

# “FULL CIRCLE”

## Theories of Property Rights as Indicated by Two Case Summaries Concerning the Individualization of Collective Indigenous Lands Interests

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### ABSTRACT

*The “Rule of Law” and “Individual Property Rights” are often regarded as necessary conditions for economic growth and development. Recently, the common ownership of First Nation reserve lands in Canada was identified as “Dead capital.” Apparently, the problems of delayed development can be traced to a dysfunctional property system. A serious critique of collective ownership with its concomitant high transactions costs suggests a stronger on-reserve role for market relations. Only by individualizing land ownership and coming out from under the Indian Act can the commercial potential of reserve lands be realized. Clearly, a closer look at the property rights paradigm is required. To assist with a discussion of such proposals for development, this paper will employ a critical economic history approach, by (i) explaining the foundations of the property rights paradigm; (ii) employing two case summaries to demonstrate how US and Canadian authorities directed the conversion of collective Indigenous land holdings to individual transferable titles; and (iii) identifying some outcomes associated with the creation of transferable individual rights in property. Two case summaries demonstrate how economic history can illustrate the private property rights experiences of Indigenous peoples. Coercion by the United States government resulted in the breakup (allotment) and sale of large Indian territorial reservation lands. In the Canadian prairie west, Métis entitlements took the form of grants of millions of acres of scrip and the assignment or conveyance of their interests left them without a land base. In these cases, lands and entitlements ostensibly reserved for Indigenous peoples were diverted to emerging settler land markets. Evidence suggests that the weaker property rights of speculators/settlers triumphed over the legally recognized rights of Indigenous peoples. In other words, the Rule of Law in respect of property was somewhat different for settlers/speculators and Indigenous peoples. In these historical cases, the individualization of collective ownership into transferable assets had similar outcomes that do not seem to accord with predictions that economic growth will ensue from the promotion of private property rights and the reduced transaction costs.*

## INTRODUCTION<sup>†</sup>

Growth and divergence are intellectual concerns for many economic historians. In many quarters, Anglo or Anglo-American settlement regions are regarded as having created the right mix of institutions that generated growth and prosperity; however, the Native or Indigenous populations of these societies tend to be economically distinct from the mainstream and can be compared with populations of the poor periphery. Among several explanations for western growth and development, (i) individual property rights, and (ii) the Rule of Law, seem to be most worthy of consideration with respect to *historical causation* of the market as a harbinger of growth, development and prosperity. A robust combination of individual property rights and the Rule of Law promises efficiency with justice.

This article is associated with a general and ongoing concern about the diversion of lands, formally set aside for Indigenous Peoples, to the market, more specifically a market created by White settlement. Here, two seemingly dissimilar case studies: (i) the Indians of the mid-western United States whose reservations were allotted with some lands sold as surplus; and (ii) the Métis of western Canada whose Indian title was converted to scrip, are both historical examples in which in forms of collective title were individualized. The historical experiences of crafty forms of “dispossession by grant” can inform present day debates about First Nation reserves in Canada and test the views about institutional economics. A reconstruction of the initial formulation of a *property rights paradigm* is relevant to developing understandings of historical causation associated with the loss of land by Indigenous peoples. Sig-

nificantly, in these case summaries, the question of the appropriation of Indigenous lands and property law intersect, but perhaps in ways that the proponents of the property right paradigm might not have imagined. In fact, in terms of this journal theme of “the field of economic development and Aboriginal peoples’ community”, development economist Erik Reinert’s assertion that “... attempts to isolate single features of market economies without seeing the whole ... tend to obfuscate rather than illuminate”<sup>1</sup> can be applied to proscriptive approaches to Aboriginal economies. However, with respect to private titling lands, as a means to promote credit and market relations, Reinert warned: “But as several studies in Latin America have shown, giving property rights to the poor may very well lead them to sell their houses in order to buy food or healthcare. They also easily fall victims to fraud in this new and unfamiliar situation. Property rights without economic development may actually make things worse than they were in pre-capitalist societies.”<sup>2</sup> Given this warning about individualization, a form of privatization, can anything insightful be learned about the economic history of the transformation of collective interests in the land to marketable assets? Certainly, the lot of the many Indians and Métis did not improve with their acquisition of individual rights.

Because a credible argument has been made that the titling of informally held parcels of lands will lead to growth and prosperity for many of world’s poor,<sup>3</sup> an introduction to the conceptualization underlying the property rights paradigm in light of the individualization of Indigenous lands has relevance to an exploration of approaches to economic development and First Nation reserves.

<sup>†</sup> A version of this article was presented as “Individualization of Collective Indigenous Lands Interests in Regions of Anglo-American Settlement in the Late 19th/Early 20th Centuries”, as part of the panel: Economics and Causation in History, organized by Christer Gunnarsson at the *Sixteenth World Economic History Conference*, Stellenbosch, Republic of South Africa (13 July 2012). The case summaries portion of this article derive from research published with Kathleen Dimmer, “Great Frauds and Abuses: Institutional Innovation at the Colonial Frontier of Private Property: Case Studies of the Individualization of Maori, Indian and Métis Lands”, in *Settler Economies in World History*, edited by Christopher Lloyd, Jacob Metzger and Richard Sutch, Volume 9 of *Global Economic History Series*, edited by Maarten Prak and Jan Luiten van Zanden (Linden: Brill, 2013) pp. 205–49.

<sup>1</sup> Erik S. Reinert, *How Rich Countries Got Rich ... And Why Poor Countries Stay Poor* (London: Constable, 2007), p. 220.

<sup>2</sup> Reinert, *How Rich Countries Got Rich*, p. 221.

<sup>3</sup> On the connections between allotment and titling, see Ezra Rosser, “Anticipating de Soto: Allotment of Indian Reservations and the Dangers of Land-Titling” in D. Benjamin Barros (Ed.), *Hernando de Soto and Property in a Market Economy* (Burlington: Ashgate Publishers, 2010) pp. 61–81.

## THE CANADIAN FUR TRADE AS AN INSPIRATION FOR THE PROPERTY RIGHTS PARADIGM

It might seem ironic to some social scientists that Harold Demsetz's insights and inspiration concerning the relationship between property rights and an efficient internalization of externalities arose from the work of Eleanor Leacock, a Marxist/feminist anthropologist,<sup>4</sup> who wrote on the Montagnais Indians, as then known as, of northeastern (present-day) Canada. Her historical and field research contributed significantly to a debate about the origins of hunting territories among mobile Subarctic Indians.<sup>5</sup> The claim by Frank Speck and a few others, that Algonquin private property (hunting territories) predated the fur trade, a dig at the notion of the viability of communalism, has seemingly been set aside by Demsetz, since he construed from Leacock's study an understanding that the fur trade created certain externalities (i.e., over-hunting) that were dealt with by developing a property system that internalized those costs. Briefly defined: "... property rights convey the right to benefit or harm oneself or others."<sup>6</sup> In fact, Leacock's "The Montagnais Hunting Territory and the Fur Trade" resulted in a major re-assessment of the Speck/Eiseley thesis concerning pre-fur trade origins of individualistic hunting territories.<sup>7</sup>

It is worth revisiting this seminal piece on property economics even by deploying his exact wording when necessary. Demsetz proposed: "... the emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities."<sup>8</sup> Several of his key postulates affirm:

1. property rights guide incentives to increase the internalization of externalities;
2. internalization of externalities occurs when internalization of gains exceed costs of internalization;
3. technological and price changes will induce changes to property systems, even from communities that lack well developed property systems;
4. long-term viability of a society depends upon changes to behavior so as to accommodate externalities brought by "technology or market value;" and
5. a potential externality exists for "every cost and benefit associated with social interdependencies."<sup>9</sup>

It would seem to economists then, subarctic Indians as rational actors, would abandon their collectivist orientations and deal with non-sustainable hunting (production) by seizing the opportunity to obtain a benefit. However, does an internalization of the benefits and harms of externalities really explain the changes that occurred in subarctic land tenures? In other words, has the property rights paradigm correctly assimilated Leacock's argument?

## INTERNALIZING EXTERNALITIES: THE ADOPTION OF PROPERTY RIGHTS DURING THE CANADIAN FUR TRADE

For our purposes, it is worth reconstructing Demsetz's understanding of the fur trade property rights example by reviewing his summary:

Leacock clearly established the fact that a close relationship existed, both historically and geographically, between the development of private rights in land and the

<sup>4</sup> See Richard Sutton & Richard Lee, "Obituary: Eleanor Burke Leacock", *American Anthropologist* 92(1) (1990): 201–205.

<sup>5</sup> See Harold Demsetz, "The Exchange and Enforcement of Property Rights", *Journal of Law and Economics* 7 (1964): 11–26; Harold Demsetz, "Toward A Theory of Property Rights", *American Economic Review*, 57(2) (1967): 347–59; and Eleanor Leacock, "The Montagnais 'Hunting Territory' and the Fur Trade", *American Anthropologist*, 56(5), part 2 memoir no. 78 [1954]. For a very useful summary of the discussion of Northern Algonquian Land Tenure, see Adrian Tanner, "The New Hunting Territory Debate: An Introduction to some Unresolved Issues", *Anthropologica* 28(1–2) (1986): 19–36.

<sup>6</sup> Demsetz, "Toward A Theory of Property Rights", p. 347.

<sup>7</sup> Frank G. Speck & Loren C. Eiseley, "The significance of the hunting territory systems of the Algonkian in social history", *American Anthropologist* 41(2) (1939): 269–80.

<sup>8</sup> Demsetz, "Toward A Theory of Property Rights", p. 350.

<sup>9</sup> While allowing that changes in property rights systems could be legal or moral experiments, Demsetz stated: "... but in a society that weights the achievement of efficiency heavily, their [property rights] viability in the long run will depend on how well they modify behavior to accommodate to the externalities associated with important changes in technology or market value." Demsetz, "Toward A Theory of Property Rights", pp. 348, 350.

development of the commercial fur trade. The factual basis of this correlation has gone unchallenged. However, to my knowledge, no theory relating privacy of land to the fur trade has yet been articulated. The factual material uncovered by Speck and Leacock fits the thesis of this paper well, and in doing so, it reveals clearly the role played by property rights adjustments in taking account of what economists have often cited as an example of an externality — the overhunting of game.<sup>10</sup>

Demsetz implied that his theory of property rights was an inference derived from the factual record set out by Speck and Leacock. In the case of Leacock's study, she explored the relationships between land tenure and the fur trade. Significantly, in terms of the history of the underpinnings of the property rights paradigm, Speck and Leacock disagree sharply on the origins of family hunting territories; based on early 20th century fieldwork, Speck held that individual property arrangements existed before contact; in other words, during an era when the conditions for internalizing the externalities did not exist. In fact, one of the difficult questions for the field of Subarctic Ethnohistory concerns the nature of land tenure before the advent of the fur trade and whether this trade influenced a change from large hunting ranges to family hunting territories.<sup>11</sup>

A few years later, in a publication with Armen A. Alchian, an elaboration on the importance of the fur trade as an illustration of the logical and beneficial adoption of individual rights was offered:

The coming of the fur trade to the New Continent had two consequences. The value of furs to the Indians increased and so did the scale of hunting activities. Before the coming of the fur trade, the Indians could tolerate a social arrange-

ment that allowed free hunting, for the scale of hunting activities must have been too small to seriously deplete the stock of animals. But after the fur trade, it became necessary to economize on the scale of hunting. The control system adopted by the Indians in the Northwestern part of the continent was to substitute private rights in land for free access to hunting lands. By owning the right to exclude others from their land, Indian families were provided with an incentive to inventory their animals. Under a free access arrangement, such inventories would have been depleted by other hunters. With private rights to hunt the land these inventories could be maintained at levels more consistent with the growing market for furs.<sup>12</sup>

Before the fur trade, externalities existed; but these externalities were insignificant, hence "... it did not pay for anyone to take them into account"; consequently, nothing resembling private ownership in land existed.<sup>13</sup> Apparently, much intellectual product has been built upon this one small case study, which interestingly, occurred on the periphery of the world system.

Notwithstanding the lack of agreement about the origins of the "institution" of family hunting territories in the Canadian Subarctic, Demsetz correctly recognized two important consequences of the fur trade: (i) the value of furs to Indians increased; and (ii) the scale of hunting activity rose sharply.<sup>14</sup> Evidently, both consequences increased the importance of externalities associated with free hunting.<sup>15</sup>

Such an explanation is not irrelevant, on its own, it suggests a certain mechanical reductionism of the social-cultural responses to economic changes. Not surprisingly then, there would seem to be little evidence that mobile caribou hunters had been conceptualizing land uses in terms of calculating the costs and bene-

<sup>10</sup> Demsetz, "Toward A Theory of Property Rights", p. 351.

<sup>11</sup> "Who owns the Beaver? Northern Algonquian Land Tenure Reconsidered", in Charles A. Bishop & Toby Morants (Eds.), Special Issue *Anthropologica* 28(1-2) (1986).

<sup>12</sup> Armen A. Alchian & Harold Demsetz, "The Property Right Paradigm", *Journal of Economic History* 33(1) (1973): 24-25.

<sup>13</sup> Demsetz, "Toward A Theory of Property Rights", pp. 351-52.

<sup>14</sup> Demsetz, "Toward A Theory of Property Rights", p. 352.

<sup>15</sup> This problem of externalities arising from a lack of property rights would later be referred to as the tragedy of the commons by some, while others conceptualized the problem as open access.

fits of internalizing externalities.<sup>16</sup> As a logical construct the Demsetz/Alchian thesis on fur trade property rights negated the Speck/Eiseley belief that individualistic land tenure did not come into existence because of externally induced changes to the economy. A significant historical aspect of the process, as identified by Leacock, concerned the basic relations of the production; a development not recognized by Demsetz and Alchian.<sup>17</sup> A tendency towards more selective production (a specialization in trapping beaver) encouraged a re-arrangement of how labour could be organized. A shift from large group hunting of migratory caribou to family trapping of sedentary beaver was necessary. Changes to the social organization of labour processes, and not merely an adjustment to land tenure, are integral to the increase in value of furs and the resulting increasing scale of hunting activity.

The creation of (new) property rights arising out of the fur trade was not as exclusive as Demsetz and Alchian seem to have imaged. Leacock provided several qualifications:

For instance, the laws of patrilineal inheritance do not supersede band interest. The occurrence of widely separated brothers lands and the lack of any really small holdings attest to the continual readjustment of band lands to fit the needs of band members. Each Indian has a right to trapping lands of his own, and at the request of the chief a band member must give up part of his ground, if necessary, for another's use. There is no material advantage to an individual hunter in claiming more territory than he can personally exploit. Nor is there any prestige

attached to holding a sizable territory or any emphasis on building up and preserving the paternal inheritance.<sup>18</sup>

Accordingly, Leacock clarified the character of the property right: "Neither can land be bought or sold. In other words, land has no value as 'real estate' apart from its products. What is involved is more properly a form of usufruct than 'true' ownership."<sup>19</sup> Leacock was careful not to overstate the extent of social-cultural change, and to specifically identify an "exchange value" dynamic to "economic behaviour." She explained:

My hypothesis is, first, that such private ownership of specific resources as exists has developed in response to the introduction of sale and exchange into Indian economy which accompanied the fur trade and, second, that it was these private rights — specifically to fur-bearing animals — which laid the basis for individually inherited rights to land. The first assumption is supported by the emphasis on rights to the beaver among the Montagnais as well as by the differential protection of individual property where immediate needs are involved as compared to acquisition for sale. For instance, trespass, or socially disapproved encroachment on another's territory, can occur in one case only — when hunting for meat or fur to sell. The concept of trespass as simple physical encroachment on another's land does not exist, nor do berrying, fishing, bark-gathering, or hunting game animals constitute trespass. These products of the land are communally owned in that they can be hunted or gathered anywhere.<sup>20</sup>

<sup>16</sup> However, Demsetz recognized that other factors can result in the creation of property rights: "I do not mean to assert or to deny that the adjustments in property rights which take place need be the result of a conscious endeavor to cope with new externality problems." Demsetz, "Toward A Theory of Property Rights", p. 350.

<sup>17</sup> Rogers and Leacock summarized the process of fragmentation: "As the Indians became more dependent on the tools, utensils, clothes, and food that they exchanged for pelts, they were faced with the constant choice to remain part of larger groups with more chance to socialize and with greater security in case of poor hunting, accident, or illness; or to spend more time apart in small groups and trap for furs. Individuals and groups made different decisions at different time, but over the years there was an increasing tendency for the lodge-groups to fragment into smaller units for more efficient trapping and to stay at some distance from one another within specific areas that have been called "hunting territories." Edward S. Rogers & Eleanor Leacock, "Montagnais-Naskapi" in June Helm (volume editor), *Subarctic*, vol. 6 in William S. Sturtevant (Series Editor), *Handbook of North American Indians* (Washington: Smithsonian Institution, 1981) pp. 179–80.

<sup>18</sup> Leacock, "The Montagnais Hunting Territory and the Fur Trade", p. 1.

<sup>19</sup> Leacock, "The Montagnais Hunting Territory and the Fur Trade", pp. 1–2.

<sup>20</sup> Leacock, "The Montagnais Hunting Territory and the Fur Trade", p. 2.

In effect, the spatial boundaries for harvesting food diverged from the territory used to produce for exchange value (fur).<sup>21</sup> And in contrast to the property rights paradigm's selective construction of causality, Leacock cautioned: "There are many contributing factors of greater or lesser importance which must have affected the relative ease and speed with which the hunting territory developed, such as the replacement of wooden traps and deadfalls by far more efficient steel traps ..."<sup>22</sup>

Moreover, Leacock noted the influence of consumption on economic behavior and reasoning:

The more furs one collects, the more material comforts one can obtain. In contrast to the aboriginal situation, material needs become theoretically limitless. The family group begins to resent intrusions that threaten to limit its take of furs and develops a sense of proprietorship over a certain area, to which it returns year after year for the sake of greater efficiency.<sup>23</sup>

In Leacock's "The Montagnais 'Hunting Territory' and the Fur Trade", fluidity in social group membership and territorial access were noted thoroughly.

Clearly, the social and economic changes that occurred in the Canadian subarctic as a consequence of the fur trade are simplified by the mechanical construct of a property right development premised on the existence of consciousness decisions to internalize the externalities so that gains of the property right will exceed the costs of open access. In fact, in the western Subarctic, not part of Leacock's study of the Montagnais (Innu), the mercantile and monopolistic Hudson's Bay Company (HBC) was instrumental in promoting, with mixed results, conservation measures (i.e., dealing with the harm of an externality). Moreover, as Ray's

account of the HBC's conservation schemes in the 19th century demonstrated, attempting to put fur production on a sustainable basis entailed both planning (e.g., maximum production quotas) and property rights (adjusting land tenure arrangements) approaches.<sup>24</sup> Such "mixed economy" methods succeed, but such historical facts are not in accord with the underlying ideology of the property rights paradigm.

### RECOGNITION OF THE VALUE OF HISTORICAL RESEARCH ON PROPERTY

The argument for dealing with externalities by adopting more private forms of property has its own economic logic. The fact that early formulation of the property right argument did not have much empirical depth on Indian land tenures in the Canadian fur trade, and thus might seem somewhat deficient as an exemplar, should not constitute a fatal flaw for this line of reasoning; it does, however, suggest that prescriptive paradigms may fall short as contemporary policies if the social/cultural/geographical complexity is reduced to narrow and mechanical reasoning. Significantly, the suggestion by Alchian and Demsetz that "[t]here exist very many property right phenomena that could benefit from thoughtful attention"<sup>25</sup> inspires this comparative interest in the individualization of Indigenous collective property rights, and in particular, a desire to assess the assumption that the creation of property rights is essentially guided by the logic of efficient market integration/formation, unencumbered by the forces of colonialism.

Alchian and Demsetz opened the door to historical causality, stating: "... our purpose here is to facilitate historical research on these problems by clarifying somewhat the content of these questions."<sup>26</sup> They supplied three important

<sup>21</sup> Leacock, "The Montagnais Hunting Territory and the Fur Trade", p. 7.

<sup>22</sup> Leacock, "The Montagnais Hunting Territory and the Fur Trade", p. 8.

<sup>23</sup> Enhanced consumption possibilities are not at odds with the category "benefit" used by the property rights paradigm, see Leacock, "The Montagnais Hunting Territory and the Fur Trade", p. 7.

<sup>24</sup> See Arthur J. Ray, "Some conservation schemes of the Hudson's Bay Company, 1821-50: An examination of the problems of resource management in the fur trade", *Journal of Historical Geography* 1(1) (1975): 49-68; and Ann M. Carlos & Frank D. Lewis, "Property rights, competition, and depletion in the eighteenth-century Canadian fur trade: the role of the European market", *Canadian Journal of Economics* 32(3) (1999): 705-28.

<sup>25</sup> Alchian & Demsetz, "The Property Right Paradigm", p. 26.

<sup>26</sup> Alchian & Demsetz, "The Property Right Paradigm", p. 17.

issues that afford opportunities for ongoing historical inquiry: “(1) What is the structure of property rights in a society at some point in time? (2) What consequences for social interactions flow from a particular structure of property rights? and, (3) How has this property rights structure come into being?”<sup>27</sup>

In part, they were concerned by the fact that most of the work done on the *origins of capitalism* was produced by the Left.<sup>28</sup> Similarly, they noted that “The identification of private rights with anti-social behavior is a doctrine as mischievous as it is popular” because “contrary to some popular notions, it can be seen that *private* rights can be socially useful precisely because they encourage persons to take account of *social costs*.”<sup>29</sup> In other words, justice and efficiency are co-dependent. By suggesting: “A rigorous test of this assertion [gains of internalization is greater the costs of internalization] will require extensive and detailed empirical work,”<sup>30</sup> these proponents of the property rights paradigm acknowledged a need for historical research. The questions that they proposed provide a very good starting point for economic history of Indigenous Peoples.

The specifics of the appropriation of Indigenous lands in the Anglo-American settler realm are seldom appreciated in the scholarly settlement literature. For the individualization case studies, it is important to realize that long-term changes to Indigenous property rights occurred in two stages: first, some recognition of an Indigenous interest in land with some concomitant protection of their collective interests for lands remaining outside of the sphere of evolving settler property relations; and subsequently, considerable further encroachment on the remaining

Native collective land interests by the individualization of these lands. The legal and economic aspects of the individualization of Indigenous lands in the past should be of interest to both the theoretical proponents of the property rights paradigm as the path to efficiency and justice, and to those advocates that pursue policies of formally titling lands as a development policy.

## LEGAL PROTECTION IN THE FIRST INSTANCE

For a variety of reasons during the colonial era, a free market of exchanges between Indian landowners and White settlers was not the mechanism that created good title. In British North America and New Zealand, the British Crown had to deal with the acquisition of Indigenous lands. Even though the proprietary interest of Indians was generally recognized in British North America, problems emerged from the manner by which early colonists took Indians lands. In 1763, as a result of “great Frauds and Abuses”,<sup>31</sup> a Royal Proclamation concerning British North America outlined the means for the Crown to intervene and acquire Indian interests in their hunting grounds.<sup>32</sup> Significantly, the private purchase of Indian lands from Indians was banned, in effect, this proclamation created a pre-emption right for the Crown. For Indians, any benefit from the Crown’s responsibility for preventing frauds and abuses came with the cost of dealing with a monopsony. An 1837 report from the UK Parliamentary Select Committee on Aborigines affirmed the intent of the 1763 Proclamation stating “So far as the

<sup>27</sup> Alchian & Demsetz, “The Property Right Paradigm”, p. 17.

<sup>28</sup> In their own words: “It is unfortunate that the study of the underpinnings of capitalism has been left by default to its critics on the left.” Alchian & Demsetz, “The Property Right Paradigm”, p. 16.

<sup>29</sup> Alchian & Demsetz, “The Property Right Paradigm”, p. 24.

<sup>30</sup> Demsetz, “Toward A Theory of Property Rights”, p. 350.

<sup>31</sup> Kings Court, *By the King a Proclamation* (7 October 1763), (Kings Printer, 1763). The Royal Proclamation of 1763, aspects of which remained as policy of the American republic after 1783, established some aspects concerning the concept of Indian Title. In what remained of British North America after 1783, the categories unceded Indian Territories or Indian hunting grounds was used to identify land outside of the sphere of settlement. Until 1930, and throughout much of the Canada, the federal government took responsibility for a treaty process that sought an extinguishment of Indian title. By and large this policy was not pursued in British Columbia, Quebec, and the far north, and consequently, in the 1970s a political and legal struggles for land rights emerges.

<sup>32</sup> The political/legal concept of the Crown does not apply to US state after 1783. Concerning the legal and economic significance of the Royal Proclamation of 1763, the purchase of lands prior to that proclamation, and the continuation of the government’s exclusive right to purchase Indian lands after 1776; see Stuart Banner, *How The Indians Lost Their Land: Law and Power on the Frontier* (Belknap Press of Harvard University, 2005) pp. 85–111.

lands of the Aborigines are within any territories over which the dominion of the Crown extends, the acquisition of them by Her Majesty's subjects, upon any title of purchase, grant or otherwise, from their present proprietors, should be declared *illegal and void*."<sup>33</sup> Even with a strong sense of property rights and the rule of law emanating from the metropolis, the emergence of land markets in regions of White settlement necessitated the circumvention of some protectionist intentions concerning Indigenous interests in territory.

### THE CONVERSION OF COLLECTIVE INDIGENOUS LAND HOLDINGS TO INDIVIDUAL TRANSFERABLE TITLES

Although the schemes and procedures for individualizing the collective land interests of the US Indians and the Métis of western Canada took different forms, the outcomes were similar in that economic growth did not ensue.

#### Allotment of Reservation Lands in the United States

Treaty processes, in both Canada and the United States, were employed to appropriate Indian lands by government acquisition of the "Indian Title."<sup>34</sup> In the American mid-west, sizable lands were set aside as tribal reservations.

A policy, known as *allotment*, given force and implemented by the Dawes Act, 1887, under the guise of civilizing Indians, allotted individual private property rights and sold the remaining (i.e., "surplus") reservation lands. The breaking up of reservations, by individual allotment and sale was designed ostensibly to promote Indian agriculture, self-sufficiency, political and cultural assimilation, and to terminate the wardship status of American Indians by breaking the collectivism of the tribal system.<sup>35</sup> The Dawes Act proponents, according to economic historian Carlson "had an almost mystical faith in the power of private property to promote the assimilation of Indians into white society" and that increased Indian agriculture would follow from the security of land titles.<sup>36</sup> In the Oklahoma Territory, where a large concentration of Indians who had been removed from their tribal territories east of the Mississippi River, a similar process of individualizing and alienated tribal lands occurred.<sup>37</sup>

The Allotment system awarded immediately an allotment of the collective interest to the reservation, a tribal homeland, to individuals. Initially, a Head of Family was to receive 160 acres, single adults or orphaned children 80 acres each; and other children 40 acres.<sup>38</sup> This sort of titling exercise also required the legal division of the reservation by survey. These grants were eventually converted to fee simple by a patent

<sup>33</sup> Great Britain, Parliament, House of Commons, *Select Committee on Aborigines (British Settlements) with Minutes of evidence, appendix and index* (London: House of Commons, 1837), p. 78 [emphasis added]. The humanitarian ideology of the era purported that authority over Natives should lie solely with the Colonial Office, executive office of the global British Empire, see R. Cole Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: University of British Columbia Press, 2002) pp. 3–16.

<sup>34</sup> The treaty process and the modern day costs of the claims process, and the benefits provided by both historical treaties and modern land claim settlements in Canada, must be regarded as significant transaction costs by the property rights paradigm. For a comparison of historical treaties and modern land claims see, Peter J. Usher, Frank J. Tough & Robert M. Galois, "Reclaiming the Land: Aboriginal Title, Treaty Rights and Land Claims in Canada", *Applied Geography* 12(2) (1992): 109–32.

<sup>35</sup> On the thinking associated with the justification of allotment policies, see Wilcomb E. Washburn, *The Assault on Indian Tribalism: The General Allotment Law (Dawes Act) of 1887* (Philadelphia: J.B. Lippincott, 1975). For an economic history to allotment, see Leonard A. Carlson, *Indians, Bureaucrats, and Land: The Dawes Act and the Decline of Indian Farming* (Westport: Greenwood Press, 1981).

<sup>36</sup> Leonard A. Carlson, "Federal Policy and Indian Land: Economic Interests in the Sale of Indian Allotments, 1900–1934", *Agricultural History* 57(1) (1983): 35.

<sup>37</sup> The Dawes Act, 1887 did not include the Indians of Oklahoma, nonetheless a somewhat coercive process was pursued. Treaties and a unified resistance to allotment prevented the unilateral enforcement of the Dawes Act. Congress ordered surveys in 1895 and compilations of membership rolls in 1896 but the tribes held off negotiations until the Curtis Act, 1898 (Act terminating tribal rights). It should be noted that the Creeks, Cherokees, and Choctaw-Chicasaw tribes were able to secure mineral rights through these negotiations. See Angie Debo, *And Still the Waters Run, The Betrayal of the Five Civilized Tribes* (Princeton University Press, 1972, original 1940) pp. 3, 35.

<sup>38</sup> However, in 1891, the allocation was modified: all adults received 80 acres of agricultural land or 160 acres of grazing land, see Banner, *How The Indians Lost Their Land*, p. 276; and Delos Sacket Otis, *The Dawes Act and the Allotment of Indian Lands*, Francis Paul Prucha, ed. (Norman University of Oklahoma Press, 1973, original 1934) pp. 6–7.



from the federal government.<sup>39</sup> The right to own reservation lands in severalty was not sought by Indians, in fact, the allotment policy was resisted, but noncompliance was not an option. If individual Indians would not select an allotment within four years, the Secretary of the Interior Department would impose a selection.

The original design of the US allotment scheme restricted the transferability of individual land interests. The transition from common reservation lands to full fee simple ownership, (the ability to lease, sell, bequeath, etc.) was not intended to be immediate. A federal land patent (proof of legal title) did not accompany the initial allotment of individual parcels of land, but parcels were held in trust by the federal government for the Indian allottees. So while a grant was made, it was encumbered by a 25-year transition period that restricted the sale of the allotments. The restrictions on transferability and alienation, based on trust/wardship status of Indians, were intended to allow time for individual Indians to appreciate the value of property and to improve the lands by investing their labour. However, the changing conditions governing the alienability of individual allotments during the trust period would determine the amount of reservation land available to satisfy the impulses of demand. The Dawes Act was amended in 1902 to allow, with official approval, heirs and the guardians of minors to sell or lease allotments whether or not the trust period had expired.<sup>40</sup> Effectively, the trust period was terminated with the Burke

Act of 1906.<sup>41</sup> “Competent” Indians could obtain patents to their allotments, and later, the allotments of incompetent Indians could be sold with the proceeds going to the benefit of the allottee. In 1919, half-blood and quarter-blood Indians were given “full and complete control of all their property.”<sup>42</sup> Since discretion about when the allotments owned by particular individuals could be conveyed was largely left up to local Indian agents,<sup>43</sup> the erosion of the trust period was responsive to local land market demands.

### Métis Entitlements in Western Canada

In Canada and the United States, governments had more land than cash, and certificates promising a parcel of land were a ready means to pay for an assortment of services and claims.<sup>44</sup> These promissory certificates might be variously referred to as, bounty, warrants, or scrip and commonly provided a potential grant of a surveyed, but unimproved parcel of land. Regardless, these paper grants were an institutional innovation of colonial property relations. Such entitlements could be converted into a fee simple title by a letter patent. Often these paper entitlements were dispensed as a form of remuneration, especially for military services. Warrant/bounty/scrip entitlement schemes were attractive to speculators because the potential value of the land could be discounted, and consequently, administrator efforts to prevent or regulate assignment were often frustrated.<sup>45</sup>

<sup>39</sup> It is tempting to refer to the process of individualizing tenures as titling, since in the case of the US allotment policy, a patent (i.e., legal title) to a parcel of land was issued. However, titling often refers to recognition of an existing use or “ownership”.

<sup>40</sup> Banner, *How The Indians Lost Their Land*, p. 281.

<sup>41</sup> For details, see Banner, *How The Indians Lost Their Land*, p. 282.

<sup>42</sup> Rule 1 of Commissioner Sells Six Rules for the Guidance of Indian Employees as cited by Jay P. Kinney, *A Continent Lost—A Civilization Won: Indian Land Tenure in America* (John Hopkins Press, 1937) p. 292.

<sup>43</sup> Banner, *How The Indians Lost Their Land*, p. 282.

<sup>44</sup> In 1776, the US Congress decided to raise an army by promising land bounties as remuneration, a precedent for other wars up to 1855, and by 1907, some 68.2 million acres of public lands were allocated as bounty land warrants, see Benjamin H. Hibbard, *A History of the Public Lands Policies* (New York: Peter Smith, 1939, original 1924) p. 132; Payson J. Threat, *The National Land System, 1785–1820* (New York: Russell & Russell, 1967, original 1910); and Rudolf Freund, “Military Bounty Lands and the Origins of the Public Domain”, *Agricultural History* 20(1) (1946): 8–18. In the old Province of Canada, scrip was issued to the children of the United Empire Loyalists and the militia, see Lillian F. Gates, *Land Policies of Upper Canada* (Toronto: University of Toronto Press, 1968) pp. 282–83. Later (ca. 1870–1930), Canada provided bounty warrants for military campaigns (Red River in 1870, the Northwest in 1885 and South African War Volunteers 1899–1902), and the North West Mounted Police; and scrip for the Original White Settlers, commutation of hay lands and colonization, as well as, land and money scrip to the Métis of Manitoba and the Northwest Territories.

<sup>45</sup> For a positive interpretation of speculation in this era, see Douglass C. North, *Growth and Welfare in the American Past: A New Economic History* (Englewood, NJ: Prentice-Hall, 1966) pp. 122–36.

The Métis are strongly associated with the fur trade, an industry that encouraged the development of a New Peoples through the mixing of Indian women and European traders. However, these people were not simply a random mixed-blood population, but they asserted a national identity and are recognized as one of the Aboriginal Peoples of Canada.<sup>46</sup> Section 31 of the *Manitoba Act, 1870* recognized the Indian title of the Métis residing in the Province of Manitoba and promised a land grant of 1.4 million acres. Children of Manitoba Métis were granted individual patents to real estate in the amount of 240 acres, and as a parallel process, adults were granted money scrip that could be exchanged for Dominion Lands.<sup>47</sup>

After some uncertainty, the Department of the Interior created a scrip claims process in 1885 for individual Métis residing in the Northwest Territories. The question of Indian title for Métis residing outside of Manitoba was addressed by the *Dominion Lands Act, 1879* and approximately 5.4 million acres of land (ca. 1875–1925) was granted under the authority of the *Manitoba Act* or *Dominion Lands Act*. The Canadian government's approach to the Métis entailed individual entitlement grants to both adults and children.<sup>48</sup>

Essentially, scrip was a coupon, issued to individual claimants/grantees, that could be redeemed either directly for *homestead lands* (i.e., 160 acres of *land scrip* could obtain 160 acres of land) or *money scrip* could be used to

purchase the same lands. However, as the price of homestead lands increased beyond one dollar per/acre, land scrip became more valuable to scrip buyers. With the onset of rapid settlement of western Canada following the end of the long recession (ca. 1897), the development of a land market was reflected in a sharp increase in land scrip issued relative to money scrip.

The process for converting a Métis claim for land scrip into a grant of fee-simple title was rather complicated and rarely involved the Métis grantee.<sup>49</sup> Numerous Orders in Councils authorized Commissions to take claims and officials to manage the process. Commissioners travelled to Northwest Métis communities, trading posts and missions, held sittings and took statutory declarations. Claimants identified themselves as Halfbreeds which officials understood to simply mean the presence of both White and Indian blood. Documents moved between local land offices, banks, law offices and the Lands Patent Branch in Ottawa. Significantly, the coupons were seldom delivered to the Métis grantees.<sup>50</sup>

With respect to land scrip, the grantee had to be present in the Dominion Land Office to locate their scrip, that is, apply their entitlement of a scrip coupon to a legally defined parcel of land. The interest in the land located with scrip could be transferred or conveyed prior to the issuing of a patent. However, the *Rule of Location* required that only after the scrip had been located, in effect, payment for the land, could

<sup>46</sup> According to the Métis National Council the definition of Métis is: "a person who self-identifies as Métis, is distinct from other Aboriginal Peoples, is of historic Métis Nation Ancestry, and is accepted by the Métis Nation"; see <<http://www.metisnation.ca/>>.

<sup>47</sup> For a discussion on Manitoba Métis Claims derived from the *Manitoba Act 1870*, see Frank Tough & Véronique Boisvert. "I am a half-breed head of a family ...: A Database Approach to Affidavits Completed by the Métis of Manitoba, ca. 1875–1877", in Denis Gagnon, Denis Combet & Lise Gaboury-Diallo (Eds.), *Histoires et identités métisses: hommage à Gabriel Dumont/Métis Histories and Identities: A Tribute to Gabriel Dumont* (Winnipeg: Presses Universitaires de Saint-Boniface, 2009) pp. 141–84. Note "Public Lands" were referred to as Dominion Lands in the Canadian Northwest and were administrated by the Department of the Interior, an agency of the federal government. Canada implemented a township survey system and homestead policies modeled after US Public Lands policies.

<sup>48</sup> It should be appreciated that scrip entitlements were subject to cutoff dates. For the *Manitoba Act* and Halfbreed scrip issued between 1885 and 1889, applicants had to be born before 15 July 1870.

<sup>49</sup> For details on the scrip process see, Frank Tough, "Terms and Conditions as May Be Deemed Expedient: Metis Aboriginal Title", and "Appendix C: Some Land Scrip Intricacies", in *As Their Natural Resources Fail: Native Peoples and the Economic History of Northern Manitoba, 1870–1939* (Vancouver: University of British Columbia Press, 1996) pp. 114–42 and 321–33; Frank J. Tough & Erin McGregor, "The Rights to the Land May Be Transferred: Archival Records as Colonial Text—A Narrative of Métis Scrip", in Paul W. DePasquale (Ed.), *Natives and Settlers, Now and Then: Historical Issues on Treaties and Land Claims in Canada* (Edmonton, University of Alberta Press, 2007) pp. 33–63.

<sup>50</sup> For one region, only 17 (1.7 percent) coupons of a sample of 1015 were delivered to the grantees. Library and Archives Canada, Public Records of the Department of the Interior, Record Group 15, vols. 1518–1520, Delivery Registers (hereafter LAC, RG15).

the interest in the land be assigned to a third party. Land scrip was especially useful in allowing settlers to circumvent onerous homestead regulations, that had been designed to prevent speculation and to award land to *bona fide* settlers.<sup>51</sup>

In the case of land scrip, the question of sharp dealings largely rests on the question of compliance with the Rule of Location. Several sources suggest that few grantees actually went to Dominion Land Offices to locate and then assign scrip.<sup>52</sup> W.P. Fillmore, who purchased scrip certificates in Northwest Saskatchewan during the 1906 treaty process as a student of law, readily observed the speculative interest in scrip. He immediately recognized the logistical problem of how scrip buyers would obtain the title (patent) without the involvement of scrip grantees, since “It would have been a matter of considerable difficulty to go north and find the person named in the scrip and bring him out to the Land Office.”<sup>53</sup> Fillmore explained how buyers located a scrip coupon with the intention of obtaining a patent: “... I was told that the practice was for the holder of a scrip to pick out some local Indian or half-breed and take him to the Dominion Land Office and present him to the person named in the scrip. The holder of the scrip, pretending to be the agent of the half-breed, would designate the land. The patent to this land would then be issued, and the scrip holder would then have to get title.”<sup>54</sup> Such a practice, entailing forgery, impersonation, suborning of perjury was at odds with the *Criminal Code of Canada*.<sup>55</sup> Due to these sharp dealings, some Métis sought remedies by making demands upon legal and political systems.

With respect to impersonation, the unsuccessful legal efforts of Antoine and Joseph L’Hirondelle petitioning for compensation for the loss of their coupons generated a number of archival records that challenge the view that the conversion of Métis land scrip into land was legal.<sup>56</sup> In correspondence to Minister of Justice C.J. Doherty, their lawyer E.B. Edwards advised: “The circumstances clearly show that the scrip has not come into the hands of the Crown in due course but, on the contrary, *through a course of fraud and forgery and personation*.”<sup>57</sup> Because of a possible appeal in this case, the Justice Department contacted their legal representative, H.L. Landry, who had successfully fended off the claims of L’Hirondelles at trial, nevertheless, he advised candidly on the risk of an appeal: “I might personally say that should the suppliants in this case succeed before the Supreme Court of Canada, there would be not only hundreds, but thousands of cases of a similar nature brought at once if fiats [decrees] were given, as there is no doubt that there were more *forgeries and impersonations in scrip* cases in Western Canada than you can even realize.”<sup>58</sup> Not surprisingly, a Justice Department legal opinion recommended to the Minister a quieting of the appeal by the L’Hirondelles, stating: “... the subsequent dealing with the scrip was admittedly tainted with fraud” while pointing out “that many similar claims might be presented if the suppliants succeed on appeal.”<sup>59</sup>

Following a successful complaint against Edmonton merchant, land speculator, and well known scrip-buyer, Richard Secord, concerning the forgery and suborning impersonation of a grantee, the *Criminal Code of Canada* was amended by Parliament so as to place a three year limitation on the prosecution of scrip

<sup>51</sup> Kevin MacLennan, “For the ‘Purposes of the Dominion’: Métis Entitlement and Regulatory Regime of Half-breed Scrip” (BA Honors Thesis, University of Alberta, 2002).

<sup>52</sup> Based on a regional sample of 742 land scrip coupons, 725 were assigned to third parties and 3 were patented to the grantee. Some cases were unredeemed or missing. LAC, RG15, vols. 1539–1550, location registers.

<sup>53</sup> William P. Fillmore, “Half-breed Scrip”, *Manitoba Bar News* 3(2) (1973): 128.

<sup>54</sup> Fillmore, “Half-breed Scrip”, p. 128.

<sup>55</sup> Canada, *Criminal Code of Canada*, Revised Statutes of Canada, 1906, chapter 146, s. 408, s. 468, s. 469.

<sup>56</sup> *L’Hirondelle (Antoine) v. The King* [1916] 16 Exchequer Court of Canada Reports, pp. 193–98.

<sup>57</sup> LAC, RG15, vol. 865, file 724372, Edwards to Doherty (11 August 1916), [emphasis added].

<sup>58</sup> LAC, RG15, vol. 865, file 724372, Landry to Deputy Minister of Justice (23 August 1916), [emphasis added].

<sup>59</sup> LAC, Public Records of the Department of Justice, RG13, vol. 2507, file C391, Memorandum, Plaxton to Minister of Justice (15 November 1916).

frauds.<sup>60</sup> Secord's charges were dropped. Eventually, the rationale supporting this controversial enactment surfaced. A memorandum from Parliamentary Counsel Francis Gisborne stated:

The object of the clause is to provide a prescription of three years with respect to any offence relating to the location of land issued by half-breed scrip [*sic*]. It is urged that there were a good many irregularities amounting to fraud and perjury in connection with the location of these lands, and parties are raking up these *frauds for the purpose of blackmailing*. If this clause passes any such prosecution would be proscribed as the offences were committed a long time ago.<sup>61</sup>

Apparently, the impersonation of grantees was less of a concern than the purported blackmailing of scrip buyers who benefited from forgery, fraud and impersonation. Certain progressive Members of Parliament opposed the sanctioning of scrip fraud. Consequently, the problem of the fraudulent acquisition of lands through Métis scrip was again forced upon Justice Department officials. With respect to the de-criminalization of scrip frauds, a legal opinion from the Justice Department acknowledged:

It appears that the scrip was handed to the half-breeds by the agent of the Indian Department and it was then purchased, for small sums of course, by speculators. However, the half-breed himself was required by the Department of the Interior to appear in person at the office of the land agent and select his land and hand over the scrip. In order to get over this difficulty the speculator would employ the half-breed to impersonate the breed entitled to the scrip. *This practice appears to have been very widely indulged in at one time.*

*The practice was winked at evidently at the time and the offences were very numerous.* The transactions are ancient history

now and the Department considered that it would be in the best interests of all to pass this section in a way of general amnesty. A substantial reason also exists probably in the fact that a conviction would throw a cloud upon the title to lands which may have passed through the hands of innocent purchasers for value in the meantime.<sup>62</sup>

Senior Justice Department officials and the Minister of Justice were aware that grantees did not locate the land, and consequently, the subsequent assignment of the property interests, obtained by locating scrip, had to be forged as well. The Justice Department's support for an amnesty concerning scrip frauds displayed little concern for the Métis. At the very least, the alienation of scrip interests in land, intended as compensation for the loss of Indian title, was tainted by sharp dealings and concomitantly, the possible disruption of colonial property relations (a cloud upon the title) was a larger concern.

### SOME OUTCOMES FROM THE CREATION OF THE TRANSFERABLE INDIVIDUAL RIGHTS IN PROPERTY

Generally, historians in the field of Native history do not employ economic concepts to examine the underlying dynamics of the process that created new property rights for Indians and the ensuing outcomes. In contrast, Carlson's quantitative approach to the US allotment process demonstrated that external economic interests shaped federal policy.<sup>63</sup> In *Indians, Bureaucrats, and Land*, he tested a demand model for allotment and found that the Office of Indian Affairs "chose reservations for allotment as a direct response to the interests of whites who wanted to develop reservation lands" and that substantial benefits were gained by non-Indians.<sup>64</sup> To elaborate: "... that reservations were

<sup>60</sup> Specifically, the amendment limited prosecution for "any offence relating to or arising out of the location of land which was paid for in whole or in part by scrip [*sic*] or was granted upon certificates issued to half-breeds in connection with the extinguishment of Indian titles. Copy found in LAC, RG15, vol. 2113, Criminal Code, Location of Halfbreed Scrip.

<sup>61</sup> Nearly a year after the adoption of this amendment to the Criminal Code, Sir James Lougheed read this copy into the record, see Canada, *Debates of the Senate of the Dominion of Canada* (Ottawa: Kings Printer, 1922), [21 June 1922], p. 500.

<sup>62</sup> LAC, RG13, vol. 2170, file 1853, legal opinion (14 October 1921) [emphasis added].

<sup>63</sup> Carlson, *Indians, Bureaucrats, and Land*, p. 67.

<sup>64</sup> Carlson, *Indians, Bureaucrats, and Land*, p. 166.

chosen for allotment when the land become sufficiently attractive to white settlers to warrant the cost of allotment. The first reservations to be allotted were those in the most developed and fertile lands in the eastern Great plains and the Pacific Northwest while reservations in the remote locations were not allotted until higher prices expanded transportation facilities made these sufficiently attractive to white settlers.<sup>65</sup> The capacity of Indians to take advantage of a new property arrangement did not influence the timing of the allotting of particular reservations. In effect, the practice of the allotment policies had less to do with providing the opportunity for Indians to benefit from the experience of private property, than to satisfy the land demands of White settlers.

Carlson demonstrate that the anti-tribal mandate of the Office of Indian Affairs was reconciled with the interests of settlers and speculators, and consequently, the sale of allotted Indian lands coincided with benefits to the purchaser.<sup>66</sup> His economic interest model anticipated that the land patent rules would be interpreted to permit Indian allottees to sell their patented land when benefits deriving from land to non-Indian purchasers increased. With increases in the parity prices for agricultural products, benefits to farmers would accrue from the purchase of additional lands. Carlson considered whether the Office of Indian Affairs would make more Indian available for sale as a response to potential net benefits.<sup>67</sup> A regression analysis of lagged price parity ratio convincingly explained year-to-year changes in the volumes of land sales.<sup>68</sup> The First World War stimulated demand for US agriculture production and in turn, a demand for Indian lands, according to Carlson: "Not only were whites more eager to buy Indian land during periods of high agricultural prices, Indians would have been more eager to sell their land

then as well."<sup>69</sup> Prices played a decisive role in moving lands from the domain of a tribal reservation to the realm of settler and market behaviour shaped the outcome of the allotment scheme. The fact that patented allotted land were sold during periods of high prices was not inconsistent with the trustee role of the federal government, however, more patents (a necessary precursor to sale) were issued during years of high prices and as Carlson suggested: "It is hard to imagine that many more Indians were suddenly able to manage their own affairs in the years 1917–1920 than had been ready to do so in 1916."<sup>70</sup> Carlson's conclusion that Indian policy was shaped by the benefits that Whites would receive, rather than serving the interests of the Indians was a significant finding and relevant to the dispossession of Indigenous peoples by White settler societies.

Not surprisingly, land fragmentation occurred with the division of allotments by heirs. Banner provided an example of uneconomic fragmentation: in the mid-20th century a parcel of land worth \$8,000 had 439 shares, and a third were receiving a nickel in annual rent.<sup>71</sup> With the intricacies of fee-simple ownership (i.e., disposing of patented allotted lands owned by Indians), Banner commented on other opportunities that developed: "Some of the predators were lawyers, who discovered they could exploit the Indians' unfamiliarity with the American legal system. ... charging exorbitant fees for the simplest of tasks."<sup>72</sup> These particular property rights were accompanied by rules of law unfamiliar to the owners of the patented lands. Economic theory might suggest that a situation of asymmetrical information between buyers and sellers existed. The outcome of the alienation of reservation title in the US included: a decline in Indian land ownership with a concomitant transfer of lands to White interests, as well as a decline in

<sup>65</sup> Carlson, "Federal Policy and Indian Land", p. 38.

<sup>66</sup> Carlson, "Federal Policy and Indian Land", p. 37.

<sup>67</sup> Carlson, "Federal Policy and Indian Land", p. 38.

<sup>68</sup> The agricultural price parity ratio of an index of farm product prices received by farmers and index of operating expense and living costs paid by farmers, see Carlson, "Federal Policy and Indian Land", pp. 40–43.

<sup>69</sup> Carlson, "Federal Policy and Indian Land", p. 43.

<sup>70</sup> Carlson, "Federal Policy and Indian Land", p. 44.

<sup>71</sup> Banner, *How The Indians Lost Their Land*, p. 285.

<sup>72</sup> Banner, *How The Indians Lost Their Land*, pp. 284–85.

Indian agriculture.<sup>73</sup> Notwithstanding, the large number of scrip coupons that were issued to claimants, the Métis were left with neither an individual nor collective land base. From its inception, the Métis scrip system was something of sham.

### CONCLUSION: SOME IMPLICATIONS FROM THE HISTORY OF PROPERTY FOR INDIGENOUS PEOPLES

Before summarizing and concluding, consideration of one additional archival source is required. After the newly appointed Lieutenant-Governor of Manitoba Archibald had worked out a land policy concerning the Métis or Halfbreed grant of 1.4 million acres in 1870, he advised the Minister in Ottawa:

The whole tendency of Modern Legislation, not only on this side of the Atlantic, but beyond it, is to strike off the fetters which clog the free traffic in land. There is no state in the Union, and no Province in the Confederation, so far as I know, that has not abolished "Estates Tail."

All the tendency of Modern Legislation is in the line of abandoning the feudal ideas respecting lands and bringing Real Estate more and more to the condition of personal property and abolishing restraints and impediments on its free use and transmission.

It does not seem to me that it would be wise in the case of Manitoba to reserve a Policy approved by the *common sense of the world*, and in accord with the habits and thoughts of modern life.<sup>74</sup>

Enthusiasm for unregulated markets as a universal, common sense is not a recent sentiment.

The consequences for the Métis were anticipated by Archibald:

So far as the advance and settlement of the Country is concerned, it would be infinitely better to give a Half-breed a title in fee to his lot. He might make a bad use of it — in many cases he would do so. He

might sell it for a trifle. He might misuse the proceeds. Still the land would remain, and in passing from the hands of a man who did not know how to keep it, to those of one who had money to buy it, the probabilities are all in favor of the purchaser being the most thrifty and industrious of the two, and the most likely to turn lands to valuable account. Suppose, therefore, the worst to happen that can happen — suppose the men for whose benefit the land was intended should not know how to value the boon conferred, still the land would find its way into the hands of other settlers. It would be cultivated and improved. One individual might take the place of another; thrift might come into the place of improvidence; but the country would be no loser by any number of such changes. It is by just such movements that a hamlet, or village, or town grows up, and if they were prevented by the interposition of artificial barriers, these would really operate as a premium on thriftlessness and negligence. My strong conviction, therefore, is that whatever is given under the half-breed clause should be given absolutely.<sup>75</sup>

By making this grant, based on a need to deal with Indian title, alienable by those that were entitled to a share of the 1.4 million acres, lands would be improved because the thrifty and industrious would replace those that did not know how to value or keep it. Again Archibald:

Those who do not occupy, deriving no benefit from the ownership, will, as a class, be ready to convert their land into something can use and *will be sure to sell*.<sup>76</sup>

Here the rules governing a constitutionally protected Métis land grant were designed to ensure absolute and individual ownership of the Métis grant so that a dispossession of whole people could be carried out by thousands of small, individual transactions. The Métis, had been an energetic and essential component of the mer-

<sup>73</sup> This outcome was established by Carlson, *Indians, Bureaucrats, and Land*, pp. 133–63.

<sup>74</sup> LAC, RG15, vol. 236, file 7220, Archibald to Howe (27 December 1870).

<sup>75</sup> LAC, RG15, vol. 236, file 7220, Archibald to Howe (27 December 1870), [emphasis added].

<sup>76</sup> LAC, RG15, vol. 236, file 7220, Archibald to Howe (27 December 1870), [emphasis added].

cantile fur trade, but became a “road allowance people” and they later referred to themselves as a “Forgotten People.”<sup>77</sup>

Lieutenant-Governor Archibald’s rationale for dispossession (free use and transmission, improvements, thrift, industry, inducements to sell) is congruent with the property rights paradigm. Decades ago, Demsetz asserted: “... it is essential to note that the valuation power of the institution of property is most effective when it is most *private*.”<sup>78</sup> Can dispossession, even if carried out in clear violation of the colonizers’ own rules, be posited as an acceptable cost of economic growth? Demsetz also concluded: “If a net increase in the total value of property follows a change in the mix of rights, the change should be allowed if we seek to maximize wealth,”<sup>79</sup> because “Not to allow the change would be to refuse to generate a surplus of value sufficient to compensate those harmed by the change. The process of calculating the net change in value will, of course, involve the taking into account of side effects ...”<sup>80</sup> In other words, private property tenures generate the most value, and by this rationale, the restrictions on alienation of Indian lands need to be changed.

While something of an argument can be made to demonstrate that the economic growth of White settler societies rested on such property arrangements, the same cannot be said for Indigenous Peoples. The predicted causal paths between economic performance and efficiency gained by reducing transaction costs concomitant with the advancement of individual property rights are not apparent in the historical experi-

ences of US allotments and Métis scrip. For these peoples, externally devised institutions of private property for the enjoyment of individuals did not initiate “sustained economic growth,”<sup>81</sup> instead even more of their lands were attained by settlers.

In these brief case studies, the individualization of land ownership was less about creating efficiency (internalizing externalities) as about a massive appropriation of lands, dispossession if you will, by clearing away collective ownership and usufruct customs to promote settlement. These lands were then allocated to White settlers. Moreover, it seems hard to infer these from historical experiences that the mere titling of individual property interests will be a panacea for economic growth and development. Inspired by De Soto’s *The Mystery of Capital*,<sup>82</sup> bold propositions to knock down the Indian Act and bring market discipline to communities; as well, new revenues will be generated from Canadian Indian reserves are just some of the promised outcomes of individualized property rights.<sup>83</sup> Flanagan, Alcantara and Le Dressay explained: “We support making available, to those First Nations who are interested, the same property-rights tools that have made economic advancement possible for other Canadians.”<sup>84</sup> The purported successes of the private titling of land in the Global South has been cycled back by Flanagan, Alcantara, and Le Dressay as an antidote for dealing with Indian Act inefficiencies and as a means to mobilize the “Dead Capital” of reserve lands and resources.

Hernando de Soto’s argument about titling Third World land parcels has been used as policy

<sup>77</sup> For meaning of the designation Road Allowance People, see, John Weinstein, *Quite Revolution West: The Rebirth of Métis Nationalism* (Calgary: Fifth House, 2007) pp. 20, 22, 64–65.

<sup>78</sup> Demsetz, “The Exchange and Enforcement of Property Rights”, p. 19, [emphasis in original].

<sup>79</sup> Demsetz, “The Exchange and Enforcement of Property Rights”, p. 19.

<sup>80</sup> Demsetz, “The Exchange and Enforcement of Property Rights”, p. 19. To a certain degree, modern claims processes entertain the costs of dispossession.

<sup>81</sup> The case for individual property rights increasing “the productivity of society” is made by Douglass C. North & Robert Paul Thomas, “An Economic Theory of the Growth of the Western World”, *The Economic History Review*, New Series, 23(1) (1970): 1–17.

<sup>82</sup> Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West but Fails Everywhere Else* (New York: Basic Books, 2000).

<sup>83</sup> Tom Flanagan, Christopher Alcantara & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montréal: McGill-Queen’s University Press, 2010).

<sup>84</sup> Flanagan et al., *Beyond the Indian Act*, p. 54. A succinct account of the history of US allotment of reservations under the Dawes Act, which they regard as a failed experiment, demonstrated an awareness of historical property issues. Flanagan et al., *Beyond the Indian Act*, pp. 42–54.

prototype for First Nations reserves in Canada by Flanagan, Alcantara and Le Dressay in *Beyond the Indian Act*, but de Soto's argument has a strong resemblance to much of the institutional economics literature and the emphasis that Demsetz had placed on individual property rights, but if one drills down, the Demsetz/Alchian property rights paradigm can be traced back to Eleanor Leacock's study of changes to land tenures as a consequence of the fur trade. With some irony then, the historical case of the subarctic hunting territories, even if selectively assimilated, seems to have inspired Demsetz's theory of private property as an institution that simply generates good due to the internalization of externalities.

In opposition to reductionist constructs, Reinert asserted: "Property rights per se were

not responsible for either capitalism or economic growth; it was an institution created by a certain production system in order to make it function better" and in response to over-generalizations about the historical importance of property rights claims, Reinert argued: "The mode of production of the Venetians—in contrast to the mode of production of hunters and gathers—brought with it the need for the regulation of property rights."<sup>85</sup> The cases concerning the allotment of US Indian reservation lands and Métis scrip coupons should demonstrate that the individualization of collective interests were not simply regrettable, risky historical experiences, but also, suggest that the artificial allocation of property rights will result in dispossession not development.

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<sup>85</sup> Reinert, *How Rich Countries Got Rich*, p. 220.