

The Entrepreneurship Explosion and Aboriginal Property Rights

By: [Tom Flanagan](#) on June 19, 2009 |

Aboriginal Entrepreneurship



There has been tremendous progress in aboriginal entrepreneurship over the last ten years. Without any pretence of offering a complete list, here are some examples of success stories, both big and small:

The Fort McKay First Nation, located about an hour's drive north of Fort McMurray, owns the Fort McKay Group of Companies, composed of seven corporations. With a mainly aboriginal work force, they offer corporate clients in the oil sands of northeastern Alberta various kinds of construction, transportation, and labour services, ranging from simple janitorial services to the sophisticated operation of heavy machinery. More recently, the Fort McKay Group has entered a joint venture with Shell for development of oil sands leases on its treaty lands.

In partnership with ATCO, the Tlicho Government of the Northwest Territories owns a logistics company that sells services to the Diavik diamond mine and the Colomac gold mine. As of 2006, 50 tribal members were among the 130 people who worked for Tli Cho Logistics.

The Membertou First Nation, located near Sydney, Nova Scotia, has built a business empire with revenues of \$75 million per year as of 2007. Enterprises include a fishing company, a gas station, an industrial park, and a casino. Under the leadership of Bernd Christmas, the band pulled itself out of debt, balanced its annual budget, and became a significant employer in the Sydney area.

The Enoch Cree Nation, located on the western edge of Edmonton, opened Alberta's first native casino, supported by a hotel and conference centre; and the Tsuu T'ina Nation has also opened its Grey Eagle casino on the western edge of Calgary. Several other native casinos are in the works for Alberta, while others already exist or are being built in British Columbia, Saskatchewan, Manitoba, Ontario, and Nova Scotia. Native gaming in Canada will not produce anything like the huge concentration of wealth generated by the Pequots' Foxwoods Casino in Connecticut, because the provincial authorities that regulate the industry have imposed arrangements to share profits with all First Nations as well as the government of the province. But it will provide cash flow to leverage other aboriginal enterprises into existence.

The Westbank First Nation near Kelowna, BC, has seen a great deal of real estate development on the west side of Lake Okanagan. Most of the reserve had been previously divided into certificates of possession, and many holders of these have leased their land for commercial or residential real-estate projects, so that now fewer than 5% of the people who live on the reserve are band members. Meanwhile the Kamloops Indian Band has taken a different approach, granting a head lease on band land to a developer, who in turn is selling the leases in the local residential real-estate market.

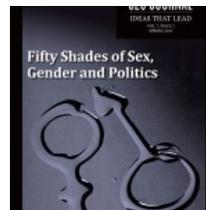
The Osoyoos Indian Band, under the leadership of Chief Clarence Louie, has become the biggest producer of grapes in the Okanagan valley. In addition to operating its own

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Call for Submission

Nk'Mip winery, the band sells grapes to many other wineries up and down the valley. It also operates other recreational and tourism enterprises.

The Samson Cree Nation, located near Hobbema, Alberta, has had difficulties in using its oil revenues for the benefit of all its people. But some of the royalties went into establishing the Peace Hills Trust Company, which now has 20,000 customers, eight regional offices, and an Internet operation.

This list could be multiplied many times over. All across Canada, aboriginal organizations own casinos, hotels, and resorts; shopping centres and industrial parks; sawmills, mines, and oil wells; banks and trust companies; airlines and trucking companies; and many other kinds of enterprises. All Canadians should welcome this explosion of entrepreneurship, which will create a class of well-to-do aboriginal owners and managers as well as provide manual and white-collar jobs to many ordinary aboriginal people.

Nevertheless, it is necessary to keep the limitations of aboriginal entrepreneurship in mind. The success stories mostly come from capitalizing on specific advantages, such as having fertile land or natural resources on the reserve, or being located near an urban centre or in an attractive holiday area. But many reserves in Canada do not have such assets and will find it more difficult to go down the entrepreneurial path. Moreover, in any society, only a relatively small number of people will become entrepreneurs, while most people will work in enterprises owned and managed by others. This is just as true of aboriginal people as of all other Canadians. And working in a business that happens to thrive on a particular reserve may not be a good fit for many individual Indians. If you have the skill set of a carpenter, there may not be a rewarding job for you at the local casino after it has been built. No matter how much aboriginal entrepreneurship there is—and I hope there is a lot of it—most aboriginal people, like most Canadians, will have to look for work in the wider economy.

Notwithstanding the limitations to aboriginal entrepreneurship, it will over time have a major impact on the relationship between aboriginal communities and Canadian society. Initially, aboriginal entrepreneurship may seem like a form of autonomy. "Finally," one might think, "we will control our own future by setting up our own businesses, creating our own jobs on the reserve, and giving up dependence on government handouts." But in practice indigenous entrepreneurship will create an ever denser network of ties with the surrounding society. All but the smallest projects will require partnership with outside investors and financial institutions. Moreover, any aboriginal business will have dealings with agents, suppliers, and maintenance and service companies. To maintain such ties will require band councils to play by ordinary commercial rules, resisting the temptation to use their governmental authority arbitrarily. The American authors David Haddock and Robert Miller call this the "sovereign's paradox": "[T]he greater a sovereign's power to insist on an outcome that is favourable to itself during potential future disputes, the less its present power to conclude agreements that require time to reach fruition." In the context of American tribal sovereignty, this often means that tribal governments agree to be bound by the commercial law and courts of the state in which they are located, thus affording more predictability to investors and suppliers.

Even if they try to promote the employment of their own people, aboriginal enterprises will often need to hire managers and skilled workers from outside the reserve. If they are selling retail goods and services to the public in casinos, resorts, and shopping centres, they will need to make the reserve a welcoming place for non-resident customers and clients. And there will be an ever-growing web of affiliations with nearby cities, rural municipalities, and provincial authorities because on-reserve business enterprises require electric power, water and sewerage, highway connections, and police and fire protection that only outside governments can provide.

All of these factors will combine to make indigenous entrepreneurs ever more involved in the Canadian economy and civil society. What began as the dream of autonomy will end in the reality of interdependence—and that's a good thing for Canada as well as native people themselves.

Getting beyond Crown Ownership

The entrepreneurship explosion is happening in spite of, rather than because of, the legal framework within which aboriginal entrepreneurs operate. The basic problem is that, under the Indian Act, lands reserved for Indians are owned by the federal Crown, not by the First Nation. This creates a whole series of obstacles to doing business on a reserve. Here are a few of the more obvious:

The band cannot sell any land to outsiders. It must surrender it to the Crown, which then sells on its behalf—a protracted, cumbersome process.

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The band can lease its land, but again only with approval of the Minister of Indian Affairs.

Because the Indian Act does not allow outsiders to seize reserve land for non-payment of debts, reserve land cannot be used in the normal way as security for loans.

Clearly, these obstacles are not insuperable; otherwise there would be no entrepreneurship at all on Indian reserves. But even if the obstacles are not total, they are very real. The extra legal work involved can cost a lot of money as well as take up a lot of time, which also costs more money. At the margin, some projects that would otherwise be profitable will never be carried out because of the extra expense involved in operating on a reserve.

The legal obstacles to aboriginal entrepreneurship could be reduced by an amendment to the Indian Act that would transfer ownership of reserve land in fee simple from the federal Crown to First Nations. Crown ownership was perhaps appropriate in the nineteenth century when the reserve was seen as a temporary refuge where Indians could learn the arts of civilization, but it is no longer consistent with the age of aboriginal self-government in the twenty-first century.

Contemporary land-claims agreements in British Columbia, such as the Nisga'a (finalized) and the Tsawwassen (now in process of approval) do in fact transfer land ownership to the reserve community. What is needed is a reasonably expeditious process for accomplishing the same result for existing Indian reserves governed by the Indian Act and older treaties.

Land ownership, however, should not be forced holus-bolus upon First Nations. Just as Canadians once felt that amendment of the Canadian constitution ought to be done in Great Britain, some First Nations, fearing internal factional disputes over the disposition of reserve lands, may want ownership of their land to remain with the federal Crown. But First Nations that feel ready to undertake all the rights and responsibilities of land ownership should have that chance.

What is under discussion in this section is collective ownership by the First Nation of its land. This is somewhat analogous to the situation of the Canadian provinces, most of which continue to own enormous amounts of Crown land and manage resource development through various forms of leases and tenures. Critics have pointed out that private ownership would be more efficient, and they are right. Nonetheless, Canadian public opinion, as expressed in the political process, does not seem to favour that option. So the provinces have devised other legal instruments to let a market economy function on an underlying basis of collective ownership. It's not textbook libertarianism, but it can work in the real world.

The Prospect for Individual Ownership

Of those Canadian First Nations who come to own their own land as communities, some may eventually choose to privatize part of it for purposes such as home ownership. Others may prefer to continue holding it communally and accept the higher transaction costs that arise from collective ownership. They will still be able to get some of the benefits of private property through legal instruments such as leases and certificates of possession, without having the additional costs of running everything through Ottawa.

In the meantime, the subordinate forms of private property that now exist on Indian reserves will continue in force:

Customary rights, based on lengthy family possession. Depending on the reserve, the basis of these rights ranges from pure oral tradition up to a high degree of formalization, including land surveys, approval by band council, and recording in a land registry. These rights enable many Indians to own their own homes, as well as to engage in farming, ranching, and other businesses; but they are not enforceable in Canadian courts and may be lost to adverse claims by neighbours or confiscation by the band council.

Certificates of possession (CPs), as authorized in the Indian Act. Once granted after approval by the band council and the Minister of Indian Affairs, CPs are much like ownership in fee simple, except that they cannot be sold or otherwise transferred to anyone who is not a member of the band. This restriction lowers their cash value because there is no real market for CPs. Nonetheless, they are useful to their owners because Canadian courts will enforce the rights that attach to them, thus offering protection against seizure by band councils or depredations by neighbours, two types of conflict that often occur on reserves. CPs are prevalent in southern Ontario and southern British Columbia, but much less common elsewhere. Where they have been granted, they are used not only for owner-occupied housing on reserve but also can be leased to outsiders for commercial development.

Subject to various approval processes, it is possible to lease band land, customary land, and land held under certificates of possession. Depending on how the leases are drawn, they may become a form of private property right that can be sold to anyone, thus transcending the limitations of CPs, at least for the duration of the lease.

Existing individual property rights on reserves are useful but imperfect in comparison to ownership in fee simple. Customary rights are not enforceable in court, certificates of possession have a very limited market for sale, and leases are by nature temporary. In contrast, the Canadian commercial economy is based largely on indefeasible individual ownership in fee simple, and it would obviously be easier for First Nations to participate in that economy if their land were held in the same way. Individual fee simple ownership, however, carries with it the possibility that land could be sold to people who are not members of the band. Instead of signing long-term leases, homeowners might want to buy their residential lots, or investors might want to buy the sites for casinos or shopping centres.

In the present climate of opinion, band members might regard such sales as a loss of control over their reserve and a threat to their land base. Because of the American experience with allotment under the Dawes Act, many Canadian Indians see private ownership of reserve land as tantamount to "breaking up the reserves." To assuage these fears, First Nations governments will probably have to retain an underlying title in any individually owned lands, allowing them to exercise the power of eminent domain with appropriate market-based compensation. They would also continue to control the use of individually owned lands through zoning and land-use by-laws.

Again, individual ownership in fee simple should not be imposed. It should be a step for bands to take voluntarily after they have gotten used to the idea of owning their own land as First Nations rather than having the Crown own it for them. Once First Nations have the right and responsibility of making their own decisions for their own land, some are bound to see the utility of individual ownership in a competitive business environment, and their experiences can guide the way for others.

*Note: This essay is drawn from the updated version of *First Nations? Second Thoughts*, scheduled to be published by McGill-Queen's University Press in fall 2008.*



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