APPLE CEDE

Apple \Ap"ple\ ([a^]p"p'l), v. i. 1. The fleshy pome or fruit of a rosaceous tree; 2. A derogatory term for a non-traditional Indian [red on the outside and white on the inside].

Cede \Cede\, v. t. [imp. & p. p. Ceded; p. pr. & vb. n. Ceding.] [L. cedere to withdraw, yield; akin to cadere to fall, and to E. chance; cf. F. c['e]der.] To yield or surrender; to give up; to resign; as, to cede a fortress, a province, or country, to another nation, by treaty.

FIRST NATIONS
LAND MANAGEMENT REGIME

JUNE 9, 1999

"Canada's solution to decisively exterminate aboriginal title."

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ABOUT THE AUTHOR

Janice G.A.E. Switlo graduated in 1981 from the University of British Columbia, Vancouver, with a bachelor of commerce in urban land economics and marketing. Finishing in the top 4% in North America for the law school admissions test in 1981, she attended Osgoode Hall Law School, Toronto, Ontario in 1983 and graduated in 1986. She articled with Ladner Downs, a Vancouver law firm, and was called to the Bar in British Columbia in 1987.

In 1989, Ms. Switlo joined the Department of Justice as legal counsel for Revenue Canada, Taxation, Customs and Excise. Soon thereafter she agreed to act as in-house legal counsel for the Department of Indian Affairs. She provided years of advice on reserve surrenders, referendum procedures, leasing and policy and was a frequent source of assistance to private sector lawyers.

Ms. Switlo quit the Department of Justice in 1993 and established her law practice in Peachland, British Columbia, in Okanagan territory. She joined the International Bar Association in 1992 and continues to be a member.

Ms. Switlo acted as the first in-house legal counsel for the Westbank Indian Band. This experience led to her decision to provide "grassroots" legal services, education and advice.[1]

In 1997, Ms. Switlo did not pay her membership fees to the Law Society of British Columbia. She maintains that the Law Society exercises powers that are unconstitutional, beyond the purview of its provincial legislative authority and places Canada in breach of international conventions. She asserts that the Law Society's illegal activities and operations seriously compromise the independence of lawyers in British Columbia. Ms. Switlo concludes that the Law Society thwarts the application of the rule of law[2] and undermines fundamental civil liberties in Canada.

Ms. Switlo candidly shares her personal experience and bears witness in her new book scheduled for release in 1999. *Sookinchute* conveys the shocking truth about Canada's governments and its justice system, revealing the roles of politicians, judges, lawyers, law societies, bankers, civil servants and the media.

Who's Who in the World[3] lists the biography of Ms. Switlo, "inclusion in which is limited to those individuals who have demonstrated outstanding achievement in their own fields of endeavor and who have, thereby, contributed significantly to the betterment of contemporary society".

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SUMMARY

The "New Regime" is a full-scale assault on Aboriginal beliefs. It is acculturation achieved through Aboriginal people abandoning their rights and ceding their land.[4] Implementing the New Regime results in the surrender of reserves and the abandonment of Aboriginal Title[5]. There will remain "reserves", but underlying Aboriginal title will have been destroyed. Where there is a treaty, for example Treaty 7, the New Regime will betray the elders' desire to preserve the treaty.[6]

The New Regime was launched with the signing of the Framework Agreement on First Nation Land Management on February 12, 1996. Amendments #1 and #2 were made as of May 12, 1998. The chiefs of fourteen Indian bands signed the Framework Agreement.[7] Bill C-49, "An Act providing for the ratification and the bringing into effect of the Framework Agreement on First Nation Land Management", short title "First Nation Land Management Act", has been passed by the House of Commons and is before the Senate. It will be enacted by Parliament shortly, though likely with some amendments. The enactment of the First Nation Land Management Act by the Governor in Council ratifies and implements the Framework Agreement.

The New Regime must be consented to by the members of the Indian bands. This is done through a vote. The standard for passing the vote is the same as for a surrender of reserve under the *Indian Referendum Regulations* of the *Indian Act*. But the band members do not vote on the Framework Agreement itself. They vote only on a Land Code that is authorized by the Framework Agreement and the Act. The federal government does not have to approve the Land Code. An independent witness, a Verifier, certifies that the Land Code complies with the Framework Agreement and has been properly voted on by the band members. Once the Land Code is passed, the Framework Agreement is *deemed* ratified. Then an Individual Agreement is negotiated and *must* be entered into by the "first nation" for funding. This funding is for exercising the residual management rights that remain after the surrender and ceding of the reserve lands. Finally, a Transfer of Administration is privately concluded between Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of the Province (where the "first nation" is located). The province is now the beneficial owner of the reserve lands. The province's jurisdiction remains subject to the residual management rights of the "first nation" that are set out in the Framework Agreement. How these residual management rights are to be exercised by the "first nation" is set out in the Land Code.

This is a surrender to the Queen by the Indian bands.[8] It is not simply a deal within the power of the Minister of Indian Affairs or Cabinet. This is not simply substituting new, better provisions for the old ones under the *Indian Act*. This surrender complies with the *Royal Proclamation, 1763*. A surrender can only be made to the Queen[9]. Once a Land Code is passed by referendum (ratified), a surrender to Her Majesty occurs. Only some residual management rights remain.

In the best light, reaction to this analysis will be, "That is not what was intended!" In which case, the documents need much improvement to prevent Canada's courts from coming along later and interpreting them as I have here. At worst, the New Regime is an underhanded attempt, smacking of the same deceiving, dirty, tricks to destroy the rights of Aboriginal peoples that Canada is well known for.

But then again, can this last statement really be said? Ample resources have been made available to the Aboriginal people to get advice on the New Regime. It has been set up as a completely "Indian-driven" process. Canada could simply say, "Well, if the advice given to you was bad, then sue your advisors,

not us.” The question would be, “Did Canada really mislead, or was it the chiefs, who mislead the people[10]?” So sue them? But what good would that do? Original title in the land would still be irrevocably gone.

It’s not a good day in Indian Country for the band that adopts the New Regime. It’s a bad deal for Aboriginal people who wish to preserve their rights and are mislead by written words. My commitment is not as a judge of the decision-making or of the decision-makers. The decision is not mine to make. When it comes to the question of whether to preserve or deny beliefs, the elders can best assist. I serve only to remind people and to help them to understand what they are being asked to trade, and for what in return, so that they can decide.

The Indian bands that are signed into the Framework Agreement are strategic targets of the federal government. Westbank First Nation is in the heart of the Okanagan Nation. It extends across the international boundary between Canada and the USA, but does not recognize the boundary.[11] This is an important territory for the federal government because of the cross border implications. Siksika First Nation is Chief Issap’mahkikaaw’s band (Chief Crowfoot). Chief Issap’mahkikaaw took a lead role in Treaty 7. He agreed first and the other chiefs followed. With their chief signing into the Framework Agreement, Siksika First Nation makes the representation that Her Majesty has “title” to the Treaty 7 lands. This means they have no belief in original title, they do not believe that the Creator bestowed the land to the Treaty 7 Indians. Rather, it means that they believe the Creator gave the land to Her Majesty and that She also owns all of the animals. So for longhouse hunters, the Framework Agreement says the hunted animal is not a gift from the Creator but a gift from the Queen. After the New Regime, there will be no priority accorded these hunters under section 2(a) of the *Charter* to hunt for religious purposes. When the present-day descendants of Chief Issap’mahkikaaw make such a representation, as they do in the Framework Agreement, it says that Chief Issap’mahkikaaw did not believe. And if he did not believe, neither did any of the other chiefs who followed his lead. The chiefs in turn represented their people. The whole territory thus falls. There is no Aboriginal Allodial Title to deal with, only the English/Canadian common law doctrine of the Aboriginal Right of Aboriginal Title. The latter is extinguishable provided the test for extinguishment set out in *Sparrow* and *Delgamu’ukw* is met. The former is not; it is protected under international human rights under freedom of religion and beliefs and will be forever.

The “Indian land question” centres on whether “title” is truly Her Majesty’s. The Framework Agreement cedes that it is Her Majesty’s. Suddenly, the “Indian land question” disappears. This attacking of the beliefs and religions of the Aboriginal peoples is not new. It has persisted since contact. When the effort is underway, it is never openly seen for what it is nor disclosed. Aboriginal parents were told their children would get a good education and opportunities to improve their conditions and strengthen their people. Instead, their beliefs and their language were beaten from them. It is no different with the New Regime. The Aboriginal people will be weaker, not stronger, after its effects. However, if the New Regime is implemented with the people not realizing the effects until later, Canada will then find itself in the throws of a holy war. It will make events at Gustafsen Lake, Ipperwash and Oka look like picnics.

The Honour of the Crown demands full information before the Aboriginal peoples can give binding consent. I do not see this happening. What I hear Aboriginal people want and think they are getting, and what I see them being offered and actually getting, differs so greatly as to suggest a repeat of history. My advice to Her Majesty’s representatives: stop the trickery, it’s not Honourable.

RECOMMENDATIONS

For Indian bands scheduled to the First Nation Land Management Act, do not put a Land Code to a vote. The Land Code triggers everything. Its ratification[12] causes the Framework Agreement to be automatically ratified as well. Band members may wish to consider legal action or going on record or otherwise paper trailing, to challenge the federally held notion that chief and council can authorize the chief to sign such an agreement. An agreement designed to surrender and cede even though these words are not used, cannot proceed without a clear and substantial mandate from the people.

For Indian bands not scheduled to the First Nation Land Management Act, keep it that way. Provide a direct mandate to the chief and council to *not* enter into the Framework Agreement. Do not wait to read the newspaper to find out that you have been signed in.

For any initiatives, have full and early distribution of drafts. This prevents travelling too far down a dangerous road. Keeping it in the hands of a very few chiefs dominated by even fewer advisors is asking for trouble. Get a commitment to this effect from the provincial and federal governments. Their fiduciary duty, duty of good faith and duty of fairness may demand compliance. Prevent them from being too cozy with your chiefs. Be patient. Analyze what is needed or desired and what the trade-off costs may be before becoming comfortable with or dependent on the extra money that flows abundantly for new initiatives. Do not believe anyone who suggests, "Oh well, let's just give it a try, what have we got to lose?" Actually, everything.

Make sure one legal advisor is an expert in property law, the heavy stuff that most law students' eyes glaze over for. Real estate lawyers who witness documents their secretaries do up for them are not what I mean by property lawyers. Time and time again I have seen disappointment from Indian bands in court because their lawyers did not seem to truly understand this difficult area of law. We are all taught it in law school as a core first year course, but few of us get it right then and even fewer retain what we memorized to pass. Usually after suffering through it, property law is not our driving passion.[13] There are very few truly expert lawyers in this field in Canada.

Look out for any missing documents or agreements, such as here in the reference to a Transfers of Administration. If any documents are suggested anywhere or appear to anyone may be needed, get a sample form attached. Clear intentions and references are needed in the agreement itself. If terminology used is legal in nature but its legal effect is not intended, this must be stated or the courts will presume the legal meaning.

Clear statements that Aboriginal Title, Aboriginal Allodial Title, Root or Original Title and treaty rights are not hereby surrendered are necessary in all documents if it is desirable not to surrender inherent and original rights. Statements that "title" remains the same and will not be transferred do not achieve this.[14] If Canada has difficulty with this, Canada can add a clause to the effect that by the same token, "nothing herein hereby compels Canada to accept, acknowledge or recognize Aboriginal title to any or all of the subject lands". There is a difference between "agreeing to disagree" and being tricked into agreeing.

ANALYSIS

There are five legal documents involved:

1. Framework Agreement on First Nation Land Management ("Framework Agreement"),
2. First Nation Land Management Act ("Act")[15],
3. Land Code,
4. Individual Agreement, and
5. Transfer of Administration

Fundamental problems developed with the treaties that continue to haunt Canada today. Questions about whom attended and signed, whether they had authority of their people, whether they were really told and understood what was going on, whether translators were sufficiently capable. Allegations exist of misrepresentation, deceit and of witnesses who were less than independent. It all adds up to considerable uncertainty.

The solution to prevent the same situation of "the Indians' word against the federal government's word" from arising here is to use a Verifier[16] A Verifier's role is defined in the Framework Agreement and in the Act. The Verifier serves as the independent witness. The Verifier creates a proper paper trail to certify that the "i"s were dotted and the "t"s crossed. The use of a Verifier is to ensure there is no future prospect of being able to challenge what was entered into should the Indians figure out how they were set up.

Look at the different definitions of "Minister".

" 'Minister' means the Minister of Indian Affairs and Northern Development" in the Act.

In the Framework Agreement, " 'Minister' means the Minister of Indian Affairs and Northern Development, *or such other member of the Queen's Privy Council as is designated by the Governor in Council* for the purposes of this Agreement." [emphasis added]

The Framework Agreement is a deal between the Queen and the Indian bands. It is not simply a deal within the power of the Minister of Indian Affairs. It is deemed ratified[17] by the Indian band members when they pass the Land Code and the process is verified. This delivers to Her Majesty an absolute surrender of the reserves of the subject Indian band. Until this time, even after the signing of the Framework Agreement and the Act is enacted, the reserves remain under 91(24) of the *Constitution Act, 1867*, in Her Majesty the Queen in Right of Canada. Not until *after* the Land Code is passed and verified do the reserves come under Her Majesty the Queen in Right of a Province. This is completely constitutional.[18]

An absolute surrender transmits the beneficial interest in the lands to the province, subject to any retained rights or privileges.[19] The lands cease to be under the legislative authority of the federal government.[20] Once reserve land is surrendered, the *Indian Act* does not apply to it. This is the case even if the "purchaser" of this surrendered land is an Indian.[21]

The Indian bands retain some residual management rights. These rights are set out in the Act. These residual rights are not constitutionally protected[22], they are not "existing Aboriginal or treaty rights" under section 35 of the *Constitution Act, 1982*.

The Framework Agreement destroys the original land rights. I describe these rights as Aboriginal Allodial Title in my book.[23] Others may refer to it as Original Title. The Supreme Court of Canada defines much more limited rights in *Delgamu'ukw,* as the Aboriginal Right of Aboriginal Title. The Supreme Court of Canada definition of Aboriginal Title is not the same as the Aboriginal peoples' definition of Title.

This is the same difference that exists, for example, regarding Treaty 7. The elders in Treaty 7 territory clearly and consistently maintain that at "istisist aohkotspi", "the time when we made a sacred alliance", a peace treaty was entered into with the Queen.[24] To the contrary, the federal government maintains today that lands were surrendered and ceded to Her Majesty when the treaty was signed.

Why is the surrender of the reserves so necessary or important for Her Majesty to obtain?

For Aboriginal people, the reserves hold the key to regaining the ability to exercise existing, powerful rights. The Supreme Court of Canada in *Delgamu'ukw*[25] admits that its definition of the Aboriginal right of Aboriginal Title[26] confers exclusive use. *Delgamu'ukw* requires proof of continuous possession. The court uses common law principles to suggest what will prove necessary continuous use of land so as to render the land subject to the court's notion of Aboriginal Title.[27] There is a fundamental principle of common law that can be applied by Aboriginal peoples to prove Aboriginal Title as defined by the Supreme Court of Canada[28]: proof of possession of a part is proof of possession of the whole.

Applying this principle to, for example, Treaty 7, it is not necessary to prove continuous use of every part of Treaty 7 territory. It is enough to show continuous use of small reserve lands within the territory. Just as an "owner" of a farm may have a house in one corner, a barn in another, a corral somewhere else, it all goes to proving possession of the whole of the farm. Small reserves in corners of the treaty territory can achieve the same thing. In the case where no treaty exists, the same principle applies over the territories to the extent the tribes remain united. If only Indian bands exist as present day remnants of dead tribes, then no lands in between are proved possessed. There, one Indian band gets the doghouse, another band gets the house and another band gets the barn. And Canada gets the farm for free. If the reserves are surrendered, this proof of continuous ownership of the whole territory is forever lost.

In the New Regime, the "first nation", as an "owner" of the "first nation land" does not have "title" to any land whatsoever. "Title" is in Her Majesty. Her Majesty has the right to grant interests less than title. A fee simple estate, not "title", is the greatest interest that Her Majesty grants. It is this interest in land to which a first nation will be able to "exercise the powers, rights and privileges of an owner"[29]. Fee simple estates, like the typical city house, are transferred and sold between Her Majesty's subjects and others. Title is not transferred from Her Majesty to anyone, unless for example, it is necessary to settle and put to end a war between Canada and another country. In such a case, title may be transferred from Her Majesty to another head of state.

Chiefs of the Indian bands signed into the Framework Agreement have drastically misinterpreted this. On the occasion of the signing of the Framework Agreement, one chief said, 'The Framework Agreement protects our reserve lands for future generations because this new land management regime prohibits any surrender and sale of reserve lands' ".[30] This is not true. The Framework Agreement *facilitates* a surrender.

Section 5(a) of the Act is misunderstood; it reads: "Title to first nation land is not affected by the Framework Agreement or this Act". Note how carefully worded it is. It does not reference "after the passing of the Land Code", the "Individual Agreement" or the mystery agreements involving the province described in section 53.1 of the Framework Agreement.[31] It only says "title" is not affected by the Framework Agreement or the Act. This is true, because the reserves are not affected until *after* the Land Code is passed.

The "Executive Summary" is misleading. It states that the "Framework Agreement provides the First Nation with all the powers of an owner in relation to its First Nation Land, except for control over title or the power to sell it."[32] But after the New Regime, there remains no title in the former reserves that the Aboriginal peoples can sell to Her Majesty.

Supporters of the New Regime say section 26(1) prohibits the sale or surrender of land. This is not true. Section 26(1) reads, "First nation land may not be alienated except where it is exchanged for other land in accordance with the Framework Agreement and this Act."

First, section 26(1) fails to say "notwithstanding section 18(1)(a)"[33]. This means that the full rights as an "owner" described in section 18(1)(a) and discussed by me above, are not limited in any way by section 26(1). Under section 18(1)(a) the first nation "owner" has the right to sell. It's just that what is sold will be subject to the first nation's residual management rights. For example, a house is built on first nation lands. It is on surrendered lands that retain the residual management rights set out in the Land Code as authorized by the Act. When this land is sold by the first nation, which can be done, that land remains subject to the Land Code. The "new owner", who can be anybody, must still comply with the first nation's laws on zoning, the environment, etc. But that land is no longer "owned" by the first nation.

Second, "alienate" does not have the same meaning as "surrender" or "sale"[34]. It can mean "separated" or "detached".[35] In other words, the surrendered lands in which only residual management rights continue must be kept together under the same scheme. The first nation can not take any of these lands out from under that status. The first nation lands, actually surrendered lands, will remain subject to the exercise of the residual management rights, which are set out in the Framework Agreement. But make no mistake about it, the lands have already been "sold" by the surrender that takes place once the Land Code is passed.

The "Executive Summary" states that "the First Nation's lands will be protected from surrender for sale."[36] The "Questions & Answers" states that "Surrender for sale is prohibited in order to protect the land base of the First Nation for future generations."[37] But such a statement is not contained in any of the legal documents. This is because to the contrary, the whole point of the exercise is to cause a full scale, absolute surrender of the reserve lands.

Clearly the chiefs who were involved in negotiating the Framework Agreement are not telling the people what it all really means. Have the chiefs been given bad advice or been deceived? The federal government is not correcting the misinformation. But then again, perhaps not all of the civil servants involved really understand it either, only those who "need to know"? Or are they simply acting on strict instructions from the political level? Why the need to resort to such trickery the New Regime manifests anyway, if this attempt, as I suspect, is indeed deliberate?

In my "Trick or Treaty" paper[38] I have commented on the effort made in British Columbia to cloak the land claims process[39] with the word "treaty" to appeal to Aboriginal peoples asking for treaties. The use of the term "first nation land" in the Framework Agreement and the Act is being used much in the same way. It cloaks the surrender of reserves to make the New Regime more attractive to Aboriginal peoples. Rather than refer to the "surrendered lands", they refer to the "first nation lands". But it does not matter what you call it, it matters what it is.

Further comments are now grouped by document.

Framework Agreement

Disputes over the Framework Agreement, such as what it means, cannot be referred to the courts.[40] Access to international courts as they currently exist or may exist in the future is given up.

If the Framework Agreement does not affect any existing rights and powers, it would not be necessary to specify the Framework Agreement does not affect fisheries[41] and migratory birds or endangered species[42].

Act

Section 13.1 of the Framework Agreement[43] and section 5(a) of the Act[44] represent that "title" is fully in Her Majesty, in accordance with the Supreme Court of Canada definition of Aboriginal Title[45], an English common-law doctrine. They represent that the first nation never did claim Aboriginal Allodial Title[46]. It means that the Aboriginal belief in original title, that of rights to the land flowing from the Creator to the people, rather than flowing from a Queen, disappears. The Indian band through the Framework Agreement is saying that they never believed in this, or even if they once did, they no longer do. To those Aboriginal people who do believe, this is the ultimate betrayal, the betrayal of the Creator who entrusted them with the care of the land.

This belief can be asserted as attracting the protection of section 2(a) of the *Charter of Rights and Freedoms*, for example as being a "religious" belief. This is the most highly protected international human right. This belief is a "creation theory". All major religions are based on a theory of creation. In fact, a creation theory has been the line which historically separates the "religious" from the "scientific".

If section 2(a) of the *Charter* applies, there are no steps to be met to extinguish the belief, which is intimately tied to the land. To the contrary, there are steps for extinguishment that apply to all existing aboriginal and treaty rights under section 35 of the *Constitution Act, 1982*.[47] Under no conditions *whatsoever*, can a creation theory, as a protected section 2(a) *Charter* right be extinguished. It can only no longer be believed in. The control is fully within the Aboriginal peoples. This is why this representation in the Framework Agreement is so critical. This more than anything else is what the federal government needs. This is why it is so important not be to be signed into the Framework Agreement, and why, if the people do not agree with this and what their chief and council have done, they must assert their continued belief through legal or other action.[48]

Section 25(1) of the Act[49] requires the Minister of Indian Affairs to establish the First Nation Land Register. Section 25(2) provides that it is to be administered, subject to the section, "in the same manner as the Reserve Land Register established under the Indian Act." The *Indian Act* establishes two

separate registers, the Reserve Land Register[50] and the Surrendered and Designated Lands Register[51]. The distinction between the registers is the status of the underlying title – has it been surrendered?

The Act does not define the First Nation Land Register to be the same as the Reserve Land Registry, just that it be *run* the same way. If in fact the reserves will not be affected, why not continue the separation of registers? If everything is surrendered, there is no longer any need for separate registers. If first nation land were to remain fully reserve land, there would be no need to list it on a separate register until surrender of it occurred. In essence the First Nation Land Register will be the equivalent of the Surrendered and Designated Lands Register.

Section 51 of the Framework Agreement says the register "will be administered by Canada as a subsystem of the existing Reserve Land Register."[52] [emphasis added] This suggests that the First Nation Land Register will remain part of the *Indian Act* established Reserve Land Register. However the wording of the Act means it clearly will *not* be a part of the existing Reserve Land Register: "The Minister shall establish a register" and run it in the same way it does the Reserve Land Register[53]. Indeed, the First Nation Land Register cannot be a part of the Reserve Land Register as the first nation lands will be surrendered lands. To include them there would be misleading to the public.

Aboriginal people perhaps forget that the exemption from seizure of personal property[54] is only vis-a-vis a non-Indian. Indians can seize and this can happen under the New Regime. If taxes are not paid or fees not paid, the first nation council can take steps to seize Indian personal property.

To add a band to the fourteen bands already scheduled to the Act, Section 45 of the Act requires the Governor in Council, Her Majesty's representative, to be "satisfied that the signing of the Framework Agreement on behalf of the band has been duly authorized and that the Framework Agreement has been so signed." "Duly authorized" could mean a band council resolution authorizing the chief to sign. Alternatively, that the band members have properly mandated their chief, not just elected him/her. From discussions with members of the scheduled bands, the current standard has been simply a band council resolution authorizing the signing.[55] There does not appear to exist any mandates from the band members.

But members of the bands that are already signed in to the Framework Agreement, notably three years ago, have not spoken up. If they were not aware of the effects and mislead, no one can hold this against them. Once however, it can be shown that the knowledge is available to them, they need to act or be held to agree that their fate lies wholly in the hands of the chief and council. It means agreeing that the chief and council will decide what beliefs the band members can hold.

Individual Agreement

Once the Land Code is passed and verified, the Framework Agreement is deemed ratified. Section 6(3) of the Act then commands, the first nation "shall, in accordance with the Framework Agreement, enter into an individual agreement…". The Individual Agreement must be signed and the courts can enforce this. The Individual Agreement concerns funding similar to that negotiated already by bands exercising delegated powers under sections 53 and 60 of the *Indian Act*.

The funding must be approved by the band members because it is part of the consideration flowing to satisfy the *Sparrow* and *Delgamu'ukw* test for extinguishment. This funding is referenced in the "Executive Summary" as "the developmental and operational funding to be provided by Canada to the

First nation for land management."[56] The federal government puts it this way, "The First Nation must also enter into an individual agreement with Canada to determine a level of operational funding for land management and to set out the specifics of transition to the new regime."[57]

Transfer of Administration

The *Federal Real Property Act* governs a Transfer of Administration. Sections 11, 16 and 18 of the *Federal Real Property Act* apply to the New Regime.[58]

"Transfer of administration" is not simply loose language referring to the Individual Agreement. I cannot believe that Department of Justice lawyers would use such language "accidentally" to reference anything but a Transfer of Administration. If a Transfer of Administration to the band is intended, it would be clearly set out and the *Statutory Instruments Act* would apply.[59] It would be included as a schedule to the Framework Agreement. This is a standard form conveyance document that took the Department of Justice years to develop and is readily available.

The Framework Agreement and the Act do not say that the first nation will enter into a Transfer of Administration. The Act only refers to, "the terms of the transfer of administration of that land". It does not say, "the terms of the Transfer of Administration of that land *to the first nation*."

Look at section 53 of the Framework Agreement[60], which has to be considered in light of section 26[61].

On first blush section 53 may appear innocent, simply necessary for dealing with enforcement and environmental management issues. However, that is specifically dealt with in section 26. Section 53 must therefore refer to something else. This something else is, I submit, a Transfer of Administration to the province.

A further indication that a Transfer of Administration to the province is intended comes from the federal government's web site[62]. "Extensive consultations have taken place in the development of the Framework Agreement and in the drafting of the legislation, with the First Nations representatives, their communities, *the six affected provinces* and with certain third parties such as the Union of British Columbia Municipalities."[63] [emphasis added]

Just how would the provinces be affected by the New Regime? Here's how. They will receive the beneficial interest in the reserves subject to the residual administration rights retained after the surrender of the reserves that happens when the Land Code passes.

Another indication: the first nations lands "will continue to be reserves for the purposes of other applicable federal legislation"[64]. This is not the same definition of reserves that currently exists; it is a lesser definition.

And another: the goal of the New Regime is for "improved economic development on reserve."[65] Robert Louie, Chairman of the Interim Lands Advisory Board expressed the purpose of the Framework Agreement to "facilitate timely responses to economic development opportunities …"[66] *Delgamu'ukw* clearly says that if you want to do this, you must first surrender.

Finally, look at section 44 of the Act[67] and section 52 of the Framework Agreement[68]: the *Statutory Instruments Act*[69] does *not* apply.

The New Regime clearly creates regulations as defined in the *Statutory Instruments Act*, thus that act would normally apply to a Land Code and first nation laws. Since it does *not* apply, it means that the incorporated first nation is not an agent corporation of any Minister. If the first nation is not an agent corporation, then the Minister cannot do a Transfer of Administration to the first nation.[70] The Transfer of Administration that pops up throughout the documentation must therefore be to Her Majesty the Queen in Right of a Province, an "affected province" that is.

Since the Transfer of Administration is only between Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of a Province, the first nation is not a party to it.[71] Thus the first nation need not even know about the Transfer of Administration and likely would not. It might perhaps be exposed years later when necessary to allow the courts or the international community to accept Canada's submissions, that "Yes, indeed, a legal surrender occurred. Here's the paper trail and the independent Verifier to prove it. We got a vote that is consistent with our referendum regulations and practice used for all surrenders. And did we mention the millions of dollars over many years[72] that we gave to the Indians for legal and other advice? And besides, this was all their initiative anyhow. We just did what they asked us to do. The *Sparrow*/*Delgamu'ukw* test for extinguishment has been completely complied with. It's over. And we want our costs for this litigation paid for."

There is another part to the New Regime: self-government agreements and the Acts of Parliament, which follow them.[73]

"Is this [First Nation Land Management] part of aboriginal self-government? Yes. This is one component of self-government by First Nations and deals only with their reserve lands and resources. Matters related to other topics, e.g. elections, governance and education would be dealt with in the context of other agreements."[74]

Together these agreements will complete the New Regime. The federal government must obtain self-government agreements from the Indian band. Parliament then must pass legislation to implement them. This legislation is necessary to incorporate the Indian band into a "first nation" for all purposes. This is necessary to extinguish the flesh and blood peoples and replace them with a plastic replicate: a corporation. As Tim Raybould, Intergovernmental Affairs for the Westbank First Nation, puts it, "the band will be essentially incorporated."[75]

Corporations do not have human rights; they do not have spiritual or religious beliefs and rights, they do not have constitutional rights, particularly section 2(a) Charter rights[76]; they do not benefit from international convenants and treaties. They have the artificial powers of a person but they are not "a people".

Peoples have full international human rights, a quickly evolving body of laws to which Canada is bound. In fact, Canada prides itself as being a leader in international human rights. Many prominent Canadians are staunch supporters of human rights and like to showcase Canada to the world. I wonder what they will think about all of this? I wonder what the world will think.

And that is all I have to say.

Endnotes

[1] Ms. Switlo represented the Westbank Indian Band in court regarding then chief Robert Louie. His breaches of fiduciary duty, failures to act in the best interests of the band and blatant conflicts of interest caused damages, endangered public safety and exposed the band to risk of civil and criminal liability. Robert Louie's last two attempts at re-election to chief have been unsuccessful. He is the Chairman of the Interim Lands Advisory Board.

[2] The rule of law encompasses principles of peace, freedom, democracy and fairness. The Preamble to the Universal Declaration of Human Rights (1948) states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". One principal feature is that people and their governments should be ruled by the law and obey it. Professor Geoffrey de Q Walker writes, "It is plainly the essential prerequisite of our whole legal, constitutional and perhaps social order … The rule of law is not a complete formula for the good society, but there can be no good society without it.": *The Rule of Law*, Melbourne University Press, 1988.

[3] Marquis, Sixteenth Edition, 1999.

[4] It is not forced assimilation. Canada cannot be accused of genocide under the New Regime. The New Regime is structured to be the legal paper trail equivalent to a deliberate, self-induced drug overdose, a self-inflicted shotgun blast to the head, a jumping off of a chair with a noose around one's neck that's tied to the rafters. It is not murder. It is suicide.

[5] Reserves are important evidence to prove the existence and expanse of Aboriginal Title. This is discussed in more detail further on in this paper.

[6] Treaty 7 elders maintain that a peace treaty between nations was agreed to, despite what ended up being written; that Her Majesty did not conquer them; that they did not surrender. At their web site, http://www.treaty7.org, the Treaty 7 elders and tribal council in its highlights of the book, *True Spirit and Original Intent of Treaty 7*, state: "they had agreed to share the land with the white newcomers in exchange for being given an education, medical assistance, annuity payments."

[7] Westbank, Musqueam, Lheidli T'enneh, N'Quatqua, Squamish, Siksika, Muskoday, Cowessess, Opaskwayak Cree, Nipissing, Mississaugas of Scugog Island, Chippewas of Mnjikaning, Chippewas of Georgina Island, Saint Mary's.

[8] See "ANALYSIS" for more details. This includes the surrender of individual possession by certificate of possession ("CP") – the sections of the *Indian Act* dealing with CPs, including stating that CPs evidence a right of possession, will no longer apply.

[9] Or King as the case may be at the time.

[10] For whatever reason, such as, did not comprehend, were corrupted, were threatened, never bothered to inform themselves or seek advice, were compromised by personal health issues.

[11] In 1996, I took over the defence of Anthony ("Ziggy") Gregoire and Rose Fortier in BC Provincial Court, Penticton File No. 22796. They were charged under the *Immigration Act* with failing to present themselves at a border crossing by using the traditional route, the old road through a reserve in Okanagan territory, to visit within the territory. I began to raise the issue of the territory vis-à-vis the border, i.e. that the border does not apply to members of the Okanagan Nation. The charges were promptly stayed much to my disappointment and certainly without any such request from my clients or me.

[12] Being a surrender referendum.

[13] This is not intended to insult the lawyers that practice in this field; to the contrary, it takes a very capable, details person to master property law.

[14] Her Majesty is indivisible. While for administrative purposes "Her Majesty the Queen in Right of Canada" and "Her Majesty the Queen in Right of a Province" is used, it is like referring to Her Majesty's right hand and to Her left hand. Each is a part of the whole that does not function truly separate from the whole. Regardless of whether administration remains in Her Majesty the Queen in Right of Canada, in Her Majesty the Queen in Right of a Province, or is exercised by an agent of either, the "title" is Hers.

[15] The implementing legislation currently before Parliament, known as Bill C-49. The short title of this Bill is the "First Nations Land Management Act". The long form is "An Act providing for the ratification and the bringing into effect of the Framework Agreement on First Nation Land Management".

[16] Sections 8 – 15, 35 and 36 of the Act and sections 8 – 11 of the Framework Agreement.

[17] The ratification process confuses some people because of the reference to 25% plus one Indian. Section 12 of the Act is however exactly the same referendum standard that applies under the *Indian Act Indian Referendum Regulations* for surrenders. Under section 30 of the *Indian Referendum Regulations,* if a majority of the eligible voters do not turn up to vote, but a majority of those who did turn up to vote, vote "yes", a second referendum vote can be held. This time, if a majority of the voters, who turn up to vote, vote "yes", it passes.

[18] Under the *Royal Proclamation, 1763* and the *Constitution Act, 1867*, as confirmed by the Supreme Court of Canada in *Delgamu'ukw*, surrenders of Aboriginal Title can only be made to Her Majesty the Queen in Right of Canada. Surrenders can not be made to Her Majesty the Queen in Right of any Province. (Previous to 1982, the *Constitution Act, 1867* was the *British North America Act, 1867,* and commonly referred to as the BNA Act.)

[19] *St. Catherines Milling and Lumber Co. v. R*. (1888), 14 App. Cas. 46, 4 Cart. B.N.A. 107 (Privy Council); *Smith v. R*. [1983] 1 S.C.R. 554, 147 D.L.R. (3d) 237, [1983] 3 C.N.L.R. 161, 47 N.R. 132.

[20] *Smith v. R*., Ibid.

[21] *Canada (Attorney-General) v. Giroux* (1916), 53 S.C.R. 172, 30 D.L.R. 123, 4 C.N.L.C. 147.

[22] Section 1.3 of the Framework Agreement states, "This Agreement is not a treaty and shall not be considered to be a treaty within the meaning of section 35 of the *Constitution Act, 1982*."

[23] *Gustafsen Lake: Under Siege*, TIAC Communications Ltd., 1997, ISBN 1-896780-01-6.

[24] September 22, 1877.

[25] After *Delgamu'ukw*, lawyers, for instance Louise Mandell, Q.C. (Queen's Counsel), are recommending proceeding quickly to court to prove Aboriginal title. While the analysis of *Delgamu'ukw* is the subject for another paper, I strongly suggest caution. Care should be taken not to be driven into the courts by the apparent failure of the Canadian governments to implement *Delgamu'ukw* and a seemingly friendly court. Mine is not the only analysis to conclude that this may be precisely the intention; hay is put on a moving truck to herd hungry cattle. This is a strategy not unknown to the federal government. Aboriginal people should consider that these governments may prefer the more controlled environment of the courts. There is a strong history of the courts being corrupted against the Aboriginal peoples. Examples are in my book *Gustafsen Lake: Under Siege*, supra. I provide current examples in my new book, *Sookinchute*.

[26] Recall that the court is attempting a reconciliation of rights that are inherently mutually exclusive. Again I refer the reader to my discussion of Aboriginal Allodial Title in my book, *Gustafsen Lake: Under Siege,* supra.

[27] Even though this notion is flawed, it allows for the attachment of significant powers to the lands. The Supreme Court of Canada likely suspects flaws as it pushes for negotiated settlements.

[28] In doing so the Aboriginal peoples would be well advised to carefully attempt to preserve the larger view of Original/Allodial rights as conferred by the Creator, such as something on record in the nature of without prejudice to the rights recognized in the subject Treaty. Extreme care should be taken in considering pursuing rights at this time in the courts. Aboriginal peoples may be better advised to patient and pursue direct business dealings with third parties while keeping existing rights preserved, notwithstanding the government's continuing failure to fulfill its commitments.

[29] Section 18(1)(a) of the Act. "Owner" is not defined in section 2(1) of the Act or in the *Indian Act* so as to be caught within section 2(2) of the Act. The ordinary meaning applies; an "owner" in Canada has a fee simple estate that can be transferred, i.e. "sold".

[30] Joint Press Release by the Department of Indian Affairs and the Chiefs' Steering Committee issued February 12, 1996 at Georgina Island, Ontario.

[31] The "mystery agreements" are discussed further on in the paper.

[32] The "Executive Summary – Framework Agreement on First Nation Land Management" was obtained through access to information on the Chiefs' Steering Committee, chaired by Robert Louie, predecessor to the Interim Lands Advisory Board, page 3. Also refer to the previous discussion earlier in this paper on what "title" is.

[33] Consistent with the Framework Agreement: section 13.3 of the Framework Agreement does not say "notwithstanding section 12.2".

[34] American Justice Holmes wrote in a decision, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Quoted by John F. Harding, "Libel and Right of Privacy Problems Involved in the Publication of National Magazines", *Conference Series No. 10*, p.44.

[35] For example, commentary on section 35 of the *Indian Act* by Shin Imai, author of Carswell's 1997 *Annotated Indian Act* at page 47, further illustrates this: "… Other methods of alienating reserve land to non-members includes s. 28 (Minister may Issue Permits for Reserve Lands), ss. 37-39 (Surrenders and Designations) and s, 58 (Uncultivated and Unused Lands)." I doubt that any Indians would call the issuing of a permit under the *Indian Act* a *sale* of the land.

[36] Supra, page 3.

[37] "Questions & Answers – Framework Agreement on First Nation Land" dated August 4, 1998 was obtained through access to information on the Chiefs' Steering Committee, chaired by Robert Louie, predecessor to the Interim Lands Advisory Board, page 20.

[38] "BC Treaty Process: 'Trick or Treaty?' Giving effect to the 'spirit and intent of Treaties': abandoning Treaty rights", February 1, 1996.

[39] The BC Treaty Process.

[40] Rather, the parties are bound to Part IX DISPUTE RESOLUTION, sections 43 – 47; final and binding.

[41] Section 18.5.

[42] Section 23.6.

[43] "13.1 Title to First Nation land is not changed when a First Nation's land code takes effect."

[44] "5 … (a) title to first nation land is not affected by the Framework Agreement or this Act". Note that this section makes no reference to a Land Code, the Individual Agreement or the Transfer of Administration agreement. Each is a separate document with separate legal effect.

[45] See *Delgamu'ukw*.

[46] See footnotes 17 and 20 above.

[47] See the decisions of the Supreme Court of Canada in *Sparrow*, *Adams, Cote* and *Delgamu'ukw*.

[48] I advanced this position in defense of hunting charges brought against Leonard Raphael and Robert Mante in Kelowna, British Columbia, Court File No. 38044. This matter was ultimately dropped by the Crown and so did not proceed to trial. During preliminary matters, I was threatened by the Judge, who pointed his finger at me and yelled, "You will personally pay for this!" The Crown prosecutor said he did not want to deal with a section 2(a) defence, that it was all supposed to go under section 35 of the *Constitution Act, 1982,* which, it should be noted, is outside of the *Charter of Rights and Freedoms*. But I have never been known to just "do it like everyone else does". This entire topic of using section 2(a) and the differences between it and section 35 are fully set out and explained in my book, *Gustafsen Lake: Under Siege*, supra.

[49] Which is consistent with the Framework Agreement.

[50] Section 21.

[51] Section 55.

[52] Section 51.1.

[53] Which is run the same way as the Surrendered and Designated Lands Register, the difference is in *where* the document is registered not *how* it is registered.

[54] Section 89(1) of the *Indian Act*.

[55] The federal government ignores the inherent right of self-government. The position of the federal government is that once the chief and council are elected, they hold full decision-making power in all things. Traditionally, chiefs served their people, they did not dictate to them on the basis of presuming to know what was best for the people. Where the rights of a peoples are involved, the people have the right to decide, not an agent of the federal

government, not a hand full of people holding the position of chief or councillor. Signing that Framework Agreement signs away positions on underlying title. There must be full consent to the Framework Agreement itself.

[56] Ibid.

[57] Backgrounder, supra, page 1. It does not say that a Transfer of Administration will be made to the first nation.

[58] **Federal Real Property Act, 1991, c. 50**

"Transfers of administration and control

11. (1) An instrument transferring administration and control of federal real property to Her Majesty in any right other than Canada pursuant to regulations made under paragraph 16(2)(e) shall be signed by the Minister having the administration of the property and countersigned by the Minister of Justice.

…

Authority for Dispositions, Acquisitions and AdministrativeTransfers

Powers of Governor in Council

16. (1) Notwithstanding any regulations made under subsection (2), the Governor in Council may, on the recommendation of the Treasury Board, in accordance with such terms and subject to such conditions and restrictions as the Governor in Council considers advisable,

…

(e) transfer to Her Majesty in any right other than Canada administration and control of the entire or any lesser interest of Her Majesty in any federal real property, either in perpetuity or for any lesser term;

…

(g) notwithstanding any other Act, transfer the administration of any federal real property from one Minister to another, from a Minister to an agent corporation or from an agent corporation to a Minister;

…

Regulations

(2) The Governor in Council may, on the recommendation of the Treasury Board, make regulations

(a) respecting the sale, lease or other disposition of federal real property for which sale, lease or disposition there is no provision in or under any other Act;

…

(e) respecting the transfer to Her Majesty in any right other than Canada, by instrument satisfactory to the Minister of Justice, of administration and control of the entire or any lesser interest of Her Majesty in federal real property, either in perpetuity or for any lesser term;

…

(g) respecting the transfer of the administration of federal real property by one Minister to another, by a Minister to an agent corporation or by an agent corporation to a Minister;

…

Administration by Minister
18. (1) …
Idem
(2) Where a Minister has, in relation to a department, by or under any Act or any order of the Governor in Council, the "administration", "management", "administration and control", "control, management and administration", "management, charge and direction" or another similarly expressed power in relation to any federal real property, that property is under the administration of that Minister for the purposes of that department.

Continuity of administration
(3) Federal real property that is under the administration of a Minister for the purposes of a department remains under the administration of that Minister for the purposes of that department until a change of administration is effected pursuant to section 16 or on the authority or direction of the Governor in Council.

Consequences of administration
(4) Where any federal real property is under the administration of a Minister for the purposes of a department, that Minister has the right to the use of that property for the purposes of that department, subject to any conditions or restrictions imposed by or under this or any other Act or any order of the Governor in Council, but is not entitled by reason only of the administration of the property to dispose of it or to retain the proceeds of its use or disposition.
…
Administration by corporation
(6) Where, by or under any Act or any order of the Governor in Council, a corporation has the right to the use of any federal real property the title to which is vested in Her Majesty, by the use of any expression mentioned in subsection (2) or any similar expression, and no Minister has the administration of the property, the corporation has, for the purposes of paragraphs 16(1)(g) and (h) and (2)(g), the administration of that property."

[59] The *Statutory Instruments Act* is discussed further on in this paper.

[60] "53.1 Where Canada and a First Nation intend to enter into an *agreement that is not referred to in this Agreement but is required to implement this Agreement* and where it deals with matters that normally fall within provincial jurisdiction, … [they] will invite the affected province to be a party to the negotiations and resulting agreement." [emphasis added]

[61] "26.1 The First Nation and Canada recognize that it may be advisable to enter into other agreements with each other and other jurisdictions to deal with environmental issues like harmonization, implementation, timing, funding and enforcement.

26.2 Where matters being negotiated pursuant to clause 26.1 normally fall within provincial jurisdiction, or may have significant impacts beyond the boundaries of First Nation land, the parties will invite the affected province to be a party to such negotiations and resulting agreements."

[62] As at May 27, 1999, http://www.inac.gc.ca/news/sept96/9655bk.html

[63] Backgrounder: First Nations Land Management Regime, www.inac.gc.ca/news/sept96/9655bk.html, page 2.

[64] Ibid., page 1.

[65] Ibid., page 1.

[66] Ibid., page 1.

[67] "44. The Statutory Instrument Act does not apply in respect of a land code or first nation laws."

[68] "52.1 The Statutory Instruments Act, or any successor legislation, will not apply to a land code or to First nation laws."

[69] **Statutory Instruments Act, 1970-71-71, c. 38**

" 2 (1) In this act,…

'regulation' means a statutory instrument

made in the exercise of a legislative power conferred by or under an Act of Parliament, …

'statutory instrument'

means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, or other instrument issue, made or established

in the execution of a power conferred by or under an Act of Parliament …

but

(b) does not include

(i) any instrument referred to in paragraph (a) and issued, made or established by a corporation incorporated by or under an Act of Parliament unless

(A) the instrument is a regulation and the corporation by which it is made is one that is ultimately accountable, through a Minister, to parliament for the conduct of its affairs."

…

(2) In applying the definition 'regulation' in subsection (1) for the purpose of determining whether described in … (b)(i) … is a regulation, that instrument shall be deemed to be a statutory instrument …"

[70] See section 16 of the *Federal Real Property Act*, supra.

[71] The Minister of Indian Affairs must sign and the Minister of Justice countersigned for Her Majesty the Queen in Right of Canada.

[72] The New Regime initiatives can be traced back to the 1980s starting with a review of the lands, revenues and trusts sections of the *Indian Act*.

[73] Not everyone will be approached to do it in the same order, with the First Nation Land Management first. Some will be encouraged to start with the self-government agreement and others with an election code. Any order will do. Whether the land rights are destroyed first before the peoples' rights or vice versa matters not.

[74] "Questions and Answers", supra, page 2.

[75] Dorothy Brotherton, "Says Derrickson: Westbank must seek municipal status", *Westside Weekly*, Kelowna, British Columbia, Wednesday, April 28, 1999.

[76] For a full discussion on this section of the *Charter of Rights and Freedoms*, consult my book, *Gustafsen Lake*: *Under Siege*, supra,