(c) The Penticton Indian Band will be the first to receive research results and the first invited to provide input and feedback on the results. The results should be presented in a format that is language appropriate and accessible to the Penticton Indian Band. Results may only be released in accordance with the process set out in this agreement, the SFUMITACS Internship Terms and the Non-Disclosure Agreement.

(d) During and at the end of the project, the researchers agree to participate in Penticton Indian Band meetings as reasonably requested to discuss the results and their implications.

**10. Dispute Resolution**

(a) In the event that a dispute arises out of or relates to this research project, both parties agree first to try in good faith to settle the dispute by mediation administered by an agreed upon neutral party before resorting to arbitration, litigation or some other dispute resolution procedure. A mediator will assist the parties in finding a resolution that is mutually acceptable.

(b) If a dispute cannot be resolved to the satisfaction of both parties, the research project may be terminated in accordance with the terms described below.

**11. Term and Termination**

(a) This agreement shall have an effective date of May 16, 2011, and shall terminate on May 16, 2013. Either party may terminate this agreement earlier by providing written notice to the other party.

(b) The provisions respecting the dissemination of results, ownership and intellectual property rights and communication (sections 7, 8, and 9) survive the termination of this agreement.

SIGNED on July 25 2011 (date)

For PENTICTON INDIAN BAND:

  
(Signature)

COUNCILLOR / HANAS  
(Position) ADMINISTRATOR

PRINCIPAL RESEARCHERS:

  
(Name)

  
(Signature)

Marena Brinkhurst  
(Name)

  
(Signature)

## Appendix B.

### Interview Guide

This appendix contains the interview guide and questions that I took with me to interviews. Because interviews were semi-structured and intended to be conversational, no interview followed the guide exactly but I referred to it to ensure major questions were not overlooked and to assist me in managing my interview time.

#### Interview Guide and Questions

-Introduction to research and focus of interview (informed consent procedure)

-Are there aspects of research that you are most interested in talking with me about?

Before we get into details about individual land-holdings, I'd like to know a little about you and your roles.

#### Position Questions:

-How would you describe your role or roles with regards to management of reserve lands?

Probes: Professional role(s)/personal-individual role(s)?

-Are you a CP holder? Do you use or live on reserve land but not hold a CP for it? Is your spouse/partner a CP holder? Are any close relatives CP holders?

*Clarify terminology-* do you prefer to say 'CP holder' or 'locatee'? (*adjust accordingly*)

#### Distribution of Rights, Authority, and Responsibilities

*Part of what I'm trying to understand is how land use and management decisions are made on the reserve and who is involved, so I have a few questions about that.*

-Could you describe for me how typical reserve land use and management decisions are made, including who is involved and how?

Probe: What is the role of locatees in this process(es)?

Probe: Other than locatees/Band Office, are there other specific groups or individuals involved? How?

Are there differences between how people with landholdings and those who don't have landholdings engage with this process? What are they?

-What is your understanding of the powers of the Band Council and administration with regards to lands management on reserve?

-What about responsibilities of the Council and administration?

-Do you think these powers and responsibilities apply the same to Band lands as to CP lands?

-What is your understanding of the land use and management powers of individual CP holders?

-What about responsibilities of CP holders?

-What do you think are the powers of the Band membership as a whole regarding use and management of reserve lands?

-What about responsibilities of the Band membership as a whole?

- Do you think those powers and responsibilities apply the same to Band lands as to CP lands?
  - What do you think are the powers of the Federal government regarding use and management of reserve lands?
  - What about responsibilities of the Federal government?
  - Do you think those powers and responsibilities apply the same to Band lands as to CP lands?
- Alright, those examples have helped me get a better understanding. I'd like to talk about the history of the reserve lands a little now, if that's alright with you.

#### **Historical Questions:**

- How familiar would you say you are with the early history of the reserve and its lands? By early I mean before 1950
- Do you know any details that you could tell me about the early allotments of land to individuals or families and the process by which those were made?
- In your opinion, why do you think allotments were used? (By gov't/Indian Agents and/or by Band leadership)
- Why do you think (*particular process*) was used?
- Have you heard any stories about how Band members reacted to those early allotments back then?
- Do you have a sense of how policies on individual landholdings on reserves have changed over time? (government/Band)–Why?
- I'd like to learn a bit more about land use and management specifically - before we move on, is there anything about the history of individual allotments on the reserve that you want to add?

#### **Perspectives on Land Use and Management Implications**

- What would you say are the most pressing issues to do with land use and land management on the reserve today (positive or negative)? What do you think are the top issues?
- In your experience, do you think members with landholdings have a different perspective on land use and management issues than members who don't have land? How/Why?
- Do you think CPs or individual landholdings have influenced or changed land use or land management on the reserve? How?
- That you've seen, what are advantages to having individual landholdings on the res, in terms of land-use or management?
- Are there other things that you like about individual land allotments?
- What do you think are challenges to having individual landholdings on the res, with regards to land-use or management?
- Are there other things that you don't like or are concerned about with individual landholdings?
- Are there things you would like to see PIB change about how locatee lands are used and managed?
- What about the land allotment system, should that be changed? How?
- Are there things you would like to see changed about land use and management on the reserve generally? (describe)

**Final Questions:** That covers the things I wanted to ask. Anything you would like to add? Anything you think I should have asked you that I didn't think to ask?

## Appendix C.

### En'owkinwixw Framework

[This appendix is adapted from an original, unpublished essay I authored for *INDG 301: En'owkinwixw*, a course taught by Dr. Jeannette Armstrong.]

#### Introduction

En'owkinwixw is a phrase in the Nsyilxcen language of the Syilx people of the Okanagan valley, in what is today the province of British Columbia, Canada. Dr. Jeannette Armstrong, a Syilx scholar and linguist, translates the phrase to mean “liquid being absorbed drop by single drop through the head (mind)” (Armstrong, 1999). It is used to refer to a process of community dialogue, learning, and decision-making based on “a gentle integrative process” used in Syilx communities traditionally and still today (Armstrong, 1999). The process and core principles of the En'owkinwixw model can complement and enhance many research methodologies and techniques. They are a valuable addition to research design, especially for community-based research or researching contentious social issues. In particular, researchers working with Indigenous communities that share traditions of community dialogue similar to the En'owkinwixw process may find that adoption of En'owkinwixw principles facilitates more meaningful exchanges and mutual understanding throughout the research process.

#### The En'owkinwixw Model

As its name implies, the En'owkinwixw model is based on a process of gradually developing mutual understanding. In a community dialogue setting, it functions to meaningfully and effectively include a wide group of participants and support consensus building. In research, it functions to develop and include multi-faceted perspectives on the research topic and inform more holistic and relevant analysis. In its various forms, the En'owkinwixw model is based on four core principles, which I will briefly explore here.

#### First principle: Diversity

The first principle is to identify, consider, and include a diversity of views on the topic at hand, as widely as possible and without judgment or reaction based on emotion or ideology. This is particularly important when addressing contentious topics. In a group dialogue setting, this first stage makes the process inclusive by asking all participants to identify and recognize their own perspectives on the issue, communicate this effectively to others, and listen to others' perspectives. The outcome of this stage is a composite of a full range of perspectives and a more complete understanding of the topic as well as the participants involved. This principle is also critical in other settings. In research, it functions to gather a wide range of other research contributions, across many and varied disciplines and sources to develop understanding of the topic, issues that might be influencing it, and approaches already taken towards it. The goal is to develop a wide and inclusive research context. This first principle avoids the conventional deductive-inductive divide in research design because all contributions are welcomed, both theoretical and empirical. Similar to a community discussion, some contributions are specifically focused on the question at hand while others might be tangential but also add insight.

Another important aspect of the first stage of the process is that it asks the observer or researcher to include themselves in identification of perspective and role. In this way this principle incorporates reflexivity, or “the capacity to reflect on our role in generating research knowledge” (Ali, Campbell, Branley, & James, 2004), directly into the research process. Reflexivity asks the researcher to acknowledge their specific position, theoretical framework, and approach taken towards research design and analysis (Byrne, 2004; Silverman, 2004). Particularly in Indigenous



research, Debassige (2010) identifies the practice of “locating oneself as being integral,” both at the beginning of a research project and throughout. While researchers are often reminded to be self-aware, especially in social sciences research, the En’owkinwixw process explicitly includes this as a foundational step.

### **Second principle: Context and Understanding**

Identifying and including a diversity of perspectives is just the first step. Perspectives must also be contextualized with background and reasoning, which often requires exploring information from wider and wider systems that may influence and be influenced by the specific topic in question. Therefore the second core principle of En’owkinwixw is to clarify the context and reasoning behind the perspectives and contributions gathered. While each individual piece of information exists distinctly, it is also directly and indirectly related to many other factors, consideration of which is necessary if perspectives are to be genuinely engaged with and understood for their logical contributions to analysis. Expanding inquiry in this stage helps to support the first principle of meaningfully including the perspectives of all contributors. To do so helps to avoid false assumptions and premature narrowing of focus concerning the topic and helps the researcher to maintain an open-mind to logical points of value to the overall analysis.

Two models are used to support this: ‘nested systems’ and the four polarities, illustrated in Figure A1, below. A nested system is a term that refers to a collection of interrelated systems, each of which “forms an integrated whole with a boundary, while at the same time each is part of a larger whole” (Barlow, Buckley, & Capra, 2000) and so each is best understood when inter-system relationships are included. For En’owkinwixw as community dialogue, this nested system often takes the form of individual-family-community-land; however, these systems can be adapted to a particular research topic. A perspective, placed within one system, has relationships to sub-systems and larger systems that should be explored in order to better develop an understanding of the perspective itself, cause-and-effect relationships between different ideas and actions, and identification of further perspectives and influential factors to include in analysis.

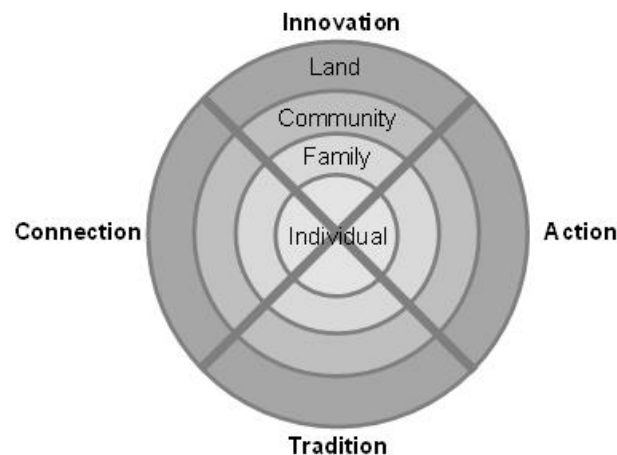


Figure A1. The En’owkinwixw process model

Source: Author generated, adapted from (Armstrong, 2011b)

The four polarities refer to four values and skills-based groupings of individuals and their perspectives. In the En’owkinwixw process these polarities are: Innovation, Tradition, Independent Action, and Interdependent Relations (Armstrong, 2011b). Each of these polarities contributes to the overall balance of a decision, of a dialogue, or of a group. The polarities are in tension with each other but all are valuable and necessary to include in analysis of perspectives.

Using the polarities helps to organize perspectives as they are collected as well as helping to identify perspectives that may have been missed and to highlight what underlying values, assumptions, and presuppositions may be influencing perspectives.

Using these two models, the second phase of clarifying and contextualizing perspectives enables the researcher (or community discussion) to identify which perspectives are justified by reasoning and should be included, somehow, in the research and analysis. It is important to stress however, that this principle does not consider the researcher or participant as an objective observer and impartial judge of perspectives gathered. Rather it asks the observer to acknowledge and attempt to think outside of their own paradigms, frameworks, and ideology to meaningfully engage with and assess perspectives of others. The first principle of inclusion and respect for every contribution remains critical to create the space and open-mindedness necessary to explore and assess the reasoning of all points.

### **Third principle: Consensus-building**

The third principle of the En'owkinwixw process is to envision a compilation of assessed perspectives into a consensus that helps to address the topic of analysis. In a community dialogue setting, this functions to move beyond differences in opinion and toward shared vision for resolution. In a research setting, it functions to motivate research to contribute to developing knowledge and sharing insights rather than to approach research as a competition with those holding other views. It is meant to unify many perspectives into a shared understanding.

### **Fourth principle: Strategy for Action**

The fourth principle builds on this consensus by focusing on a strategy for achieving that vision. At this stage, a shared understanding and spirit of cooperation has been developed and now needs clearer next steps for furthering shared goals. In a research setting, this could be a strategy for addressing the research questions and gaps identified in the earlier phases or, if research has been completed, identification of next steps and collaborations for future research.

### **Conclusion**

The En'owkinwixw framework assists the researcher to be reflexive and engage with different perspectives openly and respectfully. En'owkinwixw helps to ensure that a representative sample of perspectives is included and assessed so that the most meaningful questions and research can be undertaken. The En'owkinwixw approach of using nested systems and polarities assists with identifying, developing, organizing, and better understanding these many perspectives. Critically, the En'owkinwixw approach stresses the interrelationships between all these perspectives and supports research that attempts to investigate how different perspectives influence actions and other perspectives, across communities and through time. En'owkinwixw could also be adapted as a data collection methodology; however, Debassige (2010) cautions researchers in adapting Indigenous traditions for purposes of collecting data. Instead, it seems En'owkinwixw may be most useful in helping researchers to approach their research questions, design, and analysis creatively, openly, respectfully, and inclusively to support their research be as relevant and useful as possible for the communities they work with.

The En'owkinwixw process, developed by generations of communities to address complex and dynamic collective issues, can be adapted by researchers as a rigorous, challenging and creative tool. While it may be necessary for researchers to combine the En'owkinwixw methodology with other theoretical frameworks and research tools depending on the research topic, the En'owkinwixw methodology helps to avoid pitfalls of narrow theoretical lenses and can better include the great diversity of perspectives involved with community-based research. Particularly for contentious and emotionally charged issues, such as land tenure and land use management decisions, the En'owkinwixw process can help to account for and address opposing views and long-standing disputes in a safe and neutral framework. By including and engaging with all perspectives, research will be more grounded in the reality of local experiences and relevant for local resource managers and users.

## Appendix D.

### Additional Individual Landholding Data

#### National Data

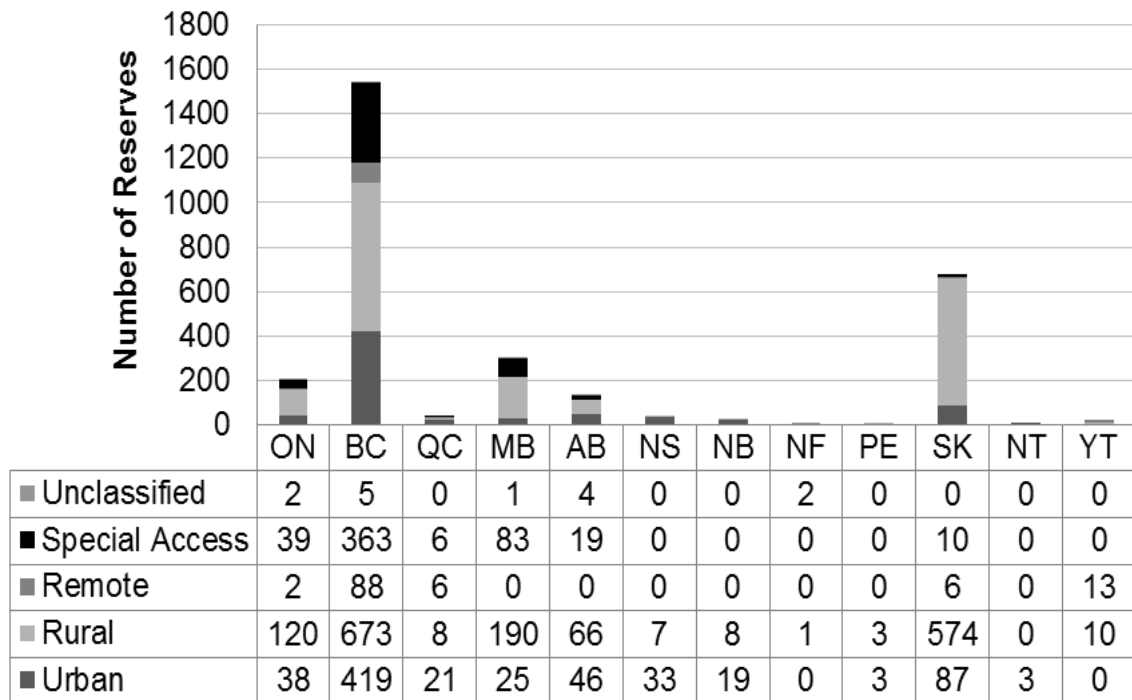
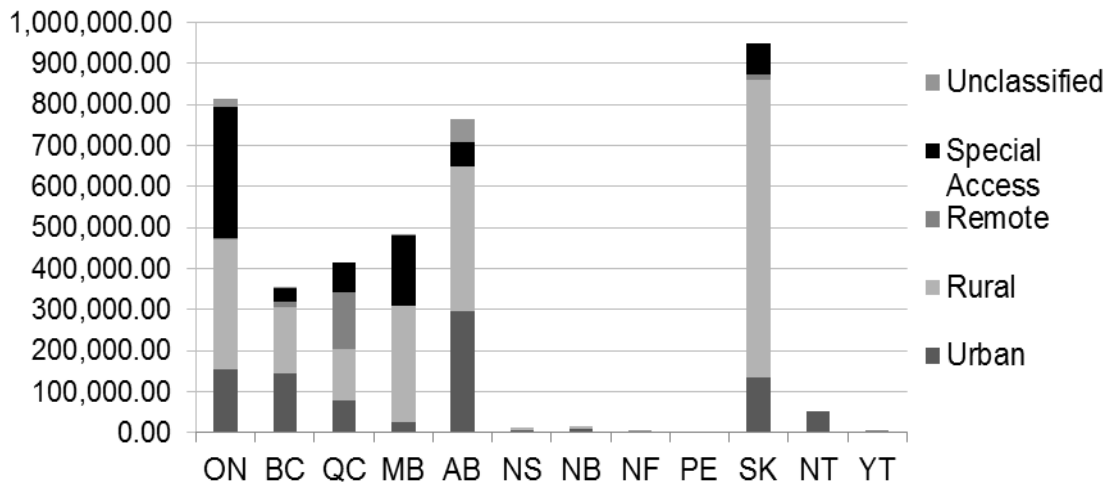


Figure D1. Number of reserves by province and classification type



Province	Urban	Rural	Remote	Special Access	Unclassified	Total
ON	153,358	317,686	2,190	320,085	19,488	812,807
BC	143,262	163,408	12,930	31,854	366	351,821
QC	76,926	128,458	136,616	73,424	-	415,425
MB	24,398	284,007	-	172,055	3	480,462
AB	294,594	354,364	-	59,989	54,307	763,253
NS	6,107	6,090	-	-	-	12,198
NB	8,935	7,406	-	-	-	16,341
NF	-	1,685	-	-	4,957	6,642
PE	198	583	-	-	-	781
SK	135,246	725,826	11,903	76,343	-	949,318
NT	52,340	-	-	-	-	52,340
YT	-	1,217	1,609	-	-	2,826

Figure D2. Reserve area (hectares) by classification and province

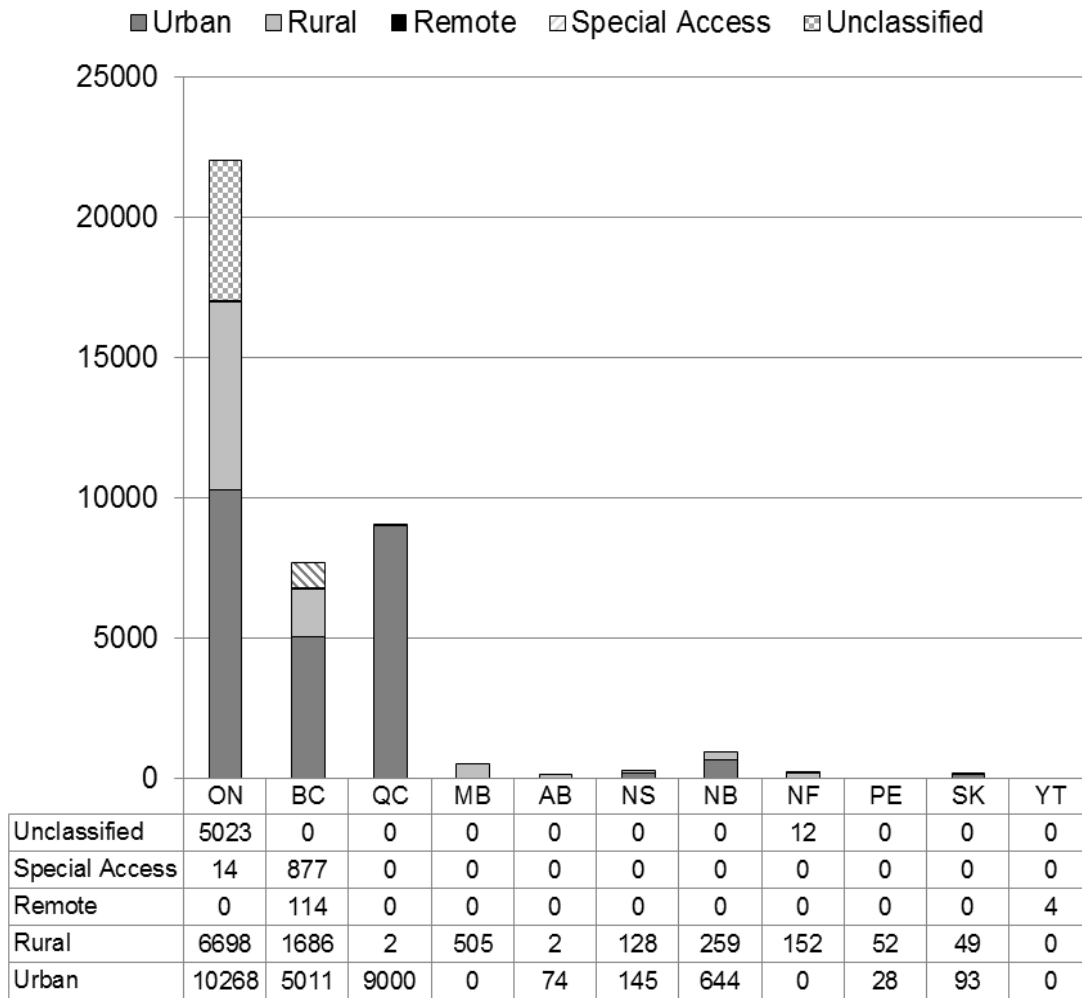


Figure D3. Number of Lawful Possessions by province and reserve classification

**PIB Data**

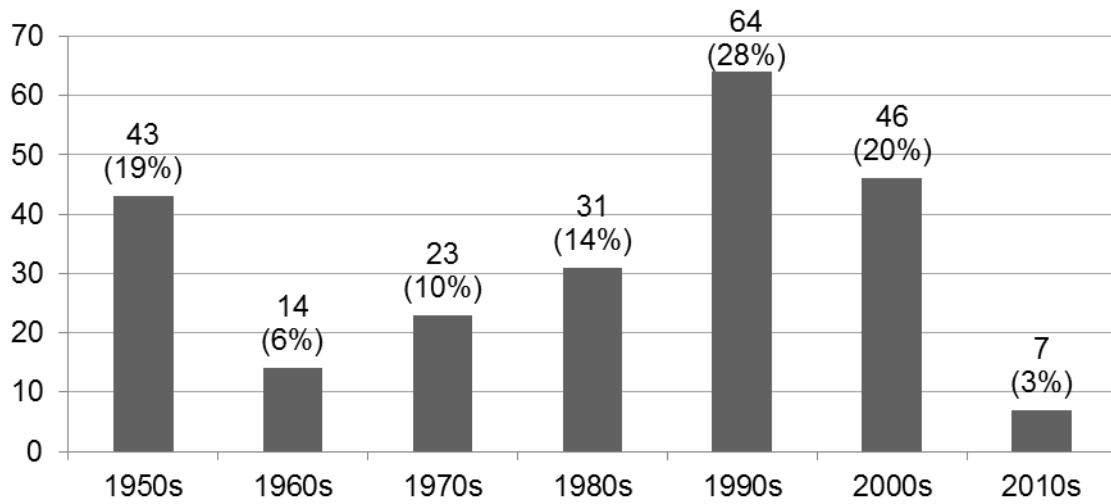


Figure D4. PIB: Number of current Lawful Possessions by decade of registration

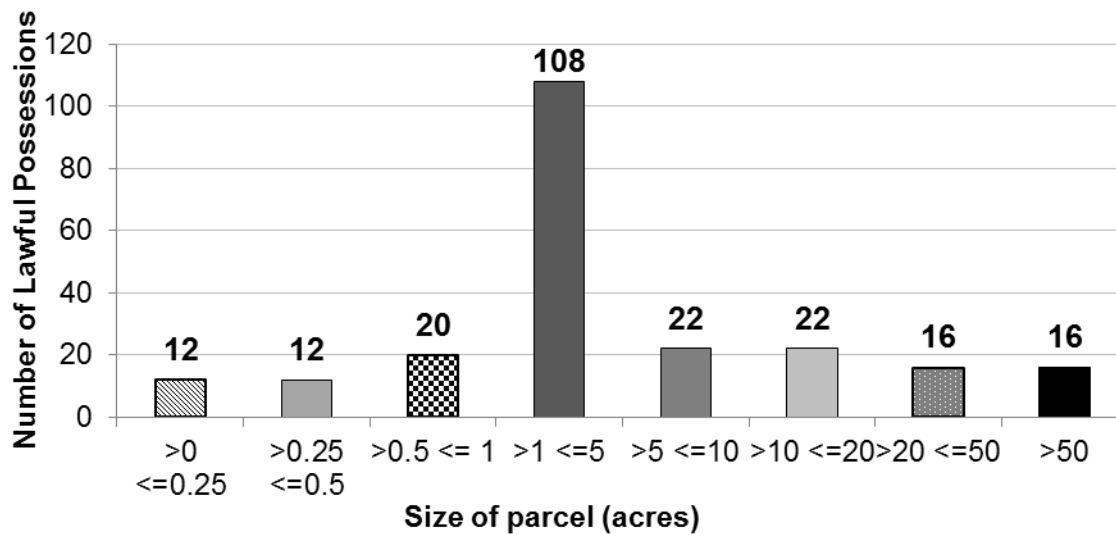


Figure D5. PIB: Number of current Lawful Possessions by size category (acres)

## Appendix E.

### Summary of Historical and Contemporary Perspectives on Reserve Land Tenure

Of the interests and questions that interviewees expressed to me, one of the predominant ones was trying to understand why people of the past made the decisions that they did concerning land on reserves. This applies to colonial officials, ancestors, and past community members. The desire to understand the motivations behind historical decisions was particularly apparent in those interviewees who see flaws in the land tenure system today, who wish that the land tenure system was more traditional, or who are opposed to individualized landholding altogether. There was also interest among other interviewees, who felt they did not fully understand the history or why things changed the way that they did. In response to these questions, and to assist myself and readers in making sense of the history, I have included this section.

There were, and are, many different perspectives and values that informed historical decisions about reserve land tenure, as with land tenure in Canada generally (Brisbin & Hunter, 2006, p. 139). While it is difficult to know how exactly people in the past were thinking, general themes can be distilled from the written and oral records left behind, and with some extrapolation. To do this, I have used the framework of the En'owkinwixw process as taught to me by Dr. Jeannette Armstrong. It is a traditional Syilx process for exploring and understanding multiple perspectives on an issue or question, represented by four quadrants that group perspectives according to their primary values or concerns: Innovation, Action, Connection, and Tradition (see Appendix C for an explanation of the En'owkinwixw process and philosophy.) In this section, I demonstrate how I used the En'owkinwixw framework to help model the many perspectives I encountered when reconstructing this history.

With this exercise, I do not mean to justify or apologize for historical decisions. Rather, I mean to illuminate the central role of different perspectives and incentives in how land tenure systems develop and how they are understood, used, and changed. The perspectives presented here are also not exhaustive; there is likely many more in addition to what I identified as the predominant ones. The goal of these summaries is to illustrate how many different, sometimes opposite, perspectives and incentives influenced individual and collective actions. I have found that appreciating the ranges and changes in perspectives, and the tensions between them, has helped me to personalize and make sense of the complex, convoluted, and contested history of reserve land tenure.

#### **Government Narratives: Historical**

##### ***Innovation***

Many European settlers and government officials had a narrow concept of landownership, based on their own experiences and cultural heritage in Europe. The predominant European concept of land ownership, represented in the philosophy of John Locke, was based on the right to permanent possession that came from investing labour into the land, through uses like farming, clearing, or otherwise 'improving' the land (Alcantara, 2003, p. 395; Freyfogle, 2003, p. 115). As a result, colonists thought that Aboriginal peoples did not own land because they did not use it in these familiar ways (Freyfogle, 2003, p. 115) and they failed to recognize existing Aboriginal land tenure systems (Alcantara, 2003, pp. 396–397; Flanagan et al., 2011, p. 61). This tenure Eurocentricity, as well as general superior and racist attitudes towards other peoples, coloured officials' perceptions of what land tenure on reserves should be. Early colonial officials considered

collective ownership of property to be limiting and inferior to European systems of individual ownership (Alcantara, 2003, pp. 392, 398; Harring, 1998) and Aboriginal resistance to land ownership policies was dismissed as ignorant (RCAP, 1996, p. 1.1.7.2). Private land ownership was believed to support individual effort, and settlers believed that having property would encourage Aboriginal people in "their hopes, interests and ambitions" (Carter, 1990, quoted in Alcantara, 2003, pp. 396–397) and reduce their "dependence on handouts" (Alcantara, 2003, p. 402). From the perspectives of settlers and government officials, private property seemed like a valuable innovation that should be introduced to Aboriginal communities as quickly as possible.

### **Action**

Early Indian policy in colonial North America was based on the goal of assimilation, which included adoption of individual ownership of land (Alcantara, 2003, pp. 396–397; Canada, 1890, p. 28; McHugh, 2004, p. 181; Nemoto, 2002). It was believed that private property rights would provide an incentive for individuals to cultivate land and settle to a permanent location (Canada, 1885, p. 22). Until the 1960s, an explicit goal of government policy was to enfranchise Aboriginal individuals and assimilate them, and individual land ownership was directly tied to enfranchisement (Place, 1981). Government decisions concerning reserve lands, and other policies, were designed to speed up enfranchisement and assimilation (RCAP, 1996, p. 1.2.9.7). A major part of these efforts was the "substitution of limited local administration for existing tribal organizations" and "issuance of individual location tickets [to] gradually eliminate communal tenure practices" (INAC, 1978, p. 66). As late as the 1970s, the goal of eventually dissolving reserves was apparent in government policy and adoption of private property was seen as a way to encourage this gradual break-up of Aboriginal communities (Baxter & Trebilcock, 2009, p. 27), likely inspired by similar efforts in the United States' tribal land policies (RCAP, 1996, p. 1.2.9.7).

Individual landholdings on reserves also served government's action-oriented goals in other ways. Colonial officials, working within the European traditions of highly simplified, cadastralized land administration could not comprehend, let alone accommodate, what are now recognized as highly complex and sophisticated Indigenous tenure arrangements designed to accommodate flexibility, resource uncertainty, spatially and temporally overlapping claims, co-ownership and a host of other adaptations to social and ecological circumstances (Çağdaş and Stubkjær, 2009). Officials thought that surveyed, individualized land allotments, and reserves generally, would make government oversight and administration easier (Baxter & Trebilcock, 2009, p. 27; Millette, 2011, p. 24; Rakai, 2005, p. 42). In cases where the size of reserves was being determined (as with the McKenna-McBride commission cut-offs in 1913), it was administratively easier to estimate land needs based on per capita land allocations. This approach was also politically expedient as it helped to justify arguments to limit or reduce reserve lands (Walkem, 1875, p. 64) in areas where settlers were hungry for land. Settlers were predominantly "poor landless people" who had left Europe in order to secure land for themselves and start a new life (ONA, 2001). Early settlers were competing with Aboriginal peoples for land and, in regions like the Okanagan, water and it suited their interests to see Aboriginal rights to these resources limited and policies imposed that would create "a dependent and compliant Indian population" (Thomson, 1994).

### **Connection**

Government officials and settlers also had motivations based on relationships and protection of Aboriginal peoples. Early colonial governments wanted to maintain good relations with the Aboriginal nations that were their allies, and that included protecting lands from encroachment by settlers (Alcantara, 2003, p. 394; Harring, 1998). Many early colonial policies on Aboriginal peoples were in fact intended to limit settler actions: banning non-Aboriginal settlement on reserves, preventing the trade of reserve lands without official approval, limiting trespass on reserves, and preventing the tax or seizure of reserve lands (Alcantara, 2003, p. 395; Flanagan et al., 2011, p. 63). The authors of a 1840 report recommending individual land ownership on reserves argued that protection of Indian lands from encroachment and trespass would only be feasible when reserve lands were allocated in small, individual land parcels (Harring, 1998, p.



31). As well, some settlers and missionaries also hoped that private property would reduce conflicts between Aboriginal peoples by more clearly dividing land and creating an incentive for peace (Alcantara, 2003, pp. 396–397). Another relationship dynamic that influenced government officials was the ultimately “contradictory mandate of representing and controlling Indian people” that Indian Agents and other Department officials found themselves in (Satzewich & Mahood, 1995, p. 26). Even the Superintendent General, as the top official for a Department that was responsible for simultaneously protecting Aboriginal rights and representing the government, at times “found it impossible to advance the interests of both parties” (Cunningham, 1997, p. 39). The competing obligations and demands on government officials may explain some of the inconsistencies and contradictions in past actions concerning reserve land management.

### **Tradition**

Many of the government and settler perspectives were infused with the history and traditions of land tenure in Europe, where private property represented a landmark success in protecting individual rights against feudalism and aristocratic control (Flanagan et al., 2011, pp. 24–25). It was also a tradition of European thought that agriculturalists had a rights to take land away from hunter-gatherers to “make better use of it” (Flanagan et al., 2011, pp. 60–61). These private property traditions had infused throughout British common law, and this in turn formed the basis of British colonial policy and Canadian law. Collective ownership of land was considered incompatible with these legal traditions because it undermined “notions of individual responsibility” (Harring, 1998, p. 81). As well, it appeared that similar systems of individual land ownership had been used with apparent success in other British colonies and in the United States, which undoubtedly influenced British and Canadian officials’ decisions and policy designs (Baxter & Trebilcock, 2009). Finally, some officials also recognized there were existing traditions of local governance and land management in Aboriginal communities, and it is likely that a desire to make colonial policies appear more acceptable influenced the decision to have local Band Councils be the authority that decided on allotment of reserve land (INAC, 1978, p. 66).

## **Government Narratives: Contemporary**

### **Innovation**

Past narratives of providing an incentive for individuals to work and invest in land have shifted slightly to emphasize individual property as foundational to entrepreneurship and economic development on reserves. Land is seen as a major asset of many First Nations and it is expected that much of the economic development on reserves will take place on individual holdings (C. Walton, personal communication, 2012). Contemporary government policies and practices have emphasized the facilitation of economic development on reserves (L. Pardy, personal communication, 2012), and court cases are granting more development powers to individual landholders (A. Eneas, personal communication, 2011). Along these lines, many proponents of reforms to the *Indian Act* land tenure system argue that more individualized property provides incentive for entrepreneurs and will assist them in accessing credit (Fiscal Realities Economists, 2007, 2010; Flanagan et al., 2011).

At the same time, another government perspective on contemporary reserve land tenure is promoting more responsive and locally determined tenure systems. This has resulted in opportunities for First Nations to opt out of the *Indian Act* tenure system, through self-government agreements or the FNLMA, though these are still early in their application. Most recently, legislation had been proposed that would give Bands the option to assume authority over the design and administration of their land tenure system (Flanagan et al., 2011; Palmater, 2010).

### **Action**

Since the 1970s, the federal government has stressed that First Nations “should have the opportunity to develop the resources of their reserves” to support their communities (INAC, 1969, p. 17) and that the government’s role should be in supporting and enabling that development. A

related policy goal is to increase the efficiency of land administration and therefore support economic development and reduce costs to the department and First Nations (L. Pardy, personal communication, 2012). This has resulted in more support for decentralization of land administration as well as cuts to departmental land services (such as reducing funding for surveying individual landholdings in 2006) (C. Walton, personal communication, 2012; J. Phillip, personal communication, 2013).

Improving land administration and strengthening individual's land tenure are seen as effective and efficient ways to help First Nations reduce poverty in their communities. The land tenure system on reserves is seen as "limit[ing] the ability of both the Band and individual to deal with the land" (INAC, 1982, p. 2) and inadequately defining the rights that go with allotment (INAC, 1982, p. 2). While today the federal government does not advocate any particular tenure arrangements over another (L. Pardy, personal communication, 2012; C. Walton, personal communication, 2012), AANDC does encourage the survey and registration of existing lawful possessions and improving the registration of interests, seeing these as very beneficial to both economic and community development initiatives (C. Walton, personal communication, 2012).

### **Connection**

Across Canada, like on the Penticton reserve, there are many ongoing land disputes involving individual landholdings. In its administration of reserve lands, the government is limited in what it can do to resolve local land disputes, but it does work with First Nations individuals and Bands to supply information from federal archives and the lands registry (C. Walton, personal communication, 2012). The prevalence of land disputes, and the tenure insecurity that some individuals experience as a result of unclear or unregistered landholdings, also supports the need for improved records of individual landholdings (C. Walton, personal communication, 2012). There are also tensions between collective and individual interests in reserve lands, and the federal government is caught in a challenging position: it has a fiduciary obligation to protect a Band's collective interest in its reserve (NALMA, 2009: 101.3, 101.6) and must follow legislation such as environmental laws, but its individual landholding system has also created permanent, individual interests in reserve land which it must respect and protect. As a result, the federal government must balance potential competing obligations when considering the approval of reserve land transactions, but the legal nature of these various obligations remain ambiguous and contested (Bartlett, 1990, pp. 124, 210). Given these competing obligations and the push for decentralized land management, department officials now operate in largely advisory and administrative roles (C. Walton, personal communication, 2012), taking direction from local Council decisions (L. Pardy, personal communication, 2012).

### **Tradition**

As has been described in the history, while reserves were initially set aside as collective lands the administrative system that grew around them was intentionally shaped to promote Eurocentric ideas of private property as a route to assimilation (Baxter & Trebilcock, 2009, p. 26). Legislation has been modified and amended, but this remains as the historical foundation of the current *Indian Act* land tenure system. In many aspects of reserve land tenure and management, today's government is constrained by existing legislation (C. Walton, personal communication, 2012; L. Pardy, personal communication, 2012). Similarly the government is obliged to protect existing legal individual interests in land and follow the provisions of the *Indian Act*, which can limit government's options when trying to support local, culturally appropriate resolutions to lands issues (C. Walton, personal communication, 2012). It is another hope of decentralized land management and new reserve land legislation that these will create opportunities for locally and culturally appropriate land tenure and management systems.

## **Penticton Indian Band Narratives: Historical**

### ***Innovation***

The Penticton Band, like many First Nations, was adaptive to changes that came with European contact, taking advantage of new technology or institutions that they found acceptable and useful (Carstens, 1991, p. xix; Thomson, 1994). As is demonstrated by the economic success of Penticton members who took up farming and ranching, new markets presented opportunities that individuals and communities welcomed (Manuel & Posluns, 1974, pp. 33–34). The registration of individual property was a new tool, an adaptation that appeared useful in that it secured protection for one's land in the legal system of the settlers and respected what was already established as individuals' rights to areas of land. Individuals were granted land based on their demonstrated ability or intention to use it productively, as a farm, ranch, or home site. As time passed, it became apparent that formal registration of landholdings also gave individuals more tools to support their initiatives, such as securing funding for housing or business developments.

### ***Action***

A major theme running through the history of landholdings on reserves, including the Penticton reserve, is the desire to secure and protect land for one's family and for one's community more generally. At a time when settlers and colonial governments were limiting access to land and powers over land, and challenging this met with limited success, using the system and rules of the colonizers offered a way to ensure that some land securely belonged to you and your community (Canada, 1881, p. 82). Reserves were being surrounded by private property, and the rights of settlers to their homesteads likely seemed more secure and an opportunity to gain similar rights and security would have been attractive (Thomson, 1994). In reports of early location tickets, some First Nations individuals and communities are described as being happy with receiving tickets (Canada, 1881, p. 82, 1882, p. 52) and having their lands surveyed (Canada, 1882, p. 35), thinking that their rights to land would be secured (Canada, 1883, p. 94). In Penticton's experience, it seems that when a few individuals adopted this new external system, and security and other benefits accompanied it, others also began to register their lands. This pattern continued as more standardized forms of land registration emerged. As the local, customary system became less secure, people turned to the external, government system for protection of their interests (E. Alec, personal communication, 2011). Later, people wanted their lands surveyed and officially recorded when they found out that sometimes an earlier, less standardized document "wasn't even worth the paper it was written on" (PIB Elder, personal communication, 2012).

Individual holding of land also helped to reduce uncertainty over one's livelihood and one's investments in land. In the early history of the Penticton reserve, there was much land suitable for agriculture available for individuals and families to use (J. George, personal communication, 2012) and as agriculture became a profitable livelihood it is likely that land came to be associated with economic security and status (Thomson, 1994). As Chief John Kruger imagined, "I'm sure they had pride in their lands- seeing what they had for their families, in their own land, what they did with it" (C.J. Kruger, personal communication, 2011). As agriculture decreased, landholdings provided another economic asset through leasing, and it became clear over time that it was beneficial for leasing to have one's land registered with the government.

Another aspect of action-oriented perspectives of the time has to do with power. The land tenure system of the government, along with the governance system and the other rules of the *Indian Act*, was being forced upon First Nations. Government officials, such as Indian Agents, often wielded significant power and influence, potentially registering land into the federal system without fully explaining what that meant to those individual landholders. Likely most Agents did not fully understand the system or anticipate how it would evolve. In addition, the Band Council system itself was not representative of traditional community governance processes, and if the Council was pressured or swayed by government officials the community's collective ability to

resist the imposed tenure system would be limited. Within communities too, control over land was political, and for some the prospect of an externally protected right to one's land would have been attractive (Royal Commission, 1913a).

### ***Connection***

As local, customary mechanisms for conflict resolution were undermined or could no longer effectively resolve land disputes, land registration and standardization of tenure and administration offered a way to manage conflicts (Flanagan et al., 2011, pp. 75–76). However, this benefit was accompanied by new forms of conflict, over property lines, historical claims to land, and contested land deals. There was also concern about the effect that individualized property would have on inequality. Exacerbating this concern was the fact that registration with the government system was uneven based on individual values and understanding of the system, and access to registration was unequal and controlled by the Indian Agent (Personal communication: C. Eneas, 2011; J. Kruger, 2012; J. George, 2012).

Community members were also concerned about how individual landholding would change relationships to land and between community members. Under the customary system, the community supported and respected an individual's right to land and one had to maintain one's claim to legitimate and responsible landholding in the eyes of the community. With the customary system, the nature of land as being both a public and a private resource was explicitly acknowledged by having authority over the land shared between the individual and the community. With external registration, an individual's accountability to the community was reduced because external courts could be called upon for protection and legitimacy; in this way the tenure system was seen to shift towards protecting individual interests over collective interests (Canada, 1902, p. 25).

### ***Tradition***

For some First Nations, the concept of protection for individual or family rights to an area of land would not have been completely unfamiliar (Alcantara, 2003, p. 397). The Syilx people did have "concepts of individual private property ownership" in some situations (Carstens, 1991, p. 59) and both before and after the reserve was created, families had been farming and using certain areas of land as their own for generations. Therefore, to some it is likely that the concept alone of allotting land to individuals and formally protecting those rights would have seemed acceptable. Some families where there was intermarriage between Penticton Band members and settlers also would have had more exposure to and understanding of the European system of landholding. To others, however, the external tenure system was unfamiliar and distrusted. The registration of landholdings, written documents, Indian Agents, and the entire colonial system these were a part of, were distrusted and rejected by many. Historical concerns with changes in land tenure and land use included the disruption or replacement of the customary system, loss of communal property and collective interests, fragmentation of reserve lands (Baxter & Trebilcock, 2009, p. 72), and a corruption of traditional relationships "between the land and the men who lived on it" (Manuel & Posluns, 1974, pp. 33–34).

## **Penticton Indian Band Narratives: Contemporary**

[Note that this summarizes themes and perspectives from PIB's contemporary history detailed in section 5.2. Findings from interviews concerning land tenure and land management today are presented in Chapter 6.]

### ***Innovation***

In PIB's contemporary history, a major theme concerning individual landholdings has been individuals' and Council's interest in supporting local economic development on locatee lands. From the initial leases to more recent community planning initiatives, there has been an ongoing effort to help individuals in using their landholdings to support themselves, their families, and

ideally the wider community. Individual landholdings have been seen as a way to encourage individual initiative and entrepreneurship, sometimes using land as an incentive for individuals to develop business proposals, and other times helping individuals to use their land to access credit or funding (PIB, 1973a, p. 3). More generally, individual landholdings specialists at AANDC have noted an increase in the number of individuals interested in learning about lawful possession, seemingly related to interest in the economic value and potential uses of reserve land (C. Walton, personal communication, 2012).

### **Action**

In recent PIB history, action-oriented perspectives have aligned closely with innovation-oriented ones, seeing individual landholding as a way to encourage individuals to use their land and support themselves and their families. There are also still echoes of older perspectives on the desire for economic security for oneself and one's family: in recent history, many individuals have requested that their lots be surveyed and are seeking clarification on what rights their landholding gives them (such as subdividing land). Since the 1970s, the PIB has been increasing its local control over land management, and individual landholdings are seen as an opportunity for more local control, given the many decision-making powers that rest with individuals. Along with local control, there has been increasing attention on managing individual land uses, through community planning and regulatory tools such as by-laws. However, Council and individuals have remained frustrated by the federal bureaucracy and limitations of the *Indian Act* land tenure system, as have First Nations across Canada (L. Pardy, personal communication, 2012). In recent history, there has also been more of a concerted call for clear and consistent Band land policies.

### **Connection**

A major driver for the standardization of the land tenure system and land administration by the PIB has been the prevalence of land disputes in the community. In periods of social and political instability in particular, individuals, families, and the community were divided by conflicts over land ownership and land boundaries (J. Phillip, personal communication, 2011). Since the 1970s there have been several efforts to make land tenure security more equal and standardized for all community members, but because standardization was not adopted evenly across the community historically, some individuals and families continued to feel like they had not been treated fairly. In recent decades, tensions between individual and collective interests in land decisions have become apparent in relations between individual members and the Band Council and Band office.

### **Tradition**

In recent PIB history, family claims to traditional ownership were important for land tenure decisions, particularly land disputes. Respect for past decisions by Chiefs and Councils, and respect for the knowledge of historical land allotments and property lines as remembered by elders, are both evident in contemporary PIB land tenure history. Similarly, there has been recent interest in reemphasizing more traditional forms of land dispute resolution, such as discussion circles. Over several generations a system of individual landholdings developed and the rights of individual locatees to the use of their lands have come to be generally accepted and respected. This tradition has sometimes run against other traditions, such as the value of equality or the interconnectedness of lands and peoples, for example in debates over land use regulations.

Across Canada, traditions of First Nations' land tenure systems are re-entering wider discussions and narratives about landholding on reserves. Many First Nations have retained, in whole or in part, their own customary tenure systems despite the imposition of external systems and standardizations (Nemoto, 2002). The historical disempowerment of local communities over their land tenure and management systems has shown signs of being reversed by those communities themselves (Rakai, 2005, p. 4), though communities like the Penticton Band continue to face challenges such as navigating the outcome of parallel or blended systems of tenure and incomplete or inconsistent land records.

## Appendix F.

### Discussion of the use and improvement requirements of PIB landholdings in the 1950s-1960s

This appendix considers the question of why landholdings on the PIB reserve appeared to have required demonstrated use and improvement to maintain their legitimacy into the 1950s and 1960s.

#### 1. It was a remnant of the old Location Ticket system or the local customary system and the external agents were attempting to find ways to accommodate local understanding within the federal system

Location tickets were less clear and secure in their guarantees of tenure security than the registry system today. There was more local variation in their use and understanding, and in the early days of location tickets, granting them was typically dependent upon an individual demonstrating willingness and ability to cultivate and improve an area of land. In addition, traditional or customary holdings were dependent upon demonstrated use and improvement or they could revert to the Band. It is possible that the Penticton Band operated on a local understanding of individual landholdings, based on either of these systems, a hybrid of the two (C. Alcantara, personal communication, 2013), or confusion between registered and customary landholdings that were existing in parallel (C. Walton, personal communication, 2013). Council may have been treating existing or historic allotments differently from modern allotments, making their legitimacy dependent upon the original rules or conditions of allotment, as might be the case with the 1953 instance where an individual's claim from an allotment in the 1910s was deemed forfeit because he had not improved the land for decades (PIB, 1953d, p. 1).

It is unlikely that external agents would have had legal authority to cancel the holdings on the basis of non-use alone (C. Alcantara, personal communication, 2013), but they might have found other legal options that accomplished the same end and then explained it to the Band in terms of local concepts of land tenure rules. This could have been accomplished, for example, under section 28 of the 1951 *Indian Act*, which allowed the Minister to issue special permits to individuals (typically non-Band members) to occupy or use areas of land (with the consent of the Band Council for periods longer than one year) but which could be revoked by the Minister. Another route may have been for the government to use its discretionary powers to control reserve lands "for the general welfare of the Band" (introduced in s.18 of the 1951 *Indian Act*).

#### 2. They were "dispossessed" of their holdings

Between the 1876 *Indian Act* and the 1951 *Indian Act*, the provisions relating to the possession of land in a reserve included the requirement that no individual Band member could be "dispossessed" of any lot or land on which he had made improvements without being compensated for the lost improvements. Compensation was determined by the Superintendent-General and paid either from Band funds or from the individual member "who obtains the land." This section, while not conferring a power to remove an individual from their land, seems to indicate that members could have been dispossessed of their registered landholding by legal means, hence the need for compensations. Since the 1951 *Indian Act* the wording of the provision has been:

An Indian who is lawfully removed from lands in a reserve upon which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by

the Minister, either from the person who goes into possession or from the funds of the Band, at the discretion of the Minister. (*Indian Act*, 1951, c.29, s.23)

However the actual application of this section is not clear, as it apparently has not been clarified by the courts (Burrell & Sanders, 1984, p. 63; Imai, 2011) and the federal government's Land Management Manual does not expand upon the meaning or causes of 'lawful removal' (INAC, 2005, p. 63). Similar to #1, it could be that the government used their power under this section to impose conditions of use and improvement on individual landholders, or to support and enforce a local rule of the same.

### **3. The holdings in question were temporary Certificates of Occupation**

Another potential explanation is that the landholdings being referred to were not full location tickets or Certificates of Possession, but a more temporary and less secure form of registered interest. Introduced in the 1951 *Indian Act*, Certificates of Occupation (COs) allowed for the Minister to withhold approval of an allotment and "authorize the Indian to occupy the land temporarily" (*Indian Act*, 1951, s.20). The Minister could also "prescribe the conditions as to use and settlement that are to be fulfilled" by the individual before a full CP would be issued (*Indian Act*, 1951, s.20). COs only last two years, after which point they can be extended for at most another two years, and finally must either be cancelled or converted into a full allotment and CP (*Indian Act*, 1951, s.20). This new instrument allowed for land to be conditionally or temporarily allotted to individuals (Burrell & Sanders, 1984, p. 56) as temporary possession did not constitute lawful possession (INAC, 1989, p. 4). These temporary possessions were used, often upon recommendation of the Band Council (INAC, 2005), but they are not widely used anymore (C. Walton, personal communication, 2013).

While this situation may have further entrenched the policy that land had to be used and improved before ownership was granted, it does not fully explain the instances in the 1950s that were quoted, or the 1953 instance where the applicant is described as having "not improved the land for over forty years" (PIB, 1953d, p. 1), much longer than the scope of a CO and which would have been based on an allotment from the 1910s. These temporary and conditional forms of landholding also had a forerunner in earlier version of the *Indian Act* that allowed for indefinite "certificates of occupancy" prior to the issuance of a location ticket and these certificates could be "cancelled at any time by the Indian commissioner" (*Indian Act*, 1906, s.21). However, the *Act* only made these certificates available to Bands in Manitoba, Saskatchewan, Alberta, of the Territories (*Indian Act*, 1906, s. 21) and so it unlikely they were being used for the Penticton Band (L. Pardy, personal communication, 2013).

### **4. The legal nature of 'possession' was not understood as permanent ownership**

A fourth explanation is that the legal nature of lawful possessions changed over time. This seems plausible in the light of legal ambiguities and uncertainties concerning the actual nature of the rights associated with Location Tickets and Certificates of Possession. This uncertainty was expressed by legal scholars in the 1970s and 1980s (Place, 1981, p. 1) and has continued to be highlighted by the courts (Alcantara, 2003). When it was introduced in the 1869 *Gradual Enfranchisement Act*, the concept of lawful possession was primarily a tool to prevent settlers from illegally possessing reserve land and the rights and procedures associated with lawful possession were not comprehensively laid out, apart from it being non-transferrable and not subject to seizure (Place, 1981, p. 2). Early use and interpretation of 'lawful possession' seems to have treated it as a life-estate, a more limited form of landholding, albeit one that could be passed to children as a life-estate for them (Place, 1981). Henderson (1978, pp. 93–94) also found that while lawful possession was "the most permanent 'estate' in reserve land available to a Band member" it was less than fee simple ("an 'estate in land' which gives the holder the 'right' to 'possession' of it forever including full 'powers' to transfer or dispose of it both while he lives or in his will"). What is problematic is that 'possession' is an imprecise term legally and how it is

interpreted has ranged significantly over time and across different circumstances (Alcantara, 2003, p. 395; Henderson, 1978, p. 95). This led past legal scholars and researchers to conclude that sometimes allotments exist “at the pleasure of the Minister or the Crown”, other times it functions as a life estate or some unique form of property right that is permanent but less than full ownership (Alcantara, 2003, pp. 406–407), and at other times “for all practical purposes, the equivalent of a fee simple interest” (Sanders, 1976, p. 5).

Given the legal uncertainty around Location Tickets and Certificates of Possession, it is plausible that at one point in PIB’s history, registered holdings were understood to constitute not permanent landholding but rather an interest in land that was dependent upon ongoing approval by Council and the Minister. If this was the case, then some holdings may have been revoked in situations of non-use. This may explain why some landholdings on the PIB reserve appear to have required ongoing use and improvement to maintain their legitimacy in the 1950s and 1960s.



## Appendix G.

### Local perspectives on locatee rights: Full quotes

This appendix contains full quotes from interviews illustrating the perspectives summarized in section 6.1.3. The interviews conducted did not necessarily capture the full range of perspective across the entire community (particularly of members without land), so these findings should not be considered fully representative, but they serve to illustrate the differences between understanding of locatees' rights and the current institutional situation.

Table H1. Local Perceptions of the rights of PIB CP holders

<b>Local perspective</b>	Locatees are caretakers, not owners – they can decide how to take care of the land, but decisions that change it permanently or for a long time require community approval.	
<b>AANDC interpretation</b>	Lawful possession is the closest to fee simple ownership of reserve lands currently available under <i>Indian Act</i> . For leases longer than 49 years, need community approval.	
<b>Quotes</b>		<b>Role</b>
	"...it should be brought out to the Band, even with the locatee landowners, the ones that have CPs, it should be brought out to them that they don't own it - they are only caretakers for it... it's their decision, just how to take care of that land...people shouldn't come in and say well, you can't do that... even the department of Indian Affairs can't say that to you." (Community member, 2012)	Member
	"To make decisions on the land you have ask all the people. If you have an idea of what you want to do, you have to ask all the people. Like have a meeting for all the people. And all the people have to vote on it - not 20 or 30 or half, but all the people. If it's a decision on the land, it has to be the whole... Like for development." (Community member, 2012)	Member
	"People should responsibly own lands, but they shouldn't be responsible only to themselves – should be responsible to us – the PIB. All these laws, jurisdictions are being set up for the whole Band." (Community member, 2011)	Member
	"I don't want someone to tell me how to develop my land, but I realize I have a social responsibility to the people. I would hate to have the Band say I couldn't do something because of zoning, but if the community says that, if it's the will of the community, then I'd have to respect that, it's my responsibility to everyone else...and because I would hate for my neighbour to put up a development that affected me...and not have regulations, or not have a say in that" (E. Alec, 2011)	Band staff
	"I do believe the people have the final say. If by some extreme, Chief and Council decided to build beside Coyote Rock, the people would say no and force it to stop... Or if a locatee landholder wanted to do something next to another landholder or Band land, like a pig farm or a landfill, if there were extreme differences [in land use]- people should have a say in extremes like that. ...Extremes like pollution- of land, water, people, air- things that would alter the way we lived here. People should have a say, not just Chief and Council. But if it's something... if the locatee wants to build a retreat centre, or a spa, or something really beautiful, I don't think the people should have a say." (Band staff member, 2011)	Band staff
	"If something impacts the interests of others, other landholdings, then the whole community had to be involved. Vice versa, there are some instances where a locatee wants to put a development on their property but they do need Band consent, such as for long leases." (G. Gabriel, 2011)	Band staff

<b>Local perspective</b>	Locatees have full rights to decide what to do with their land – but they should be responsible and think about the impacts of their decisions	
<b>AANDC interpretation</b>	Locatees have rights to use and manage their land, subject to Band by-laws, zoning, regulations, and other federal laws (environmental, health etc.).	
<b>Quotes</b>		<b>Role</b>
	"If I want to do a lease up on my property, I will. I don't expect any government or Band office to interfere." (Community member, 2011)	Member
	"Are you going to tell me my land up there will be zoned for light industry? We turned down five hotels – we weren't ready... and on other land, when my mother was still alive, we turned down offers, because she said she didn't want people to live with the smell. We're competent enough to know what we want. ...If I decide to do something on my piece of property I don't want the Band Office in there, putting up road blocks – stopping our own family from making money" (Community member, 2011)	Member
	"What about protecting ourselves from ourselves? As landowners, if we want to develop, then it is our responsibility to learn about this whole process." (Community member, 2011)	Member
	[Asked re: responsibilities of locatees] "To ensure the lands, the lots that are leased, are compatible with each other, so they don't detract value. And to make sure everyone is making deals at fair market value. ... [Asked re: role of Band membership in locatee lands] "I don't really see any..." (A. Eneas, 2011)	Former Council
	[Asked re: with a development lease less than 49 years, would still talk to Council?] "Well, you see it's...polite. Some people... they say 'I don't care about you guys I can do what I want' but we were...not causing friction. We don't need it but we might as well. [Other than long term lease, there's nothing really that the Band council would get involved with your land?] No." (Locatee, personal communication, 2012)	Member
	[Asked re: membership's influence on CP lands] "It doesn't have any, really. Members can comment on it, but locatees have the say. For example, with my own family's land, community members have said they want it protected, for habitat, but the family doesn't want anything to do with that. ...the sorts of comments you hear are 'It's my land- mind your own business' and 'We know what's best for our land' etc." (C.J. Kruger, 2011)	Council
<b>Local perspective</b>	Locatees feel that they have rights to do whatever they want with their land – it is legally/morally incorrect but practically correct because lack of regulations.	
<b>AANDC interpretation</b>	Locatees have rights to use and manage their land, subject to Band by-laws, zoning, regulations, and other federal laws (environmental, health etc.).	
<b>Quotes</b>		<b>Role</b>
	"...for some people with land they think 'this is my land- you can't tell me what to do', and they have a disregard for what anyone says, or thinks..." (C. Eneas, 2011)	Former council
	"The family, if they agree, can decide to do whatever they want and others have no control over it. Well, we don't because we don't have any laws in place. ... There are irresponsible landowners, and they could make irresponsible decisions, to make some quick money." (E. Alec, 2011)	Band staff

“with locatees...there are no clearly defined rules as to how they make decisions related to their interests. There are parcels out there in buckshee leases- handshake deals...and others go through the proper registration with Indian Affairs. It’s fairly open on the locatee side, not like Band land. ...They [the membership] really don’t have a lot of involvement with locatee decisions, unless there’s a referendum process. There isn’t much anyone can have an influence on, with locatee lands... Right now there is no protection – that’s the reason we need by-laws, zoning- I recognize that. We see from the past, where locatees were able to put whatever they wanted on their lands, there was no concern for environment, or safety. I would welcome by-laws- it would show locatees that they have to have consideration for the rest of the community.” (G. Gabriel, 2011)

Band staff

“CP holders have carte blanche right now, today. ... We had the case of [event X] and there were extremely limited things the Band could do- the courts favour the right of the individual over the collective... We don’t have control over CP properties, they can pretty much do what they want.” (J. Phillip, 2011)

Band staff, Council

**Local perspective** Bureaucratic requirements and community controls constrain locatees in many of their land use decisions – too much so in some cases

**AANDC interpretation** Chief and Council have the authority to create Band by-laws, zoning, and other land use regulations, provided they are approved by AANDC. Council and AANDC have a legal responsibility to protect Band interests.

**Quotes** **Role**

“I tried to resubmit my lease ...they came back with all sorts of hoops, because they don’t want to lose control. ...Said can’t do that, needs studies, environmental studies. It’s a way of trying to control you, you have to pay for that. ...That’s the extent that they exercise their control. I’m well versed in land leasing etcetera, but I can’t even talk to those people. I’ve tried to get help from Band Office and nothing. Unfortunately lots of Bands are trying to exert control over locatees for Indian Affairs ...When I was in office, about 20 years ago, it was a hell of a lot easier to have a lease go through. Today’s situation with government is more stringent, more controlling than ever before.” (A. Eneas, 2011)

Former council

“I’ve been trying to work on my property since ‘98. The Department of Indian Affairs has been holding me back all these years, they always want out, winning all the time. I’ve spent hundreds of thousands of dollars. I wrote down everything about my land – they approved everything, and then I got some more [paperwork]. Jonathan helped a lot – and he encouraged me to keep fighting DIA, but I’m getting fed up. There was one person who wanted to lease for five years, but they’re pulling out. Now I know why Indians are so poor, it’s DIA holding them back – everything they want to do. I can’t do anything on the edge of my property because of the water, I have to be 50 feet back because it might contaminate the water. ... And then this person, off reserve, developed their land right up to the creek – how could they get away with that?” (Community member, 2011)

Member

“We need a policy booklet, here on the table, to open up and see our Land Policy. ...we have nothing written that a locatee can turn to and say, yes, my rights are protected.” (Community member, 2011)

Member

“We’ve seen that, from the membership who are not locatees - they are upset. If something is brought forward, they will knock it down. They don’t want to see the locatees get ahead.” (A. Eneas, 2011)

Former council

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"I think people who don't own land believe that anything that happens on the res -Band or locatee land- that they should benefit from big changes or developments. There's a belief that all Band members should benefit equally. Locatees meanwhile think that since it's their land, they should get the benefit." (E. Alec, 2011)

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<b>Local perspective</b>	Bureaucratic requirements and policies constrain locatees in many of their land use decisions – rightfully so, may need more/same to protect Band interests
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<b>AANDC interpretation</b>	Chief and Council have the authority to create Band by-laws, zoning, and other land use regulations, provided they are approved by AANDC. Council and AANDC have a legal responsibility to protect Band interests.
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<b>Quotes</b>	<b>Role</b>
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"Whether it's CP land or Band land, it's still reserve land; there is the same degree of concern, and action for Band land and CP land. We make sure the right people are called, informed, and are part of the process. And overall, we have to be sure that through our decisions we are doing what's best for the community. ... the individual making the decisions, they're more concerned with themselves and their family. That's their right, and power to them as long as it doesn't endanger themselves or others.... Our checklist ensures that, we won't let people do things that are bad. ... Band Office and Lands protect the membership as best they can." (Lands staff, 2011)	Band staff, Council
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"The Department of Indian Affairs was put in place to protect our people from themselves. There were cases of people thinking they could do their own leases, so they took that power away. Not everyone has the business sense... A lease – a mortgage, a loan etcetera – who's going to pay for that? What's going to happen to the land? It'll be gone – Indian Affairs is there to protect you." (Community member, 2011)	Member
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"People should responsibly own lands, but they shouldn't be responsible only to themselves – should be responsible to us – the PIB. All these laws, jurisdictions are being set up for the whole Band." (Community member, 2011)	Member
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"Health Canada has teeth – they can walk in and shut down an event or place. ...The [proponent] was told by the landholders that they didn't need a permit to do anything, but that's not the case. ...The leasing process is long and drawn out- Environment Canada is involved, Species At Risk can come into play..." (J. Phillip, 2011)	Band staff, Council
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"...[External proponents] just come on the reserve and lease land and think that all of a sudden that they can do whatever they want and when they go and try to do something and we step in for whatever reasons, environmental reasons, health reasons, social reasons and say you can't do this because of this and this and this and they say 'Well I can do whatever I want because so-and-so said this' - Well no, maybe 30 years ago, 40 years ago, today no." (Lands staff, 2012)	Band staff, Council
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"Right now there is no protection – that's the reason we need by-laws, zoning- I recognize that. We see from the past, where locatees were able to put whatever they wanted on their lands, there was no concern for environment, or safety. I would welcome by-laws- it would show locatees that they have to have consideration for the rest of the community." (G. Gabriel, 2011)	Band staff
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## Appendix H.

### PIB Land Management System Summaries

[Note that the roles and responsibilities of Band Council or AANDC are not exhaustive, I have selected ones most relevant to PIB's experience. I include these summaries to illustrate the land management system on the PIB reserve. For more general information on reserve land management, see AANDC Lands Management Manual or Lands Manager training materials. Here, (s.#) refers to a section of the *Indian Act*]

#### Land Management Activity: Allotment of Band land

Actors	Roles and Responsibilities	Interactions	Influences of CPs
Band Council	<ul style="list-style-type: none"> <li>Decisions to allot Band land to individual members</li> <li>Develop own policies or protocols re: allotment</li> <li>Make regulations (by-laws) concerning the survey and allotment of reserve lands (if authority granted under s.60) (s.81)</li> <li>Establish a register of CP lands (if authority granted under s.60) (s.81)</li> </ul>	<ul style="list-style-type: none"> <li>Applicant requests land</li> <li>If follows house-lot allotment policy, Council approves if conditions met on loan/rent</li> <li>If non-house-lot, Council denies or may send to community</li> <li>Must avoid conflict of interest in allotments (NALMA, 2009a, p. 10)</li> </ul>	<ul style="list-style-type: none"> <li>CP is a permanent allotment of land, Council must consider implications for reserve land base and land management (NALMA, 2009b, p. 5)</li> <li>Council has fiduciary obligation to membership to protect reserve land base (NALMA, 2009a, p. 3,9)</li> <li>PIB Council has policy limiting CPs to house lots</li> </ul>
Band Department(s)	<ul style="list-style-type: none"> <li>Housing: Provide information, if Band house</li> <li>Lands: Background check, encumbrances, effects on others/Band, conformity with zoning/ by-laws, assess for servicing, access etc.</li> <li>Lands: Provide information</li> <li>Lands: Complete allotment documentation for AANDC and maintain land records. Arrange survey (if required)</li> </ul>	<ul style="list-style-type: none"> <li>Report to Council, provide background information</li> <li>Process and implement decision of Council</li> <li>May advise Council on its decisions</li> </ul>	<ul style="list-style-type: none"> <li>Housing now related to Lands because Band housing is way for individuals to receive a CP today, if rent/payment conditions are met.</li> <li>Increased records management and reporting/ documentation requirements</li> <li>Increased challenges with servicing and access to lots</li> </ul>
Applicants (Potential Locatees)	<ul style="list-style-type: none"> <li>Make formal request for allotment/Band house</li> <li>May have to provide historical evidence or further rationale if request is based on historical claim or if for non-house lot. If non-house-lot, Council may recommend the individual present request to community meeting</li> </ul>		<ul style="list-style-type: none"> <li>CPs offer permanent, externally-secured tenure</li> <li>PIB's limits on allotment means CP lands (allotments) are more difficult to get</li> </ul>
Band membership	<ul style="list-style-type: none"> <li>If house lot, no involvement</li> <li>If non-house lot, decision may be presented to community meeting or referendum</li> </ul>		<ul style="list-style-type: none"> <li>Allotment of Band land reduces communally held and accessible land</li> </ul>

Actors	Roles and Responsibilities	Interactions	Influences of CPs
	<ul style="list-style-type: none"> <li>In some conflict-of-interest situations, a general Band meeting may be called to approve allotment (NALMA, 2009b, p. 11)</li> </ul>		
AANDC	<ul style="list-style-type: none"> <li>Approval and registration of allotments</li> <li>May conditionally approve or require further information if concerns re: allotment size, conflict of interest etc.</li> </ul>	<ul style="list-style-type: none"> <li>Receives allotment documentation</li> <li>Background check on land parcel, check for encumbrances, past claims, access issues etc.</li> <li>Approves and registers, or requests further information or advises Band of concerns</li> </ul>	<ul style="list-style-type: none"> <li>Standardized system of documentation, registration, reporting etc.</li> <li>Under <i>Indian Act</i> regime, approval by Minister carries responsibility to ensure Band interests are protected (NALMA, 2009a, p. 10) and these may be a fiduciary duty (NALMA, 2009b, p. 11)</li> </ul>

### Land Management Activity: Use and Management of Band Lands

Actors	Roles and Responsibilities	Interactions	Influences of CPs
Band Council	<ul style="list-style-type: none"> <li>Traffic regulations</li> <li>By-laws on construction and maintenance of watercourses, roads, bridges, ditches, fences and other local works; construction, repair, and use of buildings; public wells /water systems (s.81)</li> <li>Regulation of public games, sports, races, and other amusements (s.81)</li> <li>Regulations for protection of wildlife on reserve (s.81)</li> <li>Maintenance of roads, bridges, ditches, and fences</li> </ul>	<ul style="list-style-type: none"> <li>Ministerial approval required for all by-laws and regulations</li> <li>Members who may be affected should be able to give input (NALMA, 2009a, p. 10)</li> </ul>	<ul style="list-style-type: none"> <li>Less Band land available</li> <li>Less collective control</li> <li>Access or servicing over locatee lands may be required</li> <li>Purchase (or expropriation) of locatee lands may be required</li> <li>Diversity of land uses on CPs and fragmentation of land management control means that more by-laws and land use regulations are required</li> <li>Band land decreased/ fragmented by CP holdings – complications for management</li> </ul>
Band Departments	<ul style="list-style-type: none"> <li>Environmental monitoring</li> <li>Maintain Band land records</li> <li>Monitoring and enforcement of by-laws</li> </ul>	<ul style="list-style-type: none"> <li>Implement Council decisions</li> <li>May draft regulations</li> <li>Educating members on by-laws, land regulations</li> </ul>	<ul style="list-style-type: none"> <li>Diversity of land uses on CPs and fragmentation of land management control may result in complications for regulation and enforcement</li> </ul>
Locatees	<ul style="list-style-type: none"> <li>Learn about by-laws and regulations and relevance to locatee's land use activities</li> <li>Minimize negative effects of activities on Band lands</li> <li>Respect Band by-laws</li> </ul>		<ul style="list-style-type: none"> <li>Access or servicing over locatee lands may be required</li> <li>Purchase (or expropriation) of locatee lands may be needed</li> <li>Locatee land uses may challenge enforcement</li> </ul>
Band membership	<ul style="list-style-type: none"> <li>Provide input/feedback on community needs and priorities</li> <li>Possibly vote on Council decisions</li> <li>Respect or ignore Band by-laws</li> </ul>		

Actors	Roles and Responsibilities	Interactions	Influences of CPs
AANDC	<ul style="list-style-type: none"> <li>Approval of Band Council by-laws and regulations</li> <li>Approve or 'direct' the use of reserve land for "schools, administration, burial grounds, health projects, or any other purpose for the general welfare of the Band" (s.18(2))</li> <li>May "take any lands required for those purposes" (with compensation to individuals affected) (s.18(2)). Powers usually not exercised today without Band approval. Expropriations rare.</li> </ul>		

### Land Management Activity: Reserve Planning (Band and Locatee lands)

Actors	Roles and Responsibilities	Interactions	Influences of CPs
Band Council	<ul style="list-style-type: none"> <li>Land use zoning (s.81)</li> <li>Responsibility to protect Band interests and address Band needs</li> <li>Approve final plan</li> <li>Assess land decisions / approvals by Land Use Plan, zoning</li> </ul>	<ul style="list-style-type: none"> <li>Oversee community land use planning, give direction and approvals</li> </ul>	<ul style="list-style-type: none"> <li>Land use planning and zoning of CP lands can be politically contentious</li> <li>Decisions may require weighing individual locatee interests against collective interests</li> </ul>
Band Department(s)	<ul style="list-style-type: none"> <li>Planning processes</li> <li>Implement planning decisions (e.g. enforce zoning)</li> <li>Assess future decisions (allotment, developments etc.) by Land Use Plan and zoning</li> </ul>	<ul style="list-style-type: none"> <li>(Apply for funding from AANDC)</li> <li>Engage community in planning process</li> <li>Report to Council</li> <li>Report to AANDC</li> </ul>	<ul style="list-style-type: none"> <li>Consultation with Locatees critical to success of planning if CP lands affected</li> </ul>
Locatees	<ul style="list-style-type: none"> <li>May be specially consulted if zoning or planning affects their lands</li> </ul>		<ul style="list-style-type: none"> <li>Increased involvement in planning because of personal interest involved</li> <li>Land use planning and zoning of CP lands can be politically contentious</li> </ul>
Band membership	<ul style="list-style-type: none"> <li>Consulted for land use planning priorities and input</li> <li>May vote on approval of final plan</li> </ul>		<ul style="list-style-type: none"> <li>Decisions may require weighing individual interests against collective interests</li> </ul>
AANDC	<ul style="list-style-type: none"> <li>Funding for planning</li> <li>Approval of zoning regulations</li> <li>Assess future approvals (allotment, developments etc.) by whether it meets Land Use Plan and zoning</li> </ul>	<ul style="list-style-type: none"> <li>Funding available by region, considers applications for funding</li> <li>Requires reporting on planning progress</li> </ul>	

### Land Management Activity: Use and Management of Locatee Lands

Actors	Roles and Responsibilities	Interactions	Influences of CPs
Band Council	<ul style="list-style-type: none"> <li>Limited role in determining land use</li> <li>Bylaws and zoning may limit Locatee land uses (though not uses already existing at the time the regulation is passed (NALMA, 2009b, p. 9)), e.g.:               <ul style="list-style-type: none"> <li>By-laws on locatee leases</li> <li>Regulation of bee-keeping and poultry; by-laws concerning trespass by cattle or other domestic animals</li> <li>By-laws concerning disease control or weeds</li> <li>Regulation of public games, sports, races, and other amusements (s.81)</li> <li>Regulations for the preservation and protection of wildlife on reserve (s.81)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Departments, members, or locatees may bring issues to attention of council</li> <li>Drafting regulations for locatee lands with input from locatees</li> <li>Send by-laws or zoning to AANDC for approval</li> </ul>	<ul style="list-style-type: none"> <li>CP is “a significant transfer of control over reserve land from the Band to an individual” that “may prevent the Band from utilizing the land in any way” (NALMA, 2009b, p. 5)</li> <li>If something is an existing use on CP lands, limited ability of the Band or federal government to restrict it (unless violates health or environmental legislation)</li> <li>Tensions between locatees and Council can have political ramifications. Enforcement of regulations can be difficult.</li> <li>CP system creates individual interests that also must be respected and protected (Council has a responsibility to respect this)</li> </ul>
Band Department(s)	<ul style="list-style-type: none"> <li>Bring issues or concerns to Council</li> <li>Draft regulations</li> <li>Advise on regulations</li> <li>Implement and enforce regulations</li> <li>Ongoing monitoring and collection of lands data (including locatee land uses)</li> <li>Provide information, advice to locatees</li> <li>Work with locatees to resolve land use issues or non-compliance to Band regulations</li> <li>Locatees sometimes request surveys</li> </ul>		<ul style="list-style-type: none"> <li>Diversity of land uses on CPs and fragmentation may result in complications for regulation and enforcement</li> <li>Large records and reporting system to maintain</li> <li>If an existing use on CP lands, Band or federal ability to restrict limited (unless violates other federal legislation)</li> </ul>
Locatees	<ul style="list-style-type: none"> <li>Locatees have a number of exclusive rights over their allotment and can largely control its use and management, subject to Band bylaws and regulations and other applicable laws</li> <li>There are differences in opinion over the rights and responsibilities of locatees (Section 6.1.3)</li> </ul>	<ul style="list-style-type: none"> <li>Locatees may raise concerns about other locatee land uses, or about Band regulations</li> <li>Locatees may ask Council/Lands Department for information or advice</li> <li>Extended family/family group may be involved in use and management decisions</li> </ul>	<ul style="list-style-type: none"> <li>Many locatees feel they have control over lands</li> <li>In some families, CPs have shifted decision-making power to those named on the CP, away from the wider family</li> <li>Decisions may be stalled by individuals who disagree or are absent (if multiple CP holders)</li> <li>CPs offer externally protected tenure security and may encourage locatees to</li> </ul>



Actors	Roles and Responsibilities	Interactions	Influences of CPs
			invest in their land more so than they would otherwise <ul style="list-style-type: none"> <li>• Uses may affect others</li> </ul>
Band membership	<ul style="list-style-type: none"> <li>• Band membership generally has a very limited role re: locatee land use and management</li> <li>• Members sometimes raise concerns re: locatee land use with Council or at a community meeting, but often individual authority over locatee lands is respected</li> </ul>		<ul style="list-style-type: none"> <li>• Membership's collective control/influence over lands are greatly reduced when they are held as CPs</li> <li>• Others/neighbours can be affected by locatee land uses and management decisions</li> </ul>
AANDC	<ul style="list-style-type: none"> <li>• Rarely involved in day-to-day land use and management decisions of locatees</li> <li>• If Band Council passes by-laws, AANDC must approve</li> <li>• If Band Council actions harm locatee interests, AANDC will suggest revisions to or disallow by-laws etc. If disagreement continues, AANDC typically lets the courts decide on the case.</li> </ul>		<ul style="list-style-type: none"> <li>• CP system creates individual interests that also must be respected and protected (AANDC has a responsibility to ensure this)</li> </ul>

### Land Management Activity: Transfers or Sales of Locatee lands

Actors	Roles and Responsibilities	Interactions	Influences of CPs
Band Council	<ul style="list-style-type: none"> <li>• Council approval is not required for a transfer of an allotment (INAC, 2005, p. 36). Some Councils require locatee(s) to submit proposed transfers to them for approval. PIB does not currently require this.</li> <li>• Council may submit concerns to AANDC to be considered in approval (INAC, 2005, p. 44)</li> <li>• [Some First Nations have pre-approval from AANDC "for almost all of the transactions involving CPs" (Alcantara, 2003, p. 420) under s.60.</li> </ul>		<ul style="list-style-type: none"> <li>• Very limited control over transfer/sale activity of locatees, unless creates Band policy to require Council involvement.</li> </ul>
Band Department(s)	<ul style="list-style-type: none"> <li>• Lands manager prepares transfer documents and advises locatees on transfer rules and processes</li> <li>• Lands manager often assists in administering estates and processes resulting transfers of CPs</li> <li>• Transfer must include a land description which meets the requirements for legal descriptions of reserve lands and includes all known encumbrances affecting the land (INAC, 2005, p. 34)</li> <li>• Alert AANDC to unusual</li> </ul>	<ul style="list-style-type: none"> <li>• Works with locatee(s) in preparing documents (e.g. transfer agreements, wills, sales)</li> <li>• Prepares documentation for AANDC</li> </ul>	<ul style="list-style-type: none"> <li>• Holding must be updated with a legal land description before the transfer is approved (sometimes relaxed given lack of funding for surveys).</li> <li>• Navigating and advising locatees on transfer process and important role for Lands.</li> <li>• Absence of wills can create issues with estate lands (see Section 6.2.4.)</li> </ul>

Actors	Roles and Responsibilities	Interactions	Influences of CPs
	circumstances (e.g. contest by a third party, questionable capacity of transferor)		
Locatees	<ul style="list-style-type: none"> <li>• CP holder may transfer, sell, or bequeath interest to another Band member</li> <li>• If ceases to be a Band member, must transfer CP or it reverts to Band after 6 months (with compensation for improvements)</li> <li>• Has a right to reasonably timely processing of transfers (INAC, 2005, p. 36)</li> </ul>		<ul style="list-style-type: none"> <li>• CP holders hold final decision authority, wider family input not required.</li> <li>• Decision to transfer or sell land may be stalled by any CP holders sharing the land if they are absent or disagree</li> <li>• Only Band members can receive land. If land is willed to a non- member it is invalid.</li> <li>• Legal wills and formal approvals of transfers critical to legality and approval of transfer.</li> <li>• Absence of wills can create issues with estate lands (see Section 6.2.4.)</li> </ul>
Band membership	<ul style="list-style-type: none"> <li>• A third party sometimes will contest a transfer – if so, the remedy lies with Council (as a mediator) or the courts (INAC, 2005, p. 36).</li> </ul>		<ul style="list-style-type: none"> <li>• CPs are difficult to contest, transfer provides an opening when some are contested. Disputes over wills, fair circumstances of transfer etc. may emerge.</li> </ul>
AANDC	<ul style="list-style-type: none"> <li>• Checks transfer details against registry records.</li> <li>• Ministerial approval of transfer required before it is valid and registered.</li> <li>• Issues new CP.</li> <li>• Approval may be withheld if unusual circumstances affect validity of the transfer (INAC, 2005, p. 36). If the transfer includes a project proposal, an Environmental Assessment may be required.</li> </ul>		<ul style="list-style-type: none"> <li>• Previous instruments, such as Cardex holdings or Notices of Entitlement need to be updated with a legal land description before the transfer is approved (sometimes relaxed given lack of funding for surveys).</li> </ul>

### Land Management Activity: Leasing of Band Lands (Designation)

(Unless otherwise indicated, information is from INAC, 1996)

Actors	Roles and Responsibilities	Interactions	Influences of CPs
Band Council	<ul style="list-style-type: none"> <li>• Deal with developers, legal advisors, and consultants (NALMA, 2009a, p. 8)</li> <li>• Manage commercial development (NALMA, 2009a, p. 8)</li> </ul>	<ul style="list-style-type: none"> <li>• Gives permission for appraisal and survey</li> <li>• Secure legal and business advice</li> <li>• Avoid conflict of interest</li> <li>• Work with Lands and</li> </ul>	<ul style="list-style-type: none"> <li>• Available Band lands reduced, fragmented (access permissions over locatee lands may be required)</li> </ul>

Actors	Roles and Responsibilities	Interactions	Influences of CPs
	<ul style="list-style-type: none"> <li>• Negotiate, enter into leases for Band land</li> <li>• For some developments for the “general welfare of the Band”, s.18 (2) applies and may be exempt from other sections of the <i>Act</i>. However, developments that do not benefit the entire community and are available to all members, such as many commercial operations, do not qualify under s.18 (2). (NALMA, 2009a, p. 2)</li> <li>• If Band-led development, completes all reporting (e.g. Environmental Assessment)</li> <li>• Assess if proposed use fits Land Use Plans, zoning, servicing</li> <li>• Input into proponent’s development planning</li> <li>• Provide AANDC with complete information on lands and proposal</li> <li>• Approves final lease agreement</li> <li>• Manage Band assets (NALMA, 2009a, p. 8)</li> <li>• Ensure that rent and lease monies flow to members (NALMA, 2009a, p. 8)</li> </ul>	<p>AANDC on compatibility with plans, zoning, servicing, access etc.</p> <ul style="list-style-type: none"> <li>• If Locatee lands are expropriated for a Band development (under s.18 (2)), then the Locatee(s) must be compensated by the Band. Band may also offer to buy Locatee lands for Band developments</li> </ul>	
Band Department	<ul style="list-style-type: none"> <li>• Provides Council with background information</li> <li>• Ongoing monitoring of development (if approved)</li> <li>• Assessments of Band developments, monitoring</li> </ul>	<ul style="list-style-type: none"> <li>• Work with Council, AANDC, proponent on compatibility with land use plans, zoning, servicing, access issues etc.</li> <li>• Advises Council</li> </ul>	<ul style="list-style-type: none"> <li>• Land use compatibility concerns, especially if limited land use planning or zoning in place</li> </ul>
Band membership (including Locatees)	<ul style="list-style-type: none"> <li>• Attend information session on proposed lease and development</li> <li>• Vote by membership on designation and proposed lease (s.38, s.39)</li> <li>• For a development on</li> </ul>	<ul style="list-style-type: none"> <li>• Information meeting attended by Council, proponent, AANDC</li> <li>• At least 51% of eligible voters must vote with at least 51% voting in favour for the designation to</li> </ul>	<ul style="list-style-type: none"> <li>• Locatees might have strong influence on community decision if the designation is good or bad for their interests and lands</li> </ul>

Actors	Roles and Responsibilities	Interactions	Influences of CPs
	<p>Band lands, even if proponent is the Band, community approval is required.</p> <ul style="list-style-type: none"> <li>If Locatee lands are expropriated for a Band development (under s.18 (2)), then the Locatee(s) must be compensated by the Band.</li> </ul>	<p>pass. If less than 51% vote but majority in favour there may be a second vote.</p>	
AANDC	<ul style="list-style-type: none"> <li>Provides information, advice to Bands/proponents interested in leasing designated lands</li> <li>Reviews information and lease application. Ensures all required information is submitted.</li> <li>Convenes meetings of parties (including other government agencies)</li> <li>Provides formal approval of development plans</li> <li>Coordinates date for community information meeting and designation vote</li> <li>If vote passes, officially designates land (within 6 months)</li> <li>AANDC drafts lease. If approved by all parties, registered in IRLS.</li> <li>AANDC collects rent and transfer to Band funds</li> </ul> <p>[Also - Minister may issue permits to occupy or use reserve land to any person for max 1 year (or with Council consent longer) (s.28(2))]</p>		
Lessee/ Proponent (may be a member or non-member)	<ul style="list-style-type: none"> <li>Negotiate proposal and lease with Band Council</li> <li>Application to lease lands sent to AANDC</li> <li>Provides land appraisal, survey, development plans and studies (including environmental assessment), service agreements, and insurance</li> <li>Approves final lease agreement</li> <li>If approved, payment of rent to AANDC</li> </ul>	<ul style="list-style-type: none"> <li>Meets and negotiates with Band Council, leases from AANDC</li> <li>Attends community information session</li> </ul>	<ul style="list-style-type: none"> <li>Access permissions over locatee lands may be required – negotiations with locatees required</li> </ul>

### Land Management Activity: Leasing of Locatee Lands

(Unless otherwise indicated, information is from INAC, 1999)

Actors	Roles and Responsibilities	Interactions	Influences of CPs
Band Council	<ul style="list-style-type: none"> <li>Provide input, advice, BCR to support</li> <li>Consider if proposed use is compatible with land use plans or zoning bylaws, and issues of access and servicing</li> <li>Allows for survey</li> <li>May provide access</li> </ul>	<ul style="list-style-type: none"> <li>May attend meeting of parties if involved and if Locatee wishes</li> <li>Because locatee leases are relatively faster than designations, some Bands avoid designation by allotting land to a member,</li> </ul>	<ul style="list-style-type: none"> <li>Locatee leases faster to process than Band Designations</li> <li>Limits on what Band Council can do, even with formally registered leases</li> <li>Concerns over buckshee leases and lack of protection for</li> </ul>

Actors	Roles and Responsibilities	Interactions	Influences of CPs
	<p>permits over Band land or service arrangements if required</p> <ul style="list-style-type: none"> <li>• Under <i>Indian Act</i>, Band does not have veto power over lease, but AANDC provides a copy for comment and any valid objections must be addressed</li> <li>• May pass by-laws governing locatee leases and specific site developments</li> </ul>	<p>who leases it, and then surrenders the allotment back to the Band subject to the lease, but this practice is not condoned by AANDC (NALMA, 2009b, p. 10)</p>	<p>locatees and Band</p>
Band Department(s)	<ul style="list-style-type: none"> <li>• Input may be required in planning stages</li> <li>• May monitor site for compliance with terms of lease and Band bylaws</li> </ul>	<ul style="list-style-type: none"> <li>• May attend meeting of parties if involved and if Locatee wishes</li> </ul>	<ul style="list-style-type: none"> <li>• Concerns over buckshee leases</li> <li>• Land use planning, zoning, and compatibility concerns</li> </ul>
Locatee(s)	<ul style="list-style-type: none"> <li>• If not formally registered:</li> <li>• Informal, buckshee lease directly with lessee</li> <li>• If formally registered:</li> <li>• Negotiate lease contract</li> <li>• Makes application to lease to AANDC</li> <li>• Signs final lease</li> <li>• Collects lease monies from AANDC. May be required to pay admin fees to Band.</li> <li>• May do monitoring and random site inspections</li> <li>• In some cases, a locatee may opt to lease land unofficially as a 'buckshee' lease or handshake deal. This provides locatee, Band, and lessee little legal protection and is actively discouraged (J. Phillip, personal communication, 2011).</li> </ul>	<ul style="list-style-type: none"> <li>• May recruit interested lessee/developer</li> <li>• May contact AANDC/Band Council for information</li> <li>• Negotiates with proponent</li> <li>• Attends meeting of parties</li> </ul>	<ul style="list-style-type: none"> <li>• CP offers a way to generate income from land through leasing</li> <li>• Individuals can feel like can make own decision without Band, membership, or AANDC input or approval (avoid registration process, but no legal protection)</li> </ul>
Band membership	<ul style="list-style-type: none"> <li>• If lease is longer than 49 years, general Band vote is required. Otherwise, not formally involved.</li> </ul>		<ul style="list-style-type: none"> <li>• Limited membership input (especially if lease is 49 years or less)</li> </ul>
AANDC	<ul style="list-style-type: none"> <li>• Provides information and advice to locatee, Band Council</li> <li>• Reviews lease application.</li> </ul>	<ul style="list-style-type: none"> <li>• Arranges and attends meeting of the parties</li> <li>• Seeks approval from Band Council, any valid</li> </ul>	<ul style="list-style-type: none"> <li>• Locatee leases faster to process than Band Designations</li> <li>• Limits on what AANDC can</li> </ul>

Actors	Roles and Responsibilities	Interactions	Influences of CPs
	<p>Reviews required permits, agreements, etc.</p> <ul style="list-style-type: none"> <li>• Attends general Band meeting if requested</li> <li>• Draft lease (lease is proponent - Crown, on locatee's behalf)</li> <li>• Provides copy of lease to Band Council for comment and BCR in support – any concerns must be addressed</li> <li>• Registers completed lease with ILRS</li> <li>• Collect lease monies and transfers to locatee</li> <li>• Performs regular reviews of the file to ensure reporting and payment being met. May also perform random site inspections.</li> </ul>	<p>concerns must be addressed</p> <ul style="list-style-type: none"> <li>• Minister's role is "to weigh the concerns expressed on behalf of the First Nation against the benefits which would flow to the locatee" (NALMA, 2009a, p. 3)</li> </ul>	<p>do to disallow a lease (must be valid concerns from Band, or the lease somehow is not in the best interest of the locatee)</p>
<p>Lessee/ Proponent (may be a member or non-member)</p>	<ul style="list-style-type: none"> <li>• Negotiate lease contract</li> <li>• Provides appraisal, proposal of use, survey (if required), access agreements, service agreements, designs and development plans, environmental assessment, and insurance</li> <li>• Signs final lease</li> <li>• Maintains lease payment schedule. May be required to pay admin fees or property taxation to Band.</li> <li>• May be required to provide reports for monitoring</li> </ul>	<ul style="list-style-type: none"> <li>• Contacts Locatee/AANDC/Band Council for information</li> <li>• Negotiates with Locatee</li> <li>• Attends meeting of parties</li> </ul>	<ul style="list-style-type: none"> <li>• Individuals can feel like can make own decision without Band, membership, or AANDC input or approval (avoid registration process, but no legal protection)</li> </ul>