

Beyond the Indian Act



INTRODUCTION

Aboriginal people are the least prosperous demographic group in Canada. In life expectancy, income, unemployment, welfare dependency, educational attainment, and quality of housing, the pattern is the same: aboriginal people trail other Canadians. And within the category of aboriginal people, another pattern also stands out: First Nations (status Indians) do worse than Métis and non-status Indians; while among First Nations those living on-reserve do worse than those living off-reserve. These patterns have been more or less stable for decades. Aboriginal people and First Nations are progressing on most indicators compared to other Canadians, but the progress is painfully slow, and it will take centuries to achieve parity at these rates of change.¹

Ironically, although First Nations are at the bottom of socioeconomic rankings, they are potentially wealthy landlords, with land reserves totalling 6.5 million acres (2.7 million hectares).² To be sure, some reserves are of modest economic value, because they have no natural resources and are located far from population centres. But others have arable land as well as commercial timber and valuable deposits of oil, natural gas, and minerals. Also, as Canadian cities continue their inexorable expansion, more and more reserves are finding that their location makes them valuable. Dozens of reserves are now situated within or on the edge of major cities such as Vancouver, Edmonton, Calgary, and Montreal, as well as rapidly growing smaller towns such as Kamloops, Kelowna, and Courtenay-Comox. All this land represents an enormous economic asset that could and should make a major contribution to raising First Nations' standard of living.

Indeed, some of that is now taking place. We are seeing almost an explosion of aboriginal entrepreneurship in the age of “red capitalism.”³ Across Canada, First Nations are opening casinos, shopping centres, industrial parks, golf courses, and residential developments; they own trust companies, airlines, trucking firms, sawmills, and oil wells. But these developments, impressive as they are, are handicapped by an inadequate framework of property rights. Investors are deterred by uncertainty; legal work and litigation multiply; projects take longer than they should, and many potentially profitable developments never happen because all these factors raise the cost structure.

A recent study of aboriginal business ventures by the Conference Board of Canada highlighted part of the property rights issue:

Prohibited land ownership under the *Indian Act* and limits on alienation of municipal lands that arose out of the referendum that followed the *Nunavut Land*

Claims Agreement make it difficult for Aboriginal entrepreneurs to access funding for businesses, since they are unable to leverage land as collateral for a business loan.⁴

Lack of collateral is indeed a well-known and serious obstacle to aboriginal business ventures, but it is only the tip of the iceberg of property-rights issues. Our book will lay out the difficulties in detail and then make constructive proposals for dealing with them through federal legislation and administrative innovations.

Defects in the property rights of First Nations exist at two levels. The first level of difficulty is that, with a few exceptions created by recent treaties, First Nations do not own their lands; the federal Crown has legislative jurisdiction over and manages these reserves for the use and benefit of their residents. In practice, this means that many economic transactions involving reserve land have to be reviewed by the Department of Indian Affairs, adding layers of legal work and delay to an already cumbersome approval process. We believe that Indians should own their own lands and are capable of managing them, and that those First Nations who wish to take over that responsibility should be able to acquire the title to their reserves from the Crown.

Collective ownership by First Nations of their reserve land will also make possible ownership in fee simple by individuals. A standard reference work explains that fee-simple ownership is the “most extensive [land tenure] and allows the tenant to sell or to convey by will or transfer to the tenant’s heir upon death intestate. In modern law, almost all land is held in fee simple. This is as close as one can get to absolute ownership in common law. Legal fiction, indeed, because the owner in fee simple can do what he or she pleases with the land including sale to another and the ability to pass it on to next-of-kin *ad infinitum*.”⁵

Most First Nations do not have fee-simple title, either collectively or individually. Most bands do not own their reserve lands in fee simple, nor do individuals living on reserves have fee-simple title to portions of those reserves. Most reserves are at least partially subdivided through some combination of certificates of possession and leases (both provided for in the Indian Act) as well as customary landholdings (not mentioned in the Act). These existing individual rights are certainly useful up to a point, but they are all seriously deficient for economic purposes, as we will show in the second part of this book. We believe that those First Nations people who wish to take on the responsibility of owning land in fee simple should have that opportunity, as do other Canadians; and we will show how that can happen without jeopardizing the integrity of the First Nations land base. The key to that is for First Nations to possess the underlying or reversionary title, which is now held in most cases by the provincial Crown. Once they have the reversionary title, First Nations can create fee-simple title for individuals on their own lands, confident, like other Canadians, that their own governments will protect their land base while also protecting individual rights created upon it.

Let us make something clear at the outset. We are proposing a voluntary approach to property rights. First Nations who want to go down the path of reversionary title and fee-simple ownership should be emancipated from the Indian Act and allowed, but not forced, to do so. This differentiates our proposal from what was tried in the United States under the aegis of the Dawes Act (1887), when Indian reservations were subdivided and privatized in an attempt to break up tribal communities. In contrast, our proposal is

meant to strengthen the economies of First Nations by giving them access to modern, effective property rights. Unlike the Dawes Act, we do not propose breaking up First Nations lands and abolishing institutions of aboriginal self-government.

By facilitating economic development on reserves, property rights reform will doubtless create more Indian millionaires. We don't apologize for that; every community should have successful entrepreneurs, whose economic leadership creates jobs and opportunities for others. But property rights reform is not only, or even primarily, for the well-to-do. Its greatest benefits will fall upon ordinary First Nations people, especially through the improvement of housing on reserves.

Reserve housing in Canada is a national disgrace. In the 2006 census, Statistics Canada found that 26 percent of reserve housing was "crowded" (compared to 3 percent off-reserve) and 44 percent needed "major repairs" (compared to 7 percent off-reserve).⁶ Most reserves have long lists of people waiting to be assigned to houses for which, on many reserves, they will pay little or no rent once they are installed. Aboriginal Policy Analyst Don Sandberg of the Frontier Centre (Winnipeg) notes that

at least one band, the Opasquiak Cree Nation (OCN) situated next to The Pas, Manitoba, is challenging this culture of entitlement and dependency by informing its people that there will be no more "free homes." In fact, band members are now required to arrange financing for their new homes and, in contrast to most reserves, are now responsible for repairs to their homes as well as the cost of water and garbage services.⁷

Unfortunately, however, such initiatives are more the exception than the rule.

Governments have repeatedly tried to alleviate problems of quantity and quality by spending more money to build more houses, but the fix never lasts. There will never be adequate housing on Indian reserves as long as most homes are built and owned by government. Only a housing market, based on a combination of rental and home ownership as exists in the rest of Canada, can balance supply and demand and keep the housing stock in good repair. In short, it is a

question of property rights – there must be owners who take pride in their own homes and see them as a savings vehicle, as well as landlords for whom housing is an investment to yield a profitable return.

Our approach follows in the footsteps of Peruvian economist Hernando de Soto, who has argued in two bestselling books that defective property rights make life miserable for the poor in the Third World.⁸ Tens of millions of people squat on poorly controlled government land in metropolitan areas such as Lima, Rio de Janeiro, and Cairo. Unable to get title to the land on which they live, they cannot use it as security for loans to improve their homes or start a business. Often, absence of ownership rights and of a legal address means they cannot even get utility hookups or police protection. The problems of First Nations in Canada, though not identical in detail to what de Soto describes, are similar in principle.

One of the co-authors has taken primary responsibility for each of the three parts in this book. Tom Flanagan wrote the first part, on property rights in general and aboriginal property rights in particular. It is an expansion of topics that he treated all too briefly in *First Nations? Second Thoughts*. Anyone who has read that book will realize that his views on aboriginal property have evolved since then. Mainly through discussions with Manny Jules and André Le Dressay as well as by studying the Dawes Act experience in the United States, he has come to realize that making property rights functional for First Nations requires recognition of their underlying title to their lands. Although Flanagan didn't address the point clearly when he wrote *First Nations? Second Thoughts*, he would have thought at that time that the Crown must hold the underlying title on Indian reserves and that any reform of property rights on reserves must come from Parliament through top-down legislation. Flanagan is grateful to Jules and Le Dressay for convincing him of the superiority of the voluntary, bottom-up approach outlined here.

Flanagan hopes that the legislation proposed in this book has the potential to break the aboriginal policy stalemate that he recently described in the second edition of *First Nations? Second Thoughts*. Broadly speaking, the political left in Canada believes in aboriginal self-government, while the political right emphasizes the integration of native peoples into the mainstream of Canadian life. Each

side seems to have political veto power over major innovations, so that nothing big seems to get done. But our proposals should appeal to both left and right: First Nations will get underlying title to their land, which is an important part of self-government; but they will also find it easier to adopt individual property rights for their land-holdings, which will facilitate their participation in the Canadian economy. Is it too much to hope that left and right can put a little water in their wine and come together on a proposal like this, which gives each of them something corresponding to their worldview?

Chris Alcantara wrote the second part, which deals with individual property rights on Indian reserves (certificates of possession, leases, customary holdings) as well as the First Nations Land Management Act. This is an outgrowth of the work that he first undertook in a political science Master's thesis under Flanagan's direction in 2002 and continued thereafter in several publications.

André Le Dressay is the author of the third part, which explains in detail the legislative and administrative changes required to restore the property rights of First Nations and make them fully functional. Many of these proposals are derived from studies that his consulting firm, Fiscal Realities Economists, carried out for Manny Jules and the First Nations Tax Commission (previously the Indian Taxation Advisory Board).

Although each of the co-authors has taken responsibility for a particular section based on his previous research, we have all participated in discussing the drafts of all the chapters, so the book is a genuine collaboration. We collectively endorse the line of thought and the practical recommendations contained in all three parts of *Beyond the Indian Act*.

Of course, we don't claim that improvement of property rights is a magic wand that will make everything right for First Nations. There are no magic wands in the real world of public policy. What we do claim is that getting "beyond the Indian Act" to restore aboriginal property rights will enhance economic activity on reserves, create more jobs and business opportunities for First Nations people, and improve both the quantity and the quality of housing on reserves. Recognizing First Nations' ownership of their lands is the single most useful reform of the aboriginal condition that is constitutionally and politically possible at the present time.

Finally, a note about vocabulary: in this book, we use the terms “First Nations” and “Indians” interchangeably. “First Nations” has become the politically correct term to refer to the people who used to be called “Indians,” but the word “Indian” is still found in the Canadian Constitution as well as in much legislation. It was also universally used, not least by Canadian native people themselves, up to the 1980s and is still in use in the United States. Because our book ranges widely across legal topics as well as Canadian and US history, we could hardly avoid using the older terminology, at least part of the time. In the end, we decided to speak both of “Indians” and “First Nations” without intending any difference thereby.

