A History of Kahnawà:ke Lands and The Indian Act

The way things were

- Since before contact with Europeans, the Iroquois and other first nations had inherent rights to the land and self-governance.
- The traditional land tenure system of the Iroquois was similar to other hunter-gatherer and horticulturalist societies. Land was not regarded as real estate, or in any sense real property - it could not be bought or sold, and was never something that any one person, or group of persons, could own. In the truest sense, land was "commercial property", something that belongs to no one person in particular. "Possession" of the land was never the issue – "use" of the land for what it could provide was the more important consideration.
- "Tenure" in common terms means the basis or condition under which anything is held or possessed - Land tenure is the way in which land may be held or possessed.
- Iroquois land tenure was seen as the geographical expression of social structure. Land was thus allocated as an extension of kinship through the through the social structure in what is termed, "usufructuary privilege". Usufruct in anthropology is defined as "use-right" simply stated, individuals or groups of individuals have rights to use or extract resources from and within a given territory, although there is no direct ownership of the territory.
- Both individuals and the community were viewed as stewards or custodians, protecting the land on behalf of present and future generations.
- Women held prominent, often decisive roles in Iroquois society, and they were particularly important in land management. While men were responsible for hunting, the clan mothers held the land and were responsible for its use.
- European Land tenure was markedly different. The feudal system was a social structure that existed throughout Europe between 800 A.D.-1400 A.D. Early feudal societies, which were governed by a lord or ruler, used land in a different way. The Lord allowed others to use his land in exchange for military allegiance or other services. Land tenure, then, was contingent upon service to the Crown or other authority figures who owned the land.
- Historically the Crown held the land in its own right. All private owners were either its tenants or sub-tenants. In the system of feudalism, the lords who received land directly from the Crown were called tenants-in-chief. They doled out portions of their land to lesser tenants in exchange for services, who in turn divided it among even lesser tenants. In this way, all individuals except the Crown were said to hold the land "of" someone else.
- Many of the relationships and concepts that characterize modern leases, tenancies and estates are directly based on land tenures and the feudal system of title.

How things became how they are today

- After first contact, Aboriginals were not considered subject to the Crown but sovereign peoples.
- The assertion of British sovereignty came with the Royal Proclamation of 1763 which established a *sui generis* (of its own kind, unique, in a class by itself) relationship between the Crown and Aboriginals. The proclamation also creates "honor of the Crown" - requiring fair and honest purchase of land and dealings with Aboriginals. The proclamation put the Crown in the role of protector and recognized the autonomous nationhood of Aboriginal peoples.

- Aboriginals made treaties with one another long before Europeans arrived. These treaties addressed peace, trade, shared lands and resources and political alliances. Pipe smoking and other ceremonies made these agreements sacred.
- In Europe, treaties had been used for centuries to end warfare between independent, sovereign nations.
- The next fifty years or so was the period of early treaty making. Land was ceded to the Crown, but rights were "granted" or left unaffected.
- The Aboriginal understanding of these treaties was very different from the British understanding of them. The British government's approach to the treaties with Aboriginal people was schizophrenic. By signing the treaties, British authorities recognized the sovereignty of First Nations over people and lands. However, they also expected First Nations to acknowledge the British Monarch as the supreme ruler of all the lands and surrender enormous tracts of land for European settlement. First Nations accepted the British Monarch as a distant protector, but had no intention of giving up their land. The idea of surrendering or ceding land was foreign (or even inconceivable) to our ancestors. Aboriginal peoples understood the agreement was to *share* the lands.
- Around 1812 began the assertion of sovereignty and control by the British Crown. Aboriginals and the Crown entered into new treaties after which the Aboriginals were then considered subjects of Canada and not distinct people. Our rights were treated as being less important than settler rights, leading to an extinguishment of rights.
- In the middle of the 1800's, statutes created the concept of "status" to separate those who were entitled to reside on Indian Lands and use their resources; securing the lands for the intended occupants: Indians themselves.
- In 1850 two statutes were passed: *An Act for the Better Protection of the Lands and Property of Indians in Lower Canada* and *An Act where the Better Protection of Indians in Upper Canada imposition, the property occupied or enjoyed by them from trespass and injury*
- In 1857 came the *Civilization of Indian Tribes Act*
- In 1867, it was the *Management of Indian Lands and Property Act* (as well as the British North America Act, which created the Federal Dominion of Canada)
- A year later, it was the *Secretary of State Act;* and the year after that it was the *Gradual Enfranchisement of Indians and the Better Management of Indian Affairs Act*
- In the 1870's the Federal Government felt that all these Acts were too cumbersome and attempted to consolidate all existing legislation. In 1876, *The Indian Act* was passed.
- Subsequent statutes were passed and consolidated in the Indian Act 1886, 1906, 1927, 1951, 1970, and 1985 (the present Act, subject to revisions)
- The theme throughout the new consolidated *Act* remained that of assimilation and civilizing of the Indians - to integrate them into Canadian society (enfranchisement). The legislation was intended to control and subsume First Nations.
- *The Indian Act* is a basic framework for management and imposes duties and limits on INAC (formerly known as INAC) and First Nations alike. *The Indian Act and Regulations* creates the concepts, processes, requirements and responsibilities in the world of reserve land management in Canada.
- The definition of "reserve" as it is written in section 2(1) of The Indian Act:
  A tract of land, the legal title to which is vested in Her Majesty that has been set apart by Her Majesty for the use and benefit of a band
- Reserves are held by the Crown in right of Canada for the use and benefit of a First Nation. The underlying legal title to reserves belongs to the Federal or Provincial Crown, depending on various factors such as the province in which a reserve is found, and how the reserve was created. Generally, only First Nations and their members occupy and use reserve land. First Nations may ask the Crown to grant interests, such as leases or other rights to non-members.

- Section 91 (24) of the Constitution Act, (the Constitution of Canada – the supreme law in Canada) gives the Federal government the authority to make laws on two subjects: *"Indians"* and *"Lands reserved for the Indians"*
- Courts have interpreted this to allow the Crown to 1) Control the property rights of Indians, 2) to limit the civil rights of Indians, 3) to impose elected governments and 4) to define who has status and rights as an Indian.
- However, on a more positive note, Section 35 (1) of the Constitution Act reads: "The existing and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." This means Federal, Provincial and Territorial law cannot intrude upon Aboriginal rights or treaty rights.
- As previously mentioned, the Federal Crown has the authority to make laws on "lands reserved for Indians", and that's what the Indian Act is – a law (statute) enacted by parliament. The Indian Act is not a treaty; it is Canada's imposed legal response *to* the treaties.
- Section 21 of the Indian Act requires INAC to maintain a Reserve Land Register to record all transactions on Indian Lands.
- A member of an Indian band who lives on and uses a particular plot of land on a reserve can (under terms set out in the Indian Act) get legal recognition and protection of his or her right to go on doing so. Before 1951, he or she was called a "Locatee" and the land was called a "Location", and the document recording the right was called a "Location Ticket". After 1951, location tickets were replaced by 3 other types of instruments (formal legal documents): Certificates of Possession (permanent licenses that can be cancelled only under special conditions), Certificates of Occupation (sets a term that the member can lawfully occupy the land - up to a maximum of 2 years) and Notices of Entitlement (provisional certificates issued to people entitled to Certificates of Possession where technical obstacles prevent the issuing of such documents, such as no adequate legal survey of the land in question).
- Locatees are said to be in "lawful occupation" or "lawful possession" of their locations. They have special rights to lease them out, by what are called "locatee leases". They may bequeath them to their Indian status heirs, within limits prescribed by the Indian Act. All legal locations today are recorded in the Indian Land Registry's Reserve Land Register.

- As mentioned above, the CP system was introduced by the Federal government in 1951 to replace earlier instruments for registering individual holdings (location tickets, notices of entitlement and cardex holdings) and to increase individuals' legal rights to their land allotments and also to integrate Indigenous people into the Canadian society and economy as individual land holders.
- A CP is a unique (and somewhat restricted) form of ownership with roots found in the Indian Act. Yet it is still the highest form of ownership that a First Nation member can have on a reserve. It is also the closest to fee simple title that the Indian Act allows. A CP holder enjoys most of the privileges of a fee simple land owner, but cannot sell the holding, or otherwise alienate it without the consent of the Minister of Indian Affairs (all reserve transactions must be approved by the Minister).
- "Fee simple" is the highest form of private property ownership one can attain (off reserves). Fee simple land owners can sell, lease, give, use and enter their property at will. Fee simple lands are subject only to the limitations of escheat (when a person dies without a valid will and without any relatives who are legally entitled to inherit in the absence of a valid will, their property reverts to the crown), Taxation, Expropriation (eminent domain) and Police Power. Eminent Domain means the Crown has ultimate control of all land in its jurisdiction in as much as it can expropriate land from its owner for public purposes.
- CPs have long been issued to individuals by the Minister of Indian Affairs. In recent years, as First Nations have taken on a greater role in governance, this has changed. Now

the Minister acts in response to requests for CPs submitted by First Nations – typically band councils.

- First Nation members may hold land for their own personal use or to be leased to third parties for their own benefit. CP holders can transfer an entire property or undivided interests in that property to other First Nation members (half interest, third interest, quarter interest, etc.)
- CP holders have substantial rights in land. Legally, the Crown retains the underlying legal title to the land, but in practical terms, there is little constraint on CP holders. What they have falls short of fee simple title, but in many ways it comes close: virtually the only constraints they face are 1) they can transfer or sell the CP only to the band or another member; and 2) the transaction requires the approval of INAC (on behalf of the Minister).

Land Issues surrounding Certificates of Possession

- Certificates of Possession have no expiry dates, and there is no limit to how many one First Nation member can have in their name.
- CP holders are under no obligation to allow a right-of-way access over their property to other CP holders behind them. This scenario is called a "land-lock" or being "Land-locked". Many CP holders lack effective access to their land.
- Some CP holders are absentees, this includes major landholders who have no residence within the community and have not lived here for years, if ever.
- Roughly 88% of the Kahnawake territory is private property – and is under the control of individuals through CPs.
- Over the years the CP system has produced a culture of entitlement and autonomy. Many CP holders tend to believe not only are they entitled to a piece of land but they can also do whatever they want without any interference from government (including Kahnawake government).
- "The CP system created a "me" mindset and not a community mindset. In the mid-1800s our people shared gardens and wells. Now it's, "This is mine, this is my boundary, I don't like you, so don't step over my line." So, the CP system created a non-native way of thinking in our community." – Carol Goodleaf
- This attitude and the ineffective regulation of land use has produced a chaotic pattern of land use across the territory with negative effects on public safety, health and the environment. Fundamentally, our community has lost control of the bulk of the remaining land base with control now in the hands of individuals who appear to feel neither the obligation nor the accountability to the community as a whole.
- Although use of private individual lands has created jobs along with the individual income produced by entrepreneurs, the CP system produces no significant community benefits and imposes very high community costs. Costs many CP holders make no effort to support. This is the case despite the fact that the success of some of these business activities are made possible only by rights held and defended by the community.

- In the future, alternative land management systems may be beneficial to our remaining communal land base. Community input will be essential before moving forward.