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THE SEARCH FOR ABORIGINAL PROPERTY RIGHTS



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By Dennis Owens

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THE SEARCH FOR ABORIGINAL PROPERTY RIGHTS

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Cover photo: A native trader, his helper, four wives, dogs and Red River cart at the corner of Albert Street and Notre Dame Avenue, Winnipeg, 1881. This picture is from the Western Pictorial Index, 63 Albert Street, Winnipeg.

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Introduction

The objective of this short paper is to make the case for giving natives the normal property rights that all Canadians enjoy.

The memory of my earliest contacts with native Canadians sparked a bias in my attitude towards the issue of aboriginals and their substandard living conditions.

My family was among the poorest in our hometown. Although very hard working, my parents loved children and had lots of them. There was always food on the table, but we knew as the family expanded that our resources were meagre compared to most others in the postwar period.

South of town sat the local nuisance grounds and occasionally we needed to haul refuse to it. The first time I was invited along, it surprised me to see, as we pulled into the landfill site, that other people were there at all. The place smelled, rats scurried about and comforts like shelter did not exist. I found out that four or five families lived near the dump and made a scant living by recycling anything of value that happened to arrive. They had their children with them, kids who were about my age. They were natives.

I then learned that there were actually people in the world who

were even poorer than my family. Perversely, that perception made me feel better, just to know that at least some others were even worse off. But it had a redeeming feature, in that it formed a continuing bias – an absolute sympathy with the native children, my peers, who were living in such destitute conditions. It made me feel very sorry for them and very lucky to have a higher standard of living.

A few years later, I delivered newspapers out that way, and I got to know some of the aboriginal families who worked the garbage dump. They didn't seem much different from anyone else. A lot poorer, and with less formal schooling, for sure, but as industrious, intelligent and proud as most of the people in town.

By this time, my family had joined the ranks of the upwardly mobile. Flush toilets had replaced the outhouse, running water had allowed us to retire the pump and the iceman, a furnace kept us warm instead of the oil burner and woodstove. Yet the native families, primarily Sioux, did not progress at the same pace. Not even close.

My hometown also had a large Indian Residential School, which housed teenagers from Cree and Ojibway communities in northern Manitoba. They studied at my high school, and as my siblings moved

out, my parents accepted many of them into our home as boarders. Although very different from the Sioux, the northerners shared a similar economic profile. Their families were invariably of modest means, poorly educated and living separately from the dominant European culture around them.

Questions started to ask themselves. Why did natives live in such grinding poverty? What happened to exclude them from the growing prosperity around them?

During those years plenty of spurious explanations were provided for this social division. Natives don't want to work, I heard; they are shiftless, into substance abuse, irresponsible parents. But I knew too many natives to believe any of this. The same insults used to be commonly thrown at my Irish ancestors, when they were at the bottom of the social ladder.

The issue came into clearer focus in college, where one encountered political philosophies that were based on natural law and individual rights. We learned that some people were not better off than others by accident. There were reasons for success and reasons for failure.

In the last provincial election in Manitoba, in 1995, candidates at one town hall meeting were asked about our province's relatively high

rate of child poverty. The Conservative Party candidate, who went on to win her riding, said it was because Manitoba had the highest percentage of people of aboriginal descent. She had stumbled onto the truth, but she failed to pursue a follow-up question. Why are natives poorer than other ethnic groups? What happened to make this so?

The general question about why some social institutions thrive and allow communities to become prosperous is interesting in itself, but one concept seems to be obviously true, and easily verified. When people function within a framework that encourages productive behaviour, that's what will result. When the surrounding culture penalizes them for hard work and forbids them to share in its rewards, they will reduce such productive efforts.

Simply altering the mix of choices that people face can induce a transformation in behaviour that is remarkable. This fact underlies most of the insights of political economists. For example, when governments tax more, they discourage economic transactions and, past a certain point, new taxes will reduce revenues instead of expanding them. Conversely, governments who, like ours, have passed this point of diminishing returns can increase their revenues with tax cuts. Different carrots and sticks make for different outcomes.

How does this fact apply to the earlier question? Why does chronic poverty persist among native populations in the midst of relative abundance? What factors impede their progress?

At the last census, the average annual income for employed aboriginals stood at \$21,270, while that for all Canadians stood at \$27,880. But unemployment rates for female natives were more than double that of non-natives, and for men, almost triple.ⁱ **So the latest estimate of average annual family income reported by Statistics Canada for Registered Indians was \$12,000.ⁱⁱ Since the average figure for all Canadian families sits around \$57,000ⁱⁱⁱ, some hard questions need to be asked about the disparity.**

A Few Reflections on Aboriginal History

Before looking at impediments that we can change, let's acknowledge the ones that we cannot. The clash of European culture with aboriginals during the settlement of North America was immensely destructive to the indigenous population. The debate about the actual size of the holocaust is still in progress, but two hundred years after the arrival of Columbus, only a fraction of aboriginals were still alive. Most of them had succumbed to communicable diseases carried by Europeans, mainly smallpox and tuberculosis.

The death rate in Canada was close to 75%.^{iv}

Popular myth portrays this devastation as the result of military conquest, and some of that happened, but germs did most of the damage. Much has been said about broken promises and broken treaties, and there is evidence to indicate that there was plenty of fault on both sides. But Europeans arrived in great numbers and carried with them a budding technological order against which a less sophisticated aboriginal culture had little defence. This statement is not intended to disparage aboriginal people, but simply recognizes real differences in technological development between them and newly arrived Europeans.

Whatever armchair historians may argue about causes and effects, there is no doubt about what happened to the aboriginal civilization in North America after Europeans arrived. Many, many tribal units were uprooted and their economies smashed. Such social dislocations can never be reversed, but how long their effects last, in terms of economic setback, depends on whether the framework of incentives that rules after the disaster allows a quick recovery or prolongs the misery. As we shall see, the governmental structure, the rule of law, put in place for the threatened aboriginal cultures made their recovery almost impossible.

Another myth that needs to be addressed is the idea that North American aboriginals shared a monolithic culture. Nothing could be further from the truth. Rather, an astonishing kaleidoscope of societies developed on the continent, their characteristics depending mostly on local geography.^v The popular perception that native people were nomadic is accurate only in regard to certain tribes, mostly ones on the Plains or in the North who followed buffalo or caribou herds. The Cambridge History of the Native Peoples of the Americas identifies only one common thread that would allow us to distinguish between an "American" civilization and a "European" one — that the former tended to interpret history in terms of religious myth while the latter relied on chronological analysis^{vi}.

This fact is important because a lot of people believe that concepts of property held by Europeans differed radically from aboriginal ones. The romantic Rousseauvian view that natives enjoyed a simpler existence where everyone shared the fruits of the land and owned their assets and resources in common is quite simply false.^{vii} Even nomadic tribes developed sophisticated trading relationships with their neighbours, where resources that were exchanged became the property of the traders, not their brethren. And inside the wandering tribes,

property like teepees, horses, weapons and utensils was usually contained within families and zealously protected against interlopers. Nomadic units hunted in concert and took meals together, but that was a function of convenience and efficiency more than communal attitudes; able-bodied individuals who did not carry their weight were not tolerated. A dead buffalo belonged to the man whose arrow had killed it.^{viii}

For non-nomadic aboriginals, that is, the vast majority, European-style concepts of private property were common. Agricultural tribes who based their food supply on crops, typically one of the "three sisters" of corn, beans and squash, worked individual plots.^{ix} The physical apparatus of surveys, fences and printed deeds that European culture usually associates with property rights had not yet developed, but large population centres with complicated social hierarchies developed nonetheless. The existence of these hierarchies indicates that some natives had a higher social standing than others, and that status was quite naturally expressed by the possession of property. In fact, many indigenous societies in the Americas had extensive private property systems in place.

Aboriginal cultures did have a clear understanding of property rights. However natives in Canada have not fully shared in the same

enjoyment of these rights as the wider society. But first let's briefly set out some ideas about what property rights are, and where they come from.

Property Rights

The source of all human rights is the basic right to life. There is almost universal agreement in all societies and religions that human beings possess this right. To guard it, we pass laws against murder.

In order to sustain their lives, people have to work to produce the values that are necessary to do that. They must find or grow food, shelter themselves from the elements and find ways to protect themselves from the innumerable threats to life that face everyone. A necessary corollary of the right to life, then, is the right to be secure in the possession of those values that sustain life. That means that you have a right to keep the food you grow, and the roof you place over your head, in other words, to your property.^x That sounds simple, but ever since the human race began, people have been trying to appropriate the values other people have produced. That's why we pass laws against theft.

It is no great leap of logic to extend this reasoning to land, at least to land that is acquired or developed through individual effort. Beginning with the Magna Carta in 1215, the western world

has struggled with the question of ownership of land. The idea of the sovereignty of individual proprietorship eventually became entrenched in the common law of Britain, and it subsequently became the pattern in the United States and Canada. Its most explicit expression is contained in the 14th Amendment to the U.S. Constitution, which states that citizens cannot be deprived of "life, liberty, or property without due process of law." In Canada, property rights never received this kind of written protection, not even in the 1982 Charter of Rights and Freedoms, with its persistent confusion between rights and entitlements. The closest the Charter comes is to recognize a right to "security of the person". Nevertheless, Canadian courts have traditionally recognized property rights as an integral part of the common law. Indeed, a strong case can be made that entrenched common law property rights are more secure if left in this context, rather than codified in a charter that can be interpreted and rewritten by Supreme Court Justices.

How did the world come to recognize property rights? John Locke argued that the protection of rights to life and property is the main justification for the existence of the set of laws we know as government.^{xi} Without the protection of the rule of law, we have no security in our selves or in our possessions. To get this

security, we establish governments. Further, governments which rule over free societies recognize that security for their citizens lies in having protective legal entitlements like human rights to life and liberty and property rights.

What do property rights mean? A 1993 Fraser Institute publication, *What Everyone Should Know About Economics and Prosperity*, contains a very good definition:

Private ownership of property involves three things:

- (a) the right to exclusive use,
- (b) legal protection against invaders, and
- (c) the right to transfer.^{xii}

With this context for property rights in mind, let's take a look at what happened to natives in Canada. What sort of property rights did aboriginals end up with? Can they use the land exclusively? Have they protection against invaders? Do they have the right to transfer ownership to others?

The Reserve System and the Indian Act

In 1763, George III issued a proclamation that placed the land rights of Indian tribes under rather dubious legal protection.^{xiii} It recognized native possession of all lands not ceded to or purchased by

the government and forbade their sale to any private parties unless the land was first transferred to the government. This "possession" did not mean ownership of the land, merely occupation of it. Under the British North America Act in 1867, the federal government assumed exclusive jurisdiction over lands occupied by Indians, while timber and mineral rights were ceded to the Provinces. This legal structure was extended to the West after the transfer of Rupertsland, the Hudson's Bay Company land, to Canada in 1870.

The government of Canada negotiated a series of eleven treaties with Indian tribes in Western Canada for the reservation of land to individual bands.^{xiv} The allocation of territory — and be aware that the location and quality of the land picked for this purpose left much to be desired — was calculated by formula. In most of the treaties, the bands were to receive 640 acres, one square mile, for each family of five, or a proportionally lesser amount for smaller families. Three of the treaties differ in that the size of the land per family was just 160 acres, a quarter section.

But variations in the interpretation of who should be included in the calculation of reserve size, and at what date, have since created no end of confusion about the fairness of the outcome. After the treaties were signed, a series of governments returned to the table

and negotiated with bands for the return of much of the original land grants.^{xv} These were known as “surrenders”, and south of the 60th parallel, they amounted to about two-thirds of the reserved land. Disputes over the original census of aboriginal people and about the legality and size of the surrenders have led to the extensive land claims process that is still underway in Canada.

When this paper talks about aboriginal property rights, it does not refer to this protracted consultation to correct the errors of history. If our governments have broken their word by reneging on contracts, that should be set right, and as quickly as possible. They are slowly doing that, by returning land to Indian bands or arriving at financial settlements in lieu of land. What this paper does deal with is what sort of property rights individual natives and families exercise inside the legal framework of reservations.

Indian reserves had been established in the Maritimes, Québec and Ontario before Confederation, and the western reserves followed a similar pattern in terms of legal structure. One important particular in this structure should be noted. The land reserved was held “in severalty”, which means collectively. In other words, bands and tribes, instead of their individual members or families, held title.

In 1868, the Secretary of State Act, soon followed by An Act for the Gradual Civilization and Enfranchisement of Indians, formed the basis for what became consolidated as the Indian Act of Canada. This legislation limits reserve land to bands for their “use and benefit in common”.^{xvi}

Section 10 of the Act speaks to the framework of political control:

A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.^{xvii}

This sounds very democratic, but unfortunately it does not recognize the limits of democracy. Group rights derive from the rights of the individuals within that group, and have no meaning outside that context. In the Indian Act, individual rights, including property rights, receive very little recognition and almost no protection. Section 16, which deals with those who may want to leave the band, makes this crystal clear:

A person who ceases to be a member of one band by reason of becoming a member of another band is not entitled to any interest in the lands or moneys held by Her Majesty on behalf of the former band, but is entitled to the same interest in common in lands and moneys held by Her Majesty on behalf of the latter band as other members of that band.^{xviii}

In short, only by virtue of membership in a band does the individual receive legal protection for his share of the common allotment. Provisions in Section 20 do allow individual possession of reserve property, but notice that it is hedged by conditions that make such possession very tenuous, dependent on the will of the band council and/or the Minister of Indian Affairs:

No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

Where possession of land in a reserve has been allotted to an Indian by the council of the band, the Minister may, in his discretion, withhold his approval and may authorize the Indian to occupy the land temporarily and may prescribe the conditions as to use and settlement that are to be fulfilled by the Indian before the Minister approves of the allotment.^{xix}

Notice, also, the short shrift the Act gives to individuals who engage in commercial activity:

A transaction of any kind whereby a band or a member thereof purports to sell, barter, exchange, give or otherwise dispose of cattle or other animals, grain or hay, whether wild or cultivated, or root crops or plants or their products from a reserve in Manitoba, Saskatchewan or Alberta, to a person other than a member of that band, is void unless the superintendent approves the transaction in writing.^{xx}

Even when a band member dies, his bequests are not secure. Section 45 reads:

No will executed by an Indian is of any legal force or effect as a disposition of property until the Minister has approved the will.^{xxi}

As mentioned before, property rights should be regarded as atomistic concepts. Attempts to expand them to nations or peoples inevitably mean these rights as properly understood are at significant risk. But even those who frame the discussion in a collective mantle must agree that the Indian Act did little to enhance the exercise of the property rights of Indian bands as collectivities. Listen to these provisions:

Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

A court that is exercising any jurisdiction or authority under this section shall not without the consent in writing of the Minister enforce any order relating to real property on a reserve.^{xxii}

The government said, in effect, "You own the land, but we'll decide how you can use it. And don't sue us, either, because the courts have to have our permission to decide the case."

The Indian Act represents a form of bureaucratic paternalism that is foreign to the experience of most Canadian citizens. Native author Bill Henderson has described it as "a statute of which few speak well. The Indian Act seems out of step with the bulk of Canadian law. It singles out a segment of society — largely on the basis of race — removes much of their land and property from the commercial mainstream and gives the Minister of Indian & Northern Affairs, and other government officials, a degree of discretion that is not only intrusive but frequently offensive. The attitude that others were the better judges of Indian interests turned the statute into a grab-bag of social engineering over the years."^{xxiii}

But the most egregious wording in the act, at least in terms of excluding natives from the wider Canadian economy, is contained in Section 89. This provision describes itself as a "Restriction on Mortgage, Seizure, etc. of Property on Reserve":

Subject to this Act, 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.^{xxiv}

This restriction on the use of reserve assets was intended to protect aboriginals from the dynamics of profit and loss in the wider economy. Designed to prevent exploitation, the Act prohibited, and still prohibits, lenders from seizing land or other reserve property for non-payment of debts. As we shall see, this exercise in condescension has caused a great deal of damage.

Recognition of the severity of the unintended consequences of this commercial restriction is reflected in the extent and variety of the means used to compensate for them. For decades, the Department of Indian Affairs acted as the lender of last resort through a hodgepodge of different economic stimulus programs. As you might expect, each of these has been accompanied by high overheads, with the usual, complex requirements for oversight, reporting and accountability that attach to federal dollars. The regular banks have set up special "aboriginal units" which are still subject to the crippling restrictions of the Indian Act. One doesn't have to look too deeply under the surface to see that they are really there to capture a piece of the multi-million dollar land claim settlement business. Neither of these efforts has done much to improve the economic performance of aboriginals. The first, from the public sector, creates temporary, unsustainable, make-work activity not much different from welfare.

The second, from the private sector, can put the new dollars to work productively off the reserve, but it still faces the legal obstacles that so adversely affect economies on reserves.

In the last few years, special aboriginal banks like the First Nations Bank of Canada^{xxv} and the Peace Hills Trust Company have been chartered.^{xxvi} These represent halfway houses that have the potential to work, because the Indian Act only forbids those who are not Indians from seizing property on a reserve. But even these native institutions have no exemption from the Act and cannot attach collateral offered for loans.^{xxvii} Instead, they extend credit in return for promises of future cash flow from band enterprises. Their assets are therefore exposed to considerably more risk than those of mainstream banks, meaning their chances for continuing success are automatically handicapped. In the financial industry, that translates into higher lending rates, making all commercial activity on reserves less competitive than it is off reserves.

Native Agriculture

One of the goals of the reserve system was to change the lifestyle of the nomadic tribes on the Plains. It was clearly impossible to retain the old ways because homesteaders were carving up the land into farms. So the aim, in

part, became to establish a self-reliant agriculture industry on reserve lands. The policy started well, but in 1888, an eccentric man named Hayter Reed was appointed Indian commissioner.^{xxviii} He believed that only subsistence peasant-style farming would instil proper work habits on reserves, and he issued a directive forbidding the use of machinery on reserve farms and the sale of surplus crops. Consequently, most of the successful new native farmers abandoned their efforts.

The right to property includes the right to its use. The benefits that flow from ownership mean little if that ownership is constricted with conditions. The consequence of these foolish restrictions on the use of reserve lands meant that most aboriginals lost the chance to develop a farming industry. The skill sets that made farming so productive on the Plains had been developed over generations. Families who turned over land from father to son and then grandson had also been passing on the benefit of decades of trial and error. Because of Reed's restrictions on their property rights, natives were not able to follow this path.

Of course, the effects of Section 89, the banking restriction, have wreaked the most havoc. Cut off from conventional sources of credit, unable to leverage their assets as security for loans, aboriginals have much greater

difficulty building up equity in farming operations. Modern farming is a highly capitalized industry; machinery and other inputs are expensive. It is not unusual for successful operations to carry high levels of debt. This means that native farmers cannot compete with their counterparts past the reserve line, because their property rights are encumbered by a legal edict that they cannot use their land to gain credit.

Reserves contain an abundance of arable land. In Alberta alone, 900,000 of the 1.5 million acres of reserve land are suitable for crops or grazing.^{xxix} More than half of what is in use is being leased to non-aboriginal farmers, typically farmers who have adjacent lands that can be legally capitalized. They just swing their seeders and sprayers and combines down the road. On the Cowessess reserve outside Broadview, Saskatchewan, for example, 60% of its 20,000 acres is arable, but most of that is leased to white farmers. In 1995, only six band members seeded a crop.^{xxx} Without unrestricted legal title, they have to scramble every spring to raise enough operating credit to make it through the crop year.

The problem does not have an easy solution. As one native entrepreneur notes, "The Indian Act built a big wall around the reserves that kept the banks out. But now that you've built this wall, people don't want to give it up."^{xxxi}

As I have noted, some reserves issue "certificates of possession" which can be sold to other band members, and these constitute a form of ownership. But most band councils decide from year to year which farmers or ranchers will have access to the land. That cancels out any incentive to improve the land, because those who make the effort to do so cannot be sure that they will retain the value added.

What about halfway measures? Some have been tried, with some success in the development of native agriculture. There are many examples, but consider just a few:

- In 1987, a credit pool for native farmers called the Indian Agri-Business Corporation received \$7 million in start-up capital from the federal government. It lends money to beginning farmers, mostly cattle operators, and its portfolio has grown in value without any additional infusion of tax dollars.
- In Saskatchewan, a 1992 agreement called the Treaty Land Entitlement gave 26 bands \$445 million to buy land as compensation for acreage removed from reserves years ago as surrenders. In 1994, the Niekaneet Reserve near Maple Creek used its \$5.5 million share of the settlement to buy 28,000 acres of grazing land in the Cypress Hills. Band members who put down \$1,000 received a matching \$1,000 outright and a \$10,000 loan to

buy cattle. Within a year, the total herd had grown to 1,200 head.

- Another Saskatchewan initiative, the Indian Agriculture Program, started up in the 1970s and had great success in developing the wild rice industry. It now offers natives training in farm management and agronomy and piloted a program to twin band members with non-natives who rent land from reserves, to acquire hands-on experience. At the inception of the SIAP, there were only 40 aboriginal farmers in Saskatchewan; now there are more than 600.
- A similar double thrust is the focus of the First Nations Agriculture Association of Alberta, which formed in 1995 and offers seed money and technical training in computers, marketing and finance to band members who want to try farming.

Now observe that these programs are all directed at remediating the damage done to native agriculture over the previous century because it lacked a property rights framework. And, as mentioned earlier, they constantly skirt the danger of failure due to the entanglements of band politics. Joseph Kalt, director of the Harvard University Project on Indian Economic Development, spoke to the Royal Commission on Aboriginal Peoples in 1993, and said that the most successful

reserves have band governments that clearly separate their political and economic activities. They give band members the right to appeal band decisions to independent tribunals. "We're learning that we need checks and balances," adds an officer of Alberta's First Nations Agriculture Association. "Farming is a high-risk operation. You don't want to have to worry about band politics, too." The effort to separate the two strengthens the property rights of native farmers and reduces the drag on their exercise by the entity that owns the land in common.

Community farming operations without individual property rights can be successful, as the experience of Hutterite colonies on the Prairies demonstrates.^{xxxii} The problem I have with this sort of communal success, though, is the lack of clear legal protection for the rights of individual colony members. An individual or a family can spend a whole life of effort to make the enterprise viable, but if they should split with the colony, they leave with quite literally the clothes on their backs. That is also the case for natives.

Some Indian reservations in the United States do allow land to be privately owned, and the U.S. Bureau of Indian Affairs has also allowed farmers to work land as if they owned it, in an arrangement known as trust land. Terry Anderson, executive director of the Political Economy Research Center

in Bozeman, Montana, cites a study of the returns from agricultural land on a cross-section of Western reservations.^{xxxiii} The survey found that land owned collectively by tribes was 80% to 90% less productive than privately owned land, while tribal trust lands were 30% to 40% less productive. It's clear that adopting private ownership arrangements, or at least imitating them, is key to a successful revival of native agriculture.

Anderson also describes a visit to a reservation in Montana he took with some visitors from Switzerland: "Knowing that my guests had a romantic view of American Indians, I tried to prepare them for the poverty they would witness. But to my surprise, the family we visited was far from poor. [They had] a handsome home, a well-kept yard and productive fields. . . . I asked the Indian rancher if my general impression of reservation economies was incorrect, or if there was something different about this family. He matter-of-factly answered, 'I own this place.'^{xxxiv}

The Fishery

The lack of a clear property rights focus has also done immeasurable harm to the native fishing industry. Courts in Canada have consistently defended the rights of native Canadians to hunt, trap and fish on Crown lands.^{xxxv} But the right to

sell the product of those activities is not secure. Aboriginals can bag the deer or catch the salmon, but if they choose to sell them rather than consume them personally, they may then be declared "poachers", subject to fines or imprisonment. Like the restriction that forbade natives to sell their surplus agricultural production a hundred years ago, this limitation on the use of property has had devastating effects.

Despite this insecurity, catching and selling fish became a mainstay of aboriginal incomes on the Prairies. Until the federal government decided to limit everybody's property rights in that industry.^{xxxvi} In 1969, Ottawa set up the Freshwater Fish Marketing Corporation as a compulsory marketing agency with monopoly jurisdiction over all fish commercially harvested in the Hudson's Bay drainage area. The FFMC expropriated and closed down dozens of companies that had previously competed for that trade.^{xxxvii}

In 1974, that monopoly was extended to processing, and all fish had to be shipped to a new Winnipeg plant before sale. That move destroyed most of the native fishery in the north because prohibitive air freight costs made 90% of their catch uneconomic. Fish has to be handled quickly and prices for anything except pickerel were too low to make air freight economical. So most of the catch,

whitefish and mullet, rotted on the beach. Aboriginal suppliers in Ontario, outside the territory controlled by the FFMC, sell fresh fish at almost half the price charged by the board, which passes on the high overheads common to monopolies, 40% of sales in this case.

As a result, unemployment in the northern aboriginal fishery skyrocketed. Welfare and special subsidies became the fate of previously productive bands. Fishermen in Manitoba's large southern lakes fared better, but even they continue to peddle a large part of their catch on the black market. A House of Commons committee that reviewed these industry distortions in 1994 recommended that the FFMC's monopoly be disbanded. A year later, the federal government relaxed the restrictions for a three-year trial period in one location only, Island Lake in Northern Manitoba. Within a year, a successful processing plant was in operation on that reserve.

Thus the same pattern emerges that we saw with agriculture. You have the right to catch the fish, but what status does that right confer unless you are able to dispose of it freely? Admittedly, the northern fishing industry destroyed by the FFMC was not a high value-added operation. Tribes used centuries-old methods to scale and fillet the fish, but it gave useful and rewarding employment to many

people who now are effectively forbidden by law to work. Again, exceptions can be made to mediate the damage, as in Indian Lake, but why create the problem in the first place?

Housing

The means by which most people experience the benefits of property rights is through the ownership of a family residence and the land it sits on. Natives on reserves are forbidden by law from sharing this experience.

The difference this makes to the quality of reserve housing is quite extreme. The average dwelling on Canadian reserves is newer than its counterpart off-reserve, but it is also in much worse condition. Tom Flanagan, a professor of political science at the University of Calgary, has described how the housing system works on reserves:

There is some variation, but on the typical reserve the band council owns almost all the housing, which has been built with a combination of band funds, annual grants from the Department of Indian Affairs and assistance from the Canada Mortgage and Housing Corp. The band council assigns the houses to residents and lets them live rent-free, often without even charging for utilities.

In short, there is no functioning housing market on most reserves. Band members cannot buy or rent a home; they have to queue up for assignment by administrative authorities. New applicants often live with relatives for years until something becomes available. Those who are not on good terms with the band council may wait forever.^{xxxviii}

Flanagan points out that the results of this public ownership are about the same as those experienced in Eastern Europe under communist regimes: "chronic shortage of supply, queuing for access, political favouritism and poor maintenance of the existing housing stock."^{xxxix}

A few years ago, my colleagues and I met some natives who called themselves the Dakota Action Group. Unhappy with the band leadership on their reserve, Dakota Plains, just south of Portage la Prairie, many of them had applied to the Minister of Indian Affairs for recognition as a landless band. They had extensive documentation for their complaints against the band chief, who had allegedly misappropriated band funds and failed to deliver the services for which money had been provided.

Most of these dissidents, and others at a neighbouring reserve, Dakota Tipi, described receiving very poor treatment at the hands of their tribal brothers. When

assaults and other forms of intimidation failed to bring them into line, they related, many had received sudden visits from band officials who gave them 24 hours' notice to vacate their houses and leave the reserve. Against this very severe sanction, the loss of the roof over their heads, they had no recourse in law and no appeal.

Some sympathizers kept their affiliation with the Action Group secret to protect themselves and their families. But one man in particular, a dignified, middle-aged fellow named Clayton Smoke, openly backed the rebels and yet had not been evicted. When asked why he seemed to be exempt from punishment. "I used to be a pretty good scrapper," he replied. "They leave me alone because they're scared of me."

That just about sums it up. Without a framework for the protection of property rights, people are left to their own devices and the law of the jungle prevails. What incentive exists on reserves for people to take the initiative and maintain or even improve their homes? None at all. They don't have homes, they have residences that they occupy for a time set by the Band Council. In fact, in these conditions, with no security of possession, it becomes irrational for occupants of reserve housing to do anything to fix their dwellings.

The answer to the problem seems very simple, and a recent historical

example proves the point. When Margaret Thatcher's Conservative government was in power in Great Britain, it sold off thousands of infamous "council houses", low-cost public tenements bedevilled by the same set of problems described above, to the families that occupied them. The transformation was fast, and in a predictable direction. As if by magic, council houses turned into attractive properties, well maintained and repaired by the same people who previously had no reason to make the effort. The incentives had changed, and property rights had empowered the tenants.

In fact, the ruinous effects of the Indian Act's restrictions on personal ownership have motivated some bands to use certificates of possession to create an internal market, a halfway house of sorts for property rights. The cases of which I am aware involve the sale or barter of certificates within reserves; the band councils and chiefs achieve status and power by assembling mini-land banks and properties. Remember, though, that they are also the officials who issue the certificates in the first place. Again, a failure to separate the functioning of government and commercial decision-making weakens this effort to imitate a real estate market and makes it impossible to maximize the salutary effects of ownership.

Limited Government or Localized Autocracy?

The ongoing transfer of control over the day-to-day administration of government services from the Department of Indian and Northern Affairs to band officers offers a unique opportunity to reconsider the legal straitjacket around reserves. As a general principle, the most effective services are the ones that are delivered by people who are closest to their jurisdiction. But far more important than the location of governments is the amount of power they can wield over the people they oversee. It makes little difference whether Ottawa takes away one's rights or local autocrats do the job. What matters is that you've lost your rights.

Evolving systems of self-government on reserves contain very few real limits on the power of band officials over their tribes. Reserve residents must rely on periodic elections or the benevolence of the winners for fair treatment. Would we force other Canadians to wait until the next election cycle before they were allowed the chance to put a roof over their heads or find work? Even more alarming is the tendency of chiefs to assert a lifelong right to rule by hereditary custom, removing even the limited accountability afforded by the democratic process.^{x1}

A much-discussed model of native self-government with better prospects for success conceives band councils as a form of municipal government. The Sechelt reserve in British Columbia, with its unique urban mix of native residents and non-native leaseholders, operates in that fashion, pursuant to a 1988 decision by Ottawa to legitimize local taxation.^{xii} The 1998 Nisga'a treaty in that province gives the band's officers the right to levy property taxes on non-native residents.^{xiii} The Indian Act does not allow bands to tax their own members, but the growth of such relationships, where governments tax in exchange for services provided, moves these reserves closer to a structure that implicitly recognizes the legitimate status of private property.

Conclusion

With a brief look at the three areas of farming, fishing and housing, this paper has suggested that the recognition and legal guarantee of property rights are key to reversing the economic plight of native Canadians. But the obstacles that stand in the way of true reform are formidable.

The ability of our political system to respond to the aboriginal question with productive policy changes remains weak, at best. The Royal Commission on Aboriginal Affairs, the most expensive and lengthiest of such

exercises in our history, failed to come even close. The process now in vogue to explore such complex issues is very strong on comfort through consultation and very weak on substance.

Nonetheless, here are a few recommendations for change that never made it into the Royal Commission's report:

- Grant natives the right to buy and sell land and buildings on reserves freely.
- Open reserves to full participation in commercial credit arrangements.
- Allow natives the option to receive their share of land-claims settlements in the form of private property.
- Permit reserve governments to tax their own residents for local services, and allow residents the freedom to make other arrangements for their provision.
- Ensure that these new property rights include mineral, timber and fishing rights on land held in common.

As a Fraser Institute paper released late in 1995 says, "Buying, selling and trading must replace land politicking."^{xliii} Most urgent is the need to convince natives themselves that their best interests do not lie in the direction of powerful central governments. To repeat, it matters little whether control is exercised in Ottawa or by local authorities invested with overarching authority. Neither

alternative leaves individual natives the tools necessary to improve their conditions.

Friedrich Hayek's seminal insight in *The Road to Serfdom*, that magnificent indictment of the conceit of central planning, went something like this: when economic decisions are restricted to a chosen few, whether they be the federal cabinet or the Assembly of Chiefs or a Band Council, the amount of intellectual power applied to social problems is limited to the sum total of their numbers; but when decision-making is dispersed by empowering the basic building block of the social order, the individual, millions of minds are unleashed to solve problems.

Native Canadians need not fear cultural genocide because they abandon communal institutions that have not served them well. On the contrary. The individual may be the first unit of social value, but it is not the only one. Strengthening the economic and legal status of individual natives through expansion of their property rights gives them the ability to build strong families and stronger communities. Other ethnic groups sought to alter their circumstances by coming to a country where they were allowed the fullest expression of their individual rights, and that journey left most of them with a much deeper capacity to express the

unique nature of their ethnic heritage.

Inclusion of the first owners of this land in that process is long overdue.

Appendix

Excerpts from Dances With Myths

By Terry L. Anderson

The historical American Indians did not practice a sort of environmental communism in tune with the Earth; yesterday, as today, they recognized property rights.

Today we refer to "Indian nations," but this term mostly reflects the U.S. government's desire to have another government with which to negotiate. In fact, Indian tribes were mainly language groups made up of relatively independent bands with little centralized control except at specific times when they might gather for ceremonies, hunts, or wars. And after the horse allowed small bands to efficiently hunt buffalo, even that level of centralization diminished.

Just because Indians lacked modern concepts of government doesn't mean they lacked rules. American Indian tribes produced and sustained abundant wealth because they had clear property rights to land, fishing and hunting territories, and personal property. Pre-Columbian Indian history is replete with examples of property rights conditioning humans' relations with the natural environment.

Where land was scarce and making it productive required investments, private ownership by family units was common. Families among the Mahican Indians in the Northeast possessed hereditary rights to use well-defined tracts of garden land along the rivers. Europeans recognized this ownership, and deeds of white settlers indicate that they usually approached lineage leaders to purchase this land. Before European contact, other Indian tribes recognized Mahican ownership of these lands by not trespassing.

In the Southeast and the Southwest, private ownership of land was also common. "The Creek town is typical of the economic and social life of the populous tribes of the Southeast," writes historian Angie Debo. "[E]ach family gathered the produce of its own plot and placed it in its own storehouse. Each also contributed voluntarily to a public store which was kept in a large building in the field and was used under the direction of the town chief for public needs." The Havasupai and Hopi also recognized private ownership of farmland as long as it remained in use. Clans identified their fields with boundary stones at each corner with their symbols painted on them.

Fruit and nut trees that required long-term investment and care were privately owned and even inherited. In one case a Northern Paiute Indian reflected that his father "paid a horse for a certain piñon-nut range," suggesting that the property rights were valuable and could be traded. Among Indians in California, families owned piñon, mesquite, screw-bean trees, and a few wild-seed patches, with ownership marked by lines of rocks along the boundaries. Though owners would sometimes allow others to gather food during times of abundance, trespass was not tolerated. John Muir, founder of the Sierra Club, even reports that the owner of a piñon tree killed a white man for felling his tree.

Throughout North America, Indians dependent on hunting and fishing had well-defined territories within which they practiced wildlife conservation. Hunting groups among the Montagnais-Naskapi of Quebec between Hudson Bay and the Gulf of St. Lawrence recognized family and clan hunting areas, particularly for beaver when it became an important trade item. Quoting Indian informants, anthropologists Frank Speck and Wendell Hadlock report that, for New Brunswick, "It was . . . an established 'rule that when a hunter worked a territory no other would knowingly or willfully encroach upon the region for several generations.' Some of the men held districts which had been hunted by their fathers, and presumably their grandfathers." They even had a colloquial term that translates to "my

hunting ground." The Algonkian Indians from the Atlantic to the Great Lakes also had family hunting territories that passed from generation to generation. In these tracts, families sustained harvestable game populations by deliberate rotation systems. The Paiute Indians of the Owens Valley in California hunted together in groups with well-defined territories bounded by mountains, ridges, and streams. Distinct Apache bands had their own hunting grounds and seldom encroached on other territories.

In the Pacific Northwest, Indians had well-defined rights to spawning streams. To capture salmon returning from the ocean to spawn in freshwater streams, they placed fish wheels, weirs, and other fixed appliances at falls or shoals where the fish were naturally channeled. The Indians' technology was so efficient they could have depleted salmon stocks, but they realized the importance of allowing some of the spawning fish to escape upstream.

Relying on salmon as their main source of food, then, the coastal Tlingit and Haida Indians established clan rights to fishing locations where salmon congregated on their journey to spawning beds. (They also had rights to bear and goat hunting areas, berry and root patches, hot springs, sea otter grounds, seal and sea lion rocks, shellfish beds, cedar stands, and even trade routes.) The management units could exclude other clans or houses from their fishing territories. Management decisions were generally made by the yitsati, or "keeper of the house," who had the power to make and enforce decisions regarding harvest levels, escapement, fishing seasons, and harvest methods.

Indian salmon fishing rights stand in sharp contrast to the white man's law that supplanted them. When Europeans arrived on the Columbia River, they ignored Indian rights and simply placed their nets at the mouths of rivers, leaving no fish to spawn. To counter the overfishing, nets were outlawed at the beginning of the 20th century and ever since, fishermen have been encouraged to chase salmon around the open ocean in expensive boats equipped with sophisticated gear. The result is what economic historian Robert Higgs has called the "legally induced technical regress in the Washington salmon fishery." Private ownership encouraged investment and production in personal property as well. The tepee of the Plains Indians, for example, was owned by the woman who might spend weeks or months collecting, scraping, tanning, and sewing together eight to 20 buffalo hides for the completed shelter. Time spent chipping arrowheads, constructing bows and arrows, and weaving baskets was rewarded with private ownership of the completed capital equipment.

The horse was the most vivid example of the benefits of private ownership to the American Indian. Acquired by Plains Indians in the latter half of the 18th century, the horse offered them a life of abundance. With the horse they could follow the vast buffalo herds and ride into the herd to harvest as many animals as they wanted. The horse became one of the Indian's most important sources of wealth. In Canada in the early 1800s, a buffalo horse cost more than 10 guns—a price far higher than any other tribal possession. A turn-of-the-century account of a wealthy Blackfoot man describes it as a "fine sight to see one of those big men among the Blackfeet, who has two or three lodges, five or six wives, twenty or thirty children, and fifty to a hundred horses; for his trade amounts to upward of \$2,000 a year." Converting this amount to current dollars, such a man had an annual income of approximately \$500,000.

Just as private ownership encouraged resource conservation, positive rewards encouraged investment in human and physical capital. In the case of rabbit hunts, which required leadership skills and nets for catching the rabbits, the leader and owner of the net garnered a larger share of the catch.

For hunting larger game with bow and arrow, not only did the archer have to spend hours chipping arrowheads, making arrows, and constructing his bow, he had to perfect his shooting and riding skills. The proficient hunter was rewarded for his investment with the buffalo's skin and the choicest cuts of meat. To establish his claim on an animal, the archer marked his arrows with distinctive symbols. Those without horses or without riding and

shooting skills assisted in the butchering and thereby earned a right to lower cuts. The Omaha tribe developed an elaborate nomenclature to describe rewards for those who killed and butchered buffalo.

In sum, faced with the reality of scarcity, Indians understood the importance of incentives and built their societies around institutions that encouraged good human and natural resource stewardship. Though ethics and spiritual values may have inculcated a respect for nature, more than mysticism encouraged conservation of scarce resources. Rather, an elaborate set of social institutions that today would be called private property rights discouraged irresponsible behavior and rewarded stewardship. As historian Louis Warren puts it, "Among other things, Indian history is a tale of constant innovation and change. . . . If there is a single, characteristic Indian experience of the environment, perhaps it is the ability to change lifeways in radical fashion to maintain culture and identity."

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Endnotes

- ⁱ *Royal Commission on Aboriginal Peoples*, quoting 1991 census figures, 1997.
- ⁱⁱ Statistics Canada, Catalogue No. 21-006-XIE, *Geographic Patterns of Socio-Economic Well-Being of First Nation Communities*.
- ⁱⁱⁱ Statistics Canada, *Survey of Consumer Finances*, annual supplement to the April Labour Force Survey, 1998.
- ^{iv} *The Cambridge History of the Native Peoples of the Americas*, University of Cambridge Press, 1997.
- ^v *Ibid.*
- ^{vi} *Ibid.*
- ^{vii} *Dances With Myths*, by Terry L. Anderson, Reason Magazine, February, 1997. This article contains a great deal of pertinent information about native property rights customs in America, and an excerpt from it is reprinted as an appendix at the end of the paper.
- ^{viii} *Ibid.*
- ^{ix} *Ibid.*
- ^x *The Noblest Triumph: Property and Prosperity Through the Ages*, by Tom Bethell, St. Martin's Press, 1998
- ^{xi} *The History of the Philosophy of Property Rights*, by Grant Madsen, Property Rights Primer, Canadian Property Rights Research Institute, July/August, 1998.
- ^{xii} *What Everyone Should Know About Economics and Prosperity*, by James D. Gwartney and Richard L. Stroup, Fraser Institute, 1993.
- ^{xiii} *Henderson's Annotated Indian Act*, Internet, www.bloorstreet.com.
- ^{xiv} *Ibid.*
- ^{xv} *First Nation Land Surrenders on the Prairies*, by Peggy Martin-McGuire, The Indian Land Claims Commission, September, 1998.
- ^{xvi} *The Indian Act*, Revised Statutes of Canada, 1985.
- ^{xvii} *Ibid.*
- ^{xviii} *Ibid.*
- ^{xix} *Ibid.*
- ^{xx} *Ibid.*
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- ^{xxii} *Ibid.*
- ^{xxiii} *Henderson's Annotated Indian Act*, op. cit.
- ^{xxiv} *The Indian Act*, op. cit.
- ^{xxv} *Indian bank nearer*, The Regina Leader-Post, September 17, 1995.
- ^{xxvi} *Native bank branches out*, by Mark MacKinnon, The Globe and Mail, July 3, 1998.
- ^{xxvii} *Bank frees up loan money*, by Martin Cash, The Winnipeg Free Press, September 24, 1997. In lieu of property as collateral for loans, the Business Development Bank of Canada accepts band council resolutions, and acknowledges the danger that the Bank will have no recourse should the loans not be repaid.
- ^{xxviii} *The promise of the land*, by Terry Johnson, Western Report, October 2, 1995.
- ^{xxix} *Ibid.*
- ^{xxx} *Ibid.*
- ^{xxxi} Scott Drummond, general manager of the Indian Agri-Business Corporation, as quoted in *The promise of the land*, op. cit.
- ^{xxxii} *The Noblest Triumph*, op. cit.
- ^{xxxiii} *How the Government Keeps Indians in Poverty*, by Terry Anderson, The Wall Street Journal, November 22, 1995.
- ^{xxxiv} *Ibid.*
- ^{xxxv} *When may a government infringe on native rights in Canada?*, The Globe and Mail, August 27, 1996.
- ^{xxxvi} The information about the activities of the Freshwater Fish Marketing Corporation is drawn from other articles published previously by this writer.
- ^{xxxvii} For some historical context see Frontier policy brief on the FFMC at http://www.fcpp.org/publications/policy_notes/spr/native_policy/july1299.html
- ^{xxxviii} *Homes on native land*, by Tom Flanagan, The Globe and Mail, September 10, 1998.
- ^{xxxix} *Ibid.*

^{xi} These claims do not conform with my understanding of aboriginal cultures, where typically only the war chief ruled by hereditary custom, not those who were in control of day-to-day administration and tribal business.

^{xii} *Fighting for the right to tax*, by Rudy Platiel, *The Globe and Mail*, March 14, 1995.

^{xiii} *Nisga'a ceremony seals historic deal*, by Robert Matas, *The Globe and Mail*, August 5, 1998.

^{xiiii} *Out of Our Past: A New Perspective on Aboriginal Land Claims in British Columbia*, by Owen Lippert, The Fraser Institute, 1995.



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