Comparative Secured Transactions Law and Renewing Indigenous Economies' Access to Finance

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I. Introduction

Amongst the legal constraints put on Indigenous nations in various Anglo-American states have been restrictions on the ability of Indigenous nations and individuals to use their own personal property as collateral for finance.[1] This can be considered as a distinct matter from similar restrictions on real property (or land), which presents additional complexities.[2] In different jurisdictions, the restrictions on using personal property as collateral have arisen from varying causes, ranging from frequent insufficient attention to commercial needs in Indigenous contexts and resulting underdevelopment of modern finance regimes[3] through to paternalistically imposed protections against seizure for all on-reserve property in Canada's *Indian Act*,[4] with there being new scholarship suggesting that the latter choice in Canada actually partly embodied deliberate aims of holding back Indigenous economies in the service of assimilative goals.[5]

In any event, there have been legal impediments to Indigenous involvement in secured transactions because there have been legal barriers to permitting Indigenous personal property to be subject to a security interest. In their restrictions on it, colonial legal systems have effectively rendered Indigenous-owned personal property into being less valuable than non-Indigenous personal

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[1] See generally Patrice H. Kunesh & Benjamin D. Horowitz, "Access to Credit in Indian Country: The Promise of Secured Transaction Systems in Creating Strong Economies", in Robert J. Miller, Miriam Jorgensen & Daniel Stewart, eds., *Creating Private Sector Economies in Native America: Sustainable Development Through Entrepreneurship* (New York: Cambridge University Press, 2019) 97; Frankie Young, "A Trojan Horse: Can Indian Self-Government Be Promoted Through the Indian Act" (2019) Canadian Bar Review (forthcoming December 2019). See also Matthew Fletcher, American Indian Tribal Law ( ) at 756 (stating that "tribes have developed a growing recognition of the fact that secured transactions codes are often critical tools in promoting economic growth in Indian country").

[2] See e.g. Jessica Shoemaker, "The Challenges of American Indian Land Tenure and the Vastness of Entrepreneurial Potential", in Robert J. Miller, Miriam Jorgensen & Daniel Stewart, eds., *Creating Private Sector Economies in Native America: Sustainable Development Through Entrepreneurship* (New York: Cambridge University Press, 2019) 67 (engaging with the possibility of searching for a middle ground between trust ownership and fee simple ownership that can support finance while nonetheless protecting land base).

[3] See discussion in Kunesh & Horowitz, *supra* note 1.

[4] *Indian Act*, R.S.C. 1985, c. I-85, s. 89(1) ("the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band"). See discussion in Part IV, below.

[5] See generally Young, *supra* note 1.

property and prevented Indigenous nations and individuals from accessing finance and investment to build Indigenous economies. This state of affairs that has held back Indigenous economies has perpetuated economic inequality and outright poverty, and it is imperative to turn toward solutions.

This paper will examine, first, some background theory on secured transactions and will turn, second, to comparative secured transactions law as between the United States and Canada as it affects Indigenous nations. On the background theory, Part II of the paper will set out reasons why secured transactions law is a vital component of a modern finance system and of contemporary economic growth. At the same time, it will also acknowledge room for some complexity on aspects of secured transactions systems, and it will explain why it is important not to overstate the importance of this issue in any isolated fashion but to see it as part of a broader set of issues needing attention in renewing Indigenous economies.

In terms of comparative perspectives, as will be discussed in Part III, the United States has now developed some significant paths forward to assist Indigenous nations themselves in solving this impediment to finance and investment. One of the key American efforts in this regard, the *Model Tribal Secured Transactions Act* (*MTSTA*)[6] and 2017 *Revised Model Tribal Secured Transactions Act* (*RMTSTA*)[7] has enormous promise, albeit with some implementation hurdles. Moreover, at the same time, it remains subject to some possibly broader take-up challenges that leave some ongoing questions on the degree to which it will fully accomplish its objectives.

As will be discussed in Part IV, Canada presents a partly differing example on secured transactions in Indigenous contexts. The paper will discuss a very explicit legal impediment to the use of Indigenous personal property as collateral contained within a section of the colonial *Indian Act*,[8] alongside reasons why judicial engagement with this section has been inadequate to offer meaningful paths forward despite some theories otherwise.[9] Canada thus has nothing to teach on the specific matter of secured transactions and Indigenous nations, but much to learn from the United States experience. At the same time, drawing from some important work by Canadian Indigenous nations on registries outside the specific context of secured transactions, the paper will also reference some approaches on land registry systems that may provide perspective on the very important issues of registry systems associated with secured transactions reform. Moreover, the paper will also briefly reference the improving take-up record on other modern statutes for First Nations in Canada, which may be informative in terms of comparative issues on take-up of legal reforms.

So, the paper will both consider comparative paths forward that are being developed and offer certain comparative perspectives on those paths. Notably, the analysis offered will open some

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[6] National Conference of Commissioners on Uniform State Laws, Model Tribal Secured Transactions Act (2006) (hereinafter "*MTSTA*").

[7] National Conference of Commissioners of Uniform State Laws, *Revised Model Tribal Secured Transactions Act* (National Conference of Commissioners of Uniform State Laws, 2016) (hereinafter "*RMTSTA*").

[8] *Indian Act*, R.S.C. 1985, c. I-85, s. 89(1) ("the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band"). See discussion in Part IV, below.

[9] See Part IV, below (challenging claims of various judicial workarounds as offering insufficient certainty and clarity).

room in Part V for consideration of some relative advantages of harmonization and flexible adaptation to particular circumstances.

Comparative secured transactions law has become an important area of legal scholarship in recent years,[10] but this scholarship has not addressed specific issues associated with Indigenous contexts.[11] This paper will seek to address this important nexus and to show why comparative secured transactions law offers some particular perspectives on law reform in this context that can help in renewing Indigenous economies.

II. Background Theory

The significance of renewing Indigenous economies can hardly be overstated. Renewed Indigenous economies will contribute to both the well-being of individual human beings too often trapped in poverty and to the empowerment of Indigenous communities.[12]

In seeking the renewal of Indigenous economies, lack of access to finance within modern banking systems has long been recognized as a barrier for Indigenous economies.[13] Indigenous economies often had traditional means of finance in the past that were effectively overridden by colonial legal systems.[14] But there has been only limited development of modern commercial law regimes that would facilitate business activity.[15] This problem applies across various issues but includes lack of development of legal regimes to support finance for business activity based in Indigenous

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[10] See e.g. Michael G Bridge, Roderick A Macdonald, Ralph L Simmonds & Catherine Walsh, *"Formalism, Functionalism, and Understanding the Law of Secured Transactions"* (1999) 44 McGill LJ 557; Tibor Tajti, *Comparative Secured Transactions Law* (2002); Chima Williams Iheme, *Towards Reforming the Legal Framework for Secured Transactions in Nigeria: Perspectives from the United States and Canada* (Springer 2016); Spyridon V. Bazinas & Orkun Akseli, eds., *International and Comparative Secured Transactions Law: Essays in Honour of Roderick A. Macdonald* (Oxford: Hart Publishing, 2017); Philip Wood, *Comparative Law of Security Interests and Title Finance*, 3rd ed. (London: Sweet & Maxwell, 2019).

[11] *But see* Roderick A. Macdonald & Shauna Troniak, "Do Indigenous Peoples Need a Tailor-Made Secured Transactions Law?", in Roderick A. Macdonald & Véronique Fortin, eds., *Autonomie Économique Autochtone: Dimensions Multiples / Dimensions of Indigenous Economic Autonomy* (Montréal: Les Éditions Thémis, 2015) (partial exception in a Canadian piece making some reference to American developments on American Indian nations' choices on secured transaction systems).

[12] See generally Robert J. Miller, *Reservation "Capitalism": Economic Development in Indian Country* (Santa Barbara: Praeger, 2012); Terry L. Anderson, Bruce Benson & Thomas E. Flanagan, eds., *Self-Determination: The Other Path for Native Americans* (Stanford: Stanford University Press, 2006); Terry L. Anderson, ed., *Unlocking the Wealth of Indian Nations* (Lanham: Lexington Books, 2016); Tom Flanagan, *The Wealth of First Nations* (Vancouver: Fraser Institute, 2019).

[13] See e.g. Robert J. Miller, *Reservation "Capitalism": Economic Development in Indian Country* (Santa Barbara: Praeger, 2012) at 125; Robert J. Miller, "Indian Entrepreneurship", in Terry L. Anderon ed., *Unlocking the Wealth of Indian Nations* (Lanham: Lexington Books, 2016) 245 at 254-55; Gavin Clarkson, "Tribal Finance and Economic Development: The Fight Against Economic Leakage", in Deanna M. Kennedy et al., eds., *American Indian Business: Principles and Practices* (Seattle: University of Washington Press, 2017) 83. See also Miriam Jorgensen & Randall K.Q. Akee, *Access to Capital and Credit in Native Communities: A Data Review* (Tucson: Native Nations Institute, 2017).

[14] See e.g. D. Bruce Johnsen, "The Potlatch as Fractional Reserve Banking", in Terry L. Anderson, ed., *Unlocking the Wealth of Indian Nations* (Lanham: Lexington Books, 2016) 61.

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communities, including notably a longstanding lack of development of regimes for secured lending.[16] There are today increasingly steps to overcome these barriers, but the barriers have been pervasive in the past and remain widespread today. There is ongoing legal reform work to do to secure the benefits of a modern market economy for Indigenous communities and individuals.

In the context of finance, the aim of security is to provide a means of ensuring payment and by protecting secured creditors to encourage lending—either at all and/or on more favourable terms than would otherwise be available.[17] By providing greater assurance of payment to the lender, the borrower's ability to provide security enhances the borrower's ability to obtain finance.[18] That said, there is a more complex debate on the efficiency of secured finance than often realized.[19] Notably, in the context of larger firms, there is much less use of secured finance than some might have assumed, which has increasingly been understood as resulting from relatively lesser savings on interest rate for reasonably solid borrowers and secured finance resulting in some constraints on business operations decisions.[20] Secured finance is not a panacea. However, it is an important means of accessing finance, especially for enterprises that struggle more in accessing finance without security.[21]

The history of secured finance generally is one of seeking to develop innovatively in response to commercial needs. The development of particular new means of offering secured finance could occur even under English common law through judicially recognized commercial practices, and the English law of secured finance saw the development of the pledge (or pawn), the mortgage, and the charge, all achieved to a significant degree without reliance on statute so much as on commercial practice and recognition in common law judgments.[22]

A pledge is an old and particularly powerful tool of secured finance, but also a particularly restrictive tool, in that it involves actual transfer of physical possession of the personal property serving as collateral from the borrower to the lender.[23] This offers strong certainty of being able to realize on the collateral in the event of the default, but it imposes safekeeping costs on the lender and it interferes with the availability of the property for the borrower who might otherwise have been able to use the property in business activity.[24] So, it has limited applications.

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17 Cf. E.P. Ellinger, E. Lomnicka & C.V.M. Hare, *Ellinger's Modern Banking Law,* 5th edn. (Oxford: Oxford University Press, 2011) at 818.

18 See also Ewan McKendrick, *Goode on Financial Law,* 5th edn. (London: Penguin Books, 2016) at 771-780 (discussing the interplay of objectives of lender and borrower in choosing an appropriate security instrument).

19 See generally Norman Siebrasse, *A Review of Secured Lending Theory* (Washington: World Bank, 1997) (discussing some of the theory debates on secured lending).

20 See e.g. R.J. Mann, "Explaining the Pattern of Secured Credit" (1997) 110 Harvard L Rev 626. See also C.A. Hill, "Is Secured Debt Efficient?" (2002) 80 Texas L Rev 1117.

21 Cf. also Kunesh & Horowitz, *supra* note 1, at 103-104 (noting that secured finance on personal property may be even more important in the context of Indigenous communities where land-backed finance may be more problematic than in non-Indigenous contexts).

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The innovation of mortgages under which a lender would take simply legal title—or, later, equitable title, with legal title remaining in the borrower but with the lender able to foreclose and take legal title upon default—was an innovation that facilitated the availability of credit in various contexts.[25] However, the usefulness of mortgages still depended on certain forms of particular capital-intensive businesses and did not work well, for instance, in the context of travelling merchants who traded in changing merchandise over time. Thus, in English law, the innovation of the charge—and the particular innovation of a floating charge that simply hovered over shifting property until attaching in the event of a default condition—responded to commercial needs and, indeed, facilitated the development of industry that could not have developed as easily without the availability of this legal mechanism for finance.[26]

While the English law of secured finance could develop during a certain period within the common law virtually without statutory intervention,[27] there have nonetheless been powerful reasons for the development of statutory secured finance regimes. In the United States, the need for uniform systems of finance at a national level supported the development by the Uniform Law Commission of Article 9 of the Uniform Commercial Code (UCC).[28] In Canada, each common law province has adopted a *Personal Property Security Act (PPSA),*[29] based at least loosely on UCC Article 9.[30] These statutory interventions have permitted certain forms of greater nuance in the secured finance regime for personal property, such as in allowing for the development of carefully designed exemptions from seizure for certain sorts of property and in allowing for the more rapid development of approaches to some novel issues related to forms of intangible property than the common law would have attained on its own.[31] Statutory systems have also supported the effective development of certain forms of consolidated lien registries, which has significant efficiencies in supporting secured lending.[32]

III. The Model Tribal Secured Transactions Act – Innovations in the MTSTA and RMTSTA

These patterns of innovation in the history of secured finance provided a precedent of sorts for innovation on secured finance for Indigenous nations, albeit with a significant time delay. The Uniform Law Commission initiated a process toward a Model Tribal Secured Transaction Act (MTSTA) with its Committee on Liaison with Native American Tribes only in 2001.[33] There was growing awareness during the 1990s of the need for appropriate commercial legislation and a reality that Indigenous nations had largely not adopted such legislation on their own[34]—although

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there were some exceptions to this generalization.[35] Indeed, in respect of exceptions, there was even a Montana Model Tribal Secured Transactions Act promulgated in 1997 by the University of Montana's Indian Law Clinic, which was adopted in a modified form by the Hoopa Valley Tribe and the Northern Cheyenne Tribe.[36] This state-level development was obviously overtaken at a national level by the ULC's processes.

The ULC's development of the MTSTA would offer significant drafting efficiencies and support broader uniformity that would have commercial value in itself.[37] Following a developmental process over the next several years involving a number of Indigenous nations, a first form of the MTSTA was promulgated in 2005.[38] It followed significantly upon Article 9 from the 2003 version of the UCC, although with contextual adaptations for specific issues in the context of Indigenous nations.[39]

Relatively shortly thereafter, there was a need for revision of the MTSTA, arising partly from 2010 amendments to UCC Article 9 and partly from new perspectives on the contextually appropriate approach on some issues, including agricultural liens.[40] There was thus a further process from the 2005 MTSTA toward the 2017 RMTSTA. Some of the changes were necessary in light of the ongoing revision of UCC Article 9, and some valuably reflected further thought on particular issues. However, the relatively rapid change in a complex model regime may well have complicated aspects of communicating to Indigenous nations concerning the implementation of this model legislation. Even though there are implementation guides attempting to explain the revised version in the RMTSTA and reasons for the revisions,[41] there could nonetheless be complicating perceptions from a model code that has shifted so rapidly.

There could also be some complications for uniformity in so far as some Indigenous nations had already adopted the MTSTA through processes that took them past the date of promulgation of the RMTSTA on aspects of its implementation, making it arguably unlikely that they will immediately move to the RMTSTA. For example, the Chippewa Cree Tribe of Rocky Boy's Reservation, after adopting the MTSTA in 2012, reached and entered into a Compact with the state of Montana concerning a joint sovereign filing system in April 2017,[42] by which time the RMTSTA was then already appearing.

It is also worth noting that the RMTSTA's text does not appear to have responded directly to some broader critiques such as a scholarly view that there had been insufficient adaptations within the MTSTA relative to UCC Article 9 to protect Indigenous interests in cultural property.[43] However,

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39 *See generally* Elaine A. Welle, "A Guide to the Model Tribal Secured Transactions Act for Those Familiar with the Uniform Commercial Code" (2013) 37 Am. Indian L. Rev. 467.

40 Implementation guide to RMTSTA

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43 *See e.g.* Grant Christensen, "Selling Stories OR You Can't Own This: Cultural Property as a Form of Collateral in a Secured Transaction Under the Model Tribal Secured Transactions Act" (2015) 80 Brooklyn L. Rev. 1.

the guidance to Indigenous nations on implementation of the MTSTA and, now, the RMTSTA emphasizes the significance of such issues and invites careful consideration on them.[44] This approach may reflect an appropriate awareness that it is challenging to pronounce on such issues at the level of a uniform code or model statute, while nonetheless seeking to draw the attention of Indigenous nations to them. However, some will no doubt continue to have some concerns over whether there has been sufficient attention to these issues within the text itself, and there is an ongoing need for monitoring of the effects of the model code on cultural issues.[45]

Nonetheless, the significant innovation in the MTSTA/RMTSTA is one of providing a flexible opt-in framework. It is a dramatic improvement over an earlier approach under which some Indigenous nations attentive to commercial regime matters earlier on "adopted secured transactions codes by simply cutting and pasting either the model article 9 of the UCC or an enacted state version of Article 9 and incorporating the cut-and-pasted product as tribal law".[46] The availability of a flexible opt-in framework from which adaptations are possible allows Indigenous nations to overcome the lack of a modern secured financing regime without needing to draft such a regime from scratch and while having a framework that makes some adaptations to UCC Article 9 to be responsive to some specific circumstances of Indigenous nations. There are also some resources available to assist with successful adoption of the RMTSTA, and adaptations to it as necessary.[47]

Thus, the availability of a model code is a tremendously important law reform route. It is responsive to real challenges in reform processes. And it responds to significant commercial needs. There have certainly been significant uses of the model code by a number of Indigenous nations.[48] At the same time, a lack of external transparency on the commercial legal regimes of many Indigenous nations makes it challenging to identify fully how many Indigenous nations have adopted such frameworks.[49] And, indeed, there do appear to be some limitations thus far on take-up that could benefit from further understanding of processes by which such law reforms are likely to be adopted. Interestingly, some ideas may be present in comparative legal scholarship.

IV. Canadian Constraints on Indigenous Access to Secured Finance

The sort of innovation present in the *MTSTA* and *RMTSTA* has occurred in the United States but not yet in Indigenous contexts in Canada. Thus, Canada needs to learn from the United States on

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45 Cf. also Fletcher, *supra* note 2, at 758 (noting broader issues with the concern that "[i]n contrast to the goals of cultural sovereignty, transplanted law represents a further step toward modeling tribal legal systems after Anglo legal systems….In the case of a secured transactions code modeled after Article 9 of the UCC, the code challenges the development of cultural sovereignty to the extent that it displaces or modified tribal norms and values that relate to the ownership of property and the relationship between debtors and creditors.")

46 Fletcher, *supra* note 2, at 757.

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matters related to secured transactions specifically. At the same time, though, other aspects of Canadian experience may offer some perspectives on take-up issues of use in the United States.

The differentiated development on secured transactions specifically has been for several reasons, perhaps most notably the different barriers in place in the American and Canadian contexts. The barrier in the United States has been simply the absence of modern secured lending legal regimes in the context of sovereign Indigenous nations that were outside the UCC legal regime.[50]

The barrier is different in Canada. While the various Canadian provinces have developed a sophisticated system facilitating secured finance with personal property as collateral, with a body of personal property security law,[51] this body of law is largely blocked from applying in on-reserve contexts, thus seriously damaging Indigenous access to finance. This is because there is a specific federal government relation with Canada's Indigenous peoples,[52] there was no early adoption of any legal doctrine of Indigenous sovereignty (and only much more recent, ongoing efforts to negotiate self-government agreements with some Indigenous nations),[53] and the federal government has regulated its interaction with First Nations ("Indians") under the auspices of the highly-paternalistic *Indian Act*.[54] The *Indian Act* has imposed a general system of "band council" governance over First Nations in Canada since the 1870s, continues to be on the books, and contains a legally enacted barrier to the use of secured lending.[55] In particular, it has sections that specifically prevent seizure of property on a reserve,[56] and the governance sections of the *Indian Act* do not appear to contemplate adoption of a secured lending regime by a band council.[57]

While a coordinated change on secured transaction issues would thus theoretically be possible in Canada through one statutory amendment to the federal *Indian Act*, an imposed legal regime on secured transactions would actually replicate the problematic paternalistic character of the *Indian Act*. Essentially for this reason, the pattern of statutory reform over recent decades on matters affected by the *Indian Act* has been more incremental and more focused on opt-in possibilities for First Nations. The processes that have and have not worked well in this regard will be a matter for later attention in relation to take-up of legal reform possibilities.[58] In the meantime, where reform

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51 On this body of law, see generally Ronald C.C. Cuming, Catherine Walsh & Roderick J. Wood, *Personal Property Security Law*, 2nd edn. (Toronto: Irwin, 2012).

52 Indigenous peoples in Canada include First Nations (the more common name now for those formerly called "Indians"), Métis, and Inuit (formerly known as "Eskimos", although that term has come to be regarded as particularly unacceptable). All of these groups hold constitutionally recognized rights under s. 35 of Canada's *Constitution Act, 1982*: _____. While a federal relationship with "Indians" was clear from the outset, the specific federal relationship with Métis and Inuit was established only through later litigation interpreting s. 91(24) of Canada's *Constitution Act, 1867*: _____.

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has not been attempted, such as on secured transactions, there have been attempts at workaround solutions of various sorts, but with only questionable effectiveness.

To set this out in more detail, Canada's federal *Indian Act* imposes substantial barriers against the use of secured finance in those on-reserve contexts to which the *Indian Act* applies, whether under personal property security legislation or otherwise. Three sections of the *Indian Act* are most pertinent. Section 29 provides that "[r]eserve lands are not subject to seizure under legal process".[59] Section 89(1) provides that "the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band."[60] The effects of section 89(1) are extended by the section 90 deeming clause that deems any personal property "purchased by Her Majesty with Indian moneys or moneys appropriated by Parliament for the use and benefit of Indians or bands" as well as any property "given to Indians or to a band under a treaty or agreement between a band and Her Majesty" to always be situated on a reserve and thus exempted from the enumerated secured finance instruments and operations.[61] But apart from that personal property deemed situated on a reserve, other personal property will simply be legally sited on a reserve in the first instance—and other personal property yet again will be subject to problematic uncertainties concerning its *situs* that make it risky for anyone to assume it to be situated off-reserve.[62]

There are two important exceptions within section 89 that facilitate some uses of secured finance. Section 89(1.1) carves out leasehold interests in designated lands as exempt from the restrictions of s. 89.[63] Section 89(2) also provides that a person who sells to a band or a band member a chattel where the right of property or possession remains with the seller may exercise rights under the agreement notwithstanding a *situs* on the reserve, thus providing for the possibility of enforceable conditional sales agreements.[64]

Even with these exceptions, the effect of the provisions constrains the use of secured finance. As noted by Indigenous lawyer and economic development writer Darwin Hanna, "As a result of these provisions in the *Indian Act* [sections 29, 89, and 90], Indigenous peoples undoubtedly have difficulty in obtaining the…financing necessary to achieve economic development."[65]

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[59] *Indian Act*, R.S.C. 1985, c. I-5, s. 29.
[60] *Indian Act*, R.S.C. 1985, c. I-5, s. 89(1).
[61] *Indian Act*, R.S.C. 1985, c. I-5, s. 90(1).
[62] Amongst such less clear situations, there is of course a line of case law concerning property that travels between on-reserve and off-reserve locations. See *e.g. Kingsclear Indian Band v. J.E. Brooks & Associates Ltd.* (1991), [1992] 2 C.N.L.R. 46 (N.B.C.A.); *Syrette v. Sewell* (1996), [1997] 1 C.N.L.R. 207 (Ont. Small Cl. Ct.); *Wahpeton Dakota First Nation v. Lajeunesse*, 2001 SKQB 146, aff'd 2002 SKCA 27, leave to appeal to SCC refused (2002). However, there is a wider range of issues that could arise in terms of the *situs* of property when considering various forms of intangible property, intellectual property, and so on, with no certainty that rules on *situs* developed for some other context (such as conflict of laws) necessarily apply to the specialized context of determining *situs* on- or off-reserve. That such determinations need to be made just generates further complexity for the Indigenous entrepreneur's legal environment.
[63] *Indian Act*, R.S.C. 1985, c. I-5, s. 89(1.1).
[64] *Indian Act*, R.S.C. 1985, c. I-5, s. 89(2). See also *Chrysler Credit Corp. v. Penagin*, [1982] 1 C.N.L.R. 19 (Ont. Div. Ct.) (assignee of conditional sales agreement able to enforce on reserve in same manner as original vendor).
[65] Darwin Hanna, *Legal Issues on Indigenous Economic Development* (Toronto: LexisNexis, 2017) at 159.

Dimensions of these problems have been repeatedly noted,[66] and the fact that here has not been a more substantial solution attained probably reflects a mix of ongoing paternalism, policy-making inertia and coordination problems, and difficulties in identifying an optimal path forward. However, there have been at least some more positive trends in recent jurisprudence.

In recent years, the Canadian courts have tended to interpret the *Indian Act* provisions that would interfere with secured finance in more limited ways that have the potential to lessen the resulting interference. Notably the Supreme Court of Canada's decision in *McDiarmid Lumber Ltd. v. God's Lake First Nation* saw the majority of the Court hold that band funds in an off-reserve account did not attract the *Indian Act*'s exemptions from seizure.[67] The Court was also ready to read the s. 90 deeming clause narrowly so as to limit the agreements between bands and the Crown that would give rise to funds removed from being potential collateral.[68] While the majority decision in *God's Lake* has been subjected to ongoing critique by some legal academics[69]—arguably part of a more general phenomenon of academics wrestling with difficult questions on intersections of the cultural norms of Indigenous communities and modern secured finance systems[70]—its practical implications are such as to open more financing options for Indigenous communities.

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[66] See e.g. Roderick A. Macdonald & Shauna Troniak, "Do Indigenous Peoples Need a Tailor-Made Secured Transactions Law?", in Roderick A. Macdonald & Véronique Fortin, ed.s, *Autonomie Économique Autochtone: Dimensions Multiples / Dimensions of Indigenous Economic Autonomy* (Montréal: Les Éditions Thémis, 2015); Anita G. Wandzura, "The Enforcement of Security Interests Against the Personal Property of First Nations Persons on a Reserve" (2007) 39 Ottawa L. Rev. 1; James I. Reynolds, "Taking and Enforcing Security Under the Indian Act and Self-Government Legislation" (2002) 18 B.F.L.R. 37.

[67] *McDiarmid Lumber Ltd. v. God's Lake First Nation*, [2006] 2 S.C.R. 846 at paras. 18-20. A band retains the option of holding funds in an on-reserve account, even on another reserve, if it wishes to maintain their exemption from seizure: *ibid.* at para. 62. See also *Joyes v. Louis Bell Tribe # 439*, 2009 ABCA 49 (off-reserve account subject to garnishment due to amounting to property off-reserve even where evidence that band used it alongside on-reserve account principally for purposes of clearing large numbers of cheques).

[68] *McDiarmid v. God's Lake, ibid.* at para. 42.

[69] For example, in the context of sophisticated, subtle thinking about unsecured lending, Anna Lund still manages to offer some critiques of the majority judgment in *God's Lake* and to indicate a preference for the dissent based on worry about bands potentially seeing funds seized that would have been directed to public services: Anna Lund, "Judgment Enforcement Law in Indigenous Communities—Reflections on the *Indian Act* and Crown Immunity from Execution", in Dwight Newman, ed., *Business Implications of Aboriginal Law* (Toronto: LexisNexis, 2018) 279 at 295-97.

[70] For one strand of subtle thinking on such issues, see: Macdonald & Troniak, *supra* note , at 147, 150 (raising the cultural implications of secured finance); Thomas B. McMorrow, "Why New Laws Alone Won't Yield Indigenous Economic Autonomy", in Macdonald & Fortin, eds., *supra* note ___, 59 (wrestling more generally with intersections of culture and Indigenous economic development); Roderick A. Macdonald & Thomas McMorrow, "Rabbits, Ravens, Snakes, Turtles: Analyzing the Political Economy of Aboriginal Communities from the Inside Out" in Pierre Noreau, ed., *Gouvernance autochtone: Reconfiguration d'un avenir collectif* (Montréal: Les Éditions Thémis, 2010) 213 (wrestling creatively—indeed, almost too creatively—with issues related to "imposed aboriginal economic modernity"). There is a consistency in such thinking with results from the Harvard Project on American Indian Economic Development which has advocated for law reform that takes account of cultural values and thus called for American Indian nations to adopt "appropriately adapted versions of the Uniform Commercial Code": Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions Under U.S. Policies of Self-Determination* (New York: Oxford University Press, 2008) at 126. There are less subtle strands of academic literature that see any legal and economic reform as involving cultural and political assimilation: see e.g. generally Wanda Wuttunee, *Living Rhythms: Lessons in Indigenous Economic Resilience and Vision* (Montreal: McGill-Queen's University Press, 2004). However, those claims ignore the significant pre-colonial economic

A further judicial decision that could open more financing options arises from appellate authority in Manitoba to the effect that it is permissible to waive the protections of s. 89. In its 2009 decision in *Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson,* the Manitoba Court of Appeal held that such waiver is possible "with respect to a commercial transaction on reserve".[71] Some commentators interpret the case to mean that "an Indian who signs a waiver in respect of property situated on reserve would not benefit from s. 89 of the *Indian Act* and the property under agreement would be subject to seizure".[72] However, another leading text on Indigenous economic development published in 2017 does not appear to mention this option even amid a lengthy discussion of finance issues.[73]

A 2017 Quebec Superior Court decision in *Corporation de développement économique Montagnaise v. Robertson* appears to read the Supreme Court of Canada decision in *God's Lake* as implying the possibility of waiver, although Bouchard J.S.C. expresses this point less clearly than one might have hoped.[74] On the facts of the case, a universal hypothec was in any event held not to involve a sufficiently clear waiver,[75] with the case's holding likely amounting only to a reiteration of the point that an unclear waiver will not remove the s. 89 protection from seizure.[76] Notably, the case does not mention the Manitoba decision in *Tribal Wi-Chi-Way-Win Capital Corp.*, so it certainly does not help to develop any line of authority on waiver of s. 89. Considering other subsequent decisions in the tax arena that might have assisted with an understanding of pertinent sections of the *Indian Act*, Anna Lund specifically notes that "[t]he decisions also provide no direction regarding whether a beneficiary of the exemptions can validly waive them as was done in *Tribal Wi-Chi-Way-Win Capital Corp.*"[77] With a decade of case law failing to comment further on it, the potentially important precedent in *Tribal Wi-Chi-Way-Win Capital Corp.* could yet end up a judicial orphan, and reliance on it thus carries some meaningful legal risks.

Despite some promising dimensions to these jurisprudential developments, given the legal barriers and the uncertainties present in relying on judicial interpretations that may assist with those barriers, on-reserve secured lending is often able to operate only through a variety of work-arounds.[78] Some of these work-arounds are no different than possibilities that would exist in general and that may or may not be suitable to the circumstances of an Indigenous borrower,

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activity present in Indigenous economies whose modern continuation would logically consider modern policy steps within community traditions: cf. e.g. Robert J. Miller, *Reservation "Capitalism": Economic Development in Indian Country* (Santa Barbara: Praeger, 2012); Terry L. Anderson, ed., *Unlocking the Wealth of Indian Nations* (Lanham: Lexington Books, 2016).

[71] See *Tribal Wi-Chi-Way-Win Capital Corp. v. Stevenson*, 2009 MBCA 72 at para. 9 (Man. C.A.).

[72] See Olthuis, Kleer, Townshend LLP, *Aboriginal Law Handbook,* 4th edn. (Toronto: Carswell, 2012)at 451.

[73] See Darwin Hanna, *Legal Issues on Indigenous Economic Development* (Toronto: LexisNexis Canada, 2017) at 135-67.

[74] See *Corporation de développement économique Montagnaise v. Robertson*, 2017 QCCS 2736 (Que. S.C.).

[75] *Ibid.* at paras. 18-21.

[76] This conclusion was also present in *Sioui (Syndic) (Re)* (1995), 42 C.B.R. (3d) 181 (Que. S.C.).

[77] Anna Lund, "Judgment Enforcement Law in Indigenous Communities—Reflections on the *Indian Act* and Crown Immunity from Execution", in Dwight Newman, ed., *Business Implications of Aboriginal Law* (Toronto: LexisNexis, 2018) 279 at 307.

[78] For some such workarounds, see Darwin Hanna, *Legal Issues on Indigenous Economic Development* (Toronto: LexisNexis Canada, 2017) at 165-66.

such as the use of a guarantor or the use of secured lending against off-reserve assets. But it goes without saying that not every Indigenous debtor has suitable guarantors or extensive off-reserve assets for this solution to operate.

Another workaround solution is to require an Indigenous debtor to operate through a corporation, which does not qualify for the *Indian Act* exemptions.[79] However, that approach restricts the form of business structure utilized differently than would be the case for a non-Indigenous debtor and still does not access for security purposes the personal assets of an individual Indigenous entrepreneur. Moreover, the required corporate structure also has tax implications for an Indigenous entrepreneur who could otherwise qualify for tax exemptions for income earned on a reserve.[80]

Someone could imagine a solution from the fact that an Indian or a band (even from another community) may enforce against property on reserve,[81] but that solution presents the opposite problem in terms of corporate structure—only assignment of debts to a band or to an individual would permit any widespread use of this enforcement option, but having an individual carry out extensive enforcement against property on reserves would be an unusual business structure for enforcement.

Another established solution, of course, involves using a conditional sales agreement pursuant to the s. 89(2) exclusion from the effects of s. 89 of the *Indian Act*,[82] but the appropriateness of a conditional sales agreement will differ in varying circumstances, and the ultimate effect is to force secured lending back to a limited range of options more restricted than those available in the commercial mainstream.

With some other workarounds in active commercial use, the legal effectiveness of the technique is subject to some uncertainty. As expressed above, the ability of an Indigenous debtor to waive the s. 89 protections must arguably be treated with some caution.

Making some of these approaches work may also require further steps, such as having in place a band council resolution (BCR) authorizing access to the reserve for purposes of seizure in the event of a default.[83] However, a BCR cannot provide for seizure of exempt property, so it must

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[79] This proposition is generally accepted by commentators (see e.g. Olthuis, Kleer, Townshend LLP, *supra* note _____, at 461; Darwin Hanna, *Legal Issues on Indigenous Economic Development* (Toronto: LexisNexis Canada, 2017) at 165) and also has some support in case law: see *R. v. Bernard*, 118 N.B.R. (2d) 361 (N.B.Q.B.).

[80] Hanna, supra note _____, 191-99.

[81] See *Indian Act*, R.S.C. 1985, c. I-5, s. 89(1) (stating that "the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band" [underlining added]).

[82] See *Indian Act*, R.S.C. 1985, c. I-5, s. 89(2) ("A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.")

[83] For references to the role of BCRs in facilitating recovery of losses in the event of a default, see *Barriers to Aboriginal Entrepreneurship*, *supra* note , at 29n; Parliament of Canada, House of Commons, *Standing Committee on Aboriginal Affairs and Northern Development: Evidence (May 12, 2015), 41st Parl, 2nd Sess.*, at 3 and 6 (referring to band council resolutions to permit access in conjunction with mortgage of a leasehold); Parliament of Canada, House of Commons, *Standing Committee on Aboriginal Affairs and Northern Development: Evidence (May 5, 2015), 41st Parl, 2nd Sess.*, at 16 (referring to a BCR enabling an Aboriginal Financial Institution (AFI) to access a

be used in conjunction with an exception to the s. 89 exemption, such as a mortgage of leasehold assets, a use of a trusteeship over the assets, or lending against assets held not by an individual but by a corporation. However, some BCR templates of financial institutions see the BCR simply authorizing a business and providing for access to the creditor in the event of default, and it is not a certainty that they would be effective in permitting seizure of assets held by a First Nations individual on reserve.

The issue of the role of BCRs also highlights the need for band council support on a business-by-business basis. The question that logically arises is whether there are any broader approaches to getting out of the various impediments to secured financing on reserve. Canada's *Indian Act*, with its paternalistic protection of assets held by a band or individual on reserve, is a severe impediment to the use of secured financing to build Indigenous economies, and one must ask if there are options to do better while respecting some of the rationales that might exist for some limits on enforcement against particular types of assets.

Of note, some Canadian contexts related to Indigenous lands have seen the development of more creative options bearing on finance[84]—even though those have often been considered more complex and contested contexts due to deep sensitivities around risks to Indigenous land bases.[85] Even while some prominent policy proposals related to widespread transformation of Indigenous lands into fee simple property have understandably raised concerns,[86] particular nuanced adaptations and reforms have found some more creative ways of permitting the use of Indigenous land as collateral without being based on complete privatization of the land base.

Although others could also be referenced,[87] two examples are particularly noteworthy here.

(1) The adoption of the *First Nations Land Management Act (FNLMA)*, now some two decades in existence, permitted First Nations to opt out of the land management provisions of the *Indian Act* by adopting a land code and certain managerial structures to attain approval of this move. Over one hundred First Nations have now gone this route and have adopted land codes with some variations between them, some of which permit some innovative financing arrangements not previously possible while attempting to maintain ongoing jurisdiction over the land base.
(2) In response to First Nations seeking as such, Canada's Yukon Territory adopted legislation allowing First Nations effectively to move certain lands into fee simple-type formats but also back out if they choose to change the tenure structure later on, thus offering some law reform options that do not involve permanent commitments.

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reserve to recover assets from a business). A BCR may be needed because an individual cannot authorize access to the reserve: this point is made in Ronald Cuming, "Security Interests", *supra* note . Whether BCRs are technically needed if there is a legally valid right to enforce is a more complex question: Wandzura at 15n (seemingly citing work by Catherine Walsh although with citations that do not make the underlying work clear). However, even if one could argue that there was a legal right to enforce on reserve without BCR authorization, from a practical standpoint, it would be much preferable to have support from the band.

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Some lessons might emerge from these experiences in terms of law reform – (a) value of opt-in approaches (with parallels to the American experience discussed earlier); (b) value of time – two decades with the FNLMA has led to an acceleration in take-up compared to earlier on; (c) evidence of success from some First Nations as others contemplate a reform (some First Nations learning from others' experiences); (d) value of avoiding options requiring a permanent, irreversible choice (some contrasting examples on oil and gas regulations)

These lessons could be applied in the context of Canadian emulation of American innovations on secured transactions, with a model code conceivably being a valuable approach in Canada especially if combined with some of these lessons. At the same time, some of these lessons may also bear on American discussions of take-up – it is still relatively early days for the RMTSTA – experience from some Indigenous nations may be particularly valuable for others that contemplate adopting it, so there is ongoing value in processes that enable cross-learning between different Indigenous nations

CONCLUSIONS / FUTURE OF DRAFT

[This draft paper has done several things. It has rooted innovations in the secured transactions system for Indigenous contexts in broader background on secured finance and innovations on it in other contexts. It has examined some aspects of innovation on secured finance in Indigenous contexts in the United States (with potential to expand upon more examples) and has highlighted some aspects of the law reform process in this context. It has comparatively described the ways the Canadian situation is more locked in on secured finance issues in some respects, suggesting that Canada could learn from the American reform process on this issue. At the same time, it has gone on to reference some aspects of Canadian reform processes on other issues as potentially offering some perspectives for the American context. There can be some conclusions on matters on the secured transactions contexts and on law reform processes to help enable Indigenous nations to take up more possibilities in commercial law reform in renewing their economies.]

[How this draft will be developed further depends on some choices about it – whether to frame it more toward an American audience (I will be interested in how interesting or not you find it!) or a Canadian audience, and which specific aspects I then develop further. Thanks for any discussion/comments as I consider how to take it forward.]