ARTICLE

UNLOCKING THE ECONOMIC POTENTIAL OF URBAN RESERVES

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ABSTRACT

The *Indian Act* is the default legislation governing reserves. Its provisions set out a rigid and paternalistic land use planning regime that makes it difficult for First Nations to exercise their inherent right to self-determination. While the *Indian Act* was the only legislation governing land use decisions on reserves for much of the 19th and 20th centuries, First Nations led-advocacy has facilitated fundamental changes to the reserve system by delivering legislative alternatives to the *Indian Act* regime. These alternative regimes were strengthened further in 2018 through Bill C-86, which made it easier for First Nations to control revenue derived from reserves and create or add to existing reserves. This paper considers the effect of these changes on urban reserves, that is, reserves that are adjacent to urban population centres. While the reserve system remains an imperfect settler institution, I argue that the contemporary system provides a viable means for First Nations with urban reserves to develop their land in a manner that is consistent with their right to self-determination and economic interests. Upon discussing the laws and potential benefits of developing on urban reserves under the contemporary system, I conduct a case study on Senakw to highlight how the current regime can facilitate economically advantageous developments for First Nations. I conclude with a discussion on the generalizability of the Senakw model to other urban reserves in Canada.

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INTRODUCTION

Ever since Confederation, Canadian institutions have perpetuated the imposition of Crown sovereignty over Indigenous lands. This imposition has led to the ongoing forced dispossession of First Nations from their traditional territory and suppressive settler laws that make it difficult for First Nations to prosper and exercise their inherent right to self-determination.[1] Perhaps the most pervasive and prevalent intrusion on First Nations' right to self-determination is the *Indian Act*,[2] which sets out the default rules governing reserves.[3]

While the *Indian Act* was the only legislation governing reserves for much of the 19th and 20th centuries, First Nations-led advocacy has facilitated fundamental changes to the reserve system by delivering legislative alternatives to the *Indian Act* regime. Today, First Nations can exercise greater jurisdiction over reserve lands through the *First Nations Land Management Act* (*"FNLMA"*)[4] and the *First Nations Fiscal Management Act* (*"FNFMA"*).[5] These alternative regimes were strengthened further in 2018 through Bill C-86,[6] which made it easier for First Nations to control revenue derived from reserves and create or add to existing reserves. Indigenous Services Canada (ISC) maintains that Bill C-86 and its associated changes to existing legislation ensures that First Nations have greater access to opportunities for economic development.[7]

In this paper, I assess this claim with regard to reserves that are in or adjacent to urban centres ("urban reserves"). While the reserve system remains a settler institution, I argue that the changes culminating in Bill C-86 to the reserve system are a step in the right direction. More specifically, the current reserve system provides a viable means for First Nations with urban reserves to develop their land in a manner that is consistent with their right to self-determination and economic interests. To demonstrate my argument, this paper will have four parts. In Part I, I introduce the challenges associated with the default rules governing reserves and highlight how the *FNLMA* and *FNFMA* regimes alleviate those challenges. In Part II, I discuss how Bill C-86 further alleviates those challenges by making amendments to

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1 See especially *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 1. See also Robert Nichols, *Theft is Property! Dispossession and Critical Theory* (Durham: Duke University Press, 2020) at 42.

2 RSC 1985, c I-5 [*Indian Act*].

3 Though Indigenous Peoples in Canada also include Métis and Inuit peoples, the *Indian Act* that sets out the reserve system only applies to First Nations. See Robert Irwin, "Reserves in Canada" (31 May 2011), online: *Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/aboriginal-reserves> [perma.cc/7GEP-YNDL] ("Métis and Inuit do not hold reserve land").

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

5 SC 2005, c 9 [*FNFMA*].

6 Bill C-86 *A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, 1st Sess, 42nd Parl, 2018, (assented to 13 December 2018) [Bill C-86].

7 Indigenous Services Canada, "Changes to legislation ensure First Nations have greater access to lands and opportunities for economic development" (13 December 2018), online: *Government of Canada* <www.canada.ca/en/indigenous-services-canada/news/2018/12/changes-to-legislation-ensure-first-nations-have-greater-access-to-lands-and-opportunities-for-economic-development.html> [perma.cc/4ZJU-86B8].

the *FNLMA* and *FNFMA* regimes while also expediting the Additions to Reserve process. Upon completing my discussion on the relevant rules that govern the current reserve system, in Part III, I discuss the appeal of, and potential for, developing on urban reserves. Specifically, I highlight how factors related to federalism, contemporary national politics, and market demand make developments on urban reserves especially attractive. In Part IV, I conduct a case study of Senakw developments, where I highlight how First Nations could take advantage of the contemporary reserve system and other factors (outlined in section 3) to develop on urban reserves. The case study will also include a discussion on the generalizability of the Senakw model.

I. THE RESERVE SYSTEM: LEGISLATIVE REGIMES

A. Background: Reserves and the Reserve System

Reserves are a significant form of land holding for First Nations in Canada. Most First Nations communities have interests in reserve land, with about 40 percent of First Nations members living on one of more than three thousand reserves.[8] There are reserves in every single province, with some reserves serving as major population centres, while others are small plots of land with no permanent settlement. Part of the reason for this variance is that there is no single formula for creating a reserve. Rather, some reserves are a product of treaties or other agreements with settler institutions,[9] and others are unilaterally imposed by settler institutions.[10] However, irrespective of their location, size, purpose, or genesis—all reserves are wholly or partly governed by the *Indian Act.*

The *Indian Act* is the default legislation governing reserves and it sets out the legal status of reserves. Unlike fee simple lands, legal title over reserve land is held by the Federal Government, which holds it "for the use and benefit of the respective bands for which they were set apart."[11] This classification has negative symbolic ramifications since First Nations' rights in land are framed as being derived from settler institutions rather than existing by virtue of the inherent rights of First Nations to their traditional territory.[12] This symbolic ramification paves the way for a fundamental practical limitation of the reserve system—it is a settler institution and, therefore, ultimately subject to settler laws. Specifically, ownership and authority to make and delegate decision-making power rests with the Federal Government. This fundamental limitation is especially problematic when considering the decision-making structure and restrictions within the *Indian Act*.

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8 Statistics Canada, *A Snapshot: Status First Nations people in Canada,* Catalogue No 41-20-002 (Ottawa: Statistics Canada, 20 April 2021); Natural Resources Canada, "Indigenous Natural Resources" (last modified 10 May 2021), online: *Government of Canada* <www.nrcan.gc.ca/aboriginal-land-claim-boundaries/10714> [perma.cc/TQC9-ZPHN].

9 See e.g. Michelle Filice, "Treaty 4" (last modified 1 November 2016), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/treaty-4> [perma.cc/25B4-HANL].

10 See e.g. Douglas Harris, "Property and Sovereignty: An Indian Reserve in a Canadian City" (2017) 50:02 UBC L Rev 321 at para 10.

11 *Indian Act*, *supra* note 2, s 18(1).

12 See generally Kent McNeil, "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretentions" in Julie Evans et al, eds, *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai'i Press, 2012) at 37; Harris, *supra* note 9 at para 9.

B. Indian Act: Intrusion on First Nations' Autonomy

First Nations operating under the *Indian Act* regime are subject to a paternalistic decision-making structure. Technically, ultimate jurisdiction over reserves lies with the Governor in Council[13]—a constitutional reference connoting the Governor General acting on the advice of the Queen's Privy Council for Canada. In practice, most decisions are made through an interplay between the Band Council and the Minister of Indigenous Services ("Minister"), who operates the ISC. The Band Council is a First Nations decision-making body consisting of an elected chief and councillors.[14] The Band Council has general by-law creating powers, including powers to create zoning regulations.[15] However, of the 122 sections in the *Indian Act* that govern First Nation private and public life, about 90 grant authority to the Minister (or a different Cabinet Minister) over the Band Council.[16] Consequently, for a Band Council to make major land use or money management-related decisions, per the *Indian Act*, they must first seek the approval of the Minister.[17] This invariably leads to administrative hurdles that make it inefficient to develop land. However, even if a land use decision is approved, the *Indian Act* constrains the options available to First Nations through restrictive land use and economic management provisions.

The *Indian Act* sets out a rigid process for First Nations to lawfully occupy land on reserves. Section 20(1) of the *Indian Act* specifies that First Nations are not in legal possession of land in a reserve "unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band." The mechanism permitted by the *Indian Act* for this allotment process is the certificate of possession system. A certificate of possession ('CP') grants transferable legal possession of reserve lands. In that respect, it emulates a fee simple interest; however, there are notable limitations on the rights associated with CPs.

A major limitation of the CP with regards to developing reserve lands relates to the difficulty of using the CP to access secured loans. Since a CP is not considered an interest in real property, a holder of a CP would have difficulty using it as collateral to obtain a mortgage or other loan. Though the legislation does not explicitly prohibit the use of certificates for collateral, the unique legal status of reserves and interests in the reserves makes it risky for third-party lenders to loan funds. Risk arises due to a lack of clarity concerning the extent to which a lender could enforce the debt obligation on reserve lands through a CP. It is unclear, in large part, because non-members, such as banks, cannot have the same interests in reserve land as First Nations members.

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13 *Indian Act*, *supra* note 2, s 18(1).

14 *Ibid*, ss 74-80.

15 *Ibid*, ss 81-83.

16 Shalene Jobin & Emily Riddle, "The Rise of the First Nations Land Management Regime in Canada: A Critical Analysis" (2019) at 11, online (pdf): *Yellowhead Institute* <yellowheadinstitute.org> [perma.cc/QMX9-MXQR].

17 *Ibid*.

While non-members can have interests in reserve land, the *Indian Act's* procedures make it challenging to do so. As a starting point, non-members on reserves are presumed to be in trespass and subject to a fine or imprisonment.[18] For non-members to avoid a trespass infraction, the Band Council must first absolutely surrender or designate a plot of reserve land. An absolute surrender emulates a transfer in fee simple, but one that could only be transferred to the Federal Government.[19] Since an absolute transfer necessitates the *permanent* relinquishing of reserve land; it is more common for First Nations to designate lands for non-member use and occupation temporarily.

The designation of lands is a time-consuming process, where the Band Council must seek the approval of ISC to conditionally surrender the land.[20] After the land is designated, it is ISC, not the Band Council, that makes decisions relating to land management, leases, licenses, or any other transaction affecting designated lands.[21] In practice, this usually involves ISC entering into a head lease with a corporation, who then becomes the landlord capable of issuing registrable subleases in a centralized register— the Surrendered and Designated Lands Register.[22] Once this time-consuming process is complete, any subsequent revenue from that transaction is declared as *Indian moneys.*

Indian moneys refers to revenue that is derived from reserves and held in trust by the Federal Government. The Federal Government, then "determine[s] whether any purpose for which Indian moneys are used or are to be used for the use and benefit of the band."[23] Though the revenue is intended to be used for the use and benefit of the First Nations, ultimate discretion on whether - and how much of - the revenue is distributed back to First Nations lies with ISC.

Altogether, the legal status of reserves sets the stage for the *Indian Act's* restrictive land use and revenue management provisions, making it difficult to develop reserve lands. The legal status of reserves makes all decisions subject to and contingent on settler institutions and laws. In its current form, this manifests as a rigid system of administrative hurdles that creates inefficiencies and uncertainty for First Nations and investors alike. This dynamic is exacerbated by the fact that the *Indian Act* places substantial limitations on the types of interest First Nations and non-members can have. These restrictions make it even more difficult to secure private investment by setting out a complex procedure to designate lands. In the absence of private investment, First Nations operating under the *Indian Act* are at a competitive disadvantage when seeking to fund developments on reserves – a disadvantage that is exacerbated by a lack of control over revenue. While the legal status of reserves remains unchanged, subsequent legislations have provided a mechanism for First Nations to *opt out* of the restrictive portions of the *Indian Act* that relate to land use and money management.

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18 *Indian Act*, *supra* note 2, s 30.

19 *Ibid*, ss 37, 38(1).

20 *Ibid*, s 38.

21 *Ibid*, s 53(1).

22 Indigenous Services Canada, "Indian Lands Registration Manual" (12 October 2017), online: *Government of Canada* <www.sac-isc.gc.ca/eng/1100100034806/1611945250586> [perma.cc/Z4T9-RD4V].

23 *Indian Act*, *supra* note 2, s 61(1).

C. FNLMA Regime

In 1996, 13 First Nations successfully lobbied for the creation of the *Framework Agreement on First Nation Land Management* (*FA*).[24] This initiative was premised on the recognition of First Nations' inherent right to govern their lands independently. To properly respect those inherent rights, the *FA* sets out an alternative regime where First Nations could opt out of 44 land management-related sections of the *Indian Act* upon enacting a land code.[25] The Federal Government ratified the *FA* in 1999 through the *FNLMA.*

There are many associated benefits for First Nations should they decide to enact a land code under the *FNLMA.* Importantly, that land code is not imposed on First Nations; rather, it is a deliberate product developed by First Nations in accordance with their respective laws, customs, and interests. Land codes could govern a wide breadth of rules and procedures, including land use and occupancy, alienability of interests, money management, and delegating management authority over reserve land.[26] Unlike in the *Indian Act,* these general bylaw-creating powers need not be subject to the approval of ISC since First Nations under the *FNLMA* regime are deemed to have the full legal capacity to exercise those powers.[27] These powers include acquiring and holding property, entering into contracts, borrowing money, and investing money.[28] Any subsequent bylaws created under a land code also have the force of law and are enforceable in settler courts.[29] Due to these broad powers and independence, the land governance administration is effectively transferred to First Nations upon enacting a land code.

By facilitating more effective land management, the *FNLMA* makes it easier for First Nations to develop their respective reserves. Since ISC plays little if any role in reserve operation under the *FNLMA* regime, First Nations could make decisions more quickly regarding land use. In a study conducted in 2014, permits and lease decisions took an average of 17 days amongst participating First Nations. That same sample averaged 584 days before they opted for the *FNLMA* regime.[30] One First Nation operating under the *FNLMA* regime even had an average processing time of three days. Efficiency and greater certainty in land management decisions make reserves much more attractive for developers and investors. About a decade after the introduction of the *FNLMA*, one study found that a sample of 32 First Nations had created 4000 jobs with internal and external investments totalling $270 million.[31] The *FNLMA* regime's benefits for economic development could be further enhanced by combining it with the *FNFMA* regime.

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24 *Framework Agreement on First Nation Land Management*, 12 February 1996, online (pdf): *First Nation Land Management Resource Centre* <labrc.com> [perma.cc/ZTR9-Y6P7]; Lands Advisory Board, "Framework Agreement on First Nation Land Management", online: *First Nation Land Management Resource Centre* <labrc.com/framework-agreement/> [perma.cc/H9RD-N4AS] .

25 *Ibid*.

26 *FNLMA*, *supra* note 4, s 18(1).

27 *Ibid*, s 18(2).

28 *Ibid*.

29 *Ibid*, s 15(1).

30 Jobin & Riddle, *supra* note 16 at 7.

31 *Ibid*.

D. FNFMA Regime

To exercise greater jurisdiction over taxation and fiscal management, First Nations could also opt for the *FNFMA*. The legislation's mandate is to provide First Nations with "support and tools to strengthen their communities and build their own economies" through financing, investments, and advisory services to First Nation governments that voluntarily schedule to the regime.[32] To administer this broad mandate, the *FNFMA* creates institutions to assist First Nations and nullifies restrictive provisions that relate to borrowing and taxing, under subsection 73(1)(m) and section 83 of the *Indian Act,* respectively. As a result, First Nations operating under the *FNFMA* could borrow money for developments without the approval of the Federal Government and are granted broader taxation enactment and collection powers that no longer need approval from ISC. In 2018, the Federal Government committed $50 million to *FNFMA* institutions through Bill C-86—which, as I will elaborate on below, also made other significant contributions to the reserve system.

II. BILL C-86: CHANGES TO RESERVE SYSTEM

A. Overview

Bill C-86 is an omnibus legislation passed by the Federal Government in 2018. It is the first federal instrument that explicitly references Canada's commitment to the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").[33] Bill C-86 includes several changes to the reserve system, including amendments to the *FNLMA* and *FNFMA*, and a new streamlined procedure for additions to reserves.

B. Amendments to FNLMA and FNFMA

Bill C-86 amended the *FNLMA* regime so that First Nations have more flexibility and control over revenue. Amendments to the voting threshold for ratification of land codes made it easier for First Nations to opt into the *FNLMA* regime.[34] For First Nations who are scheduled to the *FNLMA*, Division 12 of Part 4 makes a subtle amendment to section 19(1) of the *FNLMA.* Previously, section 19(1) declared that only *revenue moneys* held by ISC for the use and benefit of the respective First Nation must be returned once a custom land code is enacted. The amendment declared that ISC must also transfer *capital moneys* directly to First Nations. Since *revenue moneys* refers to revenue other than *capital moneys*, and *capital moneys* is no longer held in trust, this subtle amendment effectively transfers money management directly to First Nations.

For First Nations that only opted into the *FNFMA* regime, Bill C-86's amendments provide an alternative means to control *capital moneys*. Specifically, an amendment to section 90(1) made it so a Band Council could submit a resolution requesting the payment of *capital moneys* and

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32 Crown-Indigenous Relations and Northern Affairs Canada, "First Nations Fiscal Management" (last modified 8 February 2023), online: *Government of Canada* <www.rcaanc-cirnac.gc.ca/eng/1393512745390/1673637750506> [perma.cc/QYR9-H78F].

33 GA Res 61/295, UNGAOR, 61st Sess, Supp No 49 Vol III, UN Doc A/61/49 (2007) 06-51207.

34 *FNLMA*, *supra* note 4, s 12, as amended by Bill C-86, *supra* note 6, s 363.

revenue moneys that are currently held or will be collected by the Federal Government in trust. Once the ISC approves the resolution, the provisions of the *Indian Act* that set out the trust arrangement over a First Nations' revenue from reserves cease to apply.[35]

Regardless of which route a First Nation employs to access capital moneys, the economic ramifications of the immediate access to those funds are immense. Since capital moneys refers to revenue from the sale of reserve land, resources, or capital assets—revenue from construction and infrastructure projects need not be held in trust. This is important because revenue moneys alone account for significantly less than the total revenue derived from reserves. In 2018, the trust balance for Indian moneys was $634 million, of which $400 million was capital moneys.[36] Through greater access and control over significant amounts of capital, First Nations operating under the *FNLMA* or *FNFMA* could effectively change the trust arrangement where the Federal Government collects and disburses the funds on behalf of First Nations. Thereby amendments to the *FNLMA* and *FNFMA* could facilitate more certainty and control for First Nations over virtually all revenue derived from reserves.

C. New Additions to Reserve Regulations

Bill C-86 also made it easier to create new reserves or add to existing ones. Division 19 of Bill C-86 introduced the *Additions to Reserve and Reserve Creation Act* (*ARLRC*).[37] While there has been an Addition to Reserve policy since 1972,[38] the *ARLRC* streamlines the process for First Nations. Previously, there was a four-step process for approval, with average wait times ranging from five to seven years.[39] Part of the reason for this delay was because the requests required the express approval of the Governor General through an Order in Council. Now, all requests are administered through a Ministerial Order made through Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC).[40] Since CIRNAC, as a federal department, has more resources than the office of the Governor-General, it has a greater capacity to process requests. Moreover, CIRNAC is authorized under *ARLRC* to transfer additional land to First Nations before the process prescribed by the *ARLRC* is complete.[41]

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35 *Indian Act*, *supra* note 2, ss 61-69.

36 Shiri Pasternak, Robert Houle & Brian Gettler, "The Indian Trust Fund: Debunking Myths & Misconceptions" (2019) at 2, online (pdf): *Yellowhead Institute* <yellowheadinstitute.org> [perma.cc/PFQ9-AYQ6].

37 SC 2018, c 27, s 675 [*ARLRC*].

38 Indigenous Services Canada, "Additions to Reserve" (last modified 10 September 2019), online: *Government of Canada* <www.sac-isc.gc.ca/eng/1332267668918/1611930372477> [perma.cc/T5XB-NGGZ].

39 *Report of the Auditor General of Canada to the House of Commons,* (Ottawa: Minister of Public Works and Government Services Canada, 2005) <oag-bvg.gc.ca> [perma.cc/C7N2-4PK5] at 1.

40 *ARLRC*, *supra* note 37, s 4(1).

41 *Ibid*, s 5(1).

III. URBAN RESERVES: OPPORTUNITIES & BENEFITS

A. Overview

Institutional and contemporary factors make developments on urban reserves especially attractive. While the institutional factors have existed since the inception of the *Indian Act*, the contemporary reserve system allows First Nations to take greater advantage of the unique legal status of reserves. Regarding contemporary factors, there is a political and market-driven demand for developments on urban reserves, which First Nations could capitalize on.[42] Importantly, with the current reserve system, any decision on whether and how to capitalize on these contemporary factors ultimately rests with First Nations. I elaborate on these favourable conditions below.

B. Urban Reserves – A Means to Circumvent Municipal Bureaucracy

Whereas the legal status of reserves has historically had negative implications for First Nations' ability to develop on reserves, the contemporary reserve system presents new opportunities for First Nations. Constitutionally, First Nations lands are subject to federal administration and within the exclusive jurisdiction of the Federal Parliament under section 91(24), *Constitution Act, 1867*.[43] However, since Provincial Governments have the exclusive power to regulate municipalities,[44] they are generally responsible for land management in urban areas. In the absence of equivalent federal legislation governing land management, and the ability of First Nations to opt out of land management provisions of the *Indian Act*, First Nations could potentially exercise considerably more autonomy over land management relative to private actors with interests in fee simple land, especially in the urban context.

Since provincial laws do not apply to reserves, by extension, municipal laws and procedures for permits and zoning also do not apply directly to reserves. Conventionally, urban developments require a permit to commence construction projects in Canadian municipalities. Obtaining a permit often involves extensive research, consultation with City staff, and other fees associated with the application process. Once an application is submitted, it could face incredibly burdensome processing times. Furthermore, since zoning regulations do not apply, developers could prioritize architectural design, cost-saving practices, and economic viability when constructing projects. Therefore, First Nations and developers alike can make decisions expeditiously by bypassing the permit approval process and exercising more flexibility to build in accordance with their economic interests. As such, these changes facilitate a land management regime that is more in line with the inherent jurisdiction of First Nations over their land.

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42 It is worth acknowledging that such decisions may be heavily influenced and constrained by the capitalistic system that has historically and contemporaneously been imposed on Indigenous Peoples by settler laws and practices.

43 (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

44 *Ibid*, s 92(8).

C. Political and market factors: More funding and opportunities for urban reserve developments

There are several overarching political considerations that make developments on urban reserves attractive for First Nations and the public generally. They stem from two different national priorities of the Federal Government—the first relates to a commitment to reconciliation with Indigenous peoples in Canada and the second relates to the housing crisis that plagues Canadian cities.

In the 2021 Speech from the Throne, incumbent Governor-General Mary Simon spoke about the Government's direction and goals. The speech had symbolic importance because of its source and its content. Mary Simon is the first Indigenous person to hold the office of Governor General of Canada, and her speech emphasized that *now* "is the moment to move faster on the path to reconciliation" and "build a better relationship between Indigenous Peoples and non-Indigenous Peoples."[45] Notably, the Governor General insisted on the need to take concrete action.

In practice, the Federal Government's renewal of its commitment to reconciliation manifests through greater deference to First Nations' decision-making autonomy and funding to facilitate that autonomy. Thus, even if the Federal Government retains legal title over reserve lands, it is implied that the Federal Government would exercise considerable restraint in making any incursions into reserve land. This implication can be deduced by the motivating reasons for the Federal Government's creation of ISC in 2019—where Prime Minister Trudeau acknowledged that the *Indian Act's* paternalistic structure was inconsistent with the current approach of the Federal Government towards First Nations and that a new department with a more deferential approach was needed to facilitate this new approach.[46] At the same time, the Federal Government has and continues to provide substantial investments to First Nations communities. In 2021, the Federal Government invested $18 billion over five years to Indigenous communities to, inter alia, "create new opportunities for people living in Indigenous communities."[47] Within that investment, specific funds were allocated to Indigenous entrepreneurship and infrastructure projects on reserve lands.[48] Federal funding has also been increased to address the housing crisis in Canada.

Expediting the construction of residential units, especially affordable housing, is a key priority for the Federal Government. In budget 2022, the Federal Government set aside $4 billion to help create 100,000 new housing units across Canada over the next five years

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45 Senate of Canada, *Building a Resilient Economy: Speech from the Throne to Open the Second Session of the Forty-Fourth Parliament of Canada*, 44-1 (23 November 2021) (Rt Hon Mary May Simon) at 5 <canada.ca> [perma.cc/VR44-K3JM].

46 Bill Curry, Shawn McCarthy & Robert Fife, "Trudeau pledges to end Indian Act in cabinet shuffle", *The Globe and Mail* (28 August 2017), online: <www.theglobeandmail.com> [perma.cc/EN3P-JNYQ].

47 Department of Finance Canada, "Budget 2021: Strong Indigenous Communities" (13 May 2021) online: *Government of Canada* <www.canada.ca/en/department-finance/news/2021/04/budget-2021-strong-indigenous-communities.html> [perma.cc/TY6N-YBMP].

48 *Ibid*.

and an additional $4.3 billion dedicated specifically to Indigenous housing projects.[49] Since most of the current market demand for housing takes place in urban areas and cities, urban reserves could capitalize on that federal funding by utilizing their desirable locations to attract investments from members and non-members alike.

Therefore, developments on urban reserves could be branded as a solution to the housing crisis in many cities across Canada, as well as a step toward reconciliation. There is a prospect that developments on urban reserves could simultaneously be subsidized by federal funding and take advantage of existing market factors that make it lucrative to develop on urban areas. A lucrative opportunity for First Nations has the potential to facilitate several benefits that go directly to First Nations.

D. Economic and Social Benefits for First Nations

Once a First Nation has chosen to develop on an urban reserve, there are many potential associated economic benefits. First Nation Governments could derive significant and longstanding revenue from developments on urban reserves through, for example, rental income or taxation which have become easier under the contemporary reserve system. Though that revenue may be transferred to members as a dividend, developments also have economic benefits that relate to employment for First Nations members. For example, a Costco built on a Tsuut'ina Nation's reserve near Calgary has 68 out of 88 positions filled by Tsuut'ina members.[50] These economic benefits are enhanced by the tax exemptions on income earned by First Nation members when working on a reserve.[51]

There is also a notable social benefit that developments on urban reserves could foster. Developments could provide an avenue to strengthen relations between First Nations and the local municipality through economic opportunities and collaboration. For example, the City of Edmonton, in collaboration with the city's First Nation partners, developed an "Urban Reserve Strategy" in 2021 in response to the growing popularity and interest in existing and new urban reserves.[52] Furthermore, developments on reserves could also provide greater connectivity between First Nations members that live on and off reserves by providing a shared space for members to work and benefit together. Moreover, since many First Nations live in urban areas,[53] urban reserves provide a space for First Nations to engage with and deliver services for members living in nearby urban areas. Developments could enhance the delivery of such services.

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49 Office of the Prime Minister of Canada, News Release, "Making housing more affordable" (8 April 2022), online: <pm.gc.ca/en/news/news-releases/2022/04/08/making-housing-more-affordable-canadians> [perma.cc/D7VY-34XX].

50 James Barsby, "The Untapped Potential of Urban Reserves in Northern Ontario" (2022) online: *Northern Policy Institute* <www.northernpolicy.ca/untapped-potential> [perma.cc/534A-TCUE].

51 *Indian Act, supra* note 2, s 87.

52 See generally Indigenous Relations Edmonton, "Urban Reserve Strategy" (2020), online (pdf): *City of Edmonton* <edmonton.ca> [perma.cc/VH49-RKJP].

53 Statistics Canada, *A Snapshot: Status First Nations people in Canada,* Catalogue No 41-20-002 (Ottawa: Statistics Canada, 20 April 2021).

IV. SENAKW: CASE STUDY

A. Overview

The Senakw development began construction on September 6th, 2022, with a ceremony intended to demonstrate the Federal government's commitment to reconciliation with the Squamish Nation. The ceremony included Sḵwx̱wú7mesh Úxwumixw (Squamish Nation) Council Chairperson Khelsilem, who summarized the potential of the project:

> This investment will build many needed rental apartments and generate long-term wealth for Squamish People across many generations. The wealth generated from these lands can then be recirculated into our local economies and communities to address our people's urgent needs for affordable housing, education, and social services.[54]

Prime Minister Trudeau was also in attendance, as he pledged $1.4 billion of Federal funding to support the development.[55] The development is a joint venture by the Squamish Nation and Westbank Corporation for a massive development on Kitsilano Indian Reserve 6 ("Senakw") in Vancouver. In this case study, I introduce the background behind the parties, the land, and the partnership. Upon discussing the legal processes involved in the Senakw development, I then discuss the generalizability of the Senakw model for other First Nations.

B. Background

Once completed, the Senakw development is reported to be the largest First Nations-led development in Canadian history.[56] The First Nation leading the development is the Squamish Nation. The history of the Squamish people spans many millennia with Squamish traditional territory covering 6,732 square kilometres in the Lower Mainland region of British Columbia.[57] Today, the Squamish Nation has interests in 26 different reserves in that area.

One of those reserves is the Senakw Reserve, which has a history that is characterized by settler suppression and Squamish resilience. Long before the arrival of the first European settlers, these lands were a Squamish village—serving as an important hub for trade, commerce, and cultural practices for Squamish people.[58] As European settlement and developments increased in the surrounding areas, the Government of British Columbia forced the illegal surrender of Senakw and relocated Squamish peoples to other Squamish reserves in 1913.[59] In 2002, after nearly a century of advocacy, the Squamish nation succeeded in a settlement with the

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54 Office of the Prime Minister of Canada, News Release, "Historic partnership between Canada and Sḵwx̱wú7mesh Úxwumixw (Squamish Nation) to create nearly 3,000 homes in Vancouver" (6 September 2022), online: <pm.gc.ca/en/news/news-releases/2022/09/06/historic-partnership-between-canada-and-skwxwu7mesh-uxwumixw-squamish> [perma.cc/6RRY-ETC8].

55 The Canadian Press "Canada provides $1.4 billion for 3,000 rental homes in deal with Vancouver-area First Nation", *CBC News* (6 September 2022) <www.cbc.ca> [perma.cc/Q4XH-MC26].

56 "Vision" (2023), online: *Senakw* <senakw.com/vision> [perma.cc/565D-EN37] [Senakw Vision].

57 "About Our Nation" (last modified 2022), online: *Squamish Nation* <www.squamish.net/about-our-nation> [perma.cc/E7NR-VSQ8].

58 "History" (2023), online: *Senakw* <senakw.com/history> [perma.cc/4NLJ-C3N2].

59 *Ibid.*

Federal Government that included the return of, albeit a smaller amount, of Senakw lands that now form Senakw.[60]

Senakw is 10.48 acres and is located by the Burrard Inlet in Vancouver. Though it is relatively small compared to other reserves, it is optimally located in a popular neighbourhood near downtown Vancouver. Its unique shape and small acreage have made it difficult to justify a development in the past; however, its location and growing demand for urban housing in the area make it optimally situated for large-scale residential developments.

This opportunity was not lost on Westbank Corporation, which entered into an agreement with the Squamish Nation to develop on Senakw. Westbank Corporation is one of North America's leading luxury residential and mixed-use real estate developers.[61] They are no strangers to developments in Vancouver and have built several high-rise residential tower developments in the city.[62] However, unlike their previous developments, the Senakw development is a partnership with the Squamish Nation, on a Squamish reserve—which affected the partnership agreement. The terms of the joint venture stipulate that the Squamish Nation is to issue a 120-year lease to Westbank Corporation, which will guarantee a loan of up to $3 billion—constituting the bulk of the upfront costs associated with the construction of the project.[63] After completion, Westbank Corporation would continue to act as property manager for the developments. The revenue allocation is split evenly, with each party receiving 50 percent of the revenue throughout the leasehold's lifetime.

C. Legal Processes

The Squamish Nation is scheduled to the *FNLMA* and has a land code. This *FNLMA*-sanctioned land code empowers the Squamish Government to hold broad administrative powers. In 2018, the Squamish Government exercised this broad decision-making authority through the creation of a Squamish Corporation, Nch'k̲ay̓ Development Corporation ("Nch'k̲ay̓").

Nch'k̲ay̓'s has delegated authority from the Squamish Government to develop, manage and own the active businesses of the Squamish Nation.[64] With regards to the Senakw development, Nch'k̲ay̓ started by soliciting a partnership with Westbank Corporation, putting that partnership to a vote amongst Squamish Nation members in accordance with the land code and associated regulations of the Squamish Government. In 2019, Nch'k̲ay̓ received a historic referendum mandate with the support of 87 percent of Squamish Nation members to move

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60 Canada *(Attorney General) v Canadian Pacific Ltd*, 2002 BCCA 478, 217 DLR (4th) 83.

61 "Westbank Corp." (last modified 2022) online: *Vancouver New Condos* <www.vancouvernewcondos.com/developers/westbank-corp/> [perma.cc/9FGN-JXKB].

62 In 2022 Westbank Corporation completed the construction of "Alberni" a 43-storey tower in Downtown Vancouver: "Alberni by Kengo Kuma" (last modified 2022), online: *Westbank Corporation* <westbankcorp.com/body-of-work/alberni-by-kuma> [perma.cc/W6ZS-MJAQ].

63 Joanne Lee-Young, "Squamish Nation approves $3-billion housing project in Kitsilano", *Vancouver Sun* (11 December 2019), online: <vancouversun.com> [perma.cc/NH64-TQTN].

64 "Nch'kay" (last modified 2022), online: *Squamish Nation* <www.squamish.net/nchkay/> [perma.cc/J2C6-EETH].

forward with the Senakw development.[65] As a result of that referendum, the Squamish Nation and Westbank signed a definitive partnership agreement later that year.[66]

After the partnership agreement concluded, the Squamish Government expeditiously concluded the terms of the construction with Westbank and signed a service agreement with the City of Vancouver.[67] The specific terms of the construction were negotiated by the Squamish Government and were informed by the interests and priorities of their members. The priorities included the commission of Squamish architecture and art, and a real commitment to sustainability. For example, the Senakw development will be a large-scale net zero operational carbon housing development—a first in Canada and one of only a few in the world.[68] To facilitate the construction of such ambitious projects, the Squamish Government executed a service deal with the City of Vancouver in 2022 that will provide water, sewers, and infrastructure to integrate Senakw into the rest of Vancouver.

Once completed, the Squamish Nation is entitled to half the revenue. The bulk of the revenue will come from property taxation, strata leaseholds, and rental income. Revenue from the latter two falls under the categorization of capital moneys since they relate to land and the sale of capital assets—which encompasses investment properties. Notably, had Senakw been governed by the *Indian Act* or the *FNLMA* before the enactment of Bill C-86, at least parts of these revenue streams would have been held in trust by the Federal Government, making this partnership incredibly difficult if not impossible. However, with the *FNLMA* in its current form, the revenue from the investment properties goes directly to the Squamish Nation in accordance with the terms of their partnership with Westbank Corporation.

D. Highlighting the Benefits of Senakw

Unlike many other large-scale developments, the Senakw development takes place on reserve lands. Since reserves are technically federal jurisdiction, City of Vancouver by-laws do not apply to Senakw, despite Senakw being an enclave within the City of Vancouver. Consequently, decision-making and the approval process for the project are streamlined through a single governing body—the Squamish Government. A streamlined approval process is especially valuable in Vancouver, where wait times are notoriously long. Depending on the complexity of a project and demand, average processing times can range from weeks to more than two years.[69] In the case of Senakw, the wait time would have likely been especially long since a significant portion of Senakw is zoned for single-family housing. The project would have thus required changes to zoning rules and a developer permit – both of which could further prolong the process.

In the absence of municipal zoning laws, the Squamish Nation and Westbank Corporation can focus on making the project economically profitable instead of conforming to rigid restrictions

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65 "Senakw" (2020) at 3, online (pdf): *Squamish Nation* <www.squamish.net> [perma.cc/J936-RN4U] [Senakw Presentation].

66 *Ibid* at 1.

67 *Ibid*.

68 Senakw Vision, *supra* note 56.

69 See e.g. Belle Puri, "Permit backlog leaves siblings waiting to restore home two years after blaze", *CBC News* (26 October 2017), online: <www.cbc.ca> [perma.cc/KD2M-326N].

related to height and parking requirements. In Vancouver, the only zoning designation that allows for high-rise residential buildings is a "Comprehensive Development District." Even within this zoning class, buildings are usually subject to restrictive height requirements. For example, Seaforth Place, a Comprehensive Development District metres away from Senakw, has height restrictions of five stories and mandates one street parking spot per dwelling.[70] The Senakw project, in contrast, will have buildings as high as 58 stories with a far lower parking spot-to-dwelling ratio.[71]

The avoidance of City of Vancouver by-laws and bureaucracy has allowed the Squamish Nation to expeditiously introduce, vote, and implement the project in a span of three years. With fewer administrative hurdles, more certainty, and enhanced flexibility—construction commenced on schedule in the fall of 2022, and the Senakw development is on track to meet its 2027 construction completion target.[72] An expeditious process to approve a large-scale residential development in the heart of Vancouver benefits members of the Squamish Nation and non-members alike.

The Senakw development has the potential to house thousands of people. The plan for the Senakw development describes an 11-tower mega project capable of housing thousands in a sparsely populated area in Vancouver. The area adjacent to the Senakw reserve consists of 21 dwellings per acre, while the Senakw reserve would have 545 dwellings per acre upon completion.[73] Consequently, the Senakw development will play a major ameliorative role in the City of Vancouver's housing crisis by providing more than 6,000 units with portions set aside for Squamish Nation members.[74] Of the 6,000 units, 1,200 are designated for affordable housing.[75] There is undoubtedly a demand for more housing in Vancouver;[76] therefore, large-scale residential developments are especially profitable in Vancouver. An independent analysis by Ernst and Young projected that the Senakw development could yield revenue of up to $20 billion—half of which would go to the Squamish Nation under the terms of the partnership.[77]

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70 City of Vancouver, by-law No 7174, *A By-law to amend By-law No. 3575, being the Zoning and Development By-law*, ss 4-5.

71 Alissa Thibault, "Sevices Agreement signed for 11-tower Senakw development in Kitsilano", *CTV News* (25 May 2022), online: <bc.ctvnews.ca> [perma.cc/76XR-SLHB].

72 Senakw Vision, *supra* note 56.

73 "Senakw development raises concerns in Kits Point" (14 May 2021) online (blog): *Upper Kitsilano Residents Association* <upperkitsilano.ca/2021/05/14/senakw-development-raises-concerns-in-kits-points/> [perma.cc/BF4W-NM2Q].

74 Derrick Penner, "Squamish Senakw, City of Vancouver strike service deal for 11-tower, 6,000-unit development", *Vancouver Sun* (25 May 2022), online: <vancouversun.com> [perma.cc/G8VU-66JQ].

75 *Ibid*.

76 Low inventory and high demand have made Vancouver the second least affordable housing market in North America: Wendell Cox & Hugh Pavletich, "16th Annual Demographia International Housing Affordability Survey" (2020) at 3, 12, 16, online (pdf): *Demographia* <demographia.com> [perma.cc/J8D7-JAGV].

77 Squamish Nation Council, "Senakw Lands Presentation" (November 2019) at 20, online (pdf): *Senakw* <senakw.com> [perma.cc/6VPP-CNCL].

E. Generalizability of Senakw Model

Given the early success of the Senakw development, other First Nations with interests in urban reserves may view the Senakw development as a replicable model to obtain economic prosperity on their own terms. However, despite the strengths of the Senakw model, some limitations and considerations may incline First Nations to consider other avenues.

A fundamental limitation of the Senakw model is that it is difficult to replicate in most reserves due to demographic factors. Naturally, high-rise residential developments are only feasible where there is substantial demand for housing, and substantial demand for housing is only present on lands in or adjacent to towns and cities. Not only must a First Nation have an urban reserve, but it must be in or adjacent to a significant population centre. Since most reserves are not in or adjacent to significant population centres, most reserves would likely have difficulty implementing the Senakw model and may be inclined to employ other avenues to generate revenue, such as a smaller housing project.

For First Nations who do not currently have urban reserve holdings but are actively seeking them through a settlement, there are additional challenges unique to urban reserves**.** If successful, an application to add to or create a reserve would entitle First Nations to acquire parts of federal land or settlement funds to purchase land that would then be set aside as reserves. In urban settings, federal land is scarce. It is thereby likely that a successful application would lead to a cash settlement for First Nations. First Nations Governments seeking to use those funds to purchase land in urban areas are, therefore, subject to market rates that might be prohibitively expensive. Moreover, for urban reserves, both existing and those that are pending, there are further geographic challenges that are unique to urban reserves.

By definition, urban reserves are in or adjacent to urban centres, so construction will almost always require some level of cooperation with municipalities or provinces. While the Senakw development were not required to seek a permit from the City of Vancouver for construction directly on the reserve, they did have to negotiate a service deal that would provide water, sewers, and infrastructure to integrate Senakw with the rest of Vancouver. Though the Senakw development proves that it is possible to cooperate with municipalities for service agreements, other First Nations with interests in urban reserves outside Vancouver may need to consider the prospect of working with a more hostile municipality or provincial administration.

Furthermore, it is entirely conceivable that First Nations might not *desire* or have the requisite funding to emulate the Senakw model. Urban reserves, like other reserves, have spiritual and cultural significance for First Nations that may be diluted by the presence of large-scale developments and non-members. Many First Nations have conceptions of land use that go beyond western notions of economic productivity, which may manifest as preferring to make land use decisions that prioritize communal, spiritual, or social purposes. [78]

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78 See generally Brenna Bhandar, *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (Durham: Duke University Press, 2018) at 22. See also Terri-Lynn Williams-Davidson & Janis Sara, "Haida law of gina 'waadluxan gud ad kwaagiida and Indigenous rights in Conservation Finance" (2021) at 13, online (pdf): *Canada Climate Law Initiative* <ccli.ubc.ca> [perma.cc/LKF8-VNRG].

Moreover, the Squamish Nation is comparatively more affluent than other First Nations as they have significant sources of revenue from existing real estate investments through, for example, the MST Corporation. Other First Nations may not have funds or assets to attract a partner or partnership arrangement like the fifty-fifty arrangement between the Squamish Nation and Westbank Corporation.

In short, there are limits to the generalizability of the Senakw model of development on other urban reserves. For the Senakw model to be replicated, there are many prerequisites for First Nations. First Nations need to have an urban reserve where there is demand for housing and development, significant funds or a willing third-party investor, a cooperative municipality, and the support of their membership. Even with these prerequisites met, First Nations may have other land use priorities. Nonetheless, the Senakw development can still offer some insights for other First Nations seeking to develop on reserves. At the very least, it highlights the breadth of what could be done on reserves, as well as the potential associated with increased autonomy in the current reserve system.

CONCLUSION

Ultimately, the reserve system is a settler institution, and there will always be associated challenges and limitations for First Nations seeking to use this system as a means to achieving economic prosperity. Nonetheless, I hope to have conveyed that the recent legislative changes, culminating in Bill C-86, are a concrete step in the right direction. These legislative changes empower First Nations to have greater control over decision-making and revenue management - while also making it more feasible to increase their reserve land holdings. Enhanced autonomy allows First Nations to make long-term and economically profitable decisions relating to reserves.

The Senakw model is just one manifestation of the increased autonomy fostered through the current reserve system—and perhaps one worth considering for other First Nations. With more than 120 urban reserves and potentially more on the way, there is ample opportunity for more developments on urban reserves—whether that be large-scale residential projects or housing projects exclusive to members. Though the Senakw development is in its early days, First Nations from Victoria to Halifax now have a concrete example of the challenges and economic potential of developing on urban reserves under the current reserve system. The institutional, political, and market dynamics remain especially conducive to these kinds of developments, and the reserve system in its current form empowers First Nations to capitalize on these conditions to prosper economically and potentially become financially self-sufficient.