

PROPERTY, INFORMATION AND INSTITUTIONAL DESIGN

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INTRODUCTION

First Nations in Canada confront a growing menu of property law options on their reserve and treaty lands. Some of these options recognize substantial community autonomy to develop localized property institutions that differ noticeably from existing statutory and common law regimes outside those communities. First Nations' emerging choices over their property institutions, however, are considerably more complex than perennial debates about private-individual versus communal rights would tend to suggest. One way to embrace that complexity is to investigate the quality and quantity of *information* generated through and conveyed by localized property systems. This perspective usefully moves the conversation about property law and institutional design beyond unhelpful binaries, by raising the following questions: How much precision should First Nations strive to achieve when they codify community property laws and what kinds of information should these laws seek to convey? How broadly and to what audiences?

“Information-cost theory” has become a popular theme among lawyers and economists

who are interested in the various functions of property law and keen to understand how and why property norms change over time.¹ One of the key features of property as a legal, social and political institution is that it mediates relationships between individuals or groups who might very well be strangers to one another. In this aspect, property relations differ from other legal relationships, such as those structured by personal or commercial contracts, which normally arise between known parties who have ample opportunity to articulate the precise terms of their mutual arrangements (Hansmann and Kraakman 2002). Influential strands of contemporary legal scholarship have built on this basic insight to argue that an important function of most, if not all, property is to reduce the costs of generating and disseminating information about rights to resources. For example, the right to exclude others from a piece of land is viewed by information-cost scholars as useful precisely because it reduces the amount of knowledge that non-owners need to acquire about owners and resources in order to participate in property transactions (Smith 2002). Complex rules around entitlements to use or manage specific resources

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¹ For foundational works in this area, see Merrill & Smith (2000, 2001); Smith (2002). Professor Smith has also extended this framework to the study of customary property, see Smith (2008), identifying the informational demands that local custom places on those expected to abide by and enforce it outside of the community.

tend raise these costs and arguably make such transactions less efficient in some circumstances. Such a view has reinforced the idea that a small number of formal and relatively simple rules are the *sine qua non* of property law, at least in modern common law systems. Information-cost theorists often come to prescriptions for institutional design similar to those of “privatization” proponents, but they arrive through a different — and often considerably more nuanced — set of reasons.

This type of “less is more” perspective on real property represents a substantial challenge for First Nations who aim to craft localized land laws that can balance or reconcile their unique needs and objectives, which may include demands for greater market integration and improved capital investment. More precisely, the information-based perspective suggests: (i) that First Nations should prioritize simple, bright line property rules that eschew the uncertainties of community-based interpretation and context; and (ii) that First Nations should work to harmonize their local property systems with a uniform set of norms familiar to Anglo-Canadian common law.² My purpose in this Essay is to question these two basic prescriptions and offer some alternative ways of thinking about property, information, and institutional design.

In Part I, I address the first prescription by distinguishing between two different strategies that First Nations might pursue in delineating property, drawing on comparative experiences from communities under the First Nations Land Management Act (FNLMA) regime. One strategy is for First Nations to use “property rules,” by which I mean harder, bright-line norms that provide a clear description of property rights *ex ante*, within property legislation itself. A second or alternative strategy is to employ “property standards,” which refer to softer, open-ended

norms in the form of broad principles or purposes, whose full content is shaded in *ex post* by designated decision makers or dispute resolvers. These two categories of “rules” and “standards” are ideal types and certainly blended categories (Kaplow 1992: 557),³ but distinguishing between them helps to frame a basic question that often arises for First Nations: how precise should lawmakers attempt to be as they engage in the process of legislating land codes and local property law?

In Part II, I describe a second implication of the information-based approach — namely, the idea that communities should seek to reduce local variation in their property regimes. Because local divergence from widely used common law property norms is thought raise the costs of transactions across community boundaries, recent research suggests that there may be substantial incentives for communities to move toward harmonization or convergence, at least over the long run. I examine this logic, challenge some of its underlying assumptions, and raise a number of outstanding questions about its application to the design of First Nation property laws.

I. TWO PROPERTY DESIGN STRATEGIES

Conventional wisdom and much economic intuition suggests that First Nations should aim to design clear and predictable property rules to govern their lands and promote economic investment. For several reasons, investors will demand *secure* property — i.e., well defined and broadly agree upon norms with predictable and enforceable consequences.⁴ Using uncertain legal standards to delineate property rights appears to cut against this accepted logic by undermining real and perceived security and discouraging economic investment. Moreover, because uncer-

² While this perspective does not necessarily endorse private property rights *per se*, the fact that freehold estates dominate property holdings at common law likely creates a strong bias in the private rights direction.

³ I adopt this criterion as the primary difference between rules and standards generally. For a good overview of the benefits and drawbacks of rules versus standards, see Sullivan (1992: 57); Kennedy (1976); and Schlag (1985: 379). A seminal article on rules and standards in property law is Rose (1988). For more recent discussions in the property context see Lehari (2011); and Singer (2013).

⁴ “Property” in this Essay refers to the legal institution that defines how a group allocates, governs, and enforces relationships among persons or groups with respect to resources. Security of property is of course also important to realize other values — some deeply related to and others independent of or in tension with economic development — such as equity and social justice, maintaining social and cultural connections to land and place, and strengthening democratic participation and political autonomy. Moreover, all of these values are unlikely to be commensurate with each other in all circumstances.

tainty around property can effectively delegate important legal and political decisions to non-majoritarian institutions and third-party decision-makers from outside local communities, it seems that this strategy might also be unattractive from the perspective of strong, autonomous First Nations governance.

There is, however, no single answer to the question of how precisely First Nations might specify their property laws to reconcile goals for improving economic investment with demands to retain control over important aspects of community development, further community values, and respond to evolving circumstances such as increasing land scarcity, demographics, and other aspects of socio-economic change. To explore this problem below, I draw on examples from current land codes and laws designed as part of the First Nations Land Management Act regime (S.C. 1999, c. 24)—an optional sectoral governance initiative established in the late 1990s as one means for communities to escape from the restrictive, anachronistic lands provisions of the federal Indian Act (R.S.C. 1985, c. I-5).

In order to keep the discussion concrete, I also limit my arguments to one facet of institutional design: how First Nations might delineate the public powers of their governments with respect to the expropriation of property interests in land and the regulation of land uses. A main rationale behind governments' powers to expropriate property and regulate its use is to overcome the collective action or bargaining problems between affected parties—problems that prove too difficult for those parties to resolve on their own because of high transactions costs (Kelly 2011). The resolution of these coordination problems by government can improve overall social wealth, either by designating lands to build infrastructure developments and facilities such as roads, hospitals and schools; by reallocating property for commercial developments; or by regulating the externalities that actors impose on others through competing land uses. Those objectives, in turn, are likely central to nation building and strengthening communities (Rose 1989). As First Nations build their capacities for self-governance, gain stronger recognition of their jurisdictions over lands and take the lead in the provision of social services, the legal basis of their authority to provide public goods will be increasingly significant, as will be the conflicts

and controversies that follow from the use of these powers. But while governments' powers over property can serve important community goals, they can also generate some level of insecurity for private investors if it is difficult to predict the scope of those powers and how they might be exercised going forward. Land laws that generate or contribute to this kind of uncertainty may scare off desirable investors and projects, or attract undesirable ones.

One strategy to confront this challenge is for First Nations to adopt a clear rule that identifies all circumstances in which it is permissible for government to reallocate property rights. For example, a community might attempt to list each type of public project for which the exercise of government's expropriation power is permissible. This is the approach taken by the Tsleil-Waututh Nation, whose land code allows the government "to expropriate an interest in Tsleil-Waututh Lands, including an Easement or [to] cancel a Permit for a Community Purpose" (Tsleil-Waututh Nation Code, 2007, s. 23.1). "Community Purpose" is defined narrowly in the code as "a purpose which is intended to provide a facility, benefit or support for the Members or persons residing on Tsleil-Waututh Lands, and is limited to transportation and utility corridors and requirements related to transportation and utility corridors" (Tsleil-Waututh Nation Land Code, 2007, s. 2.1). The rule in this case is very clear: land can only be expropriated by government if its use relates to transportation and utility corridors. No other purposes are permitted. A related rule-like strategy is to reserve certain rights to government under specific conditions. This is the strategy adopted in the Kitselas Land Interests Law (2007). The community's Council reserves (i) a right to resume any part of land deemed necessary for making roads canals, bridges or other public works, but not more than 1/20 part of the whole land and not of any land on which a building has been erected or in use as a garden or otherwise; (ii) a right to take and occupy water and to carry water over, through or under any part of the land as may be required for a public purpose in the vicinity of the land; and (iii) a right to take gravel, sand, stone, lime, timber or other material that is not available on other community lands that may be required for the construction, maintenance or repair of a road, ferry, bridge or other public work (Kitselas

Land Interests Law, K.B.C. 2007, No. 1, s. 7.01). This rule is noticeably more complex than the one employed in the Tsleil-Waututh Nation, but similarly confines the exercise of government power to a limited set of circumstances.

An alternative design strategy is to establish a broad legal standard that identifies the general purpose or purposes for which land might be expropriated by government.⁵ The method behind this strategy is to place a more general restriction on the exercise of public power, to disallow the reallocation of property rights only in ways that do not align with the stated purpose or background principle. Specific actions by government must therefore be interpreted and evaluated continuously, in light of the objectives to which they are directed. This approach has been used by several First Nations under the FNLMA, usually by establishing that lands may be taken only for a general “community purpose or public works” and sometimes accompanied by an open-ended list of examples such a school, fire hall, community center, road, etc.⁶ These lists are clearly not exhaustive, but offer some degree of guidance as to purposes for which an expropriation is deemed legitimate. Other land codes require a “*necessary* community purpose”⁷ or define “community purpose” to mean “a purpose which is intended to provide a facility, benefit or support for the Members.”⁸

First Nations have also adopted standards in other areas that establish public authority over property, such as to regulate land uses through zoning and business licensing legislation. For example, businesses licences on Nipissing Nation lands may be denied or revoked by Council if, among other reasons, “[t]he business is deemed not to be in the best interest of the members of the Nipissing Nation” (Nipissing Nation Business Licensing Law, Law No. 2, IA-2010-11-16, s. 9.1(1)). Likewise, rezoning and

land use change applications in the Tzeachten Zoning and Land Use Law are assessed based on a multi-factor balancing of “principles and factors”, including “the promotion of health, safety, convenience, and welfare of Tzeachten members and of residents and occupants and other persons who have a lawful interest in Tzeachten lands” and “compatibility with Tzeachten and Sto:lo culture” (Tzeachten First Nation, Law No. 10-01, s. 8.12(a)–(o)).

In order to weigh rules against standards as competing design strategies under the FNLMA, I aim to evaluate a relatively straightforward baseline assumption: that investors will prefer clear and simple rules because they tend to make the exercise of government action more predictable and because they represent credible, up-front commitments about the scope of permissible public authority. Rules, in other words, are presumed to generate the kind of security of property demanded by private interests and thus required for strong economic investment. I suggest that this assumption may not hold very well in some cases under the FNLMA regime. This is true especially in the case of investors from outside of communities, who can be an important source of capital inflows but who generally lack some of the rights or entitlements to formal political participation that often make rules and rulemaking legitimate in the eyes of property claimants (although some may wield considerable, sometimes disproportionate, informal political and economic influence compared to individual community members or interest groups).⁹ By comparison, property standards raise their own challenges, but I argue that some these challenges can plausibly be overcome—at least, in my case study of government powers over property—and that standards can be an important tool for First Nations to strike

⁵ The most cited example in this context is probably the Takings Clause of the United States Constitution’s Fifth Amendment, which requires that the exercise of expropriation powers by government be limited to a “public use”, U.S. Const. amend. V, s. 4.

⁶ See, e.g., Anishinaabeg of Naongashing Land Code, October 2010, s. 17.02; Henvey Inlet First Nation Land Code, September 2009, s. 16.03; We Wai Kai Land Code, 2008, s. 23.1.

⁷ See, e.g., Kinistin Salteaux Nation Land Code, November 2004, s. 25.3; Mississauga First Nation Land Code, June 2009, s. 15.2; Tswout First Nation Land Code, s. 14.2.

⁸ See, e.g., Sema:th First Nation Land Code, ss. 2, 15.2.

⁹ See Part I.A.ii, below. For a more comprehensive discussion of the perspectives of different economic actors from the standpoint of on-reserve property rights, see Jamie Baxter and Michael Trebilcock, “‘Formalizing’ Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform” (2009) 7.2 *Indigenous Law Journal* 45.

a balance when private interests diverge from community development goals.

A. Property Rules

Rules are generally thought to be more certain and predictable than standards (Sullivan 1992: 62; Kennedy 1976: 688–89; Rose 1988: 590–92). It follows that rules should produce more secure property, enabling actors to order their affairs productively and thus generate more efficient levels of economic investment (Sullivan 1992: 62). The idea that property must be secure in order to encourage investment in land seems intuitive enough, and has been a centrepiece of modern land reform movements that emphasize the formalization, standardization and commercialization of property rights in development contexts (De Soto 2000).¹⁰ But what does tenure security itself depend on? This question too is a complicated one, and scholars have suggested that the answer relates to both formal and informal aspects of legal norms, including the perceptions of different resource users (J.-L. V. Gelder 2010). Two specific claims about how formal rules generate security of property are directly relevant here: first, that rules increase the predictability of government action, mainly by reducing the costs of prediction, and second, that rules constrain governments in ways that enable them to make credible commitments over time. I examine each of these rationales in turn.

(i) Rules as Good Predictors

It is easy to see why investors might favour clear rules that identify precisely when government has the power to take up or regulate property. Rules seem much more predictable—in the sense that they post markers for and help to preserve investors’ expectations—making it possible for individuals to confidently allocate resources to capital projects (Rose-Ackerman 1988: 1700). Standards, by comparison, are thought to leave open or even work to diffuse those expectations, increasing the risk of mismatch once judges or other third parties

determine the actual content of the legal norm. As Susan Rose-Ackerman argues in the American context, “[i]f takings jurisprudence is both ad hoc and ex post ... investors may have a very difficult time knowing whether a particular predictable state action will or will not be judged to be a taking” (Rose-Ackerman 1988: 1700). Anticipating this risk of unaligned expectations, investors will react in undesirable ways—either by underinvesting because they lack confidence about realizing the gains from investment, by shying away from investing in novel land uses, or by overinvesting in the short term because they are induced to engage in rent-seeking behaviour.

Another way to see this argument is to focus on how rules can reduce information costs. According to a view most developed by Henry Smith in the case of property relations between individuals, “[i]f resources are collections of attributes measurable at some positive cost, then those setting up property rights will—subject to informational constraints and political feasibility—tend to set them up in ways that economize on measurement” (Smith 2002). Hard-edged norms such as the right to exclude fulfill this economizing function, especially when the audience is large and diffuse. Blunt rules of exclusion that leave further decisions about property uses to individual owners reduce the information costs that would otherwise accrue to non-owners if they had to expend resources to understand more nuanced interests, such as rights to particular resources and land uses. On this view, “governance strategies” that require the specification of proper uses and involve greater refinement over time are relevant, but largely supplement hard-edged rules (Smith 2002: 454; Smith 2004: 1753).

By analogy, clear rules that delineate governments’ powers to take and regulate property may also reduce the information costs that accrue to investors when they try to predict the permissible scope of government action. A rule that identifies precisely why government can expropriate lands to develop public works pro-

¹⁰ De Soto (2000) discusses more generally the connection between secure property rights and economic investment. See Fitzpatrick (2005) for description of “best practices” for formal recognition of customary rights and emphasizing that the nature and degree of formalization should be determined by how reforms address the causes of tenure security. For key discussions of tenure security in theory, see Besley (1995) and Brasselle, Gaspart & Platteau (2002). There is also an earlier vein of property scholarship which argued that security, in the sense of clearly delineated *private* property rights improves investment incentives: see Demsetz (1967); De Alessi (1980); and Feder & Feeny (1991).

jects, for example, can dramatically reduce the costs of predicting when and where it is safe to invest. Standards, by comparison, make prediction relatively costly, because they force investors to expend greater resources to anticipate when government might act, or whether a particular government action is authorized. Of course, this is not to say that investors never want governments to exercise their authority over property. Indeed, investors may frequently be the direct beneficiaries of infrastructure projects or attempts by government to regulate land use with the goal to bolster commercial activity or provide for the long-term sustainability of development. The point is that investors would like to predict those actions in inexpensive ways and without having to wait for government to act.¹¹ Rules tend to fulfill this desire by reducing the costs of prediction.

Or do they? Notice first that the effectiveness of a rule's predictive function will vary, inversely, with the complexity of that rule.¹² Very simple rules, such as a "no expropriation" rule,¹³ will make prediction easy, as will narrowly couched rules, such as the one used by the Tsleil-Waututh Nation ("expropriation only for transmission and transportation corridors"). But more detailed and complex rules, such as the one designed by the Kitselas Salteaux Nation, above, reduce the predictive value of the legal norm. Simple rules therefore appear preferable. There is, however, another basic trade-off between the complexity of a rule and the likelihood that the rule will need to be changed or amended in the future. When very simple rules fail to account for changing circumstances — such as when growing resource scarcity increases the need to take land for community uses or ratchets up competition between land uses — these rules will inevitably need to be modified or amended. The simpler the rule, the more likely it is to change.

A further but related point is that the processes involved in changing rules can generate their own uncertainty by making it more difficult to predict what rule will apply in the future. In general, when political processes require higher decision costs, they produce more uncertainty. In her study on the supply of tradable fishing quotas in the United States, Katrina Wyman notes that collective choices about the form of property rights take one of three archetypical forms: unanimity among members of the relevant community, majoritarian vote, or a unitary decision made by a single actor. Processes that fall closer to a unanimity requirement will tend to generate higher decision costs compared to processes that look more unitary (Wyman 2005: 134). In turn, processes with higher decision costs will tend to generate changes in rules more slowly than those at the lower end, because parties are assumed to have different preferences that interact and compete to create "friction" in resolving mutually beneficial outcomes. A second determinant of decision costs — one not discussed by Wyman — is the degree of openness, transparency and public participation built into the decision process. If, for example, adopting a new rule requires extensive community input and consultation before the decision is made, these processes may also dramatically increase the costs of changing the rule.

The lawmaking requirements established by the FNLMA land codes therefore come into play here. For example, rules appear relatively easy to enact and modify under the Sliammon Nation Land Code, where draft land laws are first adopted by Council, provided to the community for comments at an open meeting, and then enacted, modified or rejected by a subsequent Council resolution (Sliammon Nation Amended Land Code, July 2011, s. 7) but any amendments to the Land Code itself must be approved by a majority vote of Community Members (Sliammon Nation Amended Land Code, July 2011, s. 12.1).

¹¹ Based on parallel logic, governments might also be assumed to hold a strong preference for rules. If a community is unable to predict in advance whether or not its activities will be judged permissible because norms are too open-ended, then it will tend to shy away from otherwise efficient public projects and regulatory measures. Rules, on this view, help to realize an efficient level of public as well as private investment. Moreover, the *ex ante* predictability of rules gives government — and by extension, the community as a whole — more direct control over how specific objectives for economic development are translated into practice.

¹² Commentators frequently observe that the up-front economic costs of designing rules can be very high, depending mainly on the degree of detail built into the rule, see Kennedy (1976); C.S. Diver (1983); and Ehrlich & Posner (1974).

¹³ See, e.g., Chippewas of Georgina Island First Nation Land Management Code, 2000, s. 28; Mississaugas of Scugog Island First Nation Land Management Code, s. 29.1; and T'Souke Nation Land Code, 2006, s. 15.1.

By comparison, the decision costs associated with changing rules are relatively high under the We Wai Kai Nation Land Code, where land laws need to undergo at least two rounds of review and comment by the community, and final laws can only be approved by secret ballot of a majority of eligible voters (at least 30 community members must be present) (We Wai Kai Nation Land Code, 2008, Part IV). In the latter case, the decision costs will be higher due to the extended period of review and the greater number of participants.

The problem facing communities with respect to the predictive function of rules is thus: a simple rule has more predictive power, but this feature also makes the rule itself unstable—especially where the process of land reform creates or contributes to periods of rapid social and economic change. Relatively low-cost political decision-making processes will minimize the uncertainty involved in changing a rule, but this too leads to instability because politicians may be too willing—and able—to generate change.

(ii) Rules as Credible Commitments

There is also a second reason why rules might offer more security, based on the idea that they can help bind governments to their commitments about future action. Because rules stand as bold and public claims about government intentions and policy approaches, they may help to reassure investors that legislated norms are intended to remain stable over time.¹⁴ Rules, as compared to standards, cause governments to bind their own hands when they perceive that the benefits from stable norms are likely to outweigh the advantages of greater flexibility, at least in the moment.

But, while rules might offer credible commitments to guide investor expectations while those rules are in force, there is little to guarantee that they will remain stable over time. What prevents government from changing a rule after an investor has committed her resources? The

basic problem here is that third-party enforcement mechanisms for government commitments are largely absent.¹⁵ This leads to a second way to understand the commitment function of rules, not as one-way promises by government, but as vehicles that help to produce credible relationships in practice. Assuming that rules will inevitably need to change over time, the political processes that structure that change will determine credible outcomes. From the perspective of community members, decision processes that generate high costs—such as those requiring a community-wide vote and/or extensive community consultation—might actually be seen as more legitimate because they are inclusive, transparent, and representative of collective interests. And, to the extent that public consultation and other modes of participation facilitate the convergence of individual views and generate consensus among the community of resource users, rule-making itself is not only perceived as more credible, but may actually help to build legitimacy in practice.

The problem is more complicated, however, from the perspective of non-community members who lack standing to participate directly in rule-making processes. Because land “ownership” in First Nations does not equate with community “membership” (Grabien, forthcoming), outside investors might be skeptical of rule changes when they feel that their interests are not well represented, and will perceive their property to be substantially less secure as a result. Naomi Lamoreaux has underscored the significance of this relationship between political participation and security of property in her study of how the American governments during the colonial era and afterwards were able to successfully balance the need for widespread reallocation of property rights against landowners’ inevitable anxieties about the security of their own claims (Lamoreaux 2011). Despite popular attention to the American “success story” of making real property secure for investment (De Soto 2010), Lamoreaux points out that the appropriation and

¹⁴ Again, there is a parallel logic from the perspective of government. Rules reserve to First Nation governments important decisions about setting these commitments, in that they, rather than third party adjudicators, will assess and balancing priorities for development.

¹⁵ Schelling (1956: 283) describes the role of third-parties in making commitments credible “whether the buyer can find an effective device for committing himself may depend on who he is, who the seller is, where they live, and a number of legal and institutional arrangements”.

reallocation of property by government for public works such as dams and railroads has been a prominent feature throughout American history. This raises the question: “if putting assets in service of economic development meant reallocating the rights to them ... how could property rights be considered secure?” (Lamoreaux 2011: 277). Lamoreaux’s answer to this “mystery” is that Americans’ security in their property “owed to circumstance that made these [formal] institutions largely self-enforcing—in particular to the widespread ownership of property that was already well established during the colonial era” (Lamoreaux 2011: 278). On her account, because most American citizens already owned property, they formed a suitably powerful constituency that was comfortable in delegating the power to make reallocations that improved societal wealth. Individuals felt that they could discipline the exercise of public authority if it was co-opted by special interests or if it disproportionately advantaged those outside of the middle class.

When these insights are applied to the First Nations context, it seems that a disconnect between participatory political rights and property rights, at least for non-community members, could cause rulemaking and rule-changing to lack a credible self-enforcing mechanism that constrains the exercise of public power. On the one hand, this could mean that investors will prefer appropriately narrow rules combined with relatively low-cost decision processes because they have better chances to exercise informal influence, such as by lobbying directly to Council members or other important players. This of course raises the specter of political capture by special interests and undermines the credibility of rulemaking in its own way. When investors are large corporate interests with sophisticated lobbying and public relations capacities, imbalances in power may be particularly acute. On the other hand, when barriers to political participation in the legislative process diminish the predictive and credibility benefits of rules too much, property standards may emerge as a more attractive alternative.

B. Property Standards

Proponents of standards emphasize their flexibility and ability to adapt to changing conditions, patterns and circumstances, whereas “rules tend toward obsolescence” (Sullivan 1992: 66). The background principals and purposes that motivate standards take their precise shape over time, in response to specific cases with concrete facts.¹⁶ Standards are thus thought to be less predictable and less stable over time when compared to rules. Moreover, because standards afford a wide zone of discretion to government decision makers about when and for what aims they choose to exercise their authority over property, and because these decisions are evaluated *ex-post* by non-majoritarian institutions such as courts, they appear to lack a structure that provides credible commitments in either of the ways discussed above. It follows, on this view, that investors should feel less secure and thus considerably more skeptical of an investment environment formed by First Nations who choose to use standards to govern the exercise of public authority.

These arguments might be approached from two related angles. One set of responses asserts that standards are in fact more stable than rule-proponents normally assume, because adjudicators have developed their own set of tools and techniques to make the content of standards predictable, especially as this work carries on over time. In light of challenges for promoting the security of property through rules, as discussed above, investors may find that their security is actually enhanced under standards-type approaches. A second set of responses emphasizes the advantages of balancing multiple, complex goals and interests, and points to the nature of institutions themselves as being an important factor in determining the ultimate trade offs between rules and standards. As Amnon Lehari notes, “when we normatively aim at creating a more balanced set of property rights and duties to achieve complex or multiple goals, we are also often unable to crystallize in advance all the

¹⁶ It is possible that non-adjudicatory bodies can also contribute to giving standards content. One example is the supplementation of standards by a Lands Advisory Committees, which may issue recommendations or opinions that help to shade in the normative content of standards, if they have such powers: see, e.g., Shxwhá:y Village Land Code, 2006, s. 19.2(d) (“The purpose of the Land Management Advisory Committee is to ... hold Meetings of Members and other meetings to discuss issues related to Shxwhá:y Village Land and make recommendations to Council on the resolution of such issues”).

contingencies that may result” (Lehavi 2011). Recognizing these aspects of incompleteness goes beyond simply acknowledging that the world itself is uncertain, it also recognizes that governments, groups and individuals will inevitably need to respond to changes in social, economic and technological circumstances as they arise.

In order to track the discussion of rules, above, I first consider arguments that standards offer substantial predictability because adjudicators have developed useful techniques to guide expectations, and then move on to compare standards as an alternative form of commitment device.

(i) Standards and Predictability

Drawing on his broad survey of American property law, Joseph Singer argues that standards, in practice, tend to generate legal norms that are considerably more predictable than one might think (Singer 2013). The underlying reason is that people will base their legitimate expectations about property on both formal and informal sources. When informal expectations diverge from the content of a formal rule, the nominal “clarity” of rules actually generates highly uncertain results. By comparison, standards go hand-in-hand with a set of legal techniques that can better help to align legal norms with, as well as shape, these expectations.

More specifically, Singer identifies two mechanisms that adjudicators use to ground the stability of standards over time by helping to guide, adjust and react to expectations. He refers to these mechanisms as “exemplars” and “presumptions”. Exemplars are tacit models or core cases that develop as stylized stories to anchor shared expectations about the meaning of a standard. Exemplars also post easily accessible reference points against which to measure anticipated scenarios in the future (Singer 2013: 1388–89). Rather than providing one-way directives that might fail to consider important informal expectations, these models help to connect and confront those expectations by elaborating explicit patterns of reasoning behind broader principals — although the success of this process depends crucially on the actors and other institutions involved, as I describe below.

This approach does not ensure that investors’ expectations will always prevail over what First Nation governments’ perceive to be their

legitimate role in exercising public authority over property. Nor is that the intention. But standards may be particularly useful when parties from different backgrounds and experiences attempt to align their goals and shape mutual understandings. Exemplars aid in this process by making expectations more explicit for future cases.

For example, whether or not a First Nation government has legitimately exercised its power to expropriate lands for a “community purpose” in any given case will be determined in large part by how one understands government’s core functions. Those expectations, in turn, are framed by tacit models of active or reactive local authority, or likewise by models an activist or reactive state (Ackerman 1982). Parties anticipate future action, and adjudicators reason about an instant case, based on this type of an exemplar. Take a useful example from the Canadian case law. In *Fouillard v. Ellice (Rural Municipality)* (2007) [*Fouillard*], a local municipality in Manitoba exercised its authority to expropriate approximately 288 acres of the Fouillards’ private land because it contained the remaining structures of a historically significant trading post, Fort Ellis, built in 1831. Controversially, the goal of the this government action was not only to preserve the heritage site, but because the municipality intended to develop the lands as a local attraction with an interpretive center and fairground. The government claimed that it was authorized to do so pursuant to provincial statute, which allowed expropriations if the municipal council “considers [it] necessary or advisable to acquire [lands] for a municipal purpose” (Municipal Act, C.C.S.M., c. M225, s. 254(1), authorizing expropriation under the Expropriation Act, C.C.S.M., c. E190). Council made clear that it was taking up the lands in question for the purpose of economic development — in particular the expansion of local tourism — and the Fouillards challenged the decision claiming that this objective did not fall within the standard.

The statute at issue in *Fouillard* also provided some further detail to the standard, defining the purposes of the municipality as being (i) to provide good government; (ii) to provide services and facilities that are necessary or desirable for all or part of the municipality; and (iii) to develop and maintain safe and viable communities (Municipal Act, s. 3). The trial judge found that the pursuit of economic devel-

opment fell within the “municipal purposes” standard. The Manitoba Court of Appeal agreed, reasoning that the overarching purposes of the statute and the direct role of the municipality in providing “good government” pointed to a norm authorizing expropriation when council acted to improve the economic welfare of the community as a whole (*Fouillard*, para. 49). Crucially, the Court recognized that this interpretation of “municipal purpose” was based on an exemplar of “modern” local governance, which endowed municipalities with an “active and direct role” to stimulate economic development. Whatever the parties’ normative positions on whether this was or was not an appropriate interpretation of the role of government, the Court’s reasoning provides a strong model for future investors and other economic actors within the municipality to guide and stabilize their expectations.

Singer’s second argument is that standards also develop implicit “presumptions”, which function as default allocations and favour particular outcomes (Singer 2013: 1390). Sometimes the presumptions are implied, but they can also be explicit. Business licencing laws, for example, may presume authorized use unless public officials can show that the proposed business contravenes certain criteria such as community health and safety, or specific cultural norms. These presumptions can make standards more predictable by narrowing the range of circumstances in which government discretion is exercised.

The problem with both exemplars and presumptions as stabilizing mechanisms to make standards more concrete is that they depend heavily on well-developed and widely available precedent, and in this sense Singer’s arguments are highly contingent on common law experience. For new land regimes under the FNLMA, this poses a challenge—at least in the short term, where investors will be left either with little information about the substantive content of standards, or will turn to the exemplars and presumptions developed in the Canadian common law, which may not be sufficiently sensitive to First Nations’ contexts or to their diversity to yield accurate predictors. Standards in their early stages will inevitably be less stable and predictable compared to those that have developed over time.

(ii) *Standards as Credible Commitments*

Concerns about the development of precedent may, however, be offset by the benefits that standards offer in establishing credible commitments on the part of government. As we have seen, the presumption that rules offer a good mechanism to hold governments to their promises may not materialize in practice when credible third-party enforcers are absent and when rules can be easily changed. Using standards, by contrast, delegates a certain degree of authority over legal change to arms-length adjudicators who are not subject to the pressures or the division of interests that make political rulemaking processes potentially unattractive from the standpoint of secure property. While the commitments offered by governments through standards are necessarily open-ended, their ability to constrain the exercise of government discretion through delegation to third-parties may grant investors considerable security while leaving room for appropriate norms to develop as circumstances evolve.

What factors will determine whether or not this holds true? Independence of dispute resolution bodies from government will be one important consideration. When governments are responsible for controversial decisions about the expropriation of lands or the regulation of land uses, investors are likely to be skeptical of any adjudicatory mechanism that is too closely associated with public officials. The forms of dispute resolution under the FNLMA land codes vary widely and range from mediation, arbitration, adjudication by an individual officer, or court-like hearing procedures before a dispute resolution panel established by the First Nation. First Nations have employed a number of mechanisms to promote the independence of these bodies, including fixed terms for adjudicator appointments and prohibitions against conflict of interest with Council affairs. The Sliammon, Shxwhá:y Village and Sema:th Nations have each identified an Office of the Adjudicator, which is occupied by a lawyer with specific technical expertise (Sliammon Nation Land Code, 2011, s. 40.1; Shxwhá:y Village Land Code, 2006, s. 37.4; Sema:th Nation Land Code, 2010, s. 46.4). The Mississauga First Nation appears to have been the most aggressive in codifying structural independence by requiring a rigorous application and vetting process for members of its Appeals

Board, by listing specific qualification requirements for appointments, and by fixing terms for a period of three years (Mississauga First Nation Land Code, June 2009, s. 40). The Mississauga First Nation has also taken the additional step of requiring that all members be appointed from outside the community, but among the membership of other First Nations that are part of the Anishnabek Nation. Alternatively, some communities, such as the Songhees First Nation, have opted to outsource dispute settlement to bodies such as the British Columbia Arbitration and Mediation Institute, although this decision may also be driven by resource constraints as much as concern about adjudicatory independence (Songhees First Nation Land Code, 2011, s. 34.1).

Presumably, dispute resolution bodies also need sufficient powers to enforce commitments, but this function should not be construed too narrowly. Some arbitrators and dispute panels envisioned in the land codes appear to have strong enforcement powers, such as the power to issue orders. But other bodies have been established with an emphasis on alternative dispute resolution. Although they lack powers to directly enforce outcomes, these bodies can help to build credible commitments in much the same way that open and transparent political processes do, by taking into account a broad array of interests and resolving outcomes that are perceived as legitimate by all parties.¹⁷ Standards, however, offer a distinct advantage to rules in this respect, because dispute resolution will specifically include participation by outside investors as well.

Ultimately, some investors are likely to prefer the common law courts to community-based dispute resolution—a reality acknowledged in some of the land codes that offer courts either as an alternative forum or as a means of appeal. Some also delegate all dispute resolution to courts directly, bypassing local processes,¹⁸ and only the Mississauga First Nation appears to disallow any direct appeal to the common law courts altogether (Mississauga First Nation Land Code, June 2009, s. 50). Outside investors in particular might favour common law courts,

because they perceive them to be more independent, but also because they have greater familiarity with these institutions and see them as more likely to be aligned with their interests. A more general argument in favour of courts is that they have an available body of precedent to draw from, thereby promoting the predictability of norms. It is not clear however, as noted above, that the common law will be sufficiently flexible and sensitive to First Nations contexts to yield real predictability in practice.

C. Property Outside the Public Context

I have argued so far that standards can be a promising strategy for First Nations to chart their public authority over property in ways conducive to attracting economic investment. Much of that argument depends on the specific concerns that arise when governments exercise their public “rights” but also have a direct say as legislator in establishing their bounds. The situation likely looks somewhat different, however, where First Nations aim to delineate the property rights of non-government parties. Distinguishing between these cases therefore raises the question of how rules and standards compare as strategies in this second set of circumstances.

I intend to leave the resolution of this question to future research, but will offer a few preliminary thoughts here to motivate further work. It is worth noting that contemporary scholarship on the role of standards in property law has by no means been confined to the case of public authority—indeed, this is treated as relatively peripheral issue in studies that are primarily concerned with how standards are used at the conventional core of the common law, including trespass, adverse possession, servitudes, and leaseholds (Singer 2013). First Nations may therefore find useful insights here as they turn their attention to related issues.

One of those issues is the question of how to delineate community members’ use and occupancy rights in First Nation lands. The FNLMA requires each First Nation to “set out the general rules that apply to the use and occupancy of

¹⁷ See, e.g., Shxwhá:y Nation Land Code, 2006, s. 37.2: “Shxwhá:y Village further intends that wherever possible, a dispute in relation to Shxwhá:y Village Land that is not resolved by informal discussions by the parties to the dispute be resolved through voluntary participation of the parties to the dispute in a tribal or other alternate justice forum.”

¹⁸ For a discussion of some of the few specialized First Nations courts, see Whonnock (2011).

First Nation land”, including lands granted to individual community members and those held “pursuant to the custom of the First Nation” (FNLMA, s. 6(1)(b)). These rights might vary substantially from common law property rights off reserve or they might be designed to look quite similar.¹⁹ Interestingly, communities thus far appear to be pursuing different approaches to defining these rights. Scugog Island First Nation, for example, has adopted a fairly clear rule-like strategy that makes provision for “the exclusive use and occupancy of [lands] for residential purposes”, but also enables individuals to earn revenue from the sale of resources on these lands (Mississaugas of Scugog Island First Nation, s. 16). By comparison, other communities employ property strategies that look considerably more standard-like. Members of the Songhees First Nation, for example, are eligible to “benefit from the resources arising from the land” (Songhees First Nation Land Code, 2011, s. 25.2), while some property interests afforded to members of the Kinistin Saulteaux First Nation preclude them from “benefitting” from the resources located on, in or under residential lots (Kinistin Saulteaux First Nation Land Code, November 2004, s. 16.2).²⁰

It is too early to speculate much about these approaches, but the emerging variation raise important questions. What has motivated First Nations to adopt standard versus rule-like strategies to delineate community members’ land use rights? How will open-ended concepts such as “benefit” be interpreted over time (for example, does this include the right to commercial benefit, or is it restricted to personal or subsistence needs)? While the form of these interests may not have much bearing on large commercial developments—where lands are more likely to be leased directly from the community—they may have important implications for the development of member-run businesses and other entrepreneurial activity. Certainly, because the “credible commitments” rationale for standards, described above, is inapplicable where the question is how to delineate property rights

between non-government parties, the case for standards might be somewhat weaker here.

However these and other emerging questions might be resolved, the distinction between rules and standards as alternative strategies for property law design provides one useful framework for thinking about the many decisions facing First Nations as their property systems continue to evolve. Despite the presumptive benefits of clear rules in promoting the security of property to attract capital investment, this essay helps to explain why such a view is overly simplistic. By giving some attention to the processes by which both rules and standards change over time, the latter appear to offer some unique benefits for delineating the public authority of First Nation governments over property. And while standards can help to promote the security of property in some circumstances, assessing this strategy in comparison to rules also highlights the tradeoffs inherent in both approaches, as well as the fact that both strategies will be employed to some degree. Rules have the benefit of being simple, *ex ante* directives, but this means that they are especially vulnerable to manipulation by politics. Standards can help to insulate the evolution of legal norms from these political processes, but require First Nations to delegate some decision-making authority to institutions in ways that present their own challenges. As well, the real benefits of standards may only emerge slowly, over time. Hopefully, future research can refine the analysis and help to clarify how communities can better assess these trade-offs in context.

II. “LOCAL” PROPERTY

First Nations also face a set of important questions about the relationship between localized property regimes and legal systems external their communities. Just as an information-cost approach to institutional design tends to favour bright-line rules, it also prioritizes *uniform* ones, suggesting that communities may face steep economic costs when they create local institutions that deviate from the property norms familiar to

¹⁹ Graben (forthcoming) for a discussion of how the Nisga’a Nation has opted for a form of title that closely resembles fee simple.

²⁰ “The allocation of an Interest in a residential lot does not entitle the Member to benefit from the resources located in, under or upon the affected Kinisting Saulteaux Nation Land.”

the Anglo-Canadian common law. The general message, according to this view, seems to be that First Nations should find ways to reduce local variation in their property regimes and/or to promote integration with broader legal “networks” that structure predominant markets and commercial transactions. This perspective may therefore represent a substantial challenge to those who envision a more diverse and pluralistic landscape for First Nation property laws—and for property in Canada more generally.

While a comprehensive evaluation of questions about resistance and convergence in local property regimes is beyond the scope of this Essay, below I briefly outline the emerging information-based framework that addresses these issues and identify some key assumptions that underpin this approach. By way of a preliminary assessment, I argue that emerging research contains substantial gaps and has failed to seriously engage with some of the important benefits of localized property regimes. I conclude by raising some questions in this line of scholarship going forward.

A. An Information-based Perspective on Local Property

In a wide ranging study of property arrangements from indigenous Sámi communities in Norway to kibbutzim in Israel, property scholars Abraham Bell and Gideon Parchomovsky have recently offered a forceful theory that describes how the value of localized property can be “lost in translation” when group members seek to deploy local resources beyond community boundaries (Bell & Parchomovsky 2013). By emphasizing the information and related costs associated with maintaining property laws outside “dominant” legal regimes—i.e., regimes with a large number of adherents and which underpin widespread economic and financial markets—this work offers a relatively skeptical perspective on the capacity of different communities to maintain localized property regimes over time.

The authors’ central argument is that communities will eventually face a choice between (i) adopting “standardized”—i.e., conventional

common law—property forms or (ii) developing suitable mechanisms to translate local rights for external recognition and enforcement. According to the theory, there are two primary information cost considerations that are relevant whenever local rights-holders attempt to deploy resources beyond community boundaries, such as when homeowners on reserve lands seek collateralize their real estate through outside financial institutions (to use a much cited example). First, it may be onerous for parties who are unfamiliar with the local regime to gather and confirm information about its content (Bell & Parchomovsky 2013: 544). Large national banks that issue mortgages primarily off reserve, for example, may need to expend considerable resources locating and researching all relevant features of the many property systems now being developed by First Nations. This activity may be especially costly where information is highly dispersed and expensive to access. Second, after formulating a *prima facie* understanding of a local property regime, additional expenditures are likely required to translate local rights such that they can be used, and consequently enforced, outside the community (Bell & Parchomovsky 2013: 545).²¹

To help describe their theory, Bell and Parchomovsky analogize market-dominant property regimes to technical standards that display “network effects”—such as computer operating systems or wireless telephone infrastructure—whose value tends to increase along with the total quantity of users or participants (Bell & Parchomovsky 2013: 548). Reasoning from the available literature on technical standards, the authors argue that local property regimes will face strong pressures either to adopt external property norms wholesale so that they are accessible to a broader constituency of potential rights-holders, or to develop systems that are “interoperable” with the common law. The capacity to translate local property rights therefore becomes a defining factor in the ongoing viability of local systems.

²¹ The authors also note that there is a third dimension, labeled “enforcement costs”, which accrue from the need to enforce local rights through external institutions.

B. Early Assessment of the Theory

The information-cost framework described above usefully highlights some of the challenges that First Nations might face as they continue to cultivate localized property regimes, underscores that property norms are contingent on the networks in which they operate, and helps to focus attention on effective means of translation between distinct legal systems. The theory, however, quite likely overstates or misinterprets communities' incentives to converge on common law property norms in the long run, for several reasons.

First, the theory appears to rest on an implicit assumption that local property is more of a historical artifact and less of a dynamic institution capable of adaptive design. Granted, information-cost scholars acknowledge that communities have important reasons for creating context-specific property regimes and for resisting convergence over time (Bell & Parchomovsky 2013: 540–42)—for example, because they strive to cultivate property law as an affirmation of community needs, values and autonomy; because they wish to signal a rejection of colonial institutions; and/or because they are keen to avoid some of the rigid strictures of common law property systems. But the theory fails to recognize that local property systems may yield comparative benefits for non-community actors as well as for communities, rather than simply raising the costs of doing business or participating in community development projects. One potential benefit is that processes of institutional design themselves can help to shape First Nations-led market expectations and may forge relationships between community members, governments and outside investors in productive ways. Some local property laws will no doubt be designed with specific resources and projects in mind, and can be structured in consultation with relevant third parties.²² The result can be property regimes that are both well suited to local circumstances and actually reduce the total informational burden, at least on some participants.

Second, information-cost arguments ignore any possibility that market-dominant property systems can and may need to adapt. Bell and Parchomovsky assume that the network effects of

property are driven exclusively by the size of the network or user group, creating a one-way pull toward the regime with the largest number of adherents. By focusing entirely on the size of the user group, this view fails to account for any imbalances in the market power or other relevant features of network participants. In other words, it is reasonable to expect that the centre of gravity between intersecting property regimes depends not only on number of adherents (which determines the available opportunities to transact) but also on *who* they are (which may determine the value of particular transactions). An emphasis on network size may be warranted in certain scenarios, such as in the case of First Nations housing and commercial mortgages, where the value of transactions to large financial institutions is likely to be comparatively small. But it is not clear that First Nations lack substantial market power in other contexts, such as natural resource developments, where some communities might control or assert legal claims to considerable resources. Under these circumstances, it is conceivable that legal systems external to communities will be under pressure to change or adapt. Of course, this logic cuts both ways and there are no doubt examples of powerful private interests who are well positioned to exert market pressure on local property regimes to harmonize or converge.

Finally, the concept of “translating” local property rights for external recognition and enforcement is a compelling element of Bell and Parchomovsky’s theory, but one that needs further elaboration. For example, who bears the onus to translate local property? The authors state unequivocally that “[t]he burden of achieving legal interoperability lies squarely with ... local communities” (Bell & Parchomovsky 2013: 553) but given the fraught history of First Nations property in Canada and the broader legal frameworks that shape fiduciary relationships and principals of reconciliation, there are likely strong arguments to be made that the onus lies on the Canadian legal system to achieve or facilitate translation. In any event, the objectives and mechanisms of translating local property warrant further study—both in theory and as a reflection of evolving practice.

²² See Part I for a discussion of some possibilities and challenges for this type of consultation and political participation.

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