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## Land Regime Choice in Close-Knit Communities: The Case of the First Nations Land Management Act

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# Land Regime Choice in Close-Knit Communities: The Case of the First Nations Land Management Act

## Abstract

Land interests on Canadian First Nations reserves have long been governed by the rigid and paternalistic provisions of the federal Indian Act, which require the permission of the federal Minister of Indigenous Affairs for even relatively minor land transactions. Yet an increasing number of First Nations have taken advantage of the 1999 First Nations Land Management Act (FNLMA), which allows First Nations to adopt a custom land code that replaces most of the reserve land provisions of the Indian Act in their community. This paper seeks to examine how First Nation communities have chosen to exercise their powers under this Act to define and regulate land interests on reserve. Working from a database of 33 FNLMA land codes, the authors focus on three discrete issues on which the codes differ: 1) whether to require a vote of the community as a whole for the grant of a lease in community-held lands to a non-member; 2) whether to require the approval of the band council for the transfer of a leasehold interest to a non-member; and 3) whether to require the approval of the band council for the inter vivos transfer of a member-held interest to another member. Each of these issues relates to the contentious question of how freely alienable land interests in Indigenous communities should be—a matter that occupies a kind of ideological fault line involving considerations of economic efficiency and individual autonomy, on the one hand, and community cohesion and traditional culture, on the other. The authors make a number of observations relating to the links between the characteristics of communities and their choice of land regime. Communities with substantial non-First-Nations populations living on reserve were more likely to adopt rules allowing free alienation of leasehold interests, as well as free alienation of member interests among members. In addition, First Nations that adopted liberal rules for the transfer of interests among members experienced larger increases in the proportion of their members living off-reserve in the years following the adoption of their code. This may indicate that liberal transfer rules among members help to facilitate exit from the community.

## Keywords

Canada. First Nations Land Management Act; Indigenous peoples—Land tenure; Canada

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# Land Regime Choice in Close-Knit Communities: The Case of the First Nations Land Management Act

MALCOLM LAVOIE\* & MOIRA LAVOIE†

Land interests on Canadian First Nations reserves have long been governed by the rigid and paternalistic provisions of the federal *Indian Act*, which require the permission of the federal Minister of Indigenous Affairs for even relatively minor land transactions. Yet an increasing number of First Nations have taken advantage of the 1999 *First Nations Land Management Act (FNLMA)*, which allows First Nations to adopt a custom land code that replaces most of the reserve land provisions of the *Indian Act* in their community. This paper seeks to examine how First Nation communities have chosen to exercise their powers under this Act to define and regulate land interests on reserve. Working from a database of 33 *FNLMA* land codes, the authors focus on three discrete issues on which the codes differ: 1) whether to require a vote of the community as a whole for the grant of a lease in community-held lands to a non-member; 2) whether to require the approval of the band council for the transfer of a leasehold interest to a non-member; and 3) whether to require the approval of the band council for the *inter vivos* transfer of a member-held interest to another member. Each of these issues relates to the contentious question of how freely alienable land interests in Indigenous communities should be—a matter that occupies a kind of ideological fault line involving considerations of economic efficiency and individual autonomy, on the one hand, and community cohesion and traditional culture, on the other. The authors make a number

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of observations relating to the links between the characteristics of communities and their choice of land regime. Communities with substantial non-First-Nations populations living on reserve were more likely to adopt rules allowing free alienation of leasehold interests, as well as free alienation of member interests among members. In addition, First Nations that adopted liberal rules for the transfer of interests among members experienced larger increases in the proportion of their members living off-reserve in the years following the adoption of their code. This may indicate that liberal transfer rules among members help to facilitate exit from the community.

Les intérêts fonciers sur les réserves des Premières Nations du Canada sont depuis longtemps régis par les dispositions rigides et paternalistes de la *Loi sur les Indiens*, en vertu desquelles même des transactions foncières relativement mineures ne peuvent se faire sans l'approbation du ministre fédéral des Affaires autochtones. Pourtant, les Premières Nations sont de plus en plus nombreuses à tirer profit de la *Loi de 1999 sur la gestion des terres des premières nations* (LGTPN), qui leur permet d'adopter un code foncier personnalisé en remplacement de la plupart des dispositions de la *Loi sur les Indiens* relatives aux terres de réserve dans leur communauté. Le présent article vise à examiner comment les communautés des Premières Nations ont choisi d'exercer les pouvoirs qui leur sont conférés par cette loi afin de définir et de régler les intérêts fonciers dans les réserves. À partir d'une base de données regroupant 33 codes fonciers établis en vertu de la LGTPN, les auteurs se penchent sur trois points de divergence des codes : 1) l'obligation ou non d'un vote de l'ensemble de la communauté dans le cadre de l'octroi à un non-membre d'un bail sur des terres détenues par la communauté; 2) l'obligation ou non de l'approbation du conseil de bande dans le cadre du transfert à un non-membre d'un intérêt à bail; et 3) l'obligation ou non de l'approbation du conseil de bande dans le cadre du transfert entre vifs d'un intérêt détenu par un membre à un autre membre. Chacun de ces points se rapporte à la question controversée de savoir dans quelle mesure les intérêts fonciers doivent être librement aliénables dans les communautés autochtones; cette question fait ressortir une sorte de ligne de fracture idéologique entre, d'un côté, l'efficacité économique et l'autonomie individuelle et, de l'autre, la cohésion communautaire et la culture traditionnelle. Les auteurs formulent diverses observations concernant les liens entre les caractéristiques des communautés et leur choix de régime foncier. Les communautés des Premières Nations qui comptent de nombreuses populations non autochtones vivant dans les réserves étaient plus susceptibles d'adopter des règles autorisant la libre aliénation des intérêts à bail et la libre aliénation des intérêts des particuliers entre les membres. Par ailleurs, dans les communautés des Premières Nations qui ont adopté des règles souples en matière de transfert d'intérêts entre les membres, la proportion des membres vivant hors réserve a davantage augmenté au cours des années qui ont suivi l'adoption d'un code foncier. Ce constat peut indiquer que l'existence de règles souples en matière de transfert facilite les départs de la communauté.

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FOR MUCH OF THE 19TH AND 20TH CENTURIES, Canadian policy in relation to Aboriginal lands was conducted in a rigid, paternalistic, and centralized manner. This approach is exemplified by the land provisions of the federal *Indian Act*, which create a one-size-fits-all model for land interests on First Nations reserves and require the approval of the federal Minister of Indigenous Affairs for all but the most minor transactions.<sup>1</sup> Needless to say, this model was imposed on Indigenous communities without their consent and with little regard for the specific norms, institutions, values, and circumstances of each community. This approach was all but certain to result in rules that were maladapted to local needs. Indeed, the top-down nature of Aboriginal policy in this era has long been identified as the source of a great many harms.<sup>2</sup>

Land interests on most Canadian First Nations reserves remain governed by the provisions of the *Indian Act*. Yet an increasing number of First Nations have taken advantage of the 1999 *First Nations Land Management Act* (FNLMA), which allows bands to adopt a custom land code that replaces most of the reserve land provisions of the *Indian Act* in their community.<sup>3</sup> The FNLMA was the result of a First Nations-led movement for greater flexibility and autonomy with respect to land interests on reserve. It is widely regarded as a success story, both in taking back governance authority from the federal government and in facilitating

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1. *Indian Act*, RSC 1985, c I-5 [*Indian Act*]. Some degree of customization within the *Indian Act* is possible through the use of “53/60” delegation. See Section I, *below*.
  2. See e.g. *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communications Group, 1996), vol 1 at 282-85 & vol 2 at 485-519.
  3. *First Nations Land Management Act*, SC 1999, c 24 [FNLMA].

economic development.<sup>4</sup> At this time, roughly fifty-eight First Nations have had land codes come into force, and more than one hundred are at various stages of adopting a land code.<sup>5</sup>

As the *FNLMA* approaches its 20th anniversary, it seems appropriate to ask how groups have chosen to exercise their powers under the *FNLMA* to define and regulate land interests on reserve, and how these choices reflect the values and circumstances of each community. Working from a database of thirty-three land codes made available through the First Nations Land Management Resource

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4. Two reports prepared by KPMG for the First Nations Lands Advisory Board underscored the benefits of operating under an *FNLMA* land code, including markedly reduced transaction costs associated with land transactions. See KPMG, "Cost/Benefit Analysis of Future Investment in the Framework Agreement on First Nations Land Management" (27 January 2010), online: First Nations Land Management Resource Centre <[https://labrc.com/wp-content/uploads/2014/03/FNLM-Benefits-Report\\_FINAL\\_Jan-27\\_2010.pdf](https://labrc.com/wp-content/uploads/2014/03/FNLM-Benefits-Report_FINAL_Jan-27_2010.pdf)> [KPMG Report I] and KPMG, "Framework Agreement on First Nation Land Management: Update Assessment of Socio/Economic Development Benefits" (27 February 2014), online: First Nations Land Management Resource Centre <[https://labrc.com/wp-content/uploads/2014/03/FNLM-Benefits-Review-Final-Report\\_Feb-27-2014.pdf](https://labrc.com/wp-content/uploads/2014/03/FNLM-Benefits-Review-Final-Report_Feb-27-2014.pdf)> [KPMG Report II]. These studies also indicated a high degree of satisfaction among First Nations communities with their land codes, including the flexibility it gave them in structuring land transactions, as well as the ability to protect community values. A study of two land codes under the *FNLMA* similarly emphasized the reduced transaction costs achieved through land codes. See Christopher Alcantara, "Reduce Transaction Costs? Yes. Strengthen Property Rights? Maybe: The First Nations Land Management Act and Economic Development on Canadian Indian Reserves" (2007) 132: 3/4 Public Choice [Alcantara]. Praise for the *FNLMA* has not been unanimous. See Janice Switlo, "Apple Cede: First Nations Land Management Regime" (1999), online: <<http://www.nativeweb.org/pages/legal/apple-cede.pdf>>. The racially charged and possibly offensive title of this paper gives a sense of its tone. (An apple is red on the outside and white on the inside.) The author views the *FNLMA* as a tool of assimilation. In making this argument, the author engages in a creative and arguably misleading interpretation of the *FNLMA*, stating, for instance, that adopting a land code amounts to surrender to the Crown, and that provinces would become beneficial owners of reserve land under the *FNLMA*. These claims are contradicted by s 5 of the *FNLMA*. It may also be possible to argue that the *FNLMA* does not give First Nations sufficient flexibility over land tenure to fully reflect Indigenous legal traditions. Others have criticized the *FNLMA* for being expensive to implement and for opening bands to increased liability, such that some bands are unable to adopt a land code for financial reasons. See Canada, House of Commons, Standing Committee on Aboriginal Affairs and Northern Development, *Standing of Land Management and Sustainable Economic Development on First Nations Reserve Lands* (Library of Parliament: Ottawa, 2014) (Chair: Chris Warkentin) at 29-30 [House of Commons Report].
  5. Lands Advisory Board, *Annual Report (2015-2016)*, online: First Nation Land Management Resource Centre <<https://labrc.com/reports/>> [Lands Advisory Board Annual Report].

Centre, this article begins to answer these questions.<sup>6</sup> In particular, we identify three matters on which First Nations under the *FNLMA* have made different choices about the rules governing land interests on reserve: (1) whether to require a vote of the community as a whole for the grant of a lease in community-held lands to a non-member; (2) whether to require the approval of the band council or a delegated body for the transfer of any leasehold interest to a non-member; and (3) whether to require the approval of the band council or a delegated body for the *inter vivos* transfer of one member's interest to another member. Each of these issues relates to the loaded question of how freely alienable land interests should be in Indigenous communities. Table 1 (in the Appendix) summarizes the approach that each of the thirty-three communities has taken on these questions.

The alienability of land is a contentious issue both within Indigenous communities and more generally, because it occupies an ideological fault line involving considerations of economic efficiency and individual autonomy on the one hand, and community cohesion and traditional culture on the other.<sup>7</sup> Under the right circumstances, liberal land markets enhance economic efficiency by allowing land interests to flow to their most valuable uses, while at the same time giving individual interest-holders greater power to use their interests in accordance

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6. Lands Advisory Board, "First Nation Land Management Resource Centre," online: First Nation Land Management Resource Centre <<https://labrc.com/resources/>> [FNLMA Resource Centre]. The land codes database was accessed in May 2016. Copies of the land codes used in the study are on file with the authors. In general, land codes are not made publicly available on a First Nation's website, though under the *FNLMA* they must be available for inspection in person at a place designated by the First Nation's band council. See *FNLMA*, *supra* note 3, s 15(2).
  7. See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1957) at 33-42, 178-91; Robert Ellickson, "Property in Land" (1993) 102:6 Yale LJ 1315 at 1375-80 [Ellickson]; Richard A Epstein, "Why Restrain Alienation?" (1985) 85:5 Colum L Rev 970 [Epstein]; Susan Rose-Ackerman, "Inalienability and the Theory of Property Rights" (1985) 85:5 Colum L Rev 931; Kenneth H Bobroff, "Indian Law in Property: *Johnson v. M'Intosh* and Beyond" (2001) 37:2 Tulsa L Rev 521 at 537-38; Tom Flanagan, Christopher Alcantara & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queens University Press, 2010) at 123-36; Malcolm Lavoie, "Why Restrain Alienation of Indigenous Lands?" (2016) 49:3 UBC L Rev 997 at 1029-49 [Lavoie].

with their own goals and desires.<sup>8</sup> However, freely alienable land interests can undermine the close-knittedness of a community and its capacity to maintain cultural norms that differ from those of the wider settler society.<sup>9</sup> If members can more readily transfer their interests and leave the community, and if non-members can readily acquire interests and enter the community, the community's ability to function as a locus of a distinctive culture may be undermined.

When it comes to alienability of land interests, the approaches adopted by First Nations under the *FNLMA* differ widely. While First Nations under the *FNLMA* are not able to provide for the transfer of fee simple interests in their land to either members or non-members,<sup>10</sup> they do have a relatively free hand in designing provisions relating to leasehold interests, which can be held by both members and non-members, as well as provisions relating to the possessory interests of band members, most commonly known as certificates of possession or allotments. Some communities, including the Tla'amin Nation (formerly the Sliammon First Nation), adopted transfer rules that are demonstrably less restrictive than the *Indian Act* with respect to all three questions under study.<sup>11</sup> Under the amended *Sliammon First Nation Land Code* (recently superseded by the *Tla'amin Final Agreement*), community lands could be leased by the council to a member or non-member for any length of time and without a vote of the community as a whole.<sup>12</sup> Leasehold interests of any duration could be transferred to a non-member without the approval of the band council or another body.<sup>13</sup> Finally, permanent member interests in community lands could be transferred to

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8. Lavoie, *supra* note 7. Two recent papers rely on literature in development economics to underscore the institutional preconditions for the successful use of formalized and alienable land interests as development tools, as well as some of the trade-offs associated with doing so. Jamie Baxter & Michael Trebilcock, "Formalizing' Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform" (2009) 7:2 Indigenous LJ 45 at 63-66 [Baxter & Trebilcock]; Sari Graben, "Lessons for Indigenous Property Reform: From Membership to Ownership on Nisga'a Lands" (2014) 47 UBC L Rev 399 at 424-30 [Graben].
  9. Ellickson, *supra* note 7 at 1378; Baxter & Trebilcock, *supra* note 8 at 65; Graben, *supra* note 8 at 421; Lavoie, *supra* note 7.
  10. *FNLMA*, *supra* note 3, ss 5, 26(1).
  11. *Sliammon First Nation: Amended Land Code* (2011), ss 12.1, 31.4, 31.5, 31.6, 33.1 & 34.3, online: <<https://labrc.com/wp-content/uploads/2014/03/Sliammon-Land-Code-Amended.pdf>>. On 5 April 2016, the *Tla'amin Final Agreement* came into effect, removing the Tla'amin Nation from the jurisdiction of the *FNLMA* and transferring existing reserve land to the Tla'amin Nation in fee simple. See *Tla'amin Final Agreement* (2014), online: <<https://www.aadnc-aandc.gc.ca/eng/1397152724601/1397152939293>>. Under the terms of the agreement, the *Sliammon First Nation: Amended Land Code* is no longer in force.
  12. *Sliammon First Nation: Amended Land Code*, *supra* note 11, ss 31.4, 31.5, 33.1.
  13. *Ibid.*, s 31.6.



another member of the Tla'amin Nation without council approval.<sup>14</sup> By contrast, other First Nations, including the Chemawawin Cree Nation, have adopted rules that restrict transactions to almost the same degree as the *Indian Act*.<sup>15</sup> Transfers of both leasehold and member interests require the approval of the band council.<sup>16</sup> Leases in community lands of greater than 25 years are put to a vote of the community as a whole.<sup>17</sup> It is as if some First Nations have elected to use the powers under the *FNLMA* to adopt rules aimed at capturing the economic and other benefits of liberalized land markets, while others have gone in the opposite direction, using their powers primarily to reinforce community cohesion and collective control over their land base.<sup>18</sup>

In approaching the topic of land code choice by First Nations, we start from the thesis that, generally speaking, the First Nations in question can be expected to adopt rules that are adapted to the interests of their members, or that are at least more closely adapted to their interests than are the *Indian Act* provisions. These are small communities<sup>19</sup> with culturally homogeneous memberships and long experience living under the *Indian Act*. A proposed land code must earn broad community support before it can come into force.<sup>20</sup> In adopting a land code, First Nations are likely to have a sense of which of the *Indian Act* land provisions worked poorly in relation to the interests of members and to seek to change these provisions in a manner that better accords with those interests. Crucially, we understand interests broadly to include not only material economic interests, but also members' interests in governing their land in accordance with community values, maintaining community cohesion, and preserving their distinctive culture.<sup>21</sup>

In what follows, we use a database of thirty-three land codes, along with public data from past Canadian censuses and from Indigenous and Northern

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14. *Ibid.*, s 34.3.

15. *Chemawawin Cree Nation Land Code* (2010), ss 12.1, 34.1, online: < <http://www.labrc.com/wp-content/uploads/2014/10/Chemawawin-Land-Code.pdf>>. See FNLMA Resource Centre, *supra* note 6.

16. *Chemawawin Cree Nation Land Code*, *supra* note 15, s 34.1.

17. *Ibid.*, s 12.1.

18. This is an observation made by Chief Darcy Bear, Whitecap Dakota First Nation, in a conversation with the authors (17 August 2016) [Chief Darcy Bear].

19. Of the 33 First Nations in the sample, the smallest has 87 registered members and the largest has 5943. The average size is 1037 and the median size is 840. See Indigenous and Northern Affairs Canada, *First Nations Profiles* (2016), online: Government of Canada Indigenous and Northern Affairs Canada <<http://aadnc-aadnc.gc.ca/fnp/Main/index.aspx?lang=eng>>.

20. *FNLMA*, *supra* note 3, s 12.

21. In doing so, we mirror the approach adopted in Ellickson, *supra* note 7 at 1320-21.

Affairs Canada, to test whether certain community characteristics can help explain the rules selected by the First Nations. Among the key results of this study are that First Nations in British Columbia (BC) were significantly more likely to adopt non-restrictive or “liberal” rules relating to the granting and transfer of leasehold interests than bands elsewhere in the country. In addition, communities with substantial non-First-Nations populations living on reserve at the time the *FNLMA* was adopted were more likely to adopt rules allowing free alienation of leasehold interests, as well as free alienation of member land interests among members. However, First Nations that allowed the free transfer of leasehold interests were more likely to require a vote of the entire community prior to the initial grant of a lease, even for relatively short leases. It seems that communities that elected to give up ongoing control over lease transfer were more inclined to implement the safeguard of a community vote at the outset of the lease. Finally, we observe that First Nations that adopted liberal rules for the transfer of land interests among members experienced larger increases in the proportion of their members living off-reserve in the years following the adoption of their code. This trend may indicate that liberal transfer rules among members help to facilitate exit from the community. Such rules might also lead to a higher concentration of ownership with respect to member land interests. This possibility underscores the serious nature of the trade-offs communities face in making choices relating to the alienability of land interests.

This article proceeds in four parts. In Part I, we outline the *Indian Act* lands regime that applied to all the communities under study prior to the enactment of custom land codes under the *FNLMA*. We also briefly outline the history and structure of the *FNLMA* regime and make some general observations about the similarities and differences in the codes adopted under the *FNLMA*. In Part II, we establish a theoretical framework for land regime choice in close-knit communities, and in particular the trade-offs involved in restraining the alienation of land interests in such communities. From these observations we derive a number of predictions regarding the characteristics of communities that would be more or less open to alienable interests. Part III presents the results of our survey of land codes and seeks to interpret the results in light of the theoretical framework outlined in section II. Part IV concludes.

This article seeks, first and foremost, to understand some of the ways in which Canadian First Nations have used powers recognized under the *FNLMA* to advance local priorities. However, we hope that the article also illustrates some of the more general trade-offs faced by close-knit cultural minority communities that seek to use interests in land to maintain a distinctive culture and way of life.

These communities include Indigenous communities, but also other groups, including certain religious minorities who live in distinct, largely closed societies. Land markets present both the potential for economic development and a possible threat to community values. Reasonably good demographic and other data exist for the communities that are empowered by the *FNLMA* to make choices on these matters. Accordingly, we hope that this article provides some general insights into the nature of the choices such communities face in relation to the alienability of land interests.

## I. THE FIRST NATIONS LAND MANAGEMENT ACT REGIME

Roughly thirty-five sections in the *Indian Act* deal with the management of land and resources on reserve. Generally speaking, approval by the Minister of Indigenous Affairs is required to carry out any land- or resource-related transaction governed by these provisions, including the grant or transfer of leasehold interests or certificates of possession.<sup>22</sup> Certificates of possession are permanent interests held by individual band members under the *Indian Act* that give rise to an exclusive right to use and possess land within a reserve. They can only be held by Status Indians.<sup>23</sup> Lands held under a certificate of possession may be leased to third parties, using the Minister as an intermediary.<sup>24</sup>

Before community land on reserve can be leased, it must be designated for leasing purposes.<sup>25</sup> A designation is a time-limited surrender of reserve lands to the Crown. It must be approved by a majority of participating eligible voters of the First Nation, referred for decision to the Minister through a supportive band council resolution, and then approved by the Minister.<sup>26</sup> Ministerial approval alone is required for the transfer of a certificate of possession to another band member or the transfer of a leasehold interest.<sup>27</sup> Leases and certificates of possession (but not customary interests) must be registered through the Indian Land Registry System.<sup>28</sup> A major complaint of First Nations with respect to

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22. *Indian Act*, *supra* note 1, ss 20, 24, 38(2), 54.

23. *Ibid*, ss 20(2), 24.

24. *Ibid*, s 58(3).

25. It is possible for the Minister, acting alone, to grant a right to use or occupy reserve land for a period of one year or less through a "permit" (see *Indian Act*, *ibid*, s 28(2)). However, under the *Indian Act*, a "lease" of any duration requires that the land be designated through a process that involves a vote of the community members (see *Indian Act*, *ibid*, s 37(2)).

26. *Ibid*, s 39.1.

27. *Ibid*, ss 24, 54.

28. *Ibid*, ss 21, 55.

land management under the *Indian Act* has been the long waiting periods for departmental approval of transactions and for registration of land interests.<sup>29</sup>

Sections 53 and 60 of the *Indian Act* allow for the Governor in Council to delegate aspects of the management of leases and permits to a First Nation, and a small number of First Nations have succeeded in obtaining this delegated authority.<sup>30</sup> Yet while “53/60” delegation allows First Nations increased control over their own lands, it falls short of the control and certainty offered by the *FNLMA* regime. The Indigenous Affairs department retains the authority to register leases and permits, and land must still be designated to the Crown for a lease to be granted. Furthermore, First Nations with sections 53/60 authority may not alter legal institutions in significant ways, for instance by changing the rules governing land tenure. Finally, the Governor in Council retains the discretion to withdraw the “53/60” delegation unilaterally at any time.<sup>31</sup>

It was against this legislative backdrop that the *FNLMA* emerged. The *Framework Agreement on First Nation Land Management* was initially negotiated between Canada and fourteen First Nations.<sup>32</sup> It was finalized in 1996 and ratified in 1999 through the passage of the *FNLMA*. The *Framework Agreement* provided for a Lands Advisory Board to deliver support and services to member First Nations in developing and implementing land codes and to advise the Minister on implementation of the regime.<sup>33</sup> The Lands Advisory Board subsequently created the First Nation Land Management Resource Centre to provide technical training for land managers and other First Nation staff with responsibilities under the regime.

The *FNLMA* regime was initially restricted to the original fourteen First Nation signatories to the *Framework Agreement*. However, the *FNLMA* provided the Governor in Council with the power to add any other First Nation to the regime.<sup>34</sup> Today, fifty-eight First Nations have had land codes come into force.<sup>35</sup>

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29. House of Commons Report, *supra* note 4 at 17-19. For survey data on the lengthy delays associated with transactions under the *Indian Act*, see KPMG Report II, *supra* note 4 at 9.

30. *Indian Act*, *supra* note 1, ss 53, 60.

31. *Ibid.*, s 60(2).

32. Lands Advisory Board, *Framework Agreement on First Nation Land Management*, 12 February 1996, online: First Nation Land Management Resource Centre <<https://labrc.com/framework-agreement/>> [*Framework Agreement*]. It bears mentioning that this agreement emerged amidst the work of the Royal Commission on Aboriginal Peoples, whose focus included the barriers to economic prosperity and self-determination presented by the *Indian Act* reserve system.

33. *Ibid.*, ss 38-41.

34. *FNLMA*, *supra* note 3, ss 6-17.

35. Lands Advisory Board Annual Report, *supra* note 5.

In order to be deemed eligible by the department for entry into the *FNLMA* regime, a First Nation must meet basic requirements related to financial management history and capacity and provide information related to its readiness to adopt and administer its own code.<sup>36</sup> After a successful application has been approved by the Minister, the First Nation must negotiate an individual agreement with the federal government and develop its land code.<sup>37</sup>

Together, the *FNLMA* and the *Framework Agreement* set out the mandatory content requirements for a land code.<sup>38</sup> For instance, land codes must include general rules and procedures applicable to use and occupancy of the lands, such as use and occupancy under licences, leases, certificates of possession, and other member interests, and the granting or expropriation of interests or rights in these lands. They must speak to the procedures that apply to the management of interests at issue in the event of a breakdown of a marriage or in the implementation of a will. Land codes must also identify a forum for dealing with disputes related to these interests or rights, define the rules for enacting land laws, and set out procedures for amending the code. Lands remain reserve lands once the land code is enacted and cannot be alienated except through expropriation by or land exchanges with the federal government.<sup>39</sup> Title to reserve land technically remains vested with the Crown, and this is not affected by a land code.<sup>40</sup>

Both the land code and the associated agreement with the federal government must be ratified by a majority of all eligible voters within the First Nation after independent verification that the code complies with the *Framework Agreement* and the *FNLMA*.<sup>41</sup> Both documents must then be approved by the Minister. Upon the Minister's approval, the control and administration of the First Nation's land and resources are transferred to the First Nation.<sup>42</sup> At this point the First Nation is permanently exempted from the land management provisions of the

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36. *First Nations Land Management Readiness Guide* (2013), online: Indigenous and Northern Affairs Canada < <https://www.aadnc-aandc.gc.ca/eng/1367432545445/1367432634043> >.

37. The individual agreement between a First Nation and the Minister must describe the lands that will be subject to the land management regime. It must also provide for the terms of the transfer of administration of the lands, describe interests that have previously been granted by the Crown in the lands, and set out an interim environmental assessment process. See *FNLMA*, *supra* note 3, s 6(3).

38. *FNLMA*, *supra* note 3, s 6(1); *Framework Agreement*, *supra* note 32, s 5.2.

39. *FNLMA*, *ibid*, s 26; *Framework Agreement*, *ibid*, s 13.3.

40. *FNLMA*, *ibid*, s 5; *Framework Agreement*, *ibid*, s 13.1.

41. *FNLMA*, *ibid*, ss 8-14; *Framework Agreement*, *ibid*, ss 7-11, 44.

42. *FNLMA*, *ibid*, s 16; *Framework Agreement*, *ibid*, s 12.

*Indian Act* and takes on the rights, powers, and privileges of a land owner, along with substantial regulatory powers in relation to First Nation lands.<sup>43</sup>

First Nations are provided with significant discretion regarding approval requirements and other matters that must be dealt with under their land codes. For example, the only matters for which community approval is mandatory are the finalization of the agreement with the federal government, the passage of the land code, and the voluntary exchange of First Nation land with the federal Crown.<sup>44</sup> The *Framework Agreement* and the *FNLMA* do not prescribe what, if any, approval requirements or other limits should be placed on the lease of lands and the transfer of leases and member interests.

For some matters, First Nations have generally chosen to adopt similar provisions in their codes. All First Nations in this study require that interests established after the coming into force of their land code be registered, while pre-existing interests continue in force without registration. All but three First Nations allow for some form of band expropriation of lands,<sup>45</sup> and all but two have established a local body to advise on or make decisions concerning land management under the code.<sup>46</sup> None of the First Nation land codes explicitly prohibits the mortgaging of leasehold interests. And none allow for transfer of a permanent member interest in reserve land to a non-member.<sup>47</sup>

The First Nation Land Management Resource Centre has attempted to provide some guidance on land code content through a model land code, drafted in 2007. This model code suggests, among other things, a requirement for community approval of leases (or lease renewals) on community lands with a term exceeding 25 years, a requirement for band council approval of the transfer

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43. *FNLMA*, *ibid*, ss 18-24; *Framework Agreement*, *ibid*.

44. *FNLMA*, *ibid*, ss 12, 27(4); *Framework Agreement*, *ibid*, ss 7, 14(2).

45. Chippewas of Georgina Island First Nation, Mississaugas of Scugog Island First Nation, and T'Souke First Nation prohibit band expropriation under their codes. See *Chippewas of Georgina Island First Nation Land Code* (9 April 1997), at s 28.1; *Mississaugas of Scugog Island First Nation Land Management Code* (29 August 1997), at s 29.1; *T'souke First Nation Land Code* (11 January 2006), at s 15.1. Codes available online. See FNLM Resource Centre, *supra* note 6.

46. We Wei Kai First Nation and Westbank First Nation do not identify a lands committee in their codes, although Westbank's code allowed for the possibility that such a committee could be established at some point. See *We Wei Kai First Nation Land Code* (1 August 2008); *Westbank First Nation Land Code* (30 April 2003). Codes available online. See FNLM Resource Centre, *supra* note 6.

47. It is not clear that First Nations have the power to allow permanent interests to be transferred to non-members, since the *FNLMA* prohibits the "alienation" of First Nations land. See *FNLMA*, *supra* note 3, s 26(1).

of a leasehold interest to a non-member, and no requirement for council or community approval of the transfer of a member interest to another member.<sup>48</sup>

The land codes adopted by First Nations diverge to a significant extent on the three matters of special interest this article. Of the thirty-three codes we studied, twenty-seven require a vote of the community as a whole to lease community lands to a non-member, while six do not.<sup>49</sup> However, the lease-term threshold for requiring such a vote differs across the communities. Thirteen of the codes have a threshold of 35 years or more, and seven have a threshold of 15 years or less. Only six codes do not require council or other approval for the transfer of an existing leasehold interest to a non-member, while the remaining twenty-seven do require such approval. Ten codes require council or other approval for the transfer of a member interest to another member, while the remaining twenty-three do not.

These differences point to a divergence in the land code choice strategies adopted by First Nations that researchers have already partially identified. In an in-depth study of two *FNLM* codes (those of the Scugog and Muskoday First Nations), Christopher Alcantara observed that one was oriented around strengthening property rights and encouraging investment, while the other emphasized the preservation of customary property interests and collective community control over the land base.<sup>50</sup> Our study suggests that the differing approaches and priorities with respect to these two land codes are part of a wider trend.

Finally, it should be noted that three of the land codes in the sample are no longer in force, having been replaced under self-government or land claims agreements.<sup>51</sup> The dates on which the codes were superseded are noted in Table 1. We have retained these codes in our analysis because they may still provide insight into the characteristics of the communities that adopted them, at the time of adoption.

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48. "Model Land Code" (27 September 2007), online: First Nation Land Management Resource Centre <<https://labrc.com/resources/>>.

49. Communities that do not require a vote of the community as a whole for the granting of a lease to a non-member instead require approval by the band council and/or a land management advisory committee.

50. Alcantara, *supra* note 4.

51. The land codes of the Tla'amin Nation, the Tsawwassen First Nation, and the Westbank First Nation are no longer in force. Details on the agreements that superseded them are provided in notes to Table 1 in the Appendix.

## II. LAND REGIME CHOICE IN CLOSE-KNIT COMMUNITIES

### A. FIRST NATIONS AS CLOSE-KNIT COMMUNITIES

In the analysis that follows, we start from the thesis that a First Nation adopting a land code under the *FNLMA* will usually select a regime that is better adapted to members' interests, understood broadly, than the *Indian Act* regime that preceded it. This approach is intuitive. Barring undue influence from some narrow interest group, it seems reasonable to assume that the land regime chosen by the community's leaders and ratified through a community vote would tend to reflect the interests of community members. This is also consistent with observations that have been made about land regime choice in close-knit communities generally,<sup>52</sup> as well as findings to the effect that a key to successful economic development in Indigenous communities is the devolution of rule-making and institutional design powers to the community level to allow regimes to be tailored to local circumstances and values.<sup>53</sup>

Robert Ellickson famously observed that land rules within a close-knit group evolve in a manner that minimizes members' costs.<sup>54</sup> These costs were understood broadly to include not only material economic well-being but also values related to liberty, privacy, equality, and community.<sup>55</sup> By "close-knit," he meant groups in which power is broadly dispersed and members have regular face-to-face interactions with one another.<sup>56</sup> These requirements ensure that members of the group have both the necessary information to perceive when a rule is too costly relative to its benefits and the power to do something about it when it is.

The thirty-three First Nations in our sample appear to qualify as close-knit. They are small, with an average membership of 1,037 and a median of 840. Only three have more than 2,000 members, and only one, the Opaskwayak Cree Nation, has a membership greater than 3,000. Accordingly, these are communities in which a member can become acquainted with a significant proportion of the

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52. Ellickson, *supra* note 7 at 1320-21.

53. Stephen Cornell & Joseph P Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations" in *What Can Tribes Do? Strategies and Institutions in American Economic Development* (Los Angeles: UCLA American Indian Studies Centre, 1992) 2 [Cornell & Kalt, "Reloading the Dice"]; Stephen Cornell & Joseph P Kalt, "Where's the glue? Institutional and cultural foundations of American Indian economic development" (2000) 29 *Journal of Socio-Economics* 443 [Cornell & Kalt, "Where's the glue?"].

54. Ellickson, *supra* note 7 at 1320.

55. *Ibid* at 1321.

56. *Ibid* at 1320-21.



other members. Information about the effects of land transactions can readily be shared. Moreover, power over land rules is, at least in formal terms, broadly dispersed among community members. Significant changes to rules governing land tenure, including the adoption of a land code, must generally be approved by a vote of the community as a whole. Ellickson's framework, then, provides a basis for suspecting that land tenure rules in these First Nations communities will move in a direction that minimizes members' costs.

The notion that First Nations with the authority under the *FNLMA* to choose their own land tenure regime will tend to select rules that improve on the *Indian Act* is also consistent with a body of literature relating to economic development in Indigenous communities. Indigenous policies have been imposed by Canadian governments over the past 150 years in a top-down manner without regard for local institutions, values, and circumstances. This rigid and centralized approach has long been identified as a source of harm in Indigenous communities.<sup>57</sup> It follows that devolution of decision-making power should provide a basis for the adoption of regimes that are better adapted to local circumstances. The authors of the Harvard Project on American Indian Economic Development reinforce this position, arguing that tribal sovereignty is a key to prosperity in Indigenous communities, in part because it allows for the development of institutions congruent with local culture.<sup>58</sup>

Empirical evidence reveals a high degree of satisfaction among First Nations that have adopted an *FNLMA* land code, at least when comparing their regime to the *Indian Act*. According to surveys conducted in 2009 and 2013 by KPMG on behalf of the First Nations Lands Advisory Board, not a single respondent First Nation with an *FNLMA* land code indicated a desire to return to the *Indian Act* regime.<sup>59</sup> Moreover, bands indicated a high degree of satisfaction with their flexibility in structuring land transactions under the *FNLMA*, as well as their ability to protect community values.<sup>60</sup> While these surveys only addressed the perceptions of the leaders rather than ordinary members of these communities

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57. *Report of the Royal Commission on Aboriginal Peoples*, vol 1, *supra* note 2 at 282-85 & vol 2, *supra* note 2 at 485-519. See also Terry L Anderson, *Sovereign Nations or Reservations?: An Economic History of American Indians* (San Francisco: Pacific Research Institute for Public Policy, 1995) at 161-76.

58. Cornell & Kalt, "Reloading the Dice", *supra* note 53; Cornell & Kalt, "Where's the glue?", *supra* note 53. See also John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 35-40 (in reference to the need for sensitivity to distinctive Indigenous approaches to property in land).

59. KPMG Report I, *supra* note 4 at 36; KPMG Report II, *supra* note 4 at 8.

60. KPMG Report I, *ibid* at 35-37; KPMG Report II, *ibid* at 14.

and were limited to communities that chose to respond to the surveys, they provide at least a tentative basis for concluding that the land codes were an improvement over the prior regime.

The thesis we advance here is not that First Nations adopting a land code will select the best of all possible regimes, but rather that, having had long experience operating under the *Indian Act*, these First Nations will tend to select rules that reflect their experience by moving away from approaches that have proved costly to members' interests. In other words, the land codes will be an improvement over the *Indian Act* regime. For instance, under the *Indian Act*, the transfer of a certificate of possession to another member of the First Nation requires the approval of the Minister. As set out in Table 1, a number of First Nations have replicated an analogous requirement in their land codes by requiring the consent of the band council for such a transfer. Other First Nations have not replicated this requirement, subjecting such transfers only to registration and other formal requirements, but not the discretionary approval of the band council or another body. Our operating assumption is that for bands that eliminated a discretionary approval requirement, the costs were seen to outweigh the benefits, while those that retained this requirement viewed it as a valuable safeguard against some perceived harm that could be associated with liberalized transactions.

If the assumption that First Nations will tend to select rules that reflect their members' interests holds true, then the choices made by communities on important questions like alienability should be intelligible in relation to those interests. Accordingly, one might be able to observe trends in rule choice based on factors that may be related to members' interests, such as the community's remoteness, its level of economic development, the proportion of non-Aboriginal individuals living in the community, and the proportion of band members living off-reserve. In addition, a factor such as the geographic location of the community could serve as a proxy for the political or cultural commitments of members if, for example, First Nations in British Columbia tended to have different commitments from First Nations elsewhere.

## B. CONSIDERATIONS RELATED TO ALIENABILITY

Next, we must examine which types of considerations one would expect to guide First Nations' choices with respect to the alienability of land interests. In general terms, more liberal rules regarding the alienation of land interests can encourage economic development under the right circumstances, particularly where interests

are well-defined and institutions like registries are in place.<sup>61</sup> Restrictions on alienation introduce transaction costs that impede the ability to move land from lower- to higher-value uses.<sup>62</sup> Accordingly, mutually beneficial exchanges may be deterred. It appears that most, if not all, land codes have the effect of reducing transaction costs to at least some extent when compared with the *Indian Act* regime, since they tend to reduce the rather long delays associated with approval and registration of transactions under the *Indian Act*.<sup>63</sup> Yet maintaining council or community approval requirements adds a cost to transactions that would not exist in the absence of such requirements. Restrictions on alienation also often impede the ability of interest holders to use the land as security, thus impeding access to capital.<sup>64</sup> In addition to economic benefits, liberal transfer rules enhance the autonomy of the individual holders of land interests. An individual interest holder with the power to alienate has a greater ability to use the interest to pursue his or her objectives, including by selling the interest, deciding who the next holder will be, or pledging the interest for capital.<sup>65</sup>

Yet alienability can also come with costs, both in strictly economic terms and in terms of other values that fall under the broad heading of community interests. For instance, a collectively held land base can serve an important risk-spreading function in less-developed economies, in that individuals who fall on hard times can rely on the resources of the community.<sup>66</sup> Alienable individual interests can erode this collectively held land base, and thus undermine this risk-spreading function. Alienable land interests can also lead to undue concentrations of interests in the hands of a small number of members, leading to economic

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61. Chief Darcy Bear of the Whitecap Dakota First Nation strongly emphasized the wide range of institutions that need to be in place in order to maximize the benefits of land markets, including zoning, residential taxation, dispute resolution, and business and environmental regulation. See Chief Darcy Bear, *supra* note 18.

62. Epstein, *supra* note 7 at 972.

63. KPMG Report II, *supra* note 4 at 9.

64. A First Nation may act as the guarantor for mortgages on member-held land that cannot be transferred to non-members, and many land codes provide for such arrangements. However, such mortgages often involve higher transaction costs than off-reserve mortgages, because they usually require the approval of the band council and are limited by the band's ability to provide guarantees to creditors. Leasehold interests that require council approval for transfer typically also require council approval for mortgages, adding to the transaction costs associated with such mortgages.

65. Epstein, *supra* note 7 at 971; James W Harris, *Property and Justice* (Oxford: Oxford University Press, 2003) at 30.

66. Ellickson, *supra* note 7 at 1341; Baxter & Trebilcock, *supra* note 8 at 64.

inequality.<sup>67</sup> Because of the costs associated with registries and other trappings of modern land markets, systems of alienable interests are also generally more costly to administer than systems of collectively held land or individual land interests that do not often change hands.<sup>68</sup> Indeed, one possible motivation for requiring approval for on-reserve transactions is that the interests will not be well-defined in the first place. By requiring council approval for a transaction, a community can help mitigate conflicts relating to the definition of land interests.<sup>69</sup> The process of formalizing and defining interests with precision may thus be seen as a precursor to allowing freer transactions, but this process is not without costs.

Alienable land interests also have potential costs related to the community's culture and collective way of life. Generally speaking, alienable land interests are seen to be inimical to the fostering of close-knit communities.<sup>70</sup> Liberal alienation rules can make it easier for non-members to come into the community, and, just as importantly, can make it easier for members to leave.<sup>71</sup> This turnover of people can impede the development of close connections among members. This is an especially pressing concern for a cultural group that forms a small minority within a state. A group that does not maintain close connections among members may succumb to assimilationist pressures. In addition, by privileging the individual autonomy of interest holders, liberal land markets can also be contrary to any collectivist orientation in the traditional culture of the group, and may thus serve to undermine this aspect of the culture.

Alienable land interests can result in a significant erosion of a community's land base, effectively undermining the group's ability to govern activities in its territory in accordance with its distinctive values.<sup>72</sup> While the threat is not quite as acute in the case of leasehold interests as it would be with respect to outright transfer of ownership, long-term leases can effectively reduce the size of a group's collective land base for generations. Even if non-member lessees remain subject to the band's governance powers, market incentives—especially the need to make

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67. Baxter & Trebilcock, *supra* note 8 at 65; Graben, *supra* note 8 at 422; Tom Flanagan & Christopher Alcantara, "Individual Property Rights on Canadian Indian Reserves" (2004) 29:2 Queen's LJ 489 at 512 [Flanagan & Alcantara].

68. Flanagan & Alcantara, *supra* note 67 at 516; Baxter & Trebilcock, *supra* note 8 at 64-65.

69. This was a concern raised with respect to First Nation reserves by a former First Nations chief familiar with land code adoption processes who asked to remain anonymous (personal communication, 26 July 2016) [Anonymous First Nations Chief]. See also Baxter & Trebilcock, *supra* note 8 at 64.

70. Ellickson, *supra* note 7 at 1378.

71. *Ibid.* That said, some First Nations leaders regard reducing the segregation of First Nations people as a benefit that comes with development. See Chief Darcy Bear, *supra* note 18.

72. Lavoie, *supra* note 7 at 1029-49; Graben, *supra* note 8 at 419.

credible commitments to investors—will generally constrain the group's ability to use these powers.<sup>73</sup> Accordingly, alienable interests can pose a significant threat to the collective autonomy of a First Nation.

More precise observations can be made about the three specific types of land regime rules that are the focus of this article and the considerations that are likely to be relevant to a community's decision on these rules. The first set of rules we examine are those pertaining to the granting of a lease in community lands.<sup>74</sup> Most First Nations require a vote of the community as a whole for longer-term leases, with the threshold for holding a vote varying significantly. That said, six First Nations in our sample allow for the lease of community lands for any duration without a community vote.

What considerations might guide a community's decision whether to require a vote of the community as a whole? Such a vote is likely to be costly and time-consuming. Accordingly, a requirement for a vote each time a lease is granted may reduce the band council's ability to manage community lands in a nimble manner in response to changing market forces.<sup>75</sup> The vote requirement adds to the transaction costs involved in acquiring a lease on reserve and may deter otherwise profitable transactions. Thus, there will likely be economic costs associated with requiring community votes for leasing community lands. That said, there may also be economic benefits associated with requiring a community vote. An indication of community support for a lease provides investors with a guarantee that the lease has widespread support in the community.<sup>76</sup> If a lease were supported by council but opposed by community members, a subsequently elected band council might be hostile towards it and seek to terminate it or use its regulatory powers in an uncooperative manner.

These economic considerations may often be outweighed by considerations relating to the effect of a lease on the group's ability to maintain its distinctive culture or way of life. A long-term lease can effectively reduce a First Nation's collectively held land base for generations, restricting its ability to control what

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73. Graben, *supra* note 8 at 432.

74. In order to facilitate comparisons, our article focuses on land code provisions governing the grant of a lease to non-members. However, most codes apply the same requirements for leases to both members and non-members. Communities that apply different rules for leases to members vs. non-members are identified in Table 1 in the Appendix.

75. This was a point emphasized by Drew Lafond, an associate with MLT Aikins LLP and a member of Muskeg Lake Cree Nation, who has experience advising several First Nations on land codes under the *FNLM*A (personal communication, 4 August 2016) [Lafond]. The point was also emphasized by Chief Darcy Bear, *supra* note 18.

76. Anonymous First Nations Chief, *supra* note 69.

goes on in its territory and reducing the space available for traditional activities or members' homes.<sup>77</sup> Members of a First Nation may also harbour distrust towards outside business interests, particularly if the community does not have adequate zoning and other regulatory infrastructure in place.<sup>78</sup> A requirement for a community vote forces a period of reflection prior to such a significant decision and provides an indication that most members believe that the benefits of the lease (most likely economic) do indeed outweigh the costs in terms of the group's collective capacity to govern activities in the territory and maintain its distinctive way of life.

With that in mind, factors that may be relevant in considering whether to require a community vote include the size of the First Nation's reserve land base relative to its population, which may inform the group's apprehension about an effective reduction in collectively held land; the remoteness of the community, which could affect its land development prospects; the level of economic development of the community, which could indicate, on the one hand, an openness to market-based development or, on the other, a perceived need to prioritize economic development in order to improve standards of living; and, finally, the cultural commitments and practices of the group, which may inform its desire to maintain a large collectively held land base governed by traditional norms and available for traditional uses.

This brings us to the second issue examined in our article: whether to require the approval of council for the *transfer* of an existing leasehold interest. This decision is likely to raise slightly different considerations, relating to the community's ability to continue to control specifically who will hold an interest in community lands even after a lease has been granted. The costs involved in requiring approval for such transactions are largely economic. Requiring council approval for the transfer of leasehold interests on reserve is likely to decrease the value of these leases to potential lessees because it introduces a transaction cost as well as a degree of uncertainty. Moreover, all of the communities that require council approval for the transfer of a leasehold interest also, unsurprisingly, require council approval for the mortgage of a leasehold interest. Accordingly, an approval requirement introduces an additional transaction cost and a degree of uncertainty into a lessee's ability to raise credit. Residential and business lessees are likely to value the power to transfer and mortgage their interests freely, and thus would likely be willing to pay a premium for this power. Requiring council approval for transfer of a leasehold interest is thus likely to reduce a First Nation's

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77. *Ibid.*

78. Chief Darcy Bear, *supra* note 18.

ability to profit from the granting of leases. The transaction costs involved in the subsequent transfer of leasehold interests could also deter mutually beneficial exchanges, resulting in a misallocation of land interests on reserve.

The benefits of requiring approval for the transfer of leasehold interests are largely non-economic. A requirement for council to approve the transfer or mortgage of a leasehold interest allows council to exert ongoing control over who can hold an interest in reserve land. This goes to an important aspect of the collective autonomy of a group, namely its ability to choose who will be given substantial powers to manage land in the community through a leasehold interest.<sup>79</sup> This is an important component of a First Nation's ability to control activities in its territory in accordance with its values and priorities. Allowing for the creation of freely alienable leasehold interests means, to some degree, giving up that power.

A factor that could be relevant to a group's decision to require council approval for the transfer of a leasehold interest is the presence of market demand among non-members for residential or business leases on the reserve. If significant demand exists, the community could stand to profit more from the premium that lessees would be willing to pay for leases with transfer rights. This could tip the balance in favour of allowing for alienability. Other relevant factors are similar to those considered when deciding whether to require a community vote for the granting of leases, such as the size of the reserve relative to the First Nations population. A large reserve could make it easier for a community to pursue development plans in one area of the reserve while maintaining a distinctive and cohesive Indigenous community in another part of the reserve. Likewise, the cultural and ideological commitments of the community would also be a factor. Communities more comfortable with markets, or less committed to ensuring robust community control of activities on reserve, would presumably be more open to allowing lease transfers without council approval.

The last set of rules that we examine in this article concerns the *inter vivos* transfer of member interests among members of the First Nation. Member interests are land interests that can only be held by members. They are usually referred to as "certificates of possession" or "allotments" in the land codes analyzed in this study. The communities in the sample are divided on whether to require the approval of council for transfers of such interests. Allowing for the free transfer of member interests could enhance both the economic and individual autonomy interests of members. In economic terms, the absence of an approval requirement reduces both the transaction costs and the uncertainty

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79. Lafond, *supra* note 75.

associated with transferring an interest among members. This helps to facilitate mutually beneficial transactions among willing buyers and sellers. The reduction of transaction costs means that potential sellers are likely to receive a better return from the sale, and potential buyers are more likely to find a seller at an acceptable price. The economic gains from this kind of liberalization might be limited, though, given the small size of the potential market for member interests. Perhaps more significant are the effects on individual autonomy. The absence of an approval requirement enhances the choice set available to individual interest holders and potential buyers. A member who wishes, for example, to leave the reserve is in a better position to do so, while those who live off-reserve and wish to join the on-reserve community are also better able to do so.

However, there are potential economic and non-economic costs associated with allowing unrestrained transactions in member interests. First, transactions of this nature could give rise to inequality in member-held interests, with a small number of community members holding interests over a significant proportion of the reserve and potentially using their interests to provide land for non-Aboriginal businesses and residences. Anecdotal evidence suggests that this is perceived to be an issue for the Westbank First Nation.<sup>80</sup> Inequality of land holdings could have negative effects on the welfare of community members. In addition, it could harm both the cohesiveness of the group and the group's ability to use its reserve lands to preserve its distinctive culture. A majority of First Nations persons in Canada live off-reserve.<sup>81</sup> The lack of available reserve land is sometimes cited as a reason why members who would prefer to live on reserve are unable to do so.<sup>82</sup> Moreover, the adoption of freely alienable member interests could increase the return that a member can expect to receive in selling his or her interest, thus encouraging members to leave the community and live off-reserve. Many see a thriving on-reserve community as an important factor in a First Nation's ability to maintain itself as a distinct cultural entity in the face of assimilationist pressures. Accordingly, the potential for unequal land holdings not only entails the ordinary negative effects associated with economic inequality, but may also serve to constrain the capacity of the community to maintain its distinctive culture.

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80. Flanagan & Alcantara, *supra* note 67 at 512. This was also noted by Lafond, *supra* note 75.

81. Indigenous and Northern Affairs Canada, *Registered Indian Population by Sex and Residence 2014* (2014), online: Government of Canada Indigenous and Northern Affairs Canada <<https://www.aadnc-aandc.gc.ca/eng/1429798605785/1429798785836>>.

82. Anonymous First Nations Chief, *supra* note 69. See also Flanagan & Alcantara, *supra* note 67 at 512.



In addition, allowing member interests to be transferred freely could give rise to conflict if the interests are not well defined. Groups that previously relied on customary interests that were not well-defined might have to incur expenses in providing greater precision and “formalization” of those interests before liberal exchange rules can be adopted.<sup>83</sup> In addition to the administrative costs involved in defining interests with greater precision, the process of formalization might displace traditional norms relating to customary interests, including norms that allow community members to spread the risk of potential adverse events. These could all be perceived as important costs weighing against allowing free alienability of interests among members.

One of the indicators that might inform a community’s decision to require approval for transfers of member interests would be the degree to which member interests in the community are formally defined. In addition, relevant factors could include the amount of reserve land per capita, as well as the proportion of the First Nation’s land base that is allocated to members rather than held collectively. Here as well, however, the cultural and ideological commitments of the community are likely to loom large. Groups with a more traditional or collectivist orientation are more likely to want to retain community control over the allocation of member interests, something that is not fully compatible with alienability.

Additional factors that could be relevant to all three types of rules include fiscal capacity and *status quo* bias. Communities with greater fiscal capacity might have more resources available for overseeing transactions, and therefore may be more likely to adopt approval processes. With respect to *status quo* bias, under the *Indian Act*, the granting of a lease in collectively held reserve land requires a community vote.<sup>84</sup> Moreover, the transfer of either a certificate of possession or a leasehold interest requires the approval of the Minister.<sup>85</sup> It is possible that some communities, long accustomed to oversight of transactions on reserve, are inclined to maintain oversight in part because it is what they are used to.<sup>86</sup> Yet this does not fully explain why some communities would choose to deviate from the *status quo*. It may still be that communities whose members incurred greater costs

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83. Flanagan & Alcantara, *supra* note 67 at 516; Baxter & Trebilcock, *supra* note 8 at 64-65.

84. *Indian Act*, *supra* note 1, s 39.1.

85. *Ibid.*, ss 24, 54.

86. On the tendency of post-colonial governments to continue oppressive and economically harmful policies of their colonial predecessors, see Daron Acemoglu & James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown Publishers, 2012) at 111-13. Our thanks to André Le Dressay for raising this point.

under the restrictive *Indian Act* regime would be more likely to opt for liberal transfer provisions when given the opportunity to adopt a land code.

### III. RESEARCH METHODS AND RESULTS

#### A. DATA SOURCES AND METHODOLOGY

Our study aimed primarily to assess which characteristics of a First Nation correlated with particular choices regarding the granting and transfer of interests under the First Nation's land regime. In order to facilitate comparisons across communities, we selected three variables on which a community adopting a land code faced a discrete choice: (1) whether to require a community vote for a lease of community lands to a non-member; (2) whether to require council approval for the transfer of a leasehold interest to a non-member; and (3) whether to require council approval for the transfer of a member interest to another member. Focusing on these particular issues necessarily means that some of the context of each code is missed, but it allows for ready comparison across First Nations and in terms of economic, demographic and other variables.

Table 1 summarizes the position of each of the thirty-three codes available in the data set on the three variables of interest. In most cases, the position of the code on each of the three issues is readily apparent. In cases where a possible ambiguity exists or the code's position is somehow qualified, Table 1 notes the ambiguity or qualification and explains our classification decision. We sought to compare the choices of communities using demographic, economic and other data from a number of sources. In light of limitations in the data, we sought primarily to assess the characteristics of a community that might lead it to select a particular provision, rather than assessing possible effects of adopting a provision. One exception relates to the increase in off-reserve members that we observed with respect to communities that allowed for free alienation of interests among members. This is discussed in greater detail below at Section E.

Table 2 (in the Appendix) summarizes some of the key variables we used to compare the First Nations in our sample. Sixteen of the thirty-three bands in the sample are located in British Columbia, with the remainder spread among Saskatchewan, Manitoba, and Ontario. In addition, seven of the British Columbia bands are part of the Sto:lo Nation. In terms of assessing the remoteness of a community, we adopted the Indigenous and Northern Affairs

Canada Remoteness Classification, which is used for band funding purposes.<sup>87</sup> Twenty-two of the thirty-three bands are in Remoteness Zone 1, which is defined as being within 50 km of a service centre by road. The remaining eleven bands fall into Remoteness Zone 2, which is defined as being between 50 and 350 km of a service centre by road. None of the communities in the sample fall into Remoteness Zones 3 or 4, which designate the most remote communities.

We used demographic data derived from the federal Indian Register, which tracks the number of registered members of each First Nation on an annual basis, as well as the number living on and off reserve.<sup>88</sup> We also relied on publicly available data from Indigenous and Northern Affairs Canada regarding the physical size of each community's reserve lands.<sup>89</sup> In addition, we used the Aboriginal Population Profile from the 2006 Canadian Census to provide data on the proportion of the population of each reserve that is not a registered Indian.<sup>90</sup> This allowed us to estimate the non-registered-Indian presence on each reserve, which differs significantly among the communities in our study. Unfortunately, a reliable assessment of shifts in the non-First-Nations population in each community in the time period covered by the *FNLM*A was not possible. The 2001 Aboriginal Population Profile was missing many of the communities in our sample, while the 2011 Aboriginal Population Profile relied on data from the voluntary 2011 National Household Survey, which is widely held to be less reliable than and difficult to compare with previous mandatory surveys. The results of the 2017 Canadian Census were not yet available at the time of this study.

In terms of economic indicators, we relied partly on the median income of the Aboriginal population in each reserve community from the 2006 Aboriginal Population Profile.<sup>91</sup> Unfortunately, because of the small size of many of the communities, these data were only available for fifteen of the thirty-three First Nations under study. To supplement this income data, we also calculated the proportion of each First Nation's revenue that came from sources other than government. While this is an imperfect measure of economic development on reserve, it stands to reason that communities with higher levels of economic development will be less dependent on government transfers. This is especially

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87. *Band Support Funding Program Policy* (updated January 2016), online: Government of Canada Indigenous and Northern Affairs Canada <<https://www.aadnc-aandc.gc.ca>>.

88. Data is published in annual reports. See *Registered Indian Population by Sex and Residence 2014*, *supra* note 81. In addition, regularly updated data is available through the Indigenous and Northern Affairs Canada website. See *First Nation Profiles*, *supra* note 19.

89. *First Nation Profiles*, *supra* note 19.

90. Statistics Canada, *2006 Aboriginal Population Profile* (Ottawa: Statistics Canada, 2007).

91. *Ibid.*

so since the federal government does not claw back transfers based on increases in community-generated revenue.<sup>92</sup> We obtained information on First Nation finances from compulsory disclosures under the *First Nations Financial Transparency Act* for 2013-14 and 2014-15.<sup>93</sup> Data allowing us to estimate the proportion of a community's revenues that came from government transfers were available for all but two of the communities in our study.

We also made use of historical data on the share of each First Nation's reserve lands held under leases and certificates of possession. These data originated from the Geomatics Services Office of Indigenous and Northern Affairs Canada and were first collected by Marena Brinkhurst and Anke Kessler for their recent paper on lawful possession of reserve land and its determinants.<sup>94</sup> The data we used gave the acreage and proportion of each First Nation's reserve lands that were under leasehold or certificates of possession. This information was available in five-year increments between 1971 and 2006.<sup>95</sup>

Some qualifications are necessary about the availability and quality of data. We would have liked to include an indicator of the degree to which the pre-*FNLMA* customary interests on a reserve are well-defined, as this could be relevant to a decision regarding transfer restrictions. However, no such indicator seems to exist, at least among publicly available data. Moreover, we would also have liked to assess directly the degree of ownership concentration with respect to certificates of possession, but these data are similarly not available.

Next, something should be said about culture. Short of engaging in a detailed empirical study of the traditions and attitudes in each of the thirty-three communities, it is not possible to assess cultural commitments directly. However, some of the factors for which data do exist could serve as proxies for cultural commitments. The tribal affiliation of a First Nation—for instance, as part of the Sto:lo Nation—or its geographic location could correlate with cultural commitments. Other factors, such as the remoteness of the

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92. *Band Support Funding Program Policy*, *supra* note 87.

93. SC 2013, c 7. The current federal government has indicated that it will stop enforcing this Act, and plans to repeal it. However, band disclosures for 2013-14 and 2014-15 remain publicly available. See *First Nations Profiles*, *supra* note 19. See also Kathleen Harris, "Carolyn Bennett reinstates funds frozen under First Nations Financial Transparency Act" CBC News (18 December 2015), online: <<http://www.cbc.ca/news/politics/bennett-first-nations-transparency-1.3371591>>

94. Marena Brinkhurst & Anke Kessler, "Land Management on First Nations Reserves: Lawful Possession and its Determinants" (2013) Simon Fraser University Department of Economics Working Paper. Our sincere thanks to the authors for sharing this data with us.

95. Data were available for all First Nations in our sample except Tsawwassen.

community, the proportion of members living off reserve, and the size of the on-reserve non-registered-Indian population, could also serve as indicators for the community's degree of integration into the settler society's culture or the degree to which it maintains strong links with its traditional culture. This will be discussed in greater detail in Part IV.

Finally, with only thirty-three communities in the sample, any conclusions to be drawn are necessarily tentative. The challenge of a relatively small sample size is compounded by the fact that *FNLMA* communities whose land codes were not disclosed through the First Nation Land Management Resource Centre were not included in the study. It must be acknowledged that the thirty-three communities included in this study do not constitute a random sample, since there is an element of self-selection in the disclosure of a code through the Resource Centre. That said, the First Nations that were not included in our study all come from the same regions as those that were included: British Columbia, the Prairies, and Ontario. At a general level, the demographic and geographic characteristics of these excluded communities do not differ substantially from those of the communities included in the study.<sup>96</sup> However, self-selection bias cannot be ruled out entirely. Indeed, there is a significant element of self-selection involved in adopting an *FNLMA* land code in the first place. Generalization of the results of this study to First Nations communities as a whole or even to all *FNLMA* communities should therefore be approached with caution. With all these caveats in mind, though, a number of clear trends emerge from the data that are worthy of consideration.

## B. RULES FOR LEASING COMMUNITY LANDS

The large majority of the communities in our sample require a community vote for the lease of community lands to non-members, at least above certain thresholds for the term of the lease. However, six bands do not require such a vote

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96. The mean membership of the excluded communities is 883 vs 1037 for the communities included in the study. On average, 54% of the members of the excluded communities lived off-reserve, compared to 58% among the communities included in the study. Among the excluded communities, 29% are located in remoteness zone 2, and 71% are located in remoteness zone 1. Among the communities included in the study, 33% are located in remoteness zone 2 and 67% are located in remoteness zone 1. A remoteness classification was not available for Shawanaga First Nation. See *First Nation Profiles*, *supra* note 19.

for a lease of any duration.<sup>97</sup> In addition, among the First Nations that require a community vote, the threshold lease term to trigger a vote varies significantly. Some communities require a vote for all leases, while others require a vote only for leases of 50 years or longer.

For the twenty-seven communities that require some form of community vote, we analyzed the factors associated with the threshold for lease length at which a community vote must be held. A shorter threshold means that more potential leases are subject to a community vote requirement. In a single-variable regression, the length of the threshold was correlated negatively with the community's location in BC and positively with the adoption of a rule requiring council approval for the transfer of a leasehold interest. In both cases the results were significant at a 99 per cent confidence level. Accounting for the small sample size, the result with respect to both variables remained reasonably robust in a multivariate regression.<sup>98</sup> In other words, bands with lower lease-term thresholds for community approval were more likely to be from BC and were more likely to allow for the transfer of leasehold interests without council approval.

This analysis of communities that require a vote prior to granting leases points to a land code strategy associated with a number of BC bands, including the Westbank First Nation. These bands are relatively careful about granting leasehold interests in the first place, requiring a demonstration of community consensus in favour of the lease—even a lease of relatively short duration—through a community vote. At the same time, the leasehold interests that are granted are freely alienable. There is an intuitive link between these two propositions. Granting a leasehold interest that is transferable involves surrendering more control than granting an interest the transfer of which is subject to council approval. In the case of a transferable interest, the band gives up its ability to determine on an ongoing basis who will hold a land interest in its community. That said, transferable interests have a greater potential economic upside. The band is likely to reap a higher return on them, as both businesses and residents will tend to place a premium on the ability to sell or mortgage their interest. In addition, the absence of a council approval requirement removes potential transaction costs that could impede the efficient allocation of interests.

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97. The six First Nations whose codes do not require a community vote are Beecher Bay, Shxwha:y, Tla'amin Nation, Squiala, Ts'kw'aylaxw, and Tsawout. In these communities, leases of community lands require approval by the band council and/or a land management advisory committee.

98. In a multivariable regression with both factors, the BC effect remains significant at  $p = 0.07$ , while the transfer requirement effect drops to  $p = 0.11$ . See Table 3 in the Appendix.

It makes sense, though, that a band that decides to opt for the economic benefits associated with freely transferable leases might want to add robust safeguards at the outset of the lease to ensure that the decision to lease has broad support in the community. This appears to be what is happening with the communities that allow for free transfer of leasehold interests but require a community vote for even relatively short-term leases.

Another way of looking at the community vote requirements for granting leasehold interests is to compare the communities that require a community vote for at least some leasehold interests with the six First Nations in our study that do not require a community vote for any length of lease. In these six communities, leases can be granted with the approval of the band council or a land management advisory committee alone. All six of the First Nations that lack a community vote requirement are located in BC. The fact that 99-year leases in these six communities only require council or committee approval seems to indicate a degree of openness to the grant of leases. Yet the approaches taken by these six communities are also consistent with the idea that liberal lease transfer provisions are associated with restrictive lease granting provisions. Five of the six communities that do not require a community vote for the grant of a lease do require council approval for the transfer of a leasehold interest. Thus, liberality with respect to lease transfer is associated with restrictiveness with respect to lease granting, and vice versa.

Another interesting correlation emerged with respect to the share of land under certificates of possession in 2001 (prior to the entry into force of all the codes in our sample except four that came into force in 2000). Having a greater share of land under lawful possession in 2001 was correlated negatively with having a community approval requirement.<sup>99</sup> Those bands with more land held under certificates of possession were thus less likely to require a community vote, perhaps because of a greater degree of openness to individual land interests. However, the share of land under lawful possession did not correlate meaningfully with the threshold for a community vote. Similarly, the proportion of land under leasehold in 2001 did not correlate with either requiring a community vote or the lease-term threshold for such a vote.

Most of the other variables we examined did not correlate with either the length of the lease-term threshold for a community vote or the existence of a community vote requirement. None of the following factors yielded significant results: proportion of community-generated revenue, remoteness classification of the community, number of registered First Nation members in the community,

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99. In a binary logistic regression, the result was significant at  $p = 0.03$ .

hectares of reserve land per registered member, proportion of reserve residents who are not Registered Indians, and membership in the Sto:lo Nation. There was a negative correlation between 2006 median Aboriginal income and the threshold for a community vote, but the significance of this correlation disappeared when we controlled for whether the band was located in BC. Moreover, data for median Aboriginal income were only available for fourteen communities with a vote approval threshold, so this result should be approached with some caution.

### C. RULES FOR TRANSFERRING A LEASEHOLD INTEREST

The data on the transfer of a leasehold interest yielded some interesting results. Both the proportion of the reserve population that were not registered Indians and the location of the band in BC were correlated negatively with the adoption of a requirement for council approval for the transfer of a leasehold interest. Put another way, bands with a significant on-reserve non-First Nations population, according to the 2006 Aboriginal Population Profile, as well as bands from BC were less likely to require council approval for the transfer of a leasehold interest. All six of the First Nations that adopted liberal lease transfer provisions were located in BC.<sup>100</sup> In a binary logistic regression, the proportion of the community that were not registered Indians was correlated negatively with the adoption of approval requirements for lease transfers. This result was significant at a 98 per cent confidence level.<sup>101</sup>

It would appear that the single most important factor that correlates with allowing for the free transfer of leasehold interests is the presence of a significant non-First-Nations population on the reserve. The only reliable data on non-registered-Indian on-reserve populations came from the 2006 Census. Since earlier data are not available, a word of caution is required. Slightly more than half of the land codes in our sample came into force after 2006.<sup>102</sup> The rest came into force after 2002 but before 2006, except for four that came into force in 2000. The correlation between free transfer of leases and proportion of on-reserve non-First-Nations individuals remains significant at a 97 per cent confidence level even when the pre-2002 codes are excluded. It seems unlikely that the non-First-Nations population in communities with pre-2006 codes changed significantly in the years between the adoption of their code and the 2006 Census, although it must be conceded that such changes could be influencing the result.

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100. The six First Nations whose codes do not require council approval are Leqamel, Seabird Island, Tla'amin Nation, Tzeachten, We Wai Kai, and Westbank.

101. See Table 4 of the Appendix, *below*.

102. The years of adoption are set out in Table 1 of the Appendix, *below*.



The best explanation for the correlation between the 2006 non-registered-Indian population and the adoption of freely transferable leasehold interests is probably along the following lines. Communities that already had a significant non-First-Nations population on their reserve lands at the time they adopted a land code likely possessed two characteristics. First, they likely had valuable residential land development prospects. There was demonstrated demand among non-Aboriginals for residential land on the reserve. Second, these communities appear to have been willing to exploit these development prospects prior to the adoption of their land code, most likely using the leasing provisions of the *Indian Act*. This second point needs qualification, since it is possible that some of the pre-*FNLMA* development occurred through leases on land held by individuals under certificates of possession. So it is not necessarily the case that all of the prior non-Aboriginal residential development enjoyed robust support in the community. That said, it is probably the case that some of this development was on community land and thus would have had to garner community support under the *Indian Act*.<sup>103</sup> Accordingly, it seems to be some combination of community attitudes and circumstances that leads a community to adopt liberal lease transfer rules. The communities that adopt such rules seem to have both an openness to using land for development and opportunities to do so.<sup>104</sup>

The economic gains associated with adopting a liberal lease transfer regime are likely to be greater where there is stronger outside demand for acquiring leasehold interests on the reserve. Those interested in acquiring a residential land interest on a reserve are typically willing to pay a premium for the ability to freely sell or mortgage their interest. So it is not surprising that First Nations located in desirable residential areas (like the Okanagan Valley, Vancouver Island, or the Lower Mainland of BC) with demonstrated demand for residential land on their reserves have opted for liberal lease transfer regimes. This is an example of First Nations responding to the incentives presented by their geographic circumstances and opting for a liberal transfer regime where the gains from doing so are greater than they would be elsewhere. As emphasized in the previous section, however, many of these same First Nations have also adopted the safeguard of requiring a community vote at the outset of leases of community lands, even for relatively short leases. This would seem to indicate a keen awareness of the trade-offs

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103. *Indian Act*, *supra* note 1, s 39.1.

104. It has previously been observed that one of the principal early uses of *FNLMA* land codes was to facilitate cottage leases. Flanagan & Alcantara, *supra* note 67 at 515, citing graduate field work by Lana Bryon.

involved in adopting a liberal transfer regime, and the potential threat it poses to ongoing community control of activities on reserve.

A number of other factors did not correlate meaningfully with council approval requirements for lease transfer in a binary logistic regression. The size of the First Nations' membership did not correlate with lease transfer rules, nor did the proportion of community-generated revenue, Aboriginal median income, reserve land per capita, share of land under leasehold or certificates of possession, or the remoteness of the community.

#### D. RULES FOR TRANSFERRING A MEMBER INTEREST

The last aspect of the land codes that we analyzed was the decision whether to require council approval for the transfer of a member interest from one member to another. One weak but suggestive link emerged here with respect to the proportion of residents that were not registered Indians. Using 2006 Census data, we found that communities with a larger proportion of non-registered-Indian residents were more likely to allow free transfer of interests among their own members. This result was only significant at an 89 per cent confidence level in a binary logistic regression, however. It might at first seem curious that the presence of non-First-Nations individuals on the reserve would influence a decision whether to allow free alienation of interests among members. It may be that a non-First-Nations presence in the community makes the community more market-oriented. Perhaps more plausibly, it could be that communities that are inclined to use their land for real estate development are already more market-oriented, and thus more inclined to allow for liberal land markets with respect to member interests.

Aside from this relatively weak correlation between allowing transfer of member interests and the number of non-registered-Indian residents living on reserve, we were unable to find significant correlations between externally-observable characteristics of the communities and the decision to allow free alienation of member interests among members.<sup>105</sup> This may be in part because decisions about whether to allow transfers among members are more closely linked to the particular traditions and cultural commitments of the community, which are more difficult to observe than, say, circumstances relating

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105. None of the following factors offered significant results in a binary logistic regression: median Aboriginal income, the proportion of community-generated revenue, the remoteness classification of the community, the number of registered members of the First Nation, reserve land hectares per registered member, the share of land under leasehold or certificates of possession, and whether the community was in BC.

to the community's land development prospects. It may be necessary to engage in a more detailed examination of the culture, traditions, and institutions of particular indigenous groups in order to provide an accurate picture of what leads a group to allow for the free transfer of land interests among members. It is also possible that other factors for which data are not available predominated. The extent to which existing customary interests are well defined could also be significant, for instance, and we were unable to obtain data relating to this factor.

#### E. LIBERAL MEMBER INTEREST TRANSFER RULES AND COMMUNITY EXIT

While the principal focus of our analysis was on the characteristics of communities that led them to make certain choices in enacting their land codes, we made one observation that relates to the *effects* of rule choice: Communities that did not require council approval for the transfer of a member interest to another member experienced larger increases in the proportion of members living off reserve—that is, outside the community—in the years following the adoption of their land code. More precisely, there was a statistically significant negative correlation between the adoption of a requirement for council approval for the transfer of a member interest and the change in the proportion of members living off reserve between the year before and the third year after the land code came into force. This result was fairly robust. It remained significant at a 99 per cent confidence level when controlling for the population of the community, the proportional increase in the community's total membership over the time period in question, and the share of land under lawful possession in 2001.<sup>106</sup> The results of this regression are presented in Table 5 (in the Appendix).

Recall that under the *Indian Act*, the transfer of a certificate of possession from one member to another requires the approval of the Minister. First Nations that adopted a council approval requirement for the transfer of member interests

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106. We excluded seven communities from this analysis. Five (Henvey Inlet, Muskoday, Opaskwayak, Tla'amin, and Whitecap Dakota) were excluded because they had amended land codes, and it was not possible to determine with certainty which provisions governed the transfer of member interests in the three years following the initial adoption of their land code. Tsawwassen was excluded because we lacked data on the share of land under lawful possession in 2001. Westbank was excluded because the *Westbank First Nation Self Government Agreement* came into effect less than three years after the adoption of the *Westbank First Nation Land Code*, removing Westbank from the jurisdiction of the FNLMA. See *Westbank First Nation Self Government Agreement* (2003), online: <<https://www.aadnc-aandc.gc.ca/eng/1100100031766/1100100031768>>. Including these seven communities in the analysis did not alter the significance of the result with respect to the effect on the change in the proportion of off-reserve members.

effectively opted to keep an analogous restraint on the alienation of member interests in place through their code. By contrast, those communities that did not provide for such an approval requirement removed this alienation restriction entirely. Removing the approval requirement for the transfer of a member interest facilitates community exit by eliminating a transaction cost associated with the sale of a member interest. By doing so, it increases the return that can be expected on such a sale and can enable a relatively small number of members to end up holding a greater proportion of the member interests on the reserve.

The idea that there could be a link between the return that a member can receive in selling his or her interest and the rate of community exit is not novel. Robert Ellickson noted that one of the ways that long-standing communal societies like Hutterite colonies and Israeli kibbutzes discourage exit from the community is by refusing to give members who leave the community a share of the group's property.<sup>107</sup> Members who leave must essentially leave with nothing. The effect of an approval requirement for the transfer of a member interest is much subtler, but the intuition is the same. By increasing transaction costs, such an approval requirement makes it less lucrative to sell one's home and leave the community, and thereby discourages exit from the community.

Since member interests can only be sold to other members, sales of such interests would likely result in an increase in the off-reserve population if they came to be held by a smaller number of members who then put the land to uses other than housing members. Accordingly, if liberal member interest transfer rules lead to increased exit from the community, this is likely linked to an increase in the concentration of ownership of member interests. Unfortunately, data related to the ownership concentration of member interests are not publicly available.

An alternative explanation may be that the causation is in some way reversed. For instance, communities whose members are already leaving the reserve because the community is becoming less closely-knit or less oriented around their traditional culture may be more likely to adopt liberal member interest transfer provisions. However, there was no statistically significant relationship observed between the year-over-year change in the proportion of members living off reserve in the two years prior to the adoption of the code and the decision to require approval for the transfer of a member interest. In other words, it does not appear that communities whose members were already moving off reserve in greater numbers were more likely to adopt liberal transfer rules.

If nothing else, this result may serve to underscore some of the possible reasons why many of the communities have opted to retain alienation restrictions,

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107. Ellickson, *supra* note 7 at 1378.

even for transactions among members. If liberal transfer rules can lead to an increase in members leaving the community or an increase in the ownership concentration of member interests, it makes sense that communities committed to maintaining a close-knit on-reserve community with an egalitarian distribution of land interests would opt to require council approval for the transfer of such interests. All that said, none of this should be taken as a call for communities to adopt council approval requirements for transfers of member interests. Far from it. Even if liberal transfer rules have some costs in terms of ownership concentration or community close-knittedness, it is entirely possible that these costs are outweighed by an improvement in allocative efficiency through the removal of transaction costs related to the sale of member interests, or through the benefits associated with individual autonomy. This is a trade-off best assessed at the community level by community members themselves.

#### F. GENERAL OBSERVATIONS ON LAND REGIME CHOICE

Several more general observations emerge from our land code study. The first is that First Nations located in BC are more likely to adopt leasing provisions that can be termed liberal. All of the bands that allow for either the transfer of leasehold interests without council approval or for the granting of leasehold interests of any length without a community vote are located in BC. This trend is not completely straightforward, given that the groups that allow for the free transfer of leasehold interests, including those in BC, are also more likely to adopt the safeguard of community votes at the outset of even shorter-term leases. Moreover, BC bands do not appear to be more likely to allow unrestrained transfer of member interests. However, there does appear to be a greater tendency on the part of BC bands to allow for liberal provisions with respect to leasehold interests, though the reason is not entirely clear.

One factor that sets most BC First Nations apart from groups in other parts of the country is the absence of an historical treaty relationship with the government. In Ontario and the Prairies, where all of the non-BC First Nations in the study are located, European settlement was generally preceded by agents of the Crown who entered into land cession treaties with First Nations. This gave rise to an ongoing treaty relationship with the Crown. For the most part, historic treaties were not entered into in BC. Perhaps the absence of historic treaty relationships is in some way linked to BC First Nations' present-day approaches to land development. It is difficult to say what role the traditional culture, as opposed to the colonial history, of BC First Nations plays in this trend. While most of the BC First Nations in our sample are coastal, the group

that seems to epitomize the use of transferable leases as a basis for economic development is the Westbank First Nation, in the interior of BC. The traditional cultures of interior and coastal First Nations in BC are seen as quite different. This would seem to complicate any attempt to explain our results based on the traditional cultures of BC First Nations.<sup>108</sup>

Beyond considerations relating to the geographic location of communities, two further observations can be made. First, there appear to be real trade-offs relating to alienability with which the communities in the sample have had to grapple. This is seen in the somewhat startling finding that communities that allow for the free transfer of member interests have a higher rate of exit from the on-reserve community. The potential benefits of liberal transfer rules are well known, but this finding seems to indicate that communities must also weigh the perceived costs of such approaches. This may help explain why ten communities opted to require council approval for the transfer of a member interest, despite the absence of such a requirement in the First Nation Land Management Resource Centre's model code.<sup>109</sup>

Perhaps the clearest indication that significant trade-offs are involved in restraining the alienation of land interests lies with the interaction between lease-granting provisions and lease-transfer provisions. Communities that allow for unrestrained lease transfer apply greater scrutiny in the granting of leases through the use of community votes, even for shorter-term leases. By contrast, among the six First Nations that allow leases of community lands of any duration without a community vote, all but one require council approval for the assignment of a lease.<sup>110</sup> A more liberal approach along one dimension appears to result in the adoption of greater safeguards along another. In our view, the best explanation for this phenomenon is that free alienation can provide economic benefits but can also threaten community control. First Nations' decision-making with respect

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108. That said, one might hypothesize that the traditional legal systems of coastal First Nations, which generally emphasized property in land held by relatively small kinship groups, might have made them more predisposed to individual and family ownership than other First Nations with more collectivist traditions. See Brian Thom, *Coast Salish Senses of Place: Dwelling, Meaning, Power, Property and Territory in the Coast Salish World* (PhD Thesis, McGill University Faculty of Law, 2005) [unpublished] at 270-335. See also Sarah Noël Morales, *Snuw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* (PhD Thesis, University of Victoria Department of Anthropology, 2014) [unpublished] at 223-229. Our thanks to Sarah Morales for a very helpful discussion on this point.

109. Model Land Code, *supra* note 48 at s 35.1.

110. Tla'amin Nation is the one exception. See *Sliammon First Nation: Amended Land Code*, *supra* note 11.

to alienability appears to be motivated by a desire to achieve the right balance among the competing considerations.

Finally, something can be said about the idea that close-knit communities tend to adopt rules that are adapted to their members' interests, broadly defined. This is a difficult claim to assess because of the broad definition of member interests, though in principle it is falsifiable.<sup>111</sup> A number of factors one might have expected to correlate with land regime choice do not seem to do so. These include the median Aboriginal income in the community, the proportion of community-generated band revenue, the amount of reserve land per capita, and the remoteness of the community. That said, there is at least one issue on which we have identified a strong tendency to select rules that are adapted to a First Nation's circumstances: the transfer of leasehold interests. The communities that adopted freely transferable leasehold interests are precisely those communities that stand to gain the most from such interests. These communities are located in areas with a demonstrated demand for residential real estate on the part of non-Aboriginals and have historically demonstrated a willingness to exploit this demand. Even allowing that there are trade-offs in permitting alienable land interests, these are the communities that stand to gain the most from alienability in light of the premium that potential interest-holders should be willing to pay for the power to transfer or mortgage their interests freely. On this dimension, we can see a clear connection between the observable characteristics of a community's circumstances and the rules they adopt.

It should be borne in mind that while this article focuses on readily observable factors like economic and demographic characteristics, some of the most important factors affecting the perception of the trade-offs related to alienability relate to the specific cultural and ideological commitments of community members. For this reason, a fuller understanding of the motivations behind First Nations land regime choice would require an examination of these particular cultural characteristics.

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111. See Robert C Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991) at 182-83.

## IV. CONCLUSION

The *FNLMA* was a major step forward for First Nations seeking to reassert control over their lands by developing rules adapted to their traditions, values, and circumstances. It also provides a unique opportunity to study land regime choice among close-knit cultural minority groups. The First Nations in the present study all lived under the same uniform land regime prior to the *FNLMA* and adopted custom land codes within roughly the same time period. Moreover, demographic and other data on these First Nation communities are much more comprehensive than those available for analogous minority groups in Canada or elsewhere. The detailed annual data on the proportion of each First Nation's members living on and off reserve is a particularly useful resource that allowed us to assess some of the effects of rule choice. The *FNLMA* regime thus provides a good opportunity to study land regime choice in closely-knit minority communities. We hope this article contributes to an understanding of the trade-offs involved in adopting rules relating to the alienability of land interests, both in the context of the *FNLMA* and in general.



## V. APPENDIX

TABLE 1—LAND REGIME CHOICE RELATING TO ALIENABILITY OF INTERESTS<sup>112</sup>

<b>First Nation (Province; Year Land Code Came into Force)</b>	<b>Community Vote Required for Lease of Community Lands to a Non-Member? (Threshold in Years) [Section(s) of code]</b>	<b>Council or Other Approval Required for Transfer of a Leasehold Interest to a Non-Member? [Section(s) of code]</b>	<b>Council or Other Approval Required for Transfer of a Member Interest to Another Member? [Section(s) of code]</b>
Land Advisory Board Resource Centre Template	Yes (25) <sup>113</sup> [s 12.1]	Yes [s 30.5]	No [s 35.1]
Anishinaabeg of Naongashing (ON; 2011)	Yes (35) <sup>114</sup> [s 14.01]	Yes [s 37.01]	No [ss 36.03, 37.01]
Atikameksheng Anishnawbek (formerly Whitefish Lake) (ON; 2009)	Yes (25) [s 12.1]	Yes [s 36.2]	No [ss 34.2, 36.1]
Beecher Bay (BC; 2003)	No [s 20.1]	Yes [s 33.2]	Yes <sup>115</sup> [s 33.1]
Chemawawin (MB; 2010)	Yes (25) [s 12.1]	Yes [ss 30.1, 34.1]	Yes [ss 30.1, 34.1]
Chippewas of Georgina Island (ON; 2000)	Yes (50) <sup>116</sup> [ss 13.3, 13.5]	Yes [s 17.3]	No [s 17.1]
Henvey Inlet (ON; 2010) [Amended Code]	Yes (35) <sup>117</sup> [s 13.01]	Yes <sup>118</sup> [ss 34.01, 36.01]	No [ss 33.03, 34.01]

112. The source for all of the land codes analyzed here was a database of codes maintained by the First Nation Land Management Resource Centre. We accessed and analyzed the codes in May 2017. The codes are available at <<https://labrc.com/resources/land-codes/>>. In addition, copies of the codes are on file with the authors.

113. Community is approval not required for leases to members.

114. Community is approval not required for leases to members.

115. The code prohibits the creation of permanent member interests, and is instead oriented around members holding leases.

116. Community approval is not required for leases to members.

117. Community approval is not required for leases to members.

118. Transfers to non-members for commercial purposes may be exempted from Council approval requirements through a council resolution after community input.

Kahkewistahaw (SK; 2011)	Yes (49/99) <sup>119</sup> [ss 14.6, 14.7]	Yes [ss 14.1, 15.1]	Yes [ss 14.1, 15.1]
Kinistin Saulteaux (SK; 2005)	Yes (35) [ss 15.2, 15.3]	Yes [s 22.1]	Yes [s 22.1]
Leqamel (BC; 2010)	Yes (15) [s 13]	No [s 16.3]	No [ss 12.6, 16.1]
Lheidli T'enneh (formerly Fort George) (BC; 2000)	Yes (0) <sup>120</sup> [ss 12, 34.1, 34.2]	Yes [ss 30.5, 35.2]	No [s 35.1]
Matsqui (BC; 2009)	Yes (49) [s 23.1]	Yes [ss 36.1, 36.2]	Yes <sup>121</sup> [s 36.2]
McLeod Lake (BC; 2003)	Yes (15) [ss 11.1, 32.1]	Yes [ss 34.1, 35.2]	No <sup>122</sup> [ss 33.1, 35.1]
Mississauga (ON; 2009)	Yes (25) [ss 12.1, 32.1]	Yes [s 35.2]	No [s 35.1]
Muskeg Lake (SK; 2005)	Yes (35) [ss 12.1, 32.1]	Yes [s 35.2]	No [s 35.1]
Muskoday (SK; 2000) [Amended Code]	Yes (35) <sup>123</sup> [ss 14.1, 14.3, 16]	Yes [s 18.1]	Yes [s 18.1]
Nipissing (ON; 2003)	Yes (35) <sup>124</sup> [ss 15.1, 35.1]	Yes [s 38.2]	No [ss 36.2, 38.1]
Opaskwayak Cree Nation (MB; 2002) [Amended Code]	Yes (40) [s 12.1]	Yes [s 34.2]	Yes <sup>125</sup> [s 34.2]
Seabird Island (BC; 2009)	Yes (25) <sup>126</sup> [ss 19.3, 19.4]	No [s 23.1]	No [ss 20.1, 23.1]
Mississaugas of Scugog Island (ON; 2000)	Yes (25) <sup>127</sup> [ss 13.3, 13.5]	Yes [s 17.3]	No [s 17.1]

119. The 99-year threshold applies to residential leases only. Community approval is not required if lease is for utility purposes.

120. Community approval is not required for leases to members.

121. The code prohibits the creation of permanent member interests, and is instead oriented around members holding leases.

122. The code prohibits the creation of permanent member interest, and instead is oriented around members holding leases.

123. Community approval is not required if the lease is for utility purposes.

124. Community approval is not required for leases to members.

125. The approval requirement is subject to any land law to the contrary.

126. Community approval is not required if the lease is for utility purposes.

127. Community approval is not required for leases to members.

Shxw̓ha:y (BC; 2007)	No [s 29.1]	Yes [ss 32.1, 32.2]	Yes <sup>128</sup> [ss 32.1, 32.2]
Skawahlook (BC; 2010)	Yes (50) [ss 51, 53, 54; 103]	Yes [s 29]	No [ss 28, 40, 42]
Tla'amin Nation (formerly Sliammon) <sup>129</sup> (BC; 2004)	No [ss 33.1]	No [s 31.6]	No [s 34.3]
Squiala (BC; 2008)	No [s 30.4]	Yes [ss 28.4, 33.5]	Yes [ss 31.2, 33.1]
Swan Lake (MB; 2010)	Yes (45) <sup>130</sup> [ss 13.1; 32.1]	Yes [ss 33.2, 35.1]	No [s 35.1]
Ts'kw'aylaxw (formerly Pavilion) (BC; 2004)	No [s 20.1]	Yes [s 32.2]	Yes [ss 30.2; 32.1]
T'Sou-ke (BC; 2007)	Yes (25) <sup>131</sup> [ss 12.1; 32.1]	Yes [ss 30.5, 35.2]	No [ss 33.2; 35.1]
Tsawwassen <sup>132</sup> (BC; 2003)	Yes (25) [ss 12.1; 32.1]	Yes [s 35.2]	No [ss 33.2; 35.1]
Tsawout (BC; 2007)	No [ss 28.1; 28.4]	Yes [s 31.2]	No [ss 29.2; 31.1]
Tsleil-Waututh (formerly Burrard) (BC; 2007)	Yes (15) [ss 11.1; 11.2]	Yes [s 15.6]	No [ss 15.2; 15.5; 15.6]
Tzeachten (BC; 2008)	Yes (15) [ss 4.9; 9.14]	No [s 9.28]	No <sup>133</sup> [ss 9.25; 9.26]
We Wai Kai (formerly Cape Mudge) (BC; 2009)	Yes (0) [ss 11.1; 11.2; 11.9; 11.10]	No [s 15.4]	No [ss 15.1; 15.2; 15.5]

128. The code prohibits the creation of permanent member interests, and is instead oriented around members holding leases.

129. On 5 April 2017, the *Tla'amin Final Agreement* came into effect, removing the Tla'amin Nation from the jurisdiction of the *FNLMA* and transferring existing reserve land to the Tla'amin in fee simple. *Tla'amin Final Agreement*, *supra* note 11.

130. Community approval is not required for leases to members.

131. Community approval is not required for leases to members.

132. On 3 April 2009, the *Tsawwassen Final Agreement* came into effect, removing the Tsawwassen Nation from the jurisdiction of the *First Nations Land Management Act* and transferring existing reserve land to the Tsawwassen in fee simple. See *Tsawwassen First Nation Final Agreement Act*, SC 2008, c 32.

133. The position of the code on this matter is not entirely clear on its face. We clarified the practice of the Tzeachten First Nation through communication with Deanna Honeyman, Lands Manager, Tzeachten First Nation, who confirmed that council approval is not required.

Westbank <sup>134</sup> (BC; 2003)	Yes (15) [ss 11.1; 11.2]	No [s 15.4]	No [ss 15.1; 15.2; 15.5]
Whitecap Dakota (SK; 2004)	Yes (49/99) [s 14.6]	Yes [ss 15.1, 15.2]	Yes [ss 15.1; 15.2]

**Notes on the Interpretation of Land Codes:**  
**Community Vote Required for Lease of Community Lands to Non-Member?**  
**(Threshold in Years)**

Most First Nations require some form of community vote for the granting of longer-term leases in community-held lands. Most communities apply the same rules to leases to members and non-members alike, but some codes differ along these lines. Our focus here was on whether a community vote is required for leases to non-members. These votes may take place either in the form of a community meeting or a referendum. This column indicates whether a community vote is required for the granting of some leasehold interests in community lands. The number in brackets indicates the threshold in years of the term of the lease beyond which a community vote is required. For leases with terms less than the number in brackets, a lease can normally be granted with a band council resolution only. For leases with terms greater than the number in brackets, a community vote is required. Some First Nations make exceptions for leases granted to utilities. These exceptions are indicated with footnotes.

**Council or Other Approval Required for Transfer of a Leasehold Interest to a Non-Member?**

Lease assignment rules are typically set out in a fairly straightforward fashion. In some communities, different rules apply depending on whether the lease is being assigned to a member or a non-member. We focused on the rules that prevailed for transfer to a non-member.

**Council or Other Approval Required for Transfer of a Member Interest to Another Member?**

For most First Nations, this refers to the rules governing the transfer of permanent possessory interests, which are termed “allotments” or “certificates of possession”. However, there are four First Nations, Beecher Bay, Matsqui, McLeod Lake and Shxw̓ha:y, that prohibit the creation of permanent member interests and instead foresee members holding leasehold interests only. For these bands, this column reflects the rules governing member transfer of a leasehold to another member.

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134. On 1 April 2005, the *Westbank First Nation Self Government Agreement* came into effect, removing the Westbank First Nation from the jurisdiction of the FNLMA. See *Westbank First Nation Self Government Agreement*, *supra* note 106.

TABLE 2—SELECTED COMMUNITY CHARACTERISTICS

First Nation (Province)	Total Members (2017) <sup>135</sup>	Percentage of Membership Living Off-Reserve (2017) <sup>136</sup>	Remoteness Classification Zone <sup>137</sup>	Percentage of On-Reserve Population That Is Not a Registered Indian (2006) <sup>138</sup>	Increase in Percentage of Membership Living Off-Reserve in the Three Years Following the Adoption of the Code <sup>139</sup>
Anishinaabeg of Naongashing (ON)	428	53%	2	0%	2%
Atikameksheng Anishnawbek (formerly Whitefish Lake) (ON)	1232	65%	1	7%	4%
Beecher Bay (BC)	254	56%	1	21%	-3%

135. Data on each First Nation's membership size came from the federal Indian Register, which is updated online several times per year on the Indigenous and Northern Affairs Canada website. See *First Nation Profiles*, *supra* note 19. Data for 2017 was accessed electronically in May 2017. Data for past years came from the annual reports on First Nations population published by Indigenous and Northern Affairs Canada. See *e.g. Registered Indian Population by Sex and Residence 2014*, *supra* note 81.

136. Data on the proportion of each First Nation's membership living off-reserve came from the federal Indian Register, which is updated online several times per year on the Indigenous and Northern Affairs Canada website. See *First Nation Profiles*, *supra* note 19. Data for 2017 was accessed electronically in May 2017. Data for past years came from the annual reports on First Nations population published by Indigenous and Northern Affairs Canada. See *e.g. Registered Indian Population by Sex and Residence 2014*, *supra* note 81.

137. The remoteness classification is based on the formula in the Indigenous and Northern Affairs Canada *Band Support Funding Program Policy*, *supra* note 87. There are four remoteness categories (1, 2, 3, and 4). All the First Nations in the sample fell into either Category 1 or Category 2. 22 of the 33 First Nations fell into Remoteness Zone 1, which is defined as being within 50 km of a service centre by road. The remaining 11 bands fell into Remoteness Zone 2, which is defined as being within 50 to 350 km of a service centre by road. None of the communities in the sample fell into remoteness zones 3 or 4, which designate the most remote communities.

138. *2006 Aboriginal Population Profile*, *supra* note 90.

139. These data were derived from the annual reports on First Nations population published by Indigenous and Northern Affairs Canada. See *e.g. Registered Indian Population by Sex and Residence 2014*, *supra* note 81.

Chemawawin (MB)	1852	19%	2	3%	0%
Chippewas of Georgina Island (ON)	898	77%	2	N/A	-1%
Henvey Inlet (ON)	840	77%	2	13%	3%
Kahkewistahaw (SK)	1970	68%	2	3%	-1%
Kinistin Saulteaux (SK)	1012	62%	2	0%	2%
Leqamel (BC)	411	67%	1	76%	3%
Lheidli T'enneh (formerly Fort George) (BC)	429	77%	1	1%	10%
Matsqui (BC)	266	56%	1	73%	-1%
McLeod Lake (BC)	551	74%	2	0%	6%
Mississauga (ON)	1302	70%	2	12%	3%
Muskeg Lake (SK)	2059	82%	2	0%	-1%
Muskoday (SK)	1883	66%	1	0%	1%
Nipissing (ON)	2672	63%	1	39%	2%
Opaskwayak Cree Nation (MB)	5943	45%	1	8%	0%
Seabird Island (BC)	979	38%	1	10%	2%
Mississaugas of Scugog Island (ON)	233	78%	1	36%	-2%
Shxw̓ha:y (BC)	412	75%	1	0%	-2%
Skawahlook (BC)	87	87%	1	N/A	1%
Tla'amin Nation (formerly Sliammon) (BC)	1083	45%	1	N/A	7%
Squiala (BC)	219	33%	1	0%	3%

Swan Lake (MB)	1402	58%	2	0%	12%
Ts'kw'aylaxw (formerly Pavilion) (BC)	565	51%	2	9%	1%
T'Sou-ke (BC)	258	49%	1	31%	5%
Tsawwassen (BC)	365	48%	1	73%	7%
Tsawout (BC)	904	31%	1	67%	2%
Tsleil-Waututh (formerly Burrard) (BC)	580	26%	1	N/A	0%
Tzeachten (BC)	522	49%	1	78%	7%
We Wai Kai (formerly Cape Mudge) (BC)	1121	65%	1	16%	4%
Westbank (BC)	858	47%	1	92%	0%
Whitecap Dakota (SK)	636	51%	1	4%	1%

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**TABLE 3—LINEAR REGRESSION RESULTS (THRESHOLD FOR COMMUNITY VOTE)**  
Dependent Variable: Threshold of leasehold duration at which a community vote is required for leases to non-members (years)<sup>140</sup>

Multiple R	0.60					
R Square	0.36					
Adjusted R Square	0.31					
Standard Error	12.01					
Observations	27					
<b>ANOVA</b>						
	df	SS	MS	F	Significance F	
Regression	2	1981.89	990.94	6.87	0.00	
Residual	24	3464.11	144.34			
Total	26	5446.00				
	Coefficients	Standard Error	t Stat	P-value	Lower 95%	Upper 95%
Intercept	24.63	7.69	3.20	0.00	8.76	40.50
Transfer of a leasehold interest to a non-member - council approval required? (yes = 1; no = 0)	11.57	7.03	1.64	0.11	-2.95	26.09
BC? (1=yes; 0=no)	-10.63	5.50	-1.93	0.07	-21.98	0.72

140. Six of the 33 First Nations in the sample were excluded from this analysis, because these communities do not require a community vote at any threshold for the length of a lease. The excluded communities were Beecher Bay, Shxw̓ha:y, Tla'amin Nation, Squiala, Ts'kw'aylaxw, and Tsawout.



**TABLE 4—BINARY LOGISTIC REGRESSION RESULTS (LEASE TRANSFER)**

Dependent variable: Approval requirement for transfer of a leasehold interest to a non-member (1 = yes; 0 = no)<sup>141</sup>

<b>Regression Statistics</b>				
Number of Observations	29			
Count of Dep Var = 1	24			
Count of Dep Var = 0	5			
Mean of Dep Var	0.83			
Std Error of Dep Var	0.38			
Sum of Squares of Residuals	3.07			
Std Error of Regression	0.34			
Log Likelihood	-10.33			
Average Log Likelihood	-0.36			
Restricted Log Likelihood	-13.33			
Akaike IC	0.85			
Schwarz IC	0.94			
Hannan Quinn IC	0.88			
McFadden R Squared	0.23			
LR Statistic (0 d.f.)	6.00			
Prob of LR Statistic	0.01			
	Coefficients	Standard Error	Z-Score	P-value
Constant	2.88	0.93	3.09	0.00
Proportion non-registered (2006 NHS)	-3.89	1.71	-2.27	0.02

141. Four communities were excluded from the analysis due to a lack of census data on the proportion of the on-reserve population that is not a registered Indian. The excluded communities were Tsleil-Waututh, Skawahlook, Chippewas of Georgina Island, and Tla'amin Nation.

TABLE 5—LINEAR REGRESSION RESULTS (OFF-RESERVE MEMBERS)

Dependent variable: increase in proportion of members living off reserve from one year prior to the adoption of the code to three years after the adoption of the code<sup>142</sup>

Regression Statistics						
Multiple R	0.56					
R Square	0.31					
Adjusted R Square	0.18					
Standard Error	0.03					
Observations	26					
ANOVA						
	Df	SS	MS	F	Significance F	
Regression	4	0.01	0.00	2.41	0.08	
Residual	21	0.02	0.00			
Total	25	0.03				
	Coefficients	Standard Error	t Stat	P-value	Lower 95%	Upper 95%
Intercept	0.03	0.02	1.47	0.16	-0.01	0.06
Share under lawful possession (2001)	-7.60E-04	4.87E-04	-1.57	0.13	1.78E-03	2.47E-04

142. We excluded seven communities from this analysis. Five (Henvey Inlet, Muskoday, Opaskwayak, Tla'amin, and Whitecap Dakota) were excluded because they had amended land codes, and it was not possible to determine with certainty which provisions governed the transfer of member interests in the three years following the adoption their land code. Tsawwassen was excluded because we lacked data on the share of land under lawful possession in 2001. Westbank was excluded because the *Westbank First Nation Self Government Agreement* came into effect less than three years after the adoption of the *Westbank First Nation Land Code*, removing Westbank from the jurisdiction of the *FNLMA*. Including these seven communities in the analysis did not alter the significance of the result with respect to the effect of the council approval requirement on the change in the proportion of members living off-reserve. See *Westbank First Nation Self Government Agreement*, *supra* note 106.

Proportion increase in registered members from year prior to code to three years after code	0.13	0.09	1.35	0.19	-0.07	0.32
Population the year prior to code	2.44E-06	1.21E-05	0.20	0.84	-2.3E-05	2.76E-05
Community/ Council Approval Required for Transfer among members (1=yes; 0 = no)	-0.04	0.01	-2.96	0.01**	-0.08	-0.01

