



Indigenous lands: Tenure & boundaries

RPD 6290 - Indigenous experiences & relations

University of Guelph

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Tripartite structure

PARCELS & BOUNDS

LAND TENURE

EMPIRICAL STUFF

Reconciliation – Context

Rooted in:

- *Constitution Act 1982, s35* (Aboriginal & treaty rights affirmed = inherent)
- RCAP (October 1996)
- UNDRIP (Sept 2007 & May 2016) – 46 Articles. Article 34:
 - Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and ... juridical systems or customs
- TRC Calls to Action (June 2015) – 92 Calls
- *Bill 262: To ensure that laws are in harmony with UNDRIP*
 - May 2018: 3rd Reading, House of Commons & 1st Reading, Senate
 - June 2019: Died with end of Parliament

Honour of the Crown

Relationship founded on good faith, trust, cooperation, openness, fairness, consultation and reasonableness (*Earl of Rutland case*, 1608)

- Rooted in persuading Indigenous peoples that their rights were best protected by the Crown
- Thus, the Crown is obligated to act in the best interests of the First Nation

References:

Guerin v. Queen (1984) SCC

First Nation of Nacho Nyak Dun v. Yukon (2017) SCC



Minimal impairment

- Crown can take land from IR for public use
- But, Crown to take “only minimum interest required” to ensure “minimal impairment of use and enjoyment of Indian lands”



References:

Osoyoos Indian Band v. Town of Oliver (2001) SCC
St. Mary's Indian Band v. Cranbrook (City) 1997 SCC

Part 1 – Indigenous parcels & bounds

1631: “Very exact and punctual in the bounds of their lands ... I have known them to make bargain and sale for a small piece of land.” (Riley, 2013)

1700’s: Inuu (Quebec) demarcated parcels of 4 sq leagues (32 sq km) for trapping purposes. (Demsetz, 1967)

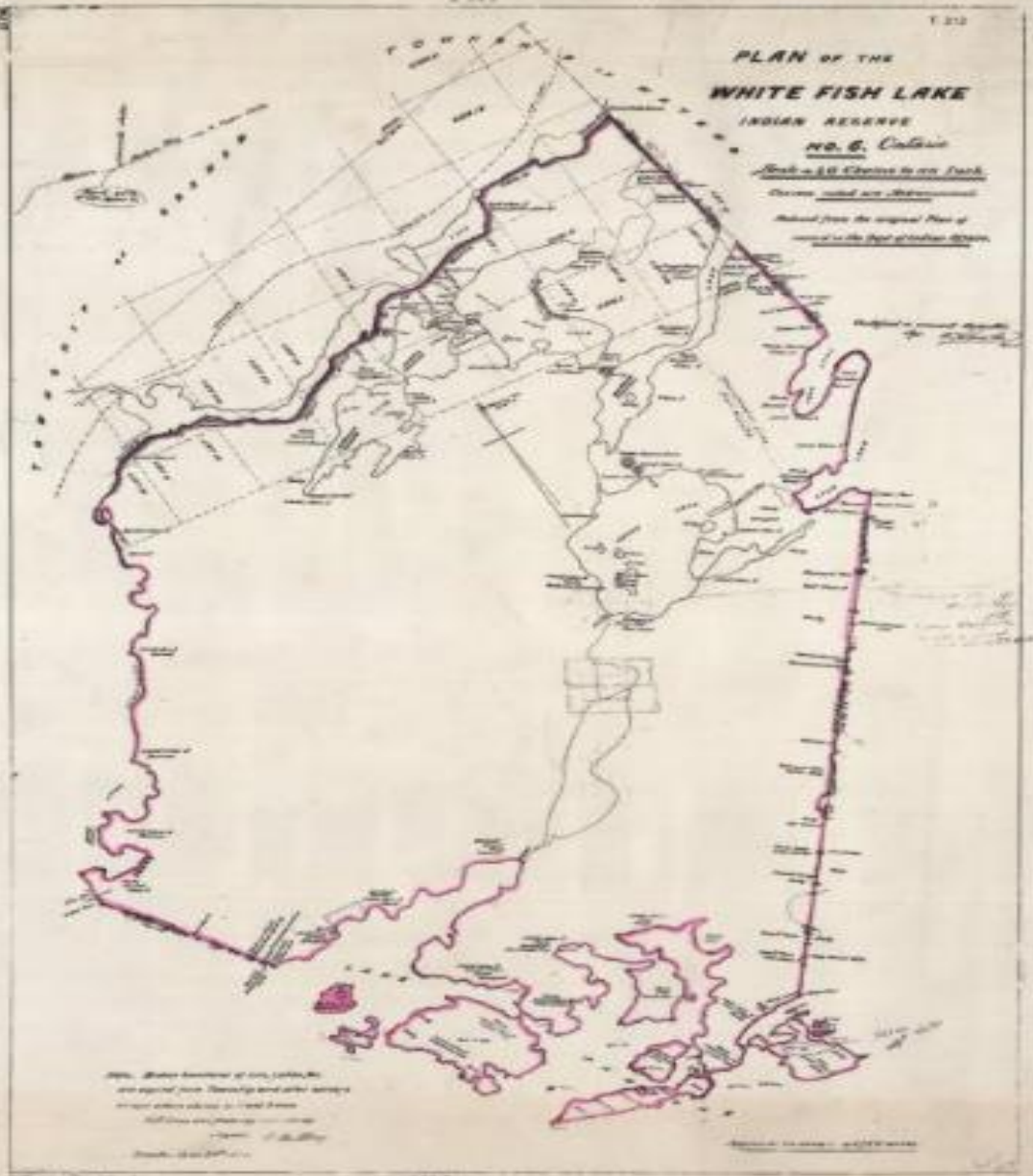
1764: First Nations were “perfectly well acquainted with their boundaries.” Six Nations understood fee simple, leasing, severing, transferring and registering rights in land. (Riley, 2013)

1850: *Robinson-Huron Treaty* – Whitefish Lake First Nation defined its parcel using nine monuments: From a lake known as “the place of high cranberries,” to Keecheemenessing (“Great Island”), to “an island where there stands a tree having a spreading top,” to ... (*AG v Francis*, 1889)

PLAN OF THE WHITE FISH LAKE INDIAN RESERVE

NO. 6. Contain

Plan of the Reserve in its
entirety, with an
insert from the original Plan of
the Department of the Interior.



Scale: 1 inch = 1 mile
 and equal to 1/250,000
 and equal to 1/250,000
 and equal to 1/250,000
 and equal to 1/250,000

Indian Reserve = parcel, with boundaries

R v. Weremy, (1943)

- No trespass on Reserve by settlers
- Reserves to be held for use/benefit of FN



575 First Nations = 3,100 IR* = 35,524* sq km



Much variation across communities

Six Nations Reserve (18,000 ha - 10,000 people)



Sand Point Reserve (987 ha - 0 people)



Creating an IR

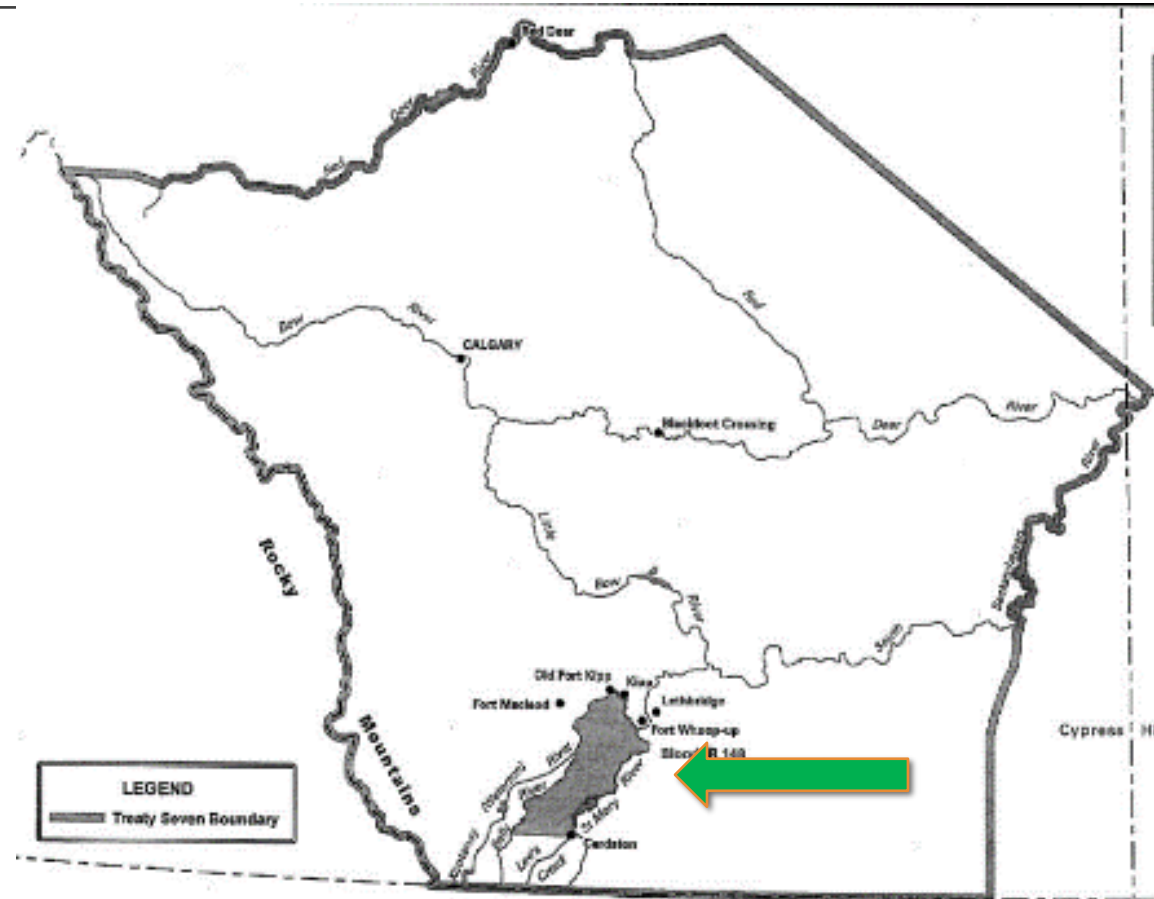
- Crown has intention;
- Intention is possessed by Crown agents with authority;
- Steps are taken to set parcel aside for benefit of First Nation (e.g. survey of bounds, Order-in-Council confirming bounds as surveyed);
- First Nation accepts the setting aside and uses parcel.



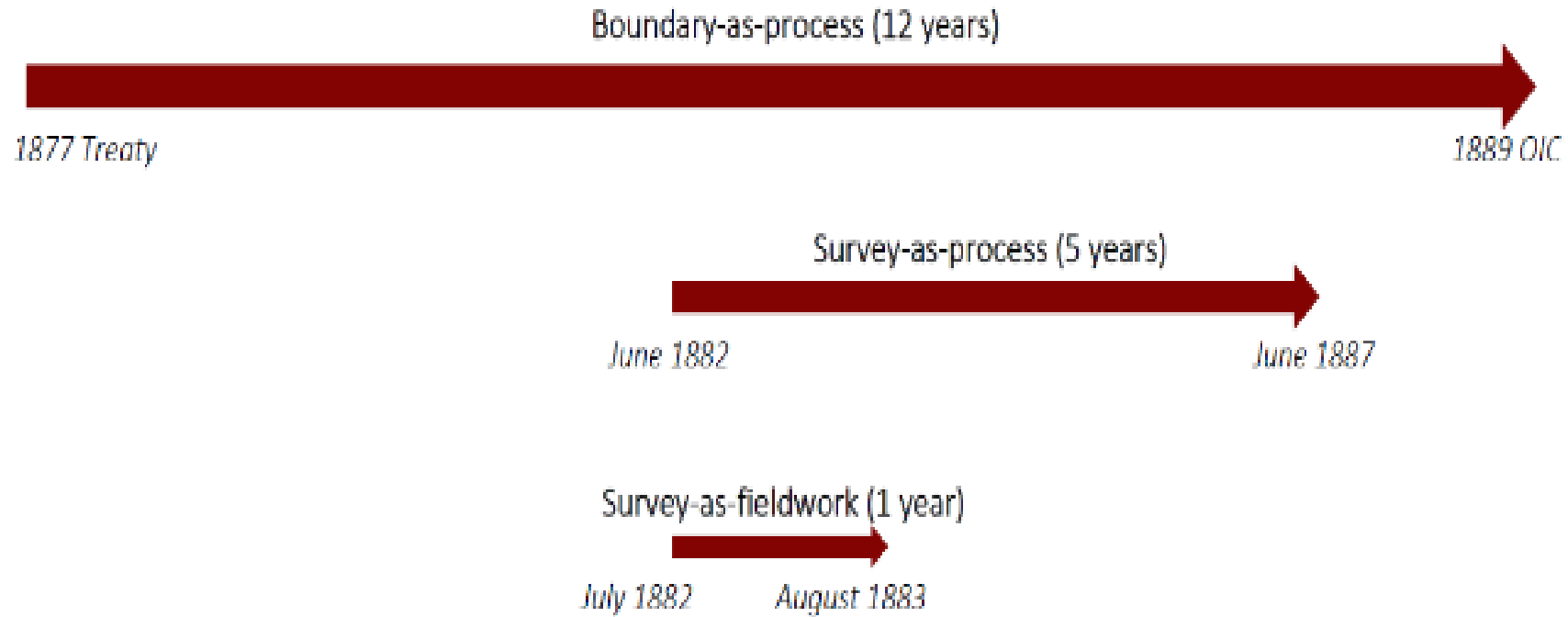
References:

Ross River Dene Council Band v. Canada (2002) SCC
Madawaska Maliseet First Nation v. Queen (2017) SCT

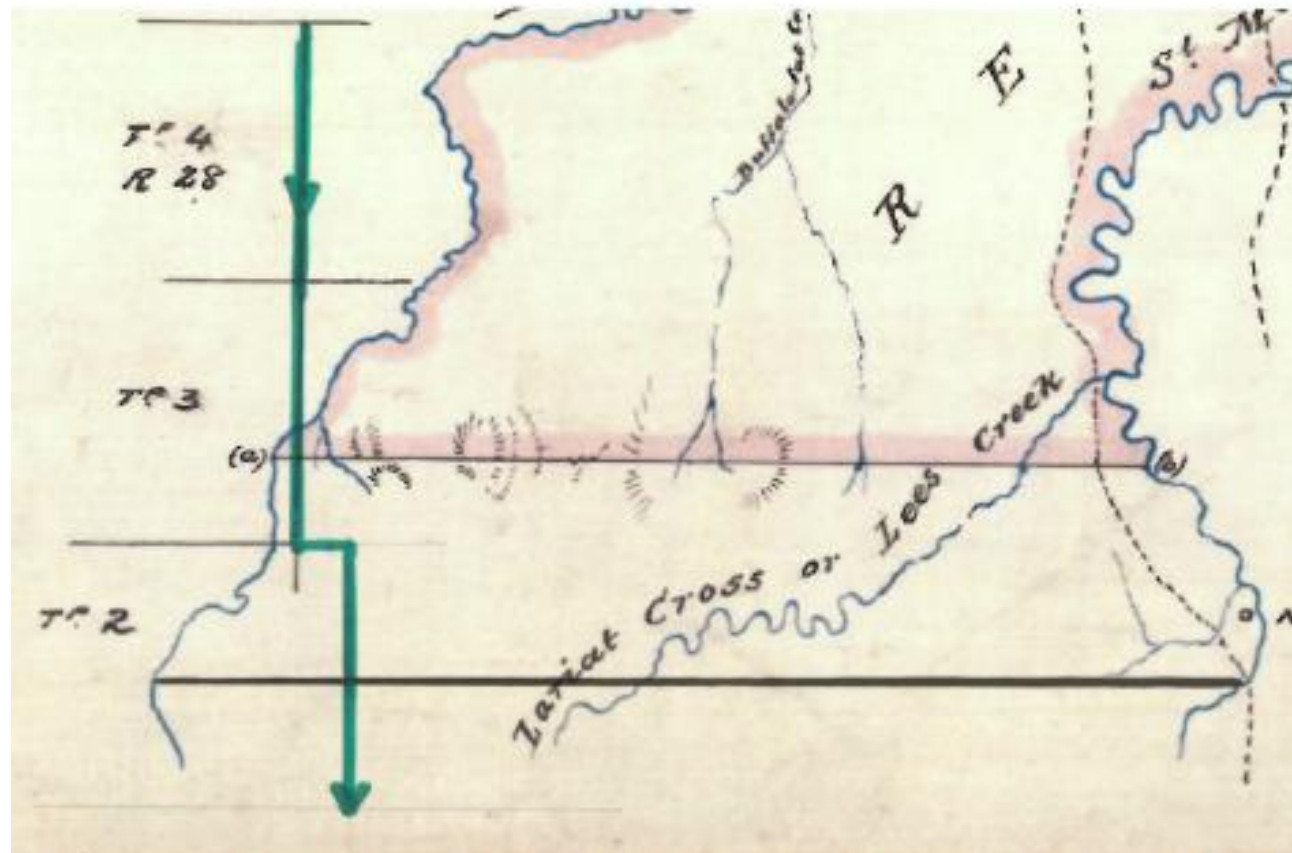
Blood IR 148 within Treaty 7 (1877)



Jim Shot Both Sides v Queen, 2019 FC 789



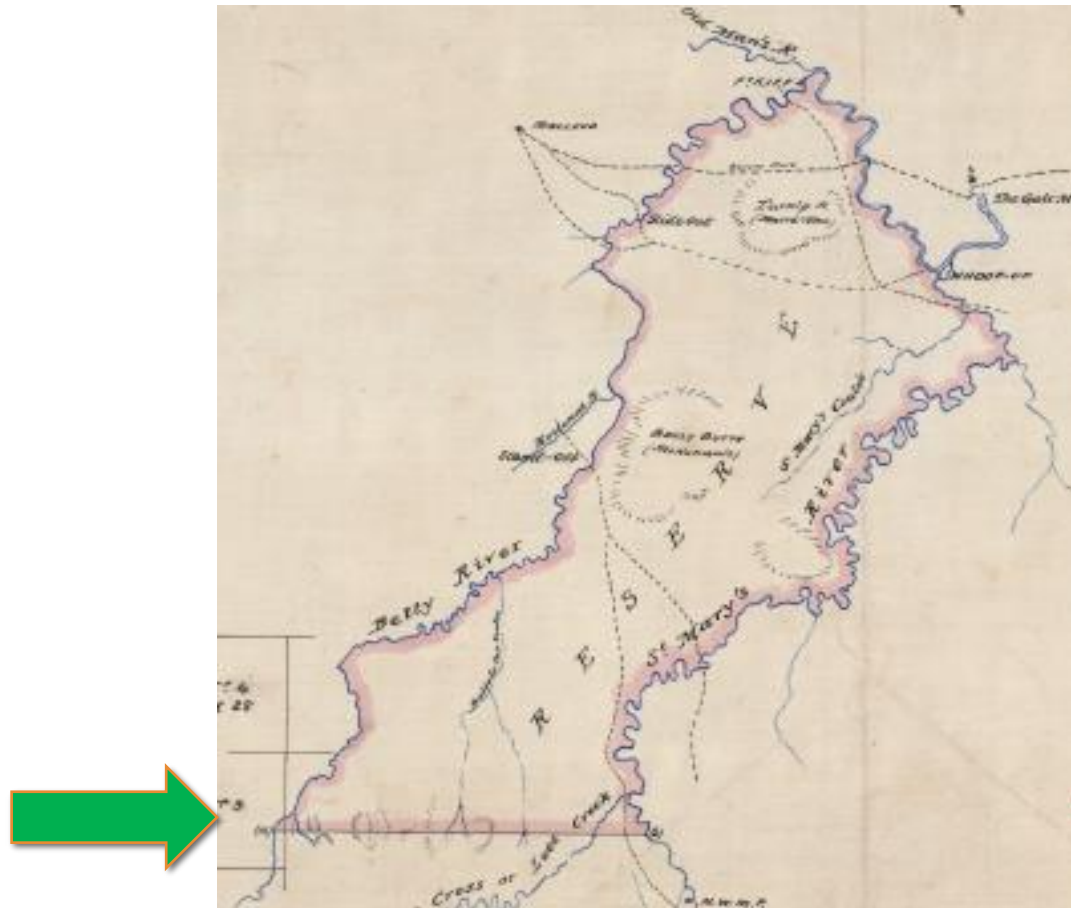
Nelson 1882 (black); Nelson 1883 (pink)



Interior map (1883): “Blood IR” = 9 mi N



Plan 323 (1885): South bound = 14 mi N



Decision re: IR creation

Issue: 650 sq mi (1882) vs 548 sq mi (1883)

Judgment: IR established in 1882

- IR CAN get larger during survey process; IR CANNOT get smaller!
- South boundary = 9 mi N of Int'l Bound (NOT 14 mi N)

Sufficient particularity

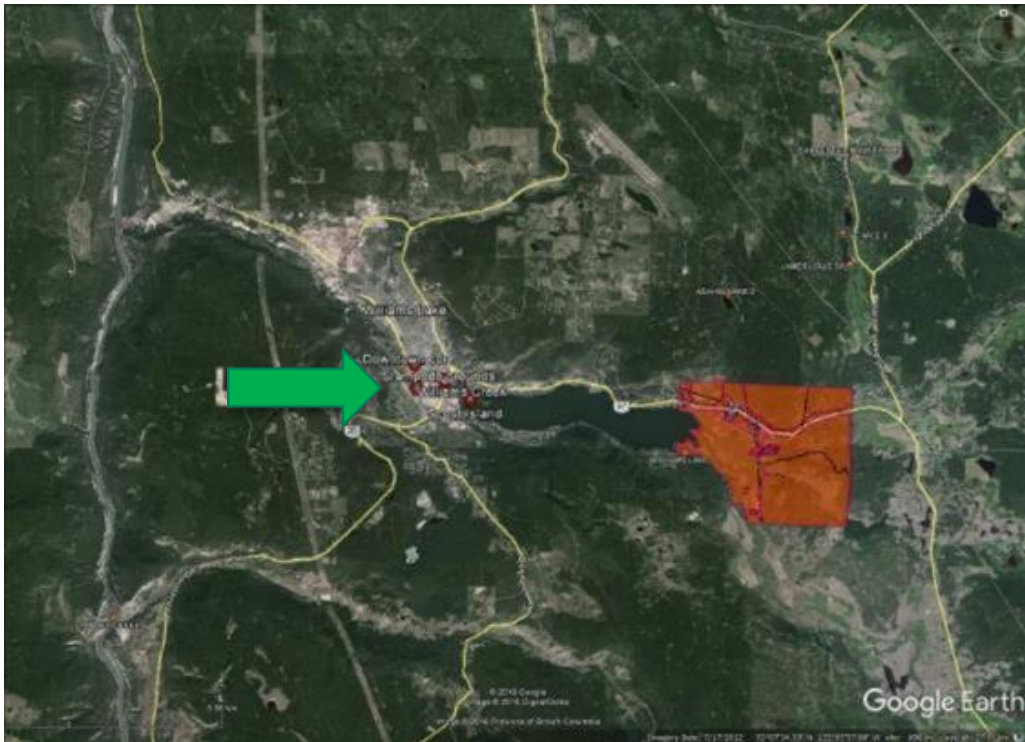
299: "The intention to create a reserve need not be an intention to create a *specific* reserve with defined bounds."

307: "The 'initial surveys' set apart land for these reserves."

316: "The boundaries of the Blood reserve had been established with sufficient particularity [in 1882]."

Promises to IR are binding

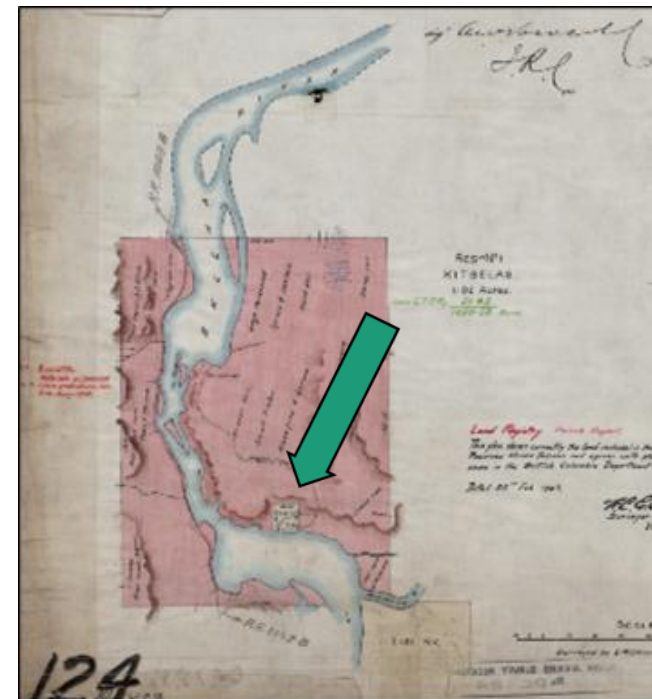
- Cannot locate settlers on lands used by First Nation communities; FN communities are NOT to be disturbed



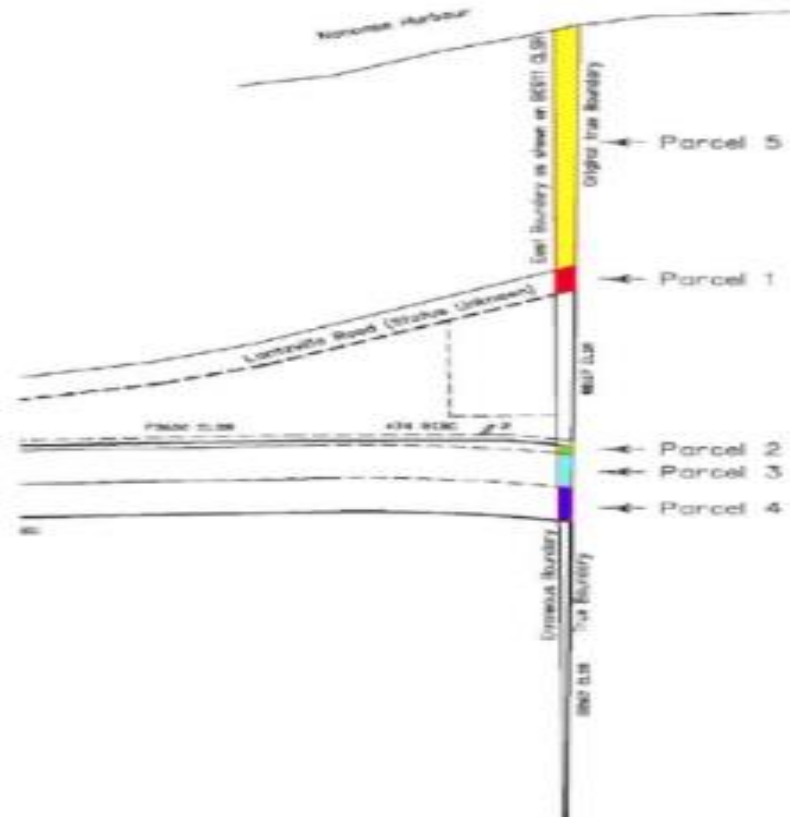
Reference:
Williams Lake Indian Band v. Canada (2018) SCC

Rectilinear (straight) bounds – Kitselas IR

- Crown has duty to the First Nation when creating Reserves.
- Fiduciary obligation to include 10.5 acre parcel (as was requested in 1891)



Nanoose IR: Encroachment?



Riparian (water) bounds – Kettle Point IR

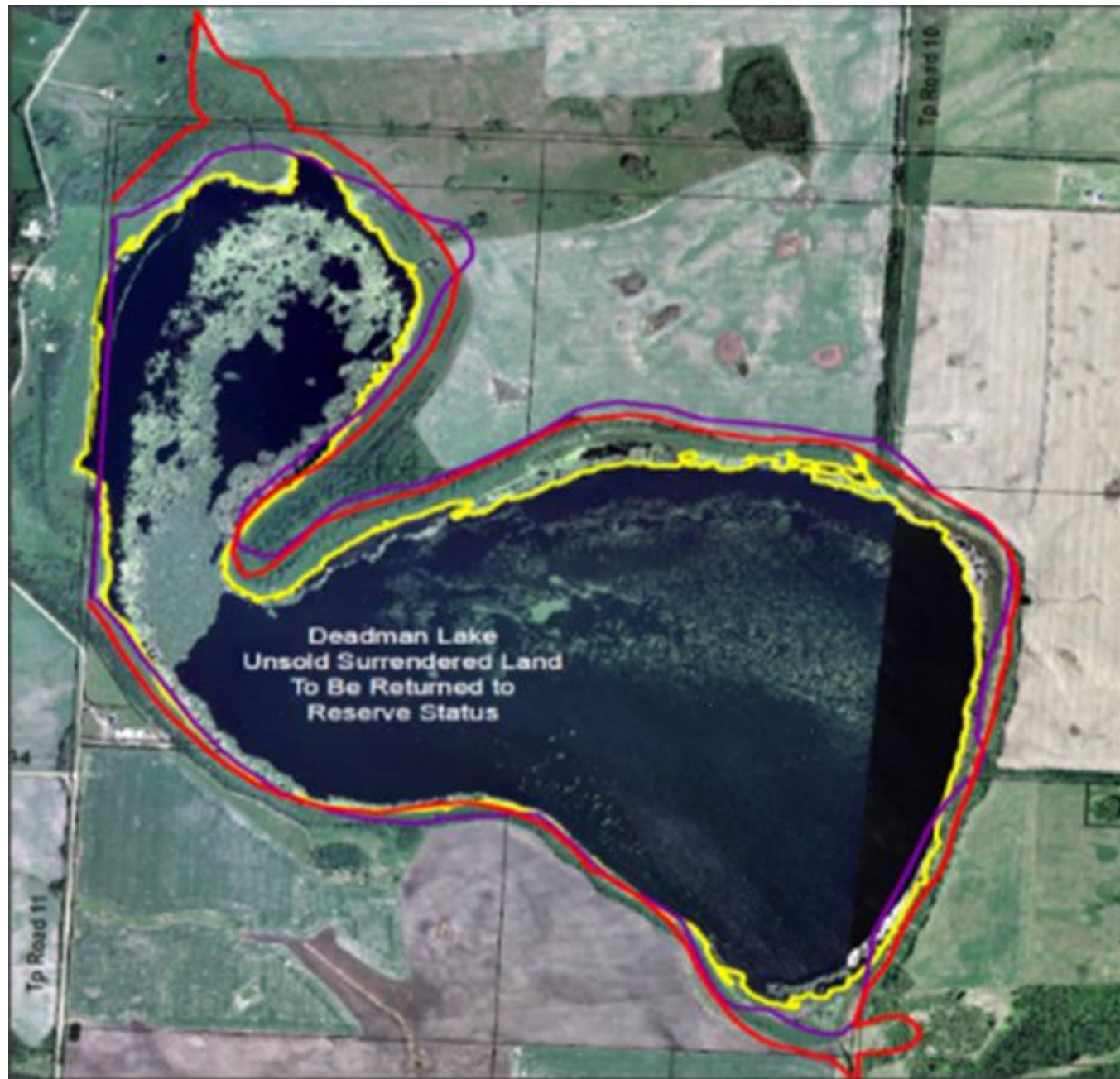


Alexander IR: Bounds of Deadman Lake?



Some facts

- IR surveyed (1880); included most of lake
- Part of IR (incl lake) surrendered (1905)
- Township survey (1906); lake = 668ac
- Lake enlarged gradually (1985) = 815ac
- Ducks Unltd lowered lake (1988) by 0.87m
- Area reduced suddenly by 22% = 642ac

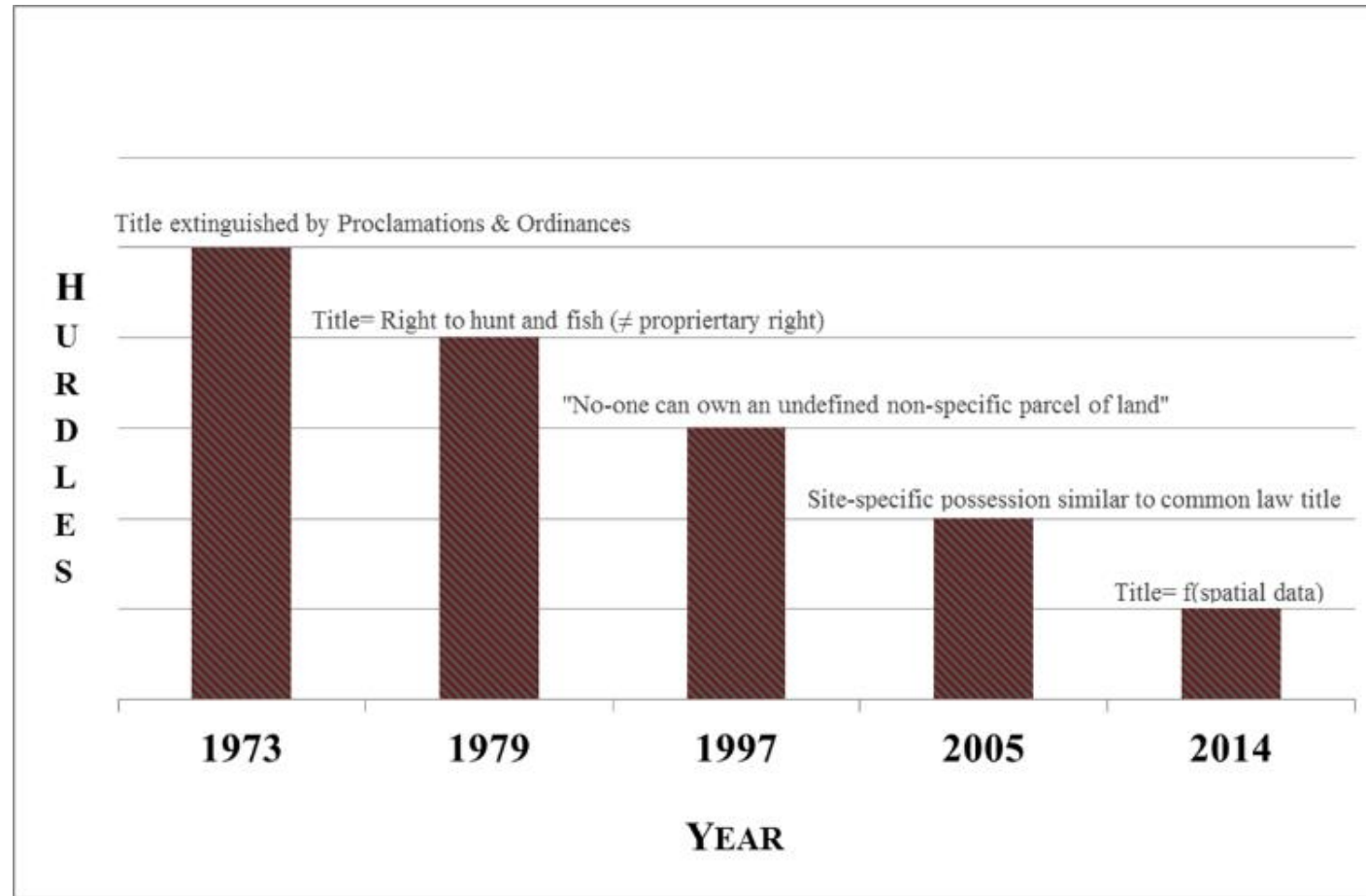


Deadman Lake
Unsold Surrendered Land
To Be Returned to
Reserve Status

Tp Road 10

Tp Road 11

Evolution of Aboriginal title



Aboriginal title

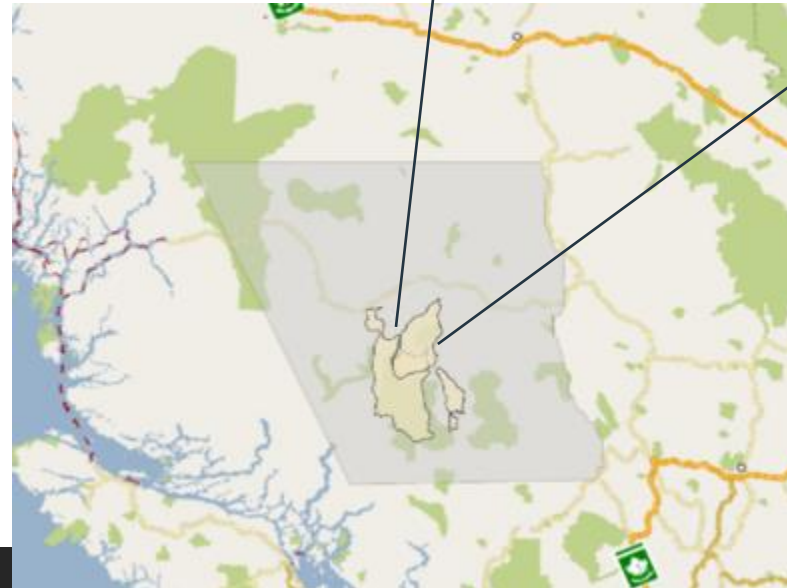
- Was land occupied at time of Crown sovereignty?
- Was occupation exclusive?
- Has occupation been continuous?

References:

Tsilhqot'in v BC (2014) SCC

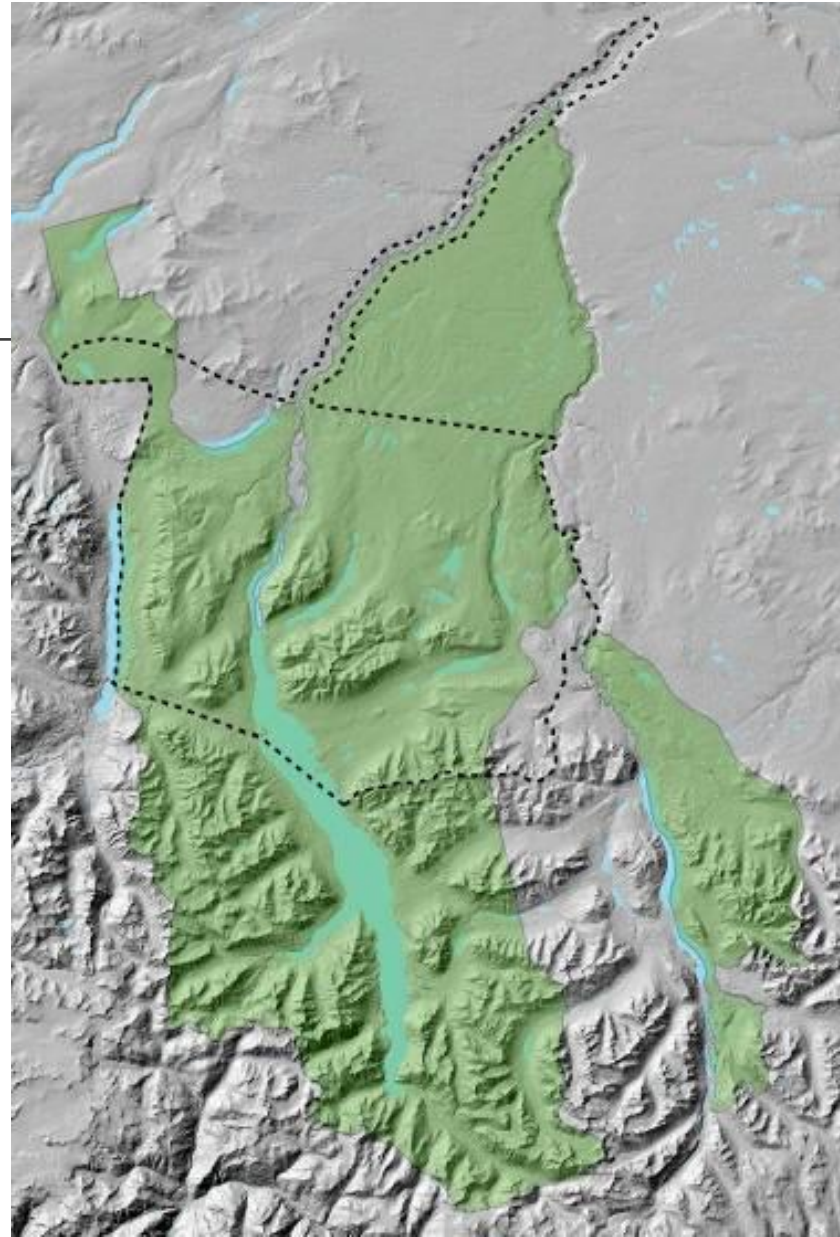
Ktunaxa Nation v. British Columbia (2017) SCC

Cowichan Tribes v. Canada (2017) BCSC



Green: Area claimed
(4,200 sq km)
5% of traditional territory

Dashed: Area affirmed
(1,900 sq km)
Some sites in/some sites out



Part 2 – What is land tenure?

- It is how we (as individuals, families, communities or corporations) hold land
- Holding = Possessing or using the land
- Land tenure = Property rights + parcel fabric
- Property rights = f(Legislation: Indian Act, FNLMA, ...);
= f(Informality: Wishes of community); or
= f(Both!)
- Parcel fabric = f(Boundaries: Sometimes surveyed)

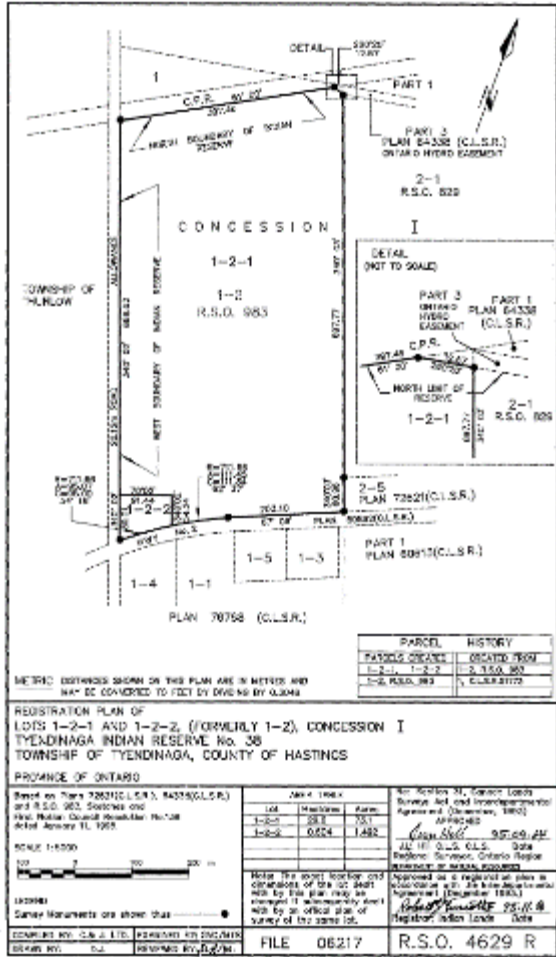
Land tenure continuum



Right of possession ≠ ownership

Title to IR is held in trust by Canada for the benefit of First Nation:

Right to possess parcel distinct from title to parcel



Individual Holdings

- Minister has authority to grant a Certificate of Possession upon request of the Council of the First Nation (s20).
- CP is legal proof of the allotment of the parcel to the individual.
- CP parcel can be sold, gifted, willed or transferred by the CP holder, but only:
 - To another FN member or
 - To the First Nation.
- Minister approves of any transfer of a CP (s24).
- Active CPs = 52,000

Indigenous and Northern Affairs Canada / Affaires autochtones et du Nord Canada
CERTIFICATE OF POSSESSION (Section 20, of the Indian Act) / CERTIFICAT DE POSSESSION (Selon l'article 20 de la Loi sur les Indiens)

This is to certify that, as of the date hereof, according to Departmental records
Le présent certificat atteste que, à la date ci-dessous, selon les registres ministériels

GRANTEE: [REDACTED] INTEREST TYPE: [REDACTED]

of the de la bande indienne de [REDACTED] Band of Indians, in the [REDACTED]
Province of dans la province de ALBERTA is entitled to a droit à la [REDACTED]

POSSESSION OF: [REDACTED]
POSSESSION DE: [REDACTED]

Dated this Date on [REDACTED] day of jour de [REDACTED]

Canada Registrar of Indian Lands - Régistrare des terres indiennes

DUPLICATE

Customary tenure (holdings/rights)

- Parcels without CPs
- Courts do not recognize informal parcels/customary rights on IR



Leasing

- Lease grants exclusive use and possession of IR land.
- A “leasehold interest” is granted by the Lessor (Canada) and held by the Lessee.
- IR land must first be Designated.



Land designations

In 1988, the *Indian Act* was amended to replace “conditional surrender” with “designation” (i.e. land remains part of IR).

Designation document must include:

- Description of the land that the designation applies to, including any existing interests in the land;
- Allowable uses (i.e. commercial, industrial, residential, etc.);
- Term of the designation (i.e. 75 years from the day the MO is issued);
- Appraised value of the land to be designated; and
- General lease rental structure (i.e. fair market rent; nominal rent for FN owned corporation, etc.),

Locatee (CP holder) leasing

Back in the day (before 2013)

- If less than 49 years, then consent of Chief and Council (BCR).
- If longer than 49 years, then majority membership approval by referendum.
- Leases to be for “fair market value rent”, regardless of the locatee’s business arrangement.

Now (since 2013)

- No time limit.
- No consent from Chief and Council or membership/citizens.
- Must be in harmony with land use by-laws and land use plans.
- Locatees determine the amount of rent to be paid.

Permits & licenses

Indian Act:

- General permits - section 28(2)
 - Permits on designated land - section 53(1)(b)
 - Sand and Gravel permits – section 58(4)
 - Indian Reserve Waste Disposal Regulations (IRWDR) – sections 5 and 8
 - Indian Timber Regulations – sections 5(1) and 9
 - Indian Mining Regulations* – section 6(1) *do not apply to B.C.
- Mining (exploration)
 - Agriculture/grazing
 - Utilities (right of way or easement)
 - Pipelines (right of way or easement)
 - Road use
 - Timber harvesting
 - Sand and gravel extraction
 - Waste disposal
 - Temporary workspace (i.e. during construction)
 - Other - ?

s81 of *Indian Act* – By-laws

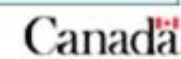
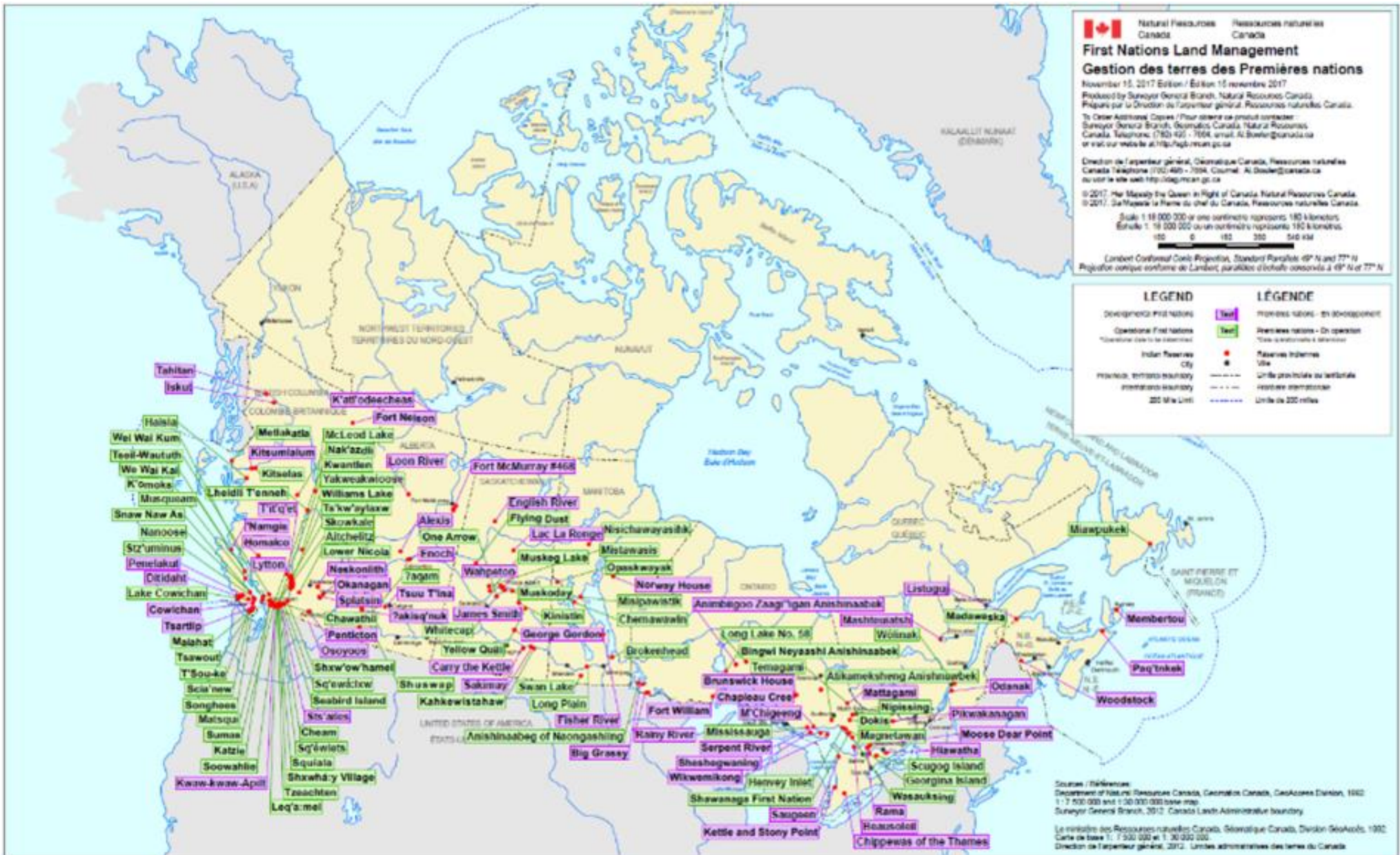
- Council may make bylaws to regulate matters that are local in nature.
- Purpose (g) – The dividing of the Reserve into land use and building zones.
- Purpose (i) – The “survey and allotment of Reserve land” and the establishment of a register of CPs.



First Nation Land Management Act

- Proposal (circa 1990s) from First Nations = bottom-up, opt-in (no foisting)
- Enacted as part of Canada's obligation to ratify the *Framework Agreement*
- FNLMA brought into effect the terms and conditions agreed to in the *Framework Agreement*
- First Nation assumes responsibility for land management (IR lands held by Canada for use/benefit of First Nation).





Describing the IR as a parcel

s6(1): Description of the land that is to be subject to the land code that ... is sufficient to identify those lands.

Land description included in the [Mississauga First Nation Land Code](#) (2009):

First Nation land

5.1 The Mississauga First Nation land that is subject to this Land Code is the Indian Reserve known as Reserve # 8 described as;

Reserve lands within the Province of Ontario, Canada in the District of Algoma,

All that portion of Mississauga River Indian Reserve No. 8, as shown on Plan 90495 recorded in the Canada Lands Surveys Records (CLSR), including mines and minerals, containing 658 square metres (0.160 acres) more or less.

Purpose of land codes

- Land codes describe the lands and set out the rules and procedures that apply to the land.
- Can include licenses and leases, interests, development, land rights, revenues from natural resources



Part 3 – Some empirical stuff

- Parcel fabric
- Informality
- Property values
- Registries
- Organizations

Internal boundary issues

Three causes:

- Many houses on large lots; confusing when lots are subdivided (common)
- One house encroaching across boundary onto neighbouring parcel (less common)
- Survey not reflecting the intention of the member/community



Findings

- Parcel fabric = 70% across 118 IR (non-IR = 98%)
- Many coherent informal parcels (some mapped; many fenced; most bounded).
- Reconciling formal and informal parcels is at community discretion (social process requiring much negotiation/discussion).
- First Nations drive parcel fabric renewal:
 - Political will,
 - Lands management capacity (funding & expertise),
 - Development/community pressure,
 - Land use planning tools.

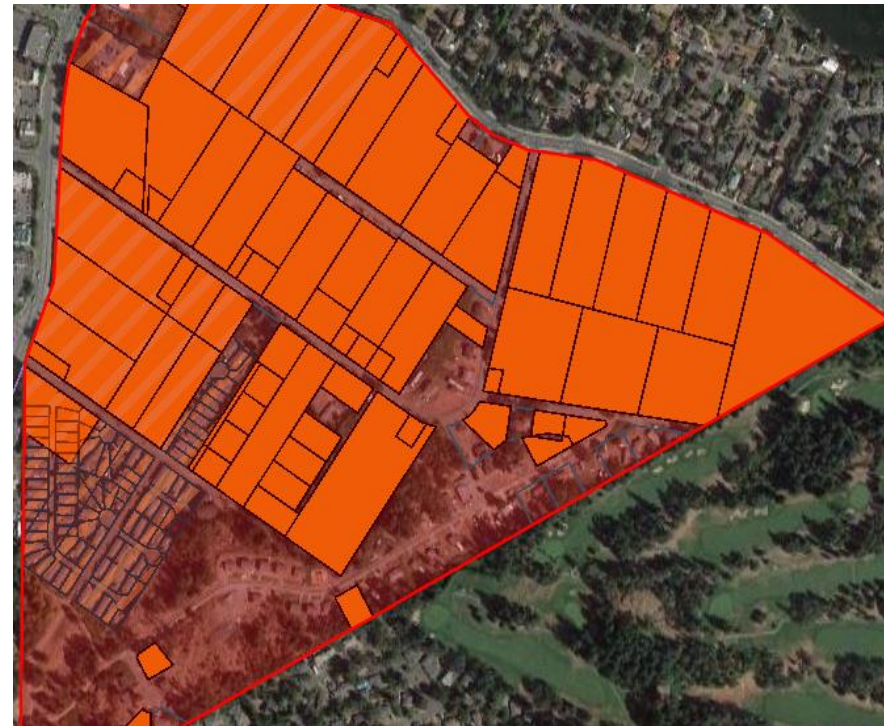
Effect of informal property rights

Does informality hinder socio-economic development (CWB)?

- 95 Reserves in BC and 74 in ON have CWB data
- 34 Reserves in BC and 44 in ON have data on:
 - Income
 - LFA
 - Education
 - Housing

Measuring informality

- Census: Total dwellings = (formal + informal)
- Indian Lands Registry: formal
- Imagery: informal
- Informality ratio = (informal/total)



Results

Overall: total housing count = 23,614; Informal = 55.1%

- 56% in Ontario (with 11,917 houses *in toto*)
- 55% in BC (with 11,697 houses *in toto*)

- Informal housing significantly reduces CWB!
- 10% increase of informality decreases CWB by:
 - 0.90 points in British Columbia
 - 0.83 points in Ontario
- Thought experiment for an IR:
 - At time 1, 100% informal
 - At time 2, 100% formal
 - Change in CWB = 9 points!

British Columbia:

Significant at 0.05 level:

- Income
- LFA
- Housing

Ontario:

Significant at 0.05 level:

- Income
- Education
- LFA

Property values

1. What is the market value of leaseholds in Indigenous communities?
2. What is the market value of CPs in Indigenous communities?
3. What factors influence the values?





Methodology

- Sample comprised 228 leaseholds and 79 CPs in 34 Indigenous communities
- Sample was benchmarked against 338 freehold properties in 34 comparable non-Indigenous communities
- Property values were reduced to \$/sq ft to determine relative values in Indigenous communities



Results

Leasehold values are discounted by 24% as compared to non-Indigenous communities.

CP values are discounted by 88% as compared to non-Indigenous communities.

Canada Lands Surveys Registry (CLSR)

- Free, open, online registry operated by Natural Resources Canada
- Comprised of survey documents (of parcels and bounds) that can be downloaded
- Users can search the registry for historical and current survey plans, field notes, diaries, journals, and reports (.pdf & .tif)
- The CLSR does not contain instruments (e.g. CPs, leases, permits)

Searching the CLSR: Survey plans

The CLSS can be searched by:

- Keyword,
- Plan number,
- Project number,
- Canada Land (e.g. Kamloops 1, Enoch Cree Nation 135),
- Surveyor,
- Type, purpose, or date.

The screenshot displays the 'Survey Plan Search' interface within the Canada Lands Survey System. On the left, a navigation menu lists options: Survey Standards, Survey Plan Search (highlighted), Survey Report Search, Map Browser, Grid Converter Tool, Well Offsets Tool, and Geospatial Data. The main search area includes several input fields: Keyword, Plan Number, Related Plan, SGB Project Number, Canada Land, and Surveyor. Below these are date range selectors for 'Surveyed From', 'Surveyed To', 'Recorded From', and 'Recorded To'. At the bottom, there are three filter options: 'Filter search by province or territory', 'Filter search by survey plan type', and 'Filter search by survey plan purposes'. A 'Search' button and a 'Cancel' button are located at the bottom right.

The screenshot shows the top portion of the Indian Lands Registry System (ILRS) website. At the top left is the Government of Canada logo. To its right is a search bar labeled "Search Canada.ca". Below the logo and search bar is a horizontal navigation menu with items: Jobs, Immigration, Travel, Business, Benefits, Health, Taxes, and More services. Underneath this menu is a secondary navigation bar with links: Home, Search Instruments, Search Evidence of Title, Search Land, Tables, and Reports. To the right of these links are icons for Contact Us, eRIP/CLSS, Help, and Logout. The main heading is "Indian Lands Registry System (ILRS)". Below the heading is a welcome message: "Welcome to the ILRS/FNLRS/SGFNLRS Public Registries. To start a search, click the Search Instruments, Search Evidence of Title or Search Land links in the Main Menu. For more information on how to navigate/search, click the Help tab." At the bottom of the page, there are two buttons: "Report a problem or mistake on this page" and "Share this page". The footer contains the text "Date modified: 2017-03-13" and "v: 1.1.23.1".

Indian Lands Registry (ILR)

National Aboriginal Land Managers Association

- Formed in June 2000 at Curve Lake First Nation
- Focus on:
 - Technical support
 - Networking and communication
 - Professional development



FNLM Lands Advisory Board - Resource Centre

- Implemented under the *Framework Agreement* (FNLM)
- **Lands Advisory Board:** Political body composed of Chiefs who are regionally elected
- **Resource Centre:** Technical body to support First Nation in the development and operational phases of implementing the Agreement



First Nation Tax Commission

Mandate:

- To help First Nation governments build and maintain fair and efficient property tax regimes and to ensure those First Nation communities and taxpayers alike, receive the maximum benefit from those systems.
- Reducing barriers to economic development on First Nation lands
- *First Nations Fiscal Management Act:*



First Nations Tax Commission

Commission de la fiscalité des premières nations