<e-notes> from fourarrows@rogers.com 9 November 2010 Edition

The Government's Drive To Convert Reserves To Private Property: An Old Dream Revived; Remembering On Remembrance Day

A Four Arrows Summary of an Old and Modern Debate

The History of Converting Reserve Lands Into Private Property

Enfranchisement and Private Property:

Although the Royal Proclamation of 1763 unconditionally confirms recognition of the Indian tribes to ownership and title to their lands, within less than a century Canada was seized of the belief that Indians were incapable of owning property.

Laws were then passed to make Indians pass tests which would demonstrate they were sufficiently civilized to own land. Those who passed were given certificates of "enfranchisement". The focus, however, was on assimilation, rather than on converting reserves to private property. That idea did not fully blossom until the *1969 White Paper.*

The *White Paper* proposed that everything "Indian" would be reserved from Canadian law. There would be no more reserves, no more special rights, no more treaties, and no more Indians. Indians would become "equal" with other Canadians.

The strong and loud protests which took place after the announcement forced the federal government of the early 1970s to withdraw the *White Paper.* In fact, it went underground in the bureaucracy and was disassembled into parts which could be implemented quietly in bite-sized segments.

However, the idea of "getting rid of the reserves" began to sprout up from time to time. There were two driving forces: one was that it was undemocratic for Indians to be "forced" to live on reserves, and that they must be liberated and allowed to integrate into Canadian society which at that time was 95% European. The other driving force held that collective ownership was "communism", un-Canadian, and was retarding progress in forcing assimilation.

Several years ago, a new force came in from the Canadian right and, with the assistance of significant amounts of hidden federal funding, has awakened something deep in the psyche of Canadians of a certain political mindset, and for them, has become a passion. The party line is that reserves are impeding the economic and social development of First Nation communities. Only when an Indian family is a proud owner of its own home, it is argued, will they take pride in their surroundings, followed by a move to the cities where they will gain useful employment and be happy ever after. Indians should be done a favour by permitting them to sell their reserves.

Thus, having the privilege of owning private property has replaced the lofty goal of "enfranchisement" in the minds of those Canadians who still in the 21st Century are grappling with their "Indian problem".

The evolution of "enfranchisement" has followed this chronology:

1857: The Province of the United Canadas passed an *Act to Encourage the Gradual Civilization of the Indian Tribes in the Province.* It provided that any Indian judged to be "sufficiency advanced education wise or capable of managing their own affairs", free from debt and of good moral character could apply to receive land within the colony and "the rights accompanying it."

1868 and 1869: The new Canadian Parliament's first *Indian Act* made enfranchisement a feature: the law was called an *Act for the Gradual Enfranchisement of Indians*. and then modified in 1869. It came with a life estate of a piece of reserve land, providing the applicant was an Indian male "who from the degree of civilization to which he has attained, and the character for integrity and sobriety which he bears, appears to be a safe and suitable person for becoming a proprietor of land."

1875: Some federal officials complained the standards to become enfranchised had been set too high. Lindsay Russell, who became Surveyor General of Canada, wrote,

> "It is only fair that an Indian who wished to become a citizen should be on the same footing as the incoming Negro or other foreigner who, though possibly as devoid of education and possessing no more intelligence, may simply by taking the oath of allegiance, becoming a householder, being taxed to a

certain amount, exercise the right of franchise.

"Compared to them, the process of enfranchisement for Indians, as defined by the Act, is not sufficiently simple and discriminates unfairly against them.

"When his vote is being polled, who meets the immigrant cited above with the objection that his character for sobriety, integrity and morality is not up to the legal mark? If the law that, for the Indian makes the right to acquire and hold property dependent on the fortunate possession of these virtues in its action his white brethren, what a questionable title would many a valuable citizen have to his belongings?

"That the Indian will for sometime cling to the tribal system there can be no doubt, and they will be encouraged to do so by their Chiefs, who will naturally dislike to lose their destructive position and authority.

"In districts where there is little or no white occupation, [the tribal system] has in favour of its continuance that any organization for the maintenance of order is better than none, and that it is the one by which they have been accustomed to govern themselves, but it tends to keep up the instinctive antipathy of race, while it would be to the welfare of the Indian that they should be merged in the general mass of the population as soon as possible, for this there should be every facility. . .

"Keeping Indians in tutelage or perpetuating among them community of property in any shape only tends to delay their progress in civilization. Every step in the removal of these conditions produces an additional incentive or necessity for individual exertion. Those who fail to respond will succumb. The fittest will survive to their own advantage and that of society at large."

There was also debate in the House of Commons on the subject of enfranchisement. The Honourable Alexander Mackenzie, the Prime Minister, told the House that

". . . whatever has to be done with the Indians, must be done with their consent. The President and one of the leading members of what may be called the Indian Parliament visited Ottawa two or three weeks ago and asked the Government not to propound any measure this session, because they wished to have further time for consultation during the coming season, in order that the Bill might be prepared, submitted to their own council and their own people, for the purpose of obtaining their opinion on it."

1876: Section 86 of a revised *Indian Act* required consent of the band for enfranchisement to take place, and that the land provided be reserve land. It stated:

Whenever any Indian man, or unmarried woman, of the full age of twenty-one years obtains the consent of the Band of which he or she is a member to become enfranchised, and whenever such Indian has been assigned by the Band a suitable allotment of land for that purpose, the local Agent shall report such action of the Band and the name of the applicant to the Superintendent General.

Whereupon the said Superintendent General, if satisfied that the proposed allotment of land is equitable, shall authorize some competent person to report whether the applicant is an Indian, who from the degree of civilization to which he or she has attained, and the character for integrity, morality and sobriety which he or she bears, appears to be qualified to become a proprietor of land in fee simple; and upon the favourable report of such person, the Superintendent General may grant such Indian a location ticket as a probationary Indian for the land allotted to him or her by the Band.

(1) Any Indian who may be admitted to the degree of Doctor of Medicine, or to any other degree by any University of Learning, or who may be admitted in any Province of the Dominion to practice law, either as an Advocate or as a Barrister, or Counsellor, or Solicitor, or Attorney, or to be a Notary Public, or who may enter Holy Orders, or who may be licensed by any denomination of Christians as a Minister of the Gospel, shall ipso facto become and be enfranchised under this Act.

In British Columbia, "aborigines" were forbidden to own private lands. This meant a homesteader acquire 320 acres of land, while land on reserves was limited to 20 acres for each head of a family of five persons, and was often less. The restriction continued until sometime after 1948.

Speaking in favour of the Bill in 1876 was then-Minister and later Treaty Commissioner David Laird:

"I am firmly persuaded that the true interests of the aborigine and of the State alike require that every effort be made to aid the Red Man in lifting himself out of this condition of tutelage and dependance, and that it is clearly our wisdom and duty, through education and every other means, to prepare him for a higher civilization, be encouraging him to assume th privileges and responsibilities of full citizenship."

1879-1880: The compulsory aspect was removed by adding the requirement that an Indian wishing enfranchisement must apply for it. Under section 93, an entire band could become enfranchised. Note that in the two decades following passage of the enfranchisement provisions, only one person, Elias Hill, applied to be enfranchised.

The legislation read:

> 109.(1) On the report of the Minister that an Indian has applied for enfranchisement, and that in his opinion the Indian
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> (a) is of the full age of twenty-one years,
>
> (b) is capable of assuming the duties and responsibilities of citizenship, and
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> (c) when enfranchised, will be capable of supporting himself and his dependents,
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> the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised.

Thus it was that a person who was enfranchised was "deemed not to be an Indian" for the purposes of the *Indian Act.* He was no longer subject to the provisions of that Act. This meant when enfranchised a "former Indian" had to give away or sell to the Band or to a Band member any home or land or improvement which he was in lawful possession of, and he must do so within 30 (thirty) days or the home was offered for sale to the highest bidder.

If there was no bid and the property remained unsold for six months from the date of offering for sale then the property reverted to the Band subject to payment at the discretion of the Minister to the enfranchised Indian from Band funds of such amount for permanent improvements as the Minister may determine.

An alternative existed – when the enfranchisement order was given the Governor in Council could, with Band Council consent, order that any lands within the reserve of which the Indian was in lawful possession formerly, shall cease to be Indian Reserve lands. The enfranchised Indian could then occupy those lands for ten years, paying to the Band funds such amount per acre for the lands as the Minister considers to be the value of the land. At the end of ten years, title of the land was given to the enfranchised person.

1882: An essay by James Bovell Mackenzie (1851-1919) from his *Treatise on the Six-Nation Indians* (Toronto, 1882) would have been received with approval in its day:

> We cannot estimate the transforming power that his enfranchisement might exert over the Indian character. The Indian youth, who is now either a listless wanderer over the confines of his Reserve; or who finds his highest occupation in putting in, now and then, desultory work for some neighboring farmer at harvest-time; who looks even upon elementary education as useless, and as something to be gone through, perforce, as a concession to his parents' wish, or at those parents' bid, would, if enfranchisement were assured to him, esteem it in its true light, as the first step to a higher training, which should qualify him for enjoying offices or taking up callings, from which he is now debarred, and in which, mayhap, he might achieve a degree of honor and success which should operate, in an incalculable way, as a stimulus to others of his race, to strive after and attain the like station and dignity.
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> There can, I think, be no gainsaying of the view that the Indian, if he were enfranchised, would avail much more generally than he does now, of the excellent educational facilities which surround him. The very consciousness, which would then be at work within him, of his eligibility for filling any office of honor in the country, which enfranchisement would confer, would minister to a worthy ambition, and would spur him on to develop his powers of mind, and, viewing education as the one grand mean for subserving this end, he would so use it and honor it, as that he should not discredit his office, if, haply, he should be chosen to fill one.
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> The present Indian legislation, in my judgment, operates in every way to blight, to grind, and to oppress; blasts each roseate hope of an ameliorated, a less abject, estate: quenches each swelling aspiration after a higher and more tolerable destiny; withers each ennobling aim, cancels each creditable effort that would assure its eventuation; opposes each soul-stirring resolve to no longer rest under the galling, gangrenous imputation of a partial manhood.
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> Though not authorized to speak for the Indian, I believe I express his views, when I say that he cherishes an ardent wish for enfranchisement, a right which should be conceded to him by the Legislature, though it should be urged only by the silent, though not, therefore, the less weighty and potent, appeal, of the unswerving devotion of his forefathers to England's crown.
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> He desires, nay, fervently longs, to break free from his condition of tutelage; to bring to the general Government the aid of his counsels, feeble though such may seem, if we measure him by his present status; aid, which, erstwhile, was not despised, but was, rather, a mighty bulwark of the British crown; and pants for the occasion to assert, it may be on the honor-scroll of the nation's fame, his descent from a vaunted ancestry.
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> It will be said, perhaps, that to harbor the idea of the Indian's elevation, following, in any way, upon his closer assimilation with the white; his divestiture of the badge of political serfdom, and deliverance from even the suggestion of thraldom – all of which his enfranchisement contemplates; or that these would assure, in greater degree, his national weal, would be

to indulge a wild chimera, which could but super-induce the purest visionary picture of his condition under the operation of the gift.

Some might be found, as well, to discredit the notion that there would supervene, on the consigning to the limbo of inutile political systems of the disabling regime that now governs, an epoch, which would witness the shaking off, by the heavy, phlegmatic red man of the present, of his dull lethargy, with the casting behind him of former inaction and unproductiveness; and his being moved to assert a healthy, genuine, wholesome activity, to be directed to lofty or soulful purpose, or expressed in high and honorable endeavour.

And it might be set down as a reasoning from the standpoint of an illusory optimism, to look for, through any change in the Indian's political condition, the incoming of an age, which should be distinguished by a hopeful and helpful accession to his character of honesty, uprightness, and self-respect, or by their conservation; or which should be the natal time for the benign rule over him of contentment, charity, and sobriety, or for the dominance of a seemly morality.

That, likewise, might be deemed idle expectancy, which would foresee, as a result of the changed order of things, now being prospectively considered, a season in the Indian's experience, when should be illustrated the greater sacredness of the marriage relation, and the happy prevalence of full domestic inter-communion, harmony, and order; or should be honored a more gracious definition of the woman's province, with the license to her to embrace a kindlier lot than one decreeing for her mere slavish labour; or project a mission, to see its fruit in the softening and refining, and in the reviving of the slumbrous chivalry, of the man, or to leave, mayhap, some beauteous impress on the race.

It may be maintained, indeed, that the withdrawal from the Indian of the Government's protecting arm, and the recognition of his position, as no longer that of a needy, grovelling annuitant, but as one of equal footing with the white before the law, would – far from bringing blessings in their train – promote, with other evils, a pernicious development, with calamitous reaction upon him, of the aggrandizing instinct of the white, who would lure and entrap him into every kind of disastrous negotiation – its outcome, in truth, a very maelstrom of artful intrigue and shameless rapacity, looking to the absorption of the Indian's land, and of the few worldly possessions he now has.

Nay, many would foresee for the Indian, through the consummation of his enfranchisement, naught but gloom and sorest plight. These would invest their picture with the sombrest hues; and, making this assume, under their pessimist delineation, blackest Tartarean aspect, would crown it with the exhibition of the Indian, as one sunken, at the instance of the white, in extremest depths of human sorrow; as plunged, engulphed, and detained in a horrible slough of degradation and misery.

Such would, in short, have an era opened up, which should mark, at once, the exaltation of the white to a revolting height of infamy, proclaiming the high carnival of unblushing trickery and chicane; and should signalize the whelming of the Indian in the noxious flood of the high-handed, unrighteous, and unprincipled practice of the white, who would project for him, and through whose unholy machinations he would be consigned to, a state of existence which should be the hideous climax of physical and moral debasement.

Now I contend that the claim to ascendancy of the Indian over the white, in respect of sagacity and cunning and craft, which this condition of things presupposes, is not satisfactorily made out. And I can readily conceive of the application of that astuteness, that distinguishes the Indian in his present trading relations with the white, to the wider field for its display, which would arise from the extended intercourse and more frequent contact with the white, that would ensue upon the Indian's enfranchisement; and of this astuteness operating as his efficient shield against evil hap or worsting by the white in any coping of the kind with him.

I do not deny, however, that there might be realization, in part, of such painful spectacle, as has just been imagined, were enfranchisement, pure and simple, conferred upon the Indian; and I would distinctly demur to being taken as an advocate of enfranchise-ment for him without certain safeguards.

Yet I honor a somewhat wide use of the term, and discredit the system of individual election for the right (if I may so call it) – which, I believe, obtains – with its vexatious exactions as to mental and moral fitness, and the very objectionable feature, to my mind, of laying upon the band, as a collective organization, the obligation of assigning to the individual member seeking enfranchisement so much land, thus imposing upon it, in effect, the onus of conferring the land qualification. Let its consummation be approached gradually, and with caution; and let a modified form of it, designed to meet the Indian's peculiar situation, be recognized and enforced. Let the enfranchisement be made a tentative thing; and let there be a provision for the divestiture of the Indian of the right, in case

disaster to him should supervene upon its application.

I have spoken elsewhere of the fact of the Indian's enfranchisement prompting him, in view of the prospect of occupying various stations of dignity in the country, which, through the extension to him of the franchise, would be thrown open to him, to set a greater value upon education, as qualifying him for enjoying and filling with credit these stations.

Perhaps, it would be the stricter view, and more apropos, to regard the Indian's more thorough education as that which would lead him to more readily perceive and better appreciate the full import and. significance of enfranchisement; which would bring home to his mind a clear apprehension of the duties and obligations it exacts, and enable him, as well, to exercise the rights thereto pertaining with a wiser foresight and greater intelligence.

Let a higher order of mental attainment than he now displays be insured, by all means, and if possible, to the Indian; and, to this end, let the authorities concerned invite, through the inducement of something better than a mere bread-and-butter salary, the accession to the Reserve of teachers, no one of whom it shall be possible for an Indian youth of tender years to outstrip in knowledge; or shall be reduced to parrying, as best as he can, the questionings of a pupil on points bearing upon merely elementary education.

I would mention a prospective result of the Indian's enfranchisement, which would suggest, forcibly, the desirability of, and the need for his anticipatory instruction in the English language. He, unlike the German or Frenchman, has never been able to maintain, indeed, has never had, a literature; and I can scarcely conceive of his tongue even surviving the more general mingling with the white, which would be the certain concomitant of enfranchisement, which, indeed, with its other subverting tendencies, would seem to me to ordain its utter effacement.

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1920: The basic thrust of the enfranchisement policy remained intact through successive *Indian Acts*, although the actual provisions were modified in various ways. It was Duncan Campbell Scott as deputy Superintendent General of Indian Affairs who called for stern measures to be taken in 1920 – enfranchisement, like it or not: .

"The proposed amendments . . . have stood upon the Statute Books since 1857. Under them it has been found possible to enfranchise only 25 Indian families of 102 persons since Confederation or during a period of 53 years. [emphasis added]

If the ultimate object of our Indian policy is to merge the natives in the citizenship of the country, it will be seen that these clauses are most inadequate. They were framed with such a refinement of caution and are so wholly dependent upon the consent of the Indian band whereof the Indian is a member, that they are practically inoperative.

Under these clauses, presuming that the band is willing, it takes six years for an Indian to become franchised, and the applicant is wearied by the additional six years of tutelage before he is deemed fit to handle his own property and take his place among the citizens of the country.

"In the session of 1918, we obtained from Parliament a clause which enables the Governor General in Council to enfranchise, on application, all Indians who have no land on reserves and who are willing to accept their share of the funds of the band and to abrogate any title to the lands on the reserve. This clause has served to show that numbers of Indians desire to take the final step towards citizenship, as to date we have enfranchised 97 families of 258 individuals.

"We have further evidence bearing in the same direction, consisting of individual applications for enfranchisement from Indians who are holders of property on reserves. Under date of January 7, 1920, an application was received from 33 Indians of Walpole Island asking for enfranchisement for themselves and their families. . .

"The proposed new sections give the Superintendent General power to report from time to time on Indians who are qualified for enfranchisement, and they give the Governor General authority, acting on such reports, to enfranchise an Indian and his wife and minor unmarried children. . . while the departure from the spirit of the existing act is radical, it is in all respects desirable that we should have legislation enabling us to enfranchise Indians without the preliminary application from themselves and without the consent of the band.

"There is on the reserves in Ontario and Quebec a class of Indians who are living the life of ordinary citizens, but who have the special protection of the *Indian Act;* they have reached a point of progress where they are stationary, and where it will require an impetus from without if they are to make any further advancement. The reserves themselves are, as they stand, in many cases, an obstacle to the progress of the white communities, and they require to be broken up in the interests of these communities and of the Indians themselves.

". . . I would anticipate that placing this legislation on the statute book would have an excellent effect on the Indians whose pleasure it is now to make claims for special privileges; for instance, the Six Nations, who say they are not British subjects but allies of the Crown and a separate nation within a nation, and not subject to the laws of this country. It would also check the intrigues of smart Indians on the reserves, who are forming organizations to foster these aboriginal feelings, and to thwart the efforts and policy of th Department. As evidence of what I refer to, I am sending herewith a copy of a circular issued by an Indian of the Six Nations, F.O. Loft, who is earning his living outside the reserve. This may be merely a clever scheme to put him in funds, but it has the effect of disquieting the Indians and stirring up suspicion of the Department and the Government. Such a man should be enfranchised.[1]

"Finally we must come close to the heart of the subject and provide legislation which will carry out the ultimate aims and objects of the policy which has governed the administration of this Department since Confederation. It is illogical to develop a policy, spend money on it, and to achieve results without possessing ourselves to make a final disposition of the individuals who have been civilized and to despatch them into the ordinary life of the country with the knowledge that they have every chance to succeed."

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– Duncan Campbell Scott,
Deputy Superintendent General of Indian Affairs

The *Indian Act* was amended in 1920 to incorporate Scott's recommendations for clearer all-embracing compulsory enfranchisement of any Indian or Indians who were "fit for enfranchisement," with fitness determined by a board of examiners appointed by the Superintendent General of Indian Affairs.[2]

1932-1933: The compulsory aspects of enfranchisement were removed by a Liberal government in 1932. In 1933 a Conservative government again amended the *Indian Act* with a view to reinstate compulsory enfranchisement, but a Liberal amendment practically defeated its operation.

1951: There were no further changes in the *Indian Act* until its major revision of the *Act* in 1951. Even then, under section 112 of the 1951 *Act*, the Minister was given the power to appoint a committee of inquiry to report on the desirability of enfranchising an Indian or a band, whether not the Indian or band applied for enfranchisement.

1985: Bill C-31 abolished enfranchisement.

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[1] Frederick Ogilvy Loft (1867 - 1934), a Mohawk born on the Six Nations Reserve, returned from duty as an lieutenant in the Canadian Army in after World War I, finding many of the freedoms he had fought for were not extended to the people of the Six Nations.

He went to London, England, to ask the British Privy Council for a hearing on behalf of Indians of Canada. He was told to organize his people before claiming to be their representative. So he worked out of his home to form an organization which became known as the League of Indians of Canada and as the North American League of Indians.

Loft travelled across Canada to unite Indians, facing tremendous opposition from the federal government during these early organisational activities. People attending these meeting were often charged by police for "violations" of laws forbidding more than three Indians from congregating or requiring them to have a pass to be outside their reserve.

In June 1920, a few thousand Indians met as the League of Indians of Canada, at the Keeseekoownin Reserve in Manitoba. The following year meetings were held in Saskatchewan, then Alberta. Gradually, the Federation of Saskatchewan Indians took form from these meetings organized by Fred Loft.

[2] Debates in the House of Common's on Scott's Bill 14 make interesting reading. They were held 23 June 1920. There was a further debate on 21 Feb 1933.

2010: Behind the scenes, Indian Affairs promotes private ownership of reserve lands as the solution to First Nations economic and social development.

The proposed Bill is being openly advocated by the First Nations Tax Commission,[3] a federal agency whose chair and members are appointed by the Minister of Indian Affairs. The Commission received $5,527,335 in 2009-2010 plus an additional $248,000 "to build strong governance". As a federal agency, it is subject to the *Access to Information Act.*

Manny Jules is the Chief Commissioner. He was appointed when the Commission was first created in 2006, and reappointed 22 June 2010.

The Commission's function is to ensure "that First Nation property tax system is administratively efficient, harmonized with the rest of the county, and fair to on-reserve tax-payers. It exercises approval of revenue laws passed by First Nations. "The FNTC represents the collective interests of First Nations and taxpayers and promotes economic development by enhancing the administrative efficiency and fairness of the First Nation property tax system.

"Its chief aims are to protect First Nation taxation jurisdiction, safeguard taxpayer interests and increase the value of real property tax on reserve. It also ensures the effective administration of the tax system while protecting its integrity by reconciling the interests of First Nation tax authorities, and taxpayers, thus creating benefits to all."

It is this federally-funded federally-appointed agency which is the principal on-the-record advocate of the proposed new legislation.

The discussion which follows is first a critical analysis of the fundamental principles of the proposal. Then the economic analysis from the far right which is used as the intellectual justification for the proposal is provided, as well as a critical analysis of that position. Finally, the advocates of the proposal are given a chance to be heard: Manny Jules and Tom Flanagan:

[3] http://www.fntc.ca/

WOODWARD & COMPANY

Woodward & Company is a Victoria, B.C. law firm which states it is a full-service law firm working with First Nations, Aboriginal organizations, Aboriginal companies and Tribal Associations. We support our clients in achieving self-determination, justice, sustainable economic development and compensation. Its website: http://www.woodwardandcompany.com/ *On 1 November 2010, the firm published a paper on "First Nation Property Ownership" which shed much light on the high-pressure publicity campaign which has been promoting the conversion of reserve lands to fee simple title. The article below contains excerpts from that paper.*

The proposed "First Nations Property Ownership Act" is an initiative that would "permit First Nations who wish to hold the legal title to their lands to do so; and ... to do so without risking the loss of their governance powers...no matter what ownership rights the First Nations may themselves decide to allow."[4]

In addition to allowing for First Nation ownership of lands, and the ability of First Nations to grant fee simple titles, proponents argue that proposed Act could bring the following benefits:

> to allow First Nations to manage land and make land and development laws without the involvement of the federal government;
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> to enable use of land as security (e.g., mortgages);
>
> to enable registration of interests in land in a Torrens-style registry, increasing certainty and greatly reducing transaction costs;
>
> to provide options to ensure that reserve property can be transferred to non-status members.[5]

We share our First Nation clients' frustration with the barriers to economic development on reserve created by the *Indian Act* system and INAC "red tape", which in our

[4] First Nations Tax Commission, "Who Should Own Reserve Lands? The First Nations Property Ownership Initiative – A Discussion Paper", October 2010.

[5] "Who Should Own Reserve Lands", cited above, p. 9.

view is a major contributor to poverty in First Nations communities. The proposed Act is one response to concerns about poverty and lack of access to capital and development opportunities for First Nations. In our view there are many questions to be answered regarding the proposed Act. For example:

★ How will reserve lands be transferred to fee simple ownership without inviting in provincial jurisdiction? The [B.C.] provincial government takes the position in Treaty negotiation that all fee simple lands held by First Nations must be subject to provincial jurisdiction and "concurrent" legislative authority.

★ What will be the nature of the underlying title to the lands subject to the proposed Act?

★ What legislative regime will apply lands under the proposed act? What will be the source of the legislative power? and where will it sit in relation to federal and provincial jurisdiction?

★ Will creation of fee simple titles remove aboriginal title through the doctrine of merger in property law?

★ How will titles on reserve be cleared for registration in a Torrens system when there are so many historical conflicts over CPs, family lands, boundaries, etc. on most reserves?

★ Will the mere creation of fee simple title magically create development and wealth? or do development and wealth depend more on a combination of factors such as geographic location, proximity to urban centres, access to transportation, availability of infrastructure?

★ Does granting fee simple title to a First Nation member create any benefit if that member has no income and cannot afford to make payments on a mortgage even if they can secure one?

> ***"In our view, there are many questions to be answered regarding the proposed First Nations Property Ownership Act."***
>
> ***– Woodward & Company***

We are hopeful that the above questions can be answered and all of the outstanding issues can be resolved. We believe that a fee simple option, if properly crafted and developed in full cooperation with First Nations, may provide a worthwhile path for some First Nations.

We recognize that there are many problems with reserves. However, there is a certain strength and sense of community and culture that derives from having First Nation members and families living in the same place over many generations, as First Nations did for thousands of years prior to the arrival of Europeans.

In the short term we believe there are existing tools and options that are under-utilized or under-appreciated. These existing tools and options hold significant opportunities for First Nations to pursue economic development and for First Nation members to generate equity.

We have set out some of the existing tools and options below.

1. Certificates of Possession

Under s. 20(2) of the *Indian Act* 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". A Certificate of Possession ("CP") has many of the attributes of fee simple land. It entitles the holder to exclusive use and possession in much the same manner as a fee simple.

The primary restriction on a CP is that it cannot be transferred to a non-member. However, a CP can be leased to a non-member and such leases have significant market value, in many cases equal or near to the value of fee simple land off-reserve. In addition, leases of CPs are mortgageable. For First Nations with Land Codes (see below), CPs can also be self-leased (i.e. the CP-holder leases the land to himself or herself) with this lease becoming the security for a mortgage.

What the proposed Act proponents cite as the major limit of CPs, the inability to sell to non-members, is also a major strength in that the non-alienability keeps the land within the First Nation community. In short, CPs are a unique, flexible and highly valuable form of property ownership on reserves which allow for exclusive use and occupation and generation of equity without putting reserves at risk of becoming permanent checkerboards and broken up communities.

2. Use of Reserve Land and CPs as security

Currently, neither First Nation members nor non-members can acquire a fee-simple interest in reserve land. However, leases of reserve land to non-members, and mortgages of those leases, are common under both *Indian Act* designations and First Nations" own Land Codes. Less common are leases of designated or Land Code land to First Nation members. However, long-term, pre-paid, fully transferable leases of land to members can allow First Nation members to access financing for home construction or improvement.

Section 89(1.1) of the *Indian Act* makes clear that "Indians" can mortgage their leasehold interest in designated reserve land and this has happened in practice.

We are not convinced that simply creating either fee

simple titles or long term leases will automatically create a housing market and allow for home equity sufficient to enable individuals to access credit, but long-term leases are an option and, as citied above, have the advantage of potentially generating equity without putting reserves at risk of being broken up forever.

Will the mere creation of fee simple title magically create development and wealth?

Or do development and wealth depend more on a combination of factors such as geographic location, proximity to urban centres, access to transportation, availability of infrastructure, etc?

3. Non-status member ownership of reserve land

It has been widely recognized that *Indian Act* rules in respect of Indian status are resulting in reduced numbers of "registered Indians". This is due to the increasing number of "marrying out" and status Indians marrying non-status or non-First Nation partners. Proponents of the proposed Act argue that these rules can also leave CP-holders with no heirs for their property, and that proposed Act provides a possible option for First Nation communities wishing to allow property to be transferred to non-status members.

We disagree with this interpretation.

Section 24 of the *Indian Act* already allows the transfer of property interests (e.g., a certificate of possession) to any member, whether or not that member has Indian status. First Nations can create membership rules which allow non-status individuals to be First Nation members who are entitled to possess reserve property.

Does granting fee simple title to a First Nation member create any benefit if that member has no income and cannot afford to make payments on a mortgage even if they can secure one?

4. Existing Land Registries

We agree that a Torrens-style registry would be better than the existing notice registry system in managed under the *Indian Act* and Land Codes. It would provide certainty and reduce legal and transaction costs that make development of reserve land more expensive. However, we would like to make three observations about the potential for existing registries.

a. Fee simple ownership is not a pre-requisite for implementing a Torrens-style land registration system. It is entirely possible to create a Torrens-style registry for interests on reserve.

b. The *First Nations Land Management Act* enables First Nations to create their own registries. First Nations could create a Torrens-style registry for Land Code interests if they wished to do so and if there were clear benefits from doing so.

c. First Nations that complete Treaties have the option of registering interests in their Treaty Settlement Land in the provincial Land Title Office. First Nations such as Tsawwassen have created their own unique forms of restricted fee simple titles that are fully registerable in the LTO but which cannot be transferred to non-members. Tsawwassen and Nisga'a also have other unrestricted fee simple lands which are fully registerable and transferable in the provincial LTO.

We are not convinced that simply creating either fee simple titles or long term leases will automatically create a housing market and allow for home equity sufficient to enable individuals to access credit.

But long-term leases are an option and, as citied above, have the advantage of potentially generating equity without putting reserves at risk of being broken up forever.

5. Land Management and Creation of Equity Under *First Nations Land Management Act*

First Nations who participate in the *First Nations Land Management Act* are able to opt out of the land management provisions of the *Indian Act,* enact their own Land Code, and, through the process established by their Land Code, enact other land-related laws. This option provides:

★ Full First Nation jurisdiction over lands and laws relating to lands;

★ Ability for members to secure mortgages against their land without the need for a ministerial or Band guarantee;

★ Speedy approval of developments;

★ Speedy registration of land transactions; and

★ The ability for non-status First Nation members to hold land and to pass it on to their heirs.

It appears that the only practical differences between the Land Code option and proposed Act are that Land Codes under the *First Nations Land Management Act* do not provide for full fee simple (the transactions are based on

long-term leases) and the registration is in the First Nations Lands Registry System rather than a Torrens system.

In the experience of a number of First Nations, and from the perspective of generating economic development and generating equity, these differences have been marginal.

There are several examples of *First Nations Land Management Act* First Nations in British Columbia that have secured financing and partners for major multi-million dollar projects on their reserves. They have done this very quickly and efficiently under their own Land Codes. The *Vancouver Sun* recently reported that a KPMG study says the *First Nations Land Management Act* program generated $101 million in investment and about 2,000 jobs on a sample of 17 First Nations that now independently manage their land under the system.[6]

First Nations that opt into the *First Nations Fiscal and Statistical Management Act* are also able to impose real property assessment and taxation laws, development cost charge laws, and business licensing laws through the First Nations Tax Commission and without the involvement of Indian Affairs.

5. Creation of Fee Simple Options and Wealth and Equity via Treaty

A First Nation that completes a modern Treaty has extensive options for creating fee simple interests and other unique interests within their Treaty Settlement Lands. First Nations may create regular fee simple interests, which is being pursued by the Nisga'a First Nation.

However, First Nations also have the opportunity to create unique fee simple interests such as "restricted" fee simples which are fully registerable in the provincial Land Title Office but only transferable to members of the First Nation. Tsawwassen First Nation is pioneering the latter approach. First Nations with modern Treaties have the full legal authority to create interests on Treaty Settlement Land and a sufficient land base to protect some of their lands as a stable base for their community and members while designating other parts of their land base for open sale and full transferability.

It is unfortunate the current federal and provincial government mandates make Treaty a non-viable option for so many First Nations. However, there is no magic to Treaties as the vehicle to achieve First Nation ownership over lands and First Nation jurisdiction over the creation of fee simple and other interests. To the extent that the proposed Act initiative achieves these objectives, it would be like a mini-Treaty, perhaps without some of the other Treaty baggage. However, if the federal and provincial government were willing, the same objectives could be achieved through reconciliation agreements or other processes backed by legislation.

6. Creation of Interests and Wealth Via Aboriginal Title

Aboriginal title gives "a right to the land itself" . The courts have stated that aboriginal title land has "an inescapable economic component" and that the land may be used "for a variety of activities, none of which need be individually protected as aboriginal rights under s.35(1)".[7] The only limit on the development of aboriginal title land is that it cannot be sold to non-members without first being surrendered to the Crown.

In our view there are no legal barriers to First Nations creating all manner of legal interests in aboriginal title lands including leases and restricted fee simple interest. Provided that financial institutions and investors are educated about the legal realities of aboriginal title, there are extensive possibilities to use aboriginal title lands to generate wealth for First Nations and equity for First Nation members.

As we write this article the *Tsilqhot'in* aboriginal title case is being appealed by the federal and provincial Crown. It is unfortunate that the federal and provincial government are spending all of their time and energy fighting against aboriginal title rather than working with First Nations to explore creative ways in which aboriginal title could be recognized and implemented in a manner that coordinates with federal and provincial jurisdiction and creates wealth for First Nations and their members.

7. Concerns about Negative Impacts on Additions to Reserve and Implementation of the FNLMA

Many First Nations have their applications for Additions to Reserve and for access into the Land Code process stuck in a federal logjam. It can take years or decades for First Nations to add lands to their reserves, even if they already own the lands in fee simple.

An ongoing problem for many of our clients is that the federal Department of Indian and Northern Affairs is obstructing First Nations wishing to enact their own Land Codes. There is a significant lack of resources for the *First Nations Land Management Act* program. Currently there are 74 First Nations on a waitlist, waiting to opt into the *First Nations Land Management Act.* It appears that INAC has provided close to $1 million in funding to the proposed

[6] "First Nations say foot-dragging holding back development", By Richard Foot, Postmedia News, October 16, 2010: http://www.vancouversun.com/business/First+nations+foot+dragging+holding+back+development/3682395/story.html

[7] *Delgamu'ukw* v. *British Columbia* [1997] 3 S.C.R. 1010.

Act initiative. We are concerned that by throwing its support behind the proposed Act initiative to the detriment of the Additions to Reserve and the FNLMA, the federal government may be denying First Nations the opportunity to create wealth on reserve lands and to manage their lands and create wealth and equity through their own Land Code and land management laws.

We are concerned that by throwing its support behind the proposed Act initiative to the detriment of the Additions to Reserve and the First Nations Land Management Act, the federal government may be denying First Nations the opportunity to create wealth on reserve lands and to manage their lands and create wealth and equity through their own Land Code and land management laws.

Conclusion

It is our view that proposed Act is an interesting initiative that is definitely worth exploring. However, the proposed Act shares many of the same challenges as Treaty negotiations and implementing aboriginal title: it is a long term prospect.

Even if comes to fruition FNPO will not automatically overcome First Nation poverty and lack of access to capital and opportunities to generate equity and wealth.

In our view, there are many factors that trap First Nations in a cycle of poverty including lack of land, lack of land in or near to urban centres, lack of capacity, lack of infrastructure, etc. A rapid transition to fee simple ownership is more likely to create a bonanza for a few non-First Nation developers than to create wide-spread wealth for First Nations and their members.

In our experience and observation, the tools and options currently available are much more likely to lead to the development of First Nation capacity and the creation of wealth and equity in the short term.

This process could be greatly enhanced and accelerated in the short term by opening up Additions to Reserve and the *First Nations Land Management Act* process, and in the longer term by exploring reconciliation agreements and implementation of aboriginal title.

Of course, all of these decisions must be left to First Nations themselves. If the federal and provincial governments become sincerely committed to reducing poverty and opening up space for First Nations to develop their capacity and create wealth and equity for themselves, First Nations will have a real choice. We have every confidence that each First Nation will know which options work best for their community and their Nation.

We welcome the opportunity to have further dialogue with First Nations, and with the legal, business and lending communities, on the relative advantages of the proposed Act and the existing available tools in creating markets and supporting economic development on First Nation lands.

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The tools and options currently available are much more likely to lead to the development of First Nation capacity and the creation of wealth and equity in the short term.

World Bank Darling Promotes Privatization of Reserves: Critics say fee-simple title on reserves could further erode Indigenous land base

by Emma Feltes, Neskie Manuel
thanks to Vancouver Media Coop

Vancouver – Peruvian economist and World Bank poster child Hernando de Soto visited Vancouver in October to speak in favour of the establishment of individual property ownership ("fee simple") on First Nations reserves in Canada.

The First Nations Property Ownership conference – hosted by the First Nations Tax Commission – paired de Soto with a select roster of Indigenous leaders, lawyers, economists and scholars from across British Columbia and Canada to promote a proposal that would allow fee simple title on reserves.

Instead of collective title to reserve land held by bands, the proposal aims to give individuals living on reserve access to the same legal private property rights that exists in the rest of the country.

The proposal is championed by conference organizer C.T. (Manny) Jules, Chief Commissioner of the First Nation Tax Commission, former Chief of the Kamloops Indian Band and one of Canada's foremost proponents of private property ownership on reserves.

The conference came at the crest of an increasingly aggressive effort throughout recent months to generate support for the controversial proposal – a charge led by Jules alongside conservative political scientist Tom Flanagan. Flanagan – a former campaign manager for Stephen Harper – has published a number of contentious books and articles prescribing solutions to First Nations economic development and land management. He most recently co-authored *Beyond the Indian Act,* which argues for federal legislation that would make way for fee simple on reserves.

In response to this effort, a growing group of Indigenous people and chiefs have been speaking out against the Jules/Flanagan proposal, arguing that fee simple property ownership will leave collective Indigenous title and rights and reserve lands – which are affirmed in section 35 of the *Constitution Act, 1982* – vulnerable to encroachment by developers, corporate interests, and federal and provincial control.

– photo by Roberto Bustamante, CC2.0
Hernando de Soto on Peruvian TV

De Soto, president of the Institute for Liberty and Democracy, is notorious for advocating fee simple property ownership and market-led agrarian reform among Latin America's campesinos. His ideas are promoted by international financial institutions like the World Bank, as well as the US international development organization USAID, which uses his theory to back their own market-driven development projects throughout Latin America.

He's also been assailed with criticism from popular and grassroots organizations such as Via Campesina – a global peasant movement – which maintains that the ramifications of de Soto's economic agenda are the global phenomena of dispossession of Indigenous people and intensified economic stratification.

Like de Soto's proposal for Latin America, which aims to convert latent or "dead" assets into market capital, Jules and Flanagan aim to transform collective rights into individual titles, which can be openly traded on the market. In Canada, collective land title is understood to be the inherent right of Indigenous peoples.

In a letter against the fee simple proposal published in the First Nations Strategic Bulletin, Manuel asserts the power and protection of collective title. "No single individual can give up or extinguish our Aboriginal title and Indigenous rights. It would be suicide or extinguishment for our future generations to accept fee simple in exchange for our collective title," he wrote.

Harry Chingee's response to the proposal warns of the damaging impact of privatizing reserve land. He writes, "The change would undermine signed treaties across Canada, undermine our political autonomy, restrict our creativity and innovation and place us in a dangerous position where any short-term financial difficulty may result in the wholesale liquidation of our reserve lands, or creation of a patchwork quilt of reserve lands, like Oka."

The fee simple proposal has come under further fire for implying that individual property ownership is the sole recourse for economic prosperity on reserves. De Soto's frequent reference to reserve lands as "dead capital" was wholeheartedly adopted by the conference organizers, who littered promotional material with the promise to unleash this untapped asset.

A recent article by Dan Cayo in the *Vancouver Sun* explains that a common approach taken by individuals on reserve is to find substitutes for individual property ownership, such as long-term leasing and "certificates of possession," which are enough to provide sufficient collateral to qualify for business loans.

"Certainly you don't need fee simple standards to prosper. People have an illusion that's totally false," says Harry Chingee, citing examples of First Nations that have achieved economic success without fee simple ownership. "You just have to look at Westbank First Nation out in Kelowna. And there's countless others, like Squamish Nation in Vancouver, for example, Macleod Lake Indian Band, up north of Prince George, that are prosperous."

Ironically, the fee simple advocates tried to use Westbank's economic success to their advantage, adding former Chief Ron Derrickson's name to the conference's list of speakers and promotional material without his consent or support.

Derrickson – known as one of the most successful Indigenous developers in the country – was alerted by Manuel to this name-borrowing. Once alerted, Derrickson voiced his disproval of the fee simple proposal and his name was removed from the list.

The FNPO website uses the Switsemalph 7 reserve near Salmon Arm as an example of a community with untapped development potential.

"Actually if you cut out the environmentally sensitive areas you come up with a picture that has a lot of development," says Dave Nordquist from Adams Lake, refuting the FNPO's claims about Switsemalph 7. The environmentally sensitive area is part of the Salmon River Delta, an area unsuitable for any land development.

Though Tom Flanagan is not a listed speaker at the conference, and is rarely named on the FNPO website, his presence is discernable. The cover image from Beyond the Indian Act graces the front page of the site, and his co-author, Andre Le Dressay, was a speaker during the Vancouver conference.

Beyond the Indian Act bears the subtitle "Restoring Aboriginal Property Rights," implying that fee simple property ownership is a traditional right among Indigenous people in Canada. This message is reiterated in the forward and in a recent *Globe and Mail* editorial – both written by Jules, who evokes early Indigenous civilizations across the Americas to make the case that individual property rights and free market trade are fundamental to Indigenous peoples, and have been obscured and impeded upon by colonial legislation.

Nevertheless, the fee simple proposal also names the Torrens title system as a source of inspiration—a colonial model which hinges on the creation of an individual title registry. Its name pays tribute to Sir Robert Torrens, a colonial premier who introduced the title system to South Australia in the mid-19th century.

Though proponents claim that the right to fee simple title is inherent, the proposal is curiously lacking in popular Indigenous endorsement. Whether or not Manny Jules and Tom Flanagan will be able to drum up support for the proposal remains to be seen.

Slate

The De Soto Delusion

By John Gravois

Legal property empowers individuals in any culture.

– Hernando de Soto, as quoted by Tom Flanagan

Peruvian Economist Hernando de Soto's ideas for helping the poor have made him a global celebrity. Now, if only those ideas worked.

Author of *The Mystery of Capital* and *The Other Path*, armchair consultant to numerous heads of state, and white knight for the cause of property formalization – Hernando de Soto is practically the patron saint of the global elite. For the left, de Soto has formulated the most seemingly practical ideas for reducing global poverty. For the right, de Soto offers the most compelling way to market capitalism to the poor.

Beginning with his first projects in Peru in the mid-'90s, de Soto's ideas have been packaged and peddled all over the Third World – by the World Bank, by the U.S. Agency for International Development, and by de Soto's own Lima think tank, the Institute for Liberty and Democracy – as the new conventional wisdom for fighting poverty. On the white board, de Soto's ideas flatter the imaginations and sensibilities of Davos-types (particularly the American ones). But on the ground, it turns out that de Soto's ideas are doing very little to solve the actual problems of poor people.

De Soto's vision of the Third World is instinctively appealing. He sees industrious, entrepreneurial slum-dwellers, toiling with boundless ingenuity, yet living in homes and owning businesses that are theirs only by de facto possession and jury-rigged local agreements, not by *de jure* deed and title.

De Soto calls all this informally held property "dead capital," because it can't be leveraged to produce growth – it can't be mortgaged, because it lacks a proper title to guarantee it as collateral. He says there are gobs and gobs of this dead stuff out there: $9.3 trillion worth, by his estimate, skulking in the ghetto.

Mindful of the fact that "the single most important source of funds for new businesses in the United States is a mortgage on the entrepreneur's house," de Soto's plan is, quite simply, to make homeowners out of the world's poor squatters. Neighborhood by neighborhood, slum by slum, he wants to formalize the vast extralegal world by dotting it with individual property titles. Once that's done, he promises, the poor will have access to credit, loans, and investment, as their dead assets are transformed – voilà! – into live capital.

De Soto is right to point out the importance of legally sorting out who owns what in the Third World. Secure property rights probably are indeed, as he puts it, the "hidden architecture" of modern economies – or something like that, anyway. De Soto deserves a lot of credit: He's brought an unprecedented degree of attention and funding to the vital and fascinating issue of squatters and informal economies. But he has botched the details, especially by pushing one solution – individual property titles—for all different kinds of poor people in all different kinds of poor places.

From the field, the verdicts are rolling in: In some corners of the world, the land-titling programs inspired by de Soto's work are proving merely ineffective. In other places, they are showing themselves to be downright harmful to the poor people they set out to help.

First, the merely useless.

In various parts of the Third World, newly legalized squatters on the outskirts of cities are discovering that a property title supplies little of the benefit de Soto projects. Government studies out of de Soto's native Peru suggest that titles don't actually increase access to credit much after all. Out of the 200,313 Lima households awarded land titles in 1998 and 1999, only about 24% had gotten any kind of financing by 2002—and in that group, financing from private banks was almost nil. In other words, the only capital infusion – which was itself modest – was coming from the state.

Reports from Turkey, Mexico, South Africa, and Colombia suggest similar trends. "In Bogota's self-help settlements," writes Alan Gilbert, a London professor of geography who has done extensive research on land issues in Colombia and other parts of Latin America, "property titles seem to have brought neither a healthy housing market nor a regular supply of formal credit."

This is probably because banks realize they don't stand to gain much from repossessing shanties in rotten locations. Faced with a massive surge in legalized but tenuous properties owned by poor people, banks have simply adjusted their criteria for lending, and in some cases care more about stable employment than a land title.

Not only that, but the actual real estate markets in many of these shantytowns on urban outskirts are stagnant, which puts a serious damper on any potential gains on capital—live or dead.

"You cannot accumulate capital if there is no market in which to trade your asset," Gilbert writes.

Now for the downright harmful. In places where real estate markets are buoyant, titles turn out to be quite a hot commodity. Too hot, in fact.

In June of 2002, for example, the World Bank kicked off a several-year project to distribute over a million titles throughout Cambodia. In Phnom Penh, the capital, untitled land near the city center has been selling for about $20 to $30 per square meter over the past few years. Titled properties nearby have been selling for around 10 times that much. For a poor squatter in the middle of the capital city, the promise of a title would seem to be a road to riches. In practice, it's more like a sign taped to his back that says, "Kick me."

In the nine months or so leading up to the project kickoff, a devastating series of slum fires and forced evictions purged 23,000 squatters from tracts of untitled land in the heart of Phnom Penh. These squatters were then plopped onto dusty relocation sites several miles outside of the city, where there were no jobs and where the price of commuting to and from central Phnom Penh (about $2 per day) surpassed whatever daily wage they had been earning in town before the fires. Meanwhile, the burned-out inner city land passed immediately to some of the wealthiest property developers in the country.

Since then, a similar pattern has continued elsewhere in the city, says Alain Durand-Lasserve, a land-management expert who has worked in Cambodia during the last couple of years. Investors have been buying squatter-occupied state land from various government officials in Phnom Penh, who pocket the money, thus looting the land both from the state and from the poor.

In other cases in Phnom Penh—and also in Manila, in the Philippines – Speculators or middle-income groups went out before titling programs took effect and bought land at slightly better than informal prices directly from the squatters, who happily sold off for a bit of cash. Then the investors just waited for the titling program – and the attendant leap in value and legal security – to come their way.

It turns out that titling is more useful to elite and middle-income groups who can afford to bother with financial leverage, risk, and real estate markets. For very poor squatters in the inner city – who care most about day-to-day survival, direct access to livelihood, and keeping costs down – titles make comparatively little sense. These poorer groups either fall prey to eviction or they sell out, assuming they'll find some other affordable pocket of informality that they can settle into.

The problem is, with titling programs on the march, such informal pockets are disappearing fast. So, the poor sell cheap or are evicted, then can't find a decent new place to settle, losing the crucial geographic advantage they once had in the labor market. But de Soto seems to pay attention to any of the lawyers, urban planners, geographers, sociologists, or economic development experts who have catalogued the real-life flaws in his ideas.

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And, for the last word:

Manny Jules, First Nations Tax Commissioner, asks: Who should own reserve lands?

from *The Globe and Mail* 20 October 2010

The First Nation Property Ownership Initiative is drawing fire, with some calling it a proposal to transform reserve lands into fee simple holdings. This is incorrect. The legislation is intended to help First Nations participate in the national economy on terms that most Canadians take for granted. But participation would be optional. No one will be forced to do anything with their lands. Those of us who participate, however, will be able to escape the oversight of the *Indian Act* and actually take legal title to our own lands.

By taking ownership, we would then be able to offer the same range of private property rights that exists off-reserve. This could include fee simple holdings. But if it did, these would be First Nations fee simple – not provincial fee simple – holdings. This is an important distinction because it means our lands will always be our lands. Legislation would confirm our governance and reversionary powers.

Our rationale is simple: we want the same standard of living as other Canadians. We need competitive infrastructure. We need a good administrative and legal framework. This legislation would confirm some of the jurisdiction that we need to provide these things. We also need something even more fundamental: We need markets to work on our lands. To do that, we need an improved system of property rights.

Some people want to believe that property and markets are not our way. I disagree. This proposal is loyal to our history. Before contact, we had markets and supportive institutions. The Secwepemc people traded pipestone from Minnesota, fish oil from the West Coast and horses from the south. We had a trading language called Chinook. We had trails that are now highways. There was money and there were private property rights. In traditional times, if you came into my winter home uninvited, you'd quickly find out who owned it.

This old way disappeared because we were systematically legislated out of the market economy. The *Indian Act* created a system of property rights that wouldn't allow us to participate on equal terms in either investment markets or credit markets. We slowly forgot our own history. The result is the poverty we see today.

Many of our communities have developed innovative methods, such as transferrable leasehold property rights, to overcome this legacy. But these innovations are often too expensive and time consuming to really level the playing field. It still takes us 10 to 20 times longer to conduct even a simple transaction, such as executing a mortgage, using the Indian Land Registry system versus elsewhere in Canada. The innovations work around these facts, but they don't address the root cause of the problem – we don't own our own lands.

Our proposal would help solve the two impediments to markets on our lands. First, it would make it easier to invest on our lands. Right now, it's simply too time consuming and too expensive for many people to consider an investment on first nation lands. This legislation will dramatically shorten procedures for basic land transactions, and it will increase investment certainty by registering all interests in an efficient Torrens system that is familiar to lenders, investors and lawyers.

Second, our people have suffered from a credit crisis ever since the *Indian Act* was passed. That's a 140-year depression. This legislation would help to end that. It would allow members to earn equity and borrow against it. We would finally be able to take out mortgages and business loans on our own lands as easily as anyone else.

As Peruvian economist Hernando de Soto said, "It's time to unleash the billions of dollars of dead capital" on our lands. If we choose, we can abandon the paternalistic practice of having lands held in trust and overcome the constraints of a 19th-century *Indian Act*.

Some First Nations will oppose this. Some won't be ready. But the rest of us should be free to choose.

(A similar op-ed article appeared 1 November 2010 in the National Post)

First Nations will be able to get underlying title to their land, and they will also find it easier to adopt individual property rights for their landholdings, which will facilitate their participation in the Canadian economy.

Restoring 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 quality of housing on reserves.

– Tom Flanagan

Native Canadians: Good enough to give their lives abroad. Forgotten at home

by Bill Twatio

9 November 2010

In a lull in the terrible struggle for Ortona in Italy at Christmas 1943, Major Jim Stone of the Loyal Edmonton Regiment remarked to Sergeant J.G. St.Germain: "What a magnificent job you've done in the fighting, Joe." St.Germain, a Metis from northern Alberta, looked up and bitterly replied: "That's fine sir, but I hope I get killed here before it's all over. Here, I lead a platoon and the boys all call me 'The Saint,' but if I get back to Canada, I'll be treated just like another poor goddamn Indian."

Less than a year later, Sergeant St.Germain was killed leading his platoon across the muddy banks of the Rapido River near Rapallo. More than 40 years later, what he said on that winter morning in Ortona continued to haunt Stone. He remembered St.Germain as "a brave and cheerful man, liked by all that served with him."

Joe St. Germain's remark was prescient. Another veteran of the Italian campaign, E.A. "Smokey" Smith, a Victoria Cross winner, summed up the plight of native veterans while reminiscing about his friend Frederick Webster from the Lytton Agency Reserve in British Columbia. Webster had been awarded the Military Medal at Agira for charging a German machine gun nest with a Bren gun.

"Dick Webster was a brave, brave man who served overseas with me in the Seaforth Highlanders. In England and Italy he was part of our group socially – of course for the first time in his life allowed into pubs, etc. Sadly, when he returned to Canada he was by Canadian law in force at the time, unable to go into a cocktail lounge or beer parlour. After serving six years in the Canadian Army, he was now once again, relegated to the status of what could be termed a second-class citizen."

Had Dick Webster or Joe St.Germain returned to their reserves after the war, they would not have been allowed to vote, manage local affairs, own property, establish a business, or teach their children in their own languages. Missionaries and government officials would have attempted to supplant their culture and religion, insisting that they be sent to residential schools far from home. They would have lived in abject poverty with a life expectancy far less than other Canadians. They would have experienced prejudice and discrimination. The *Indian Act* would not even recognize them as persons, let alone decorated veterans. Second class-citizens indeed.

During both World Wars and the Korean conflict, Indians and Metis enlisted in numbers far greater than their treatment merited. Educational requirements prevented many from joining the RCAF in World War II as did a regulation – quietly dropped early in the war – barring those from commissions who were not of "pure European descent." The Royal Canadian Navy had a more sweeping restriction. Among its prerequisites for service in any rank was a condition that an applicant "be a British-born subject of a White race." Until that regulation was rescinded in February 1943, the Navy seemed content to limit things native to naming its Tribal Class destroyers after Indian bands.

Most native Canadians served in the infantry. They fought exceptionally well, suffering heavy casualties and earning the lasting respect of their comrades. Two would become legends.

Peg Pegahmagabow

Francis Pegahmagabow, an Ojibwa from the Parry Island Band in Ontario, was the most highly decorated Indian of the First World War. Orphaned while a child, he was raised by relatives on the nearby Shwanaga Reserve and joined the 23rd Canadian Regiment (Northern Pioneers) at the outbreak of war in 1914.[8]

Francis Pegahmagabow

The government was initially concerned about enlisting Indians on the grounds that "while British troops would be proud to be associated with their fellow subjects, the Germans might not extend to them the privileges of civilized warfare." Militia units did not share that concern and welcomed them. By war's end more than 3,500 treaty Indians and many Metis had enlisted for active service with the Canadian Expeditionary Force.

The most celebrated Indian in the CEF was Tom Longboat, the famous long-distance runner from the Six Nations Grand River Reserve. He was wounded in action in 1916 while serving as a dispatch runner with the 107th Battalion. After he was mistakenly reported as dead, back home his wife married another man.

With husbands overseas, there were tensions between Indian and white communities in some newly-settled areas of the country as Indian families with the financial help of servicemen could now move off remote reserves. A shameful example was the furor aroused by the

[8] http://en.wikipedia.org/wiki/Francis_Pegahmagabow

settlement of Indian women and children in Elk Lake in northern Ontario. Deeply rooted prejudices of the white community came to the fore with the Ladies' Institute writing a letter to the mayor:

> "The ladies of the town in general pray that Your Worship take what action you deem necessary towards the removal of the James Bay Indians before we have an epidemic in the town: also a number of them are morally unfit to be residents of Elk Lake."

The letter provoked the following reply:

> "We have all heard the ladies of Elk Lake want to remove us from Elk Lake. If the ladies want to find out who brought us to Elk Lake, ask Mr. McCarthy, the recruiting officer and local police magistrate … We are not going to move out for any letter from the Ladies' Institute. We promised to stay in Elk Lake until our husbands come home and James Bay Indians are just as clean as anyone in Elk Lake. By rights all white men should have gone to the front before the Indians."
>
> – From the James Bay Indians,
> Elk Lake, Ontario

The James Bay Indians stayed in Elk Lake.

Indians in the Army were seldom subjected to that kind of prejudice. Pegahmagabow was befriended by his fellow recruits, and his customs and traditions were respected. While training at Valcartier, he decorated his tent with traditional symbols. He confidently told his friends that a medicine bag presented to him by an elder when he left the reserve would protect him overseas. He was right.

On Mount Sorel, he took a large number of prisoners and came through the fighting at Passchendaele and Amiens unscathed, his exploits earning him the Military Medal and two bars. He was a rugged individualist who successfully adapted hunting and fieldcraft skills to the fighting. By carefully camouflaging himself, he was able to blend so well into the terrain that it was almost impossible to detect his movements in No Man's Land. His iron nerves, patience and superb marksmanship made him an outstanding scout and sniper. Accounts vary, but most credit him with 378 kills, the best record of any sniper on the Western Front.

After the war, he returned to Parry Island where he served as band councillor and chief. His experience overseas had renewed his concern for the culture of his people and while chief he encouraged the preservation of traditional beliefs and skills. He died in 1952 and was buried with full military honours.

Tommy Prince

Thomas George Prince, great-grandson of the legendary Chief Peguis, was born on October 25, 1915 in Scanterbury, Manitoba. A member of the Brokenhead Band, he attended an Indian industrial and agricultural school at Elkhorn where he joined the cadets and proved himself an excellent marksman.

He enlisted in June 1940 in the Royal Canadian Engineers. In September 1942, he transferred to the 1st Canadian Parachute Battalion and a month later was assigned to the Canadian-American First Special Service Force – the Devil's Brigade. He won his first decoration in the Anzio beachhead in Italy on the night of February 8, 1944, when he went tank-hunting with a field telephone.

Creeping across a canal after dark, playing out telephone line as he went, Prince slipped into a deserted farmhouse 100 yards from enemy lines and patiently waited for morning. At first light, he spotted a pair of tanks and called down artillery fire that destroyed both. The Germans did not realize that he was in the ruined house, but around noon mortar shells fell behind it cutting his line.

Prince grabbed a black hat and jacket which he found lying on a sofa. Imitating an irate Italian civilian, he rushed outside waving his arms in the air and stamped about the yard searching for the break in the cable. He found it, made the necessary repairs, then went out front and performed "another little dervish dance" for the benefit of the Germans. He went back into the house and called down fire that destroyed two more tanks. Prince won the Military Medal for his performance.

Six months later, promoted to sergeant, he landed with the Brigade in southern France. At Les Escarence he was awarded the American Silver Star. The citation reads:

> "In charge of a two man reconnaissance patrol, Sergeant Prince led it deep into enemy held territory, covering rugged, rocky mountains to gain valuable and definite information of the enemy's outpost positions, gun locations, and a bivouac area. So accurate was the report rendered by the patrol that Sergeant Prince's regiment moved forward, occupied new heights and successfully wiped out the enemy bivouac. The keen sense of responsibility and devotion to duty displayed by Sergeant Prince is in keeping with the highest traditions of the military service and reflects great credit upon himself and the Armed Forces of the Allied Nations."

Prince later served in Korea with the Princess Patricia's Canadian Light Infantry. But the post-war years were not easy for him. Alcoholic and crippled with arthritis, he died in poverty on November 25, 1977, at age 62.

Henry Norwest,
d. 18 August 1918, near Amiens, France

by James Demphsey
Dictionary of Canadian Biography

Henry Norwest was born in the early 1880s at Fort Saskatchewan, the son of Louis Norwest and Geneviève Batoche.

Henry was a Cree. His father lived for a time with the band led by Chief Kiskaquin or "Bobtail". Henry Norwest worked as a saddler and cowpuncher. After the outbreak of war in 1914, he joined the Canadian Expeditionary Force as a private at Wetaskiwin on 2 Jan. 1915, using the name Henry Louie, and served with the 3rd Canadian Mounted Rifles. Discharged for drunkenness, he was briefly employed by the Royal North-West Mounted Police before re-enlisting in the CEF as a private on 8 Sept. 1915 in Calgary. His unit, the 50th Infantry Battalion, left for England two months later and proceeded to France in August 1916.

Norwest became the greatest sniper among the Canadian troops at the front, and possibly the best in the British forces. He was officially credited with 115 observed hits, the highest figure recorded to that time in the annals of the British army. According to enemy prisoners of war, his reputation was known to the German troops and they feared him. Being from the woodland area of central Alberta, Norwest probably had perfected his marksmanship from childhood and had developed patience as a hunter.

Because Norwest claimed a hit only when his observer was present to confirm it, it is possible that his tally stands at more than 115 men. Passionately dedicated and adept at camouflage, he had enormous patience and perseverance: using a rifle specially fitted with a telescopic lens, he would wait for days in No Man's Land to catch his man and never fired unless he was sure he could not be seen. At night he often crossed the enemy lines to make a kill in the early hours. He was awarded the Military Medal in 1917.

Norwest was said to be reserved rather than effusive, although he mixed easily with the other troops at the front. Whatever the situation, his calmness of manner and detachment never deserted him, and he served as an inspiration to his fellows. Rather short but strongly built, he had "a pleasant face, and a clear and remarkably steady eye." One companion noted that his eyes were "like discs of polished black marble . . . enigmatic yet hypnotic, strangely piercing yet mellowly compassionate, deadly serious yet humourously twinkling. One could never forget them."

His nickname "Ducky" was given to him after he had explained to his comrades that while on leave in London he had had to "duck" the girls there.


Private Henry Norwest, Sniper

Just prior to the last drive at Amiens in August 1918, Norwest was sent behind the lines. At his request, however, he joined the attack and made himself invaluable in eliminating snipers and disabling machine-gun posts.

Less than three months before the end of the war, his luck gave out. On 18 August a German marksman shot him through the head as he was searching for snipers who were threatening the Canadian advance posts. On his temporary grave marker his comrades inscribed, "It must have been a damned good sniper that got Norwest."

He was posthumously awarded a bar to his Military Medal "for Gallantry in the Field."

Norwest was reinterred in Warvillers Churchyard Extension near Amiens.