

Property rights on the rez

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Contrary to popular
belief, there are ways
to own land on reserves

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One of the most widely discussed books of 2000 was *The Mystery of Capital*, by Hernando de Soto. He showed how millions of poor squatters in sprawling Third World cities are handicapped by their inability to obtain documented ownership of the little plots of land on which they have built their homes. Without legally recognized title, they cannot get services from utility companies, borrow against their assets or open a legitimate business on their premises. Deprived of normal police protection of their homes, they often end up paying criminal racketeers for "protection."

When the book appeared, several reviewers drew parallels between the Third World conditions described by de Soto and the situation of First Nations in Canada, arguing that the Indian Act fails to provide the individual property rights that other Canadians take for granted. While these commentators had a point, they overstated their case by writing as if reserves had no individual property rights whatsoever.

In fact, however, there is a great deal of individual property on Indian reserves, though not in the form of fee-simple ownership familiar to most Canadians. There are three main regimes of private-property rights on reserves: customary rights, certificates of possession under the Indian Act and the land codes emerging under the recently passed First Nations Land Management Act.

Many Indian reserves in Canada, particularly in the Prairies, have no formalized individual property rights. In practice, however, families may hold some (sometimes almost all) the land as a form of customary private property. Such holdings are passed on to heirs and subdivided among family members.

Many reserve residents dwell in houses and operate farms, ranches and

Nations were authorized to proceed with development of their own land codes. Four have completed the process and are now outside the Indian Act with respect to land management. Most of the other listed bands are proceeding with development of their codes, and numerous other bands are making preparatory inquiries. In time, therefore, the First Nations Land Management regime may become a major part of the landscape for aboriginal people in Canada.

It is not yet clear, however, whether this will lead to a growth in private property rights on reserves. On one of the four reserves whose codes are in force, it is being applied primarily to cottage leases on the band's collective land. The band can manage these leases and collect revenue directly, without having to go through the Department of Indian Affairs. This is an improvement in aboriginal self-government and efficient administration, but it does not foster individual property rights. Existing certificate of possession rights on that reserve continue to be respected, but no new rights have been created.

Aboriginal leadership in Canada today is mainly capitalist in outlook. It is said there are no atheists in foxholes, and there appear to be few socialists in the longhouse. Aboriginal leaders declare consistently and repeatedly — and it was crystal clear in the Report of the Royal Commission on Aboriginal Peoples — that they want to participate in the economy, capitalize on their resources, create jobs for their people — in a word, to make profits.

What, however, are the most effective means by which aboriginal people can participate in the Canadian market economy? Here history and economics coincide to provide an unambiguous answer. Markets work best when property is privately owned. As Friedrich Hayek explained, the market is a process for bringing together dispersed knowledge; it functions most effectively when control over resources is also

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other businesses based on such rights, but inability to mortgage and sell customary property limits its usefulness to the owner. Also, boundaries between holdings are not always clear, and disputes easily arise within families as a result of divorce, remarriage and death. Because Canadian courts will not deal with such disputes, they may end up before the band council if the family members cannot reach their own accommodation, and politics on the council may lead to grossly unfair decisions.

A second form of on-reserve property right is the certificate of possession, known as a location ticket prior to the Indian Act revisions of 1951. Over the past 125 years, more than 100,000 such certificates have been issued to property owners on 288 reserves. Some reserves may have only one or two certificates, while, at the other extreme, the Six Nations reserve in Ontario has about 10,000 certificates.

The certificate of possession is a stronger form of property right than customary ownership. Land held in this way can be subdivided, left to an heir or sold to another person having a right to reside on that reserve. Canadian courts will settle disputes and in other ways enforce the rights generated by certificates of possession. However, since even the largest First Nations are really very small communities, on-reserve real-estate markets suffer from lack of potential buyers.

Notwithstanding the constraints on sales, the Six Nations, as well as several other First Nations in Ontario and Quebec, have made imaginative use of the certificate system to promote private ownership of homes. The band council, or a trust company working with the council, will grant a mortgage to a certificate holder, who then surrenders his certificate to the council or an on-reserve trustee approved by the council. The owner gets the certificate back after he has paid off his mortgage; if he defaults, the trustee can take his land under Section 89 of the Indian Act. This good-news story about how individual property rights can improve people's lives deserves to be better known.

A third property-rights regime was created by the First Nations Land Management Act in 1999. The Act allows bands to opt out of the land provisions of the Indian Act and draft their own land codes within the parameters of the Act. Once the Minister has accepted the code, the band can manage its lands without further need for departmental approval. Title to reserve land remains with the Crown, so landholders are not allowed to sell their land to off-reserve purchasers.

When the Act was passed, 14 First

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dispersed. Government ownership is too sluggish and too much influenced by perverse political incentives to be effective in a market economy.

First Nations in Canada have collective property rights to a substantial amount of land. Reserves total more than 2.6-million hectares, more than four times the size of Prince Edward Island, in addition to which a large amount of land is subject to a variety of co-management rights. These totals are growing over time as land claims are settled. But even large amounts of land, with their attendant natural resources, will never yield their maximum benefit to Canada's native people as long as they are held as collective property subject to political management. The small governments of First Nations are just as subject to perverse economic incentives as are the large governments of Canada and the provinces.

This land is the property of the First Nations (held in trust by the Crown), and they will have to decide what to do with it. But the teaching of economics and political science is that, in the long run, collective property is the path of poverty and private property is the path of prosperity. If the First Nations want prosperity by participating in a modern economy — as indeed they do — they should give thought to enhancing private property rights in the substantial land base they control.

There is no single model of property rights. The fee simple model that works well for most Canadians will not be appropriate for reserve lands as long as the residents wish them to remain reserved for future generations. That said, human ingenuity can discover ways of making the property rights now on reserves more conducive to prosperity. At the very least, it should be possible to devise means of neutral arbitration of disputes in customary regimes and to encourage individual home ownership with certificates of possession, as the Six Nations have already done.

Jean Chrétien's government seems to be getting the message that huge subsidies combined with lax accountability do not bring prosperity. It's time to acknowledge that secure individual property rights are the only path to prosperity, for First Nations just as much as for other Canadians.

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