

RURAL HISTORY CONFERENCE

**Regressive rights to personhood and property
on the Canadian Prairies, 1870 to 1910**

Tony Ward
Department of Economics
Department of Tourism and Environment
Brock University
St. Catharines
Ontario, L2S 3A1
Canada
award@brocku.ca

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Abstract

Indians first occupied the Prairies about 5 000 years ago, developing a society built around bison hunting, with some collecting and horticulture. The coming of the horse and the repeating rifle resulted in the extinction of the bison, and the end of the Prairie Indian way of life. Unable to feed themselves, and forced to live on reserves, the Indians, came under the control of the government. Treaties detailed support that the government was to give to enable the Indians to prosper, but in the event, economic and social conditions on the reserves deteriorated badly. The Department of Indian Affairs systematically obstructed the Indians, trying to break them as a society, with the philosophy of “assimilate or annihilate”. Indians faced severe restrictions on their human and property rights, which set the preconditions for the failure that continues today.

Introduction¹

The earliest humans to live in the Americas arrived about 12 000 years ago via Beringia². Initial settlement was focused in the warmer areas of Central and South America, and only spread up to the area that is now the Canadian Plains about 5 000 years ago, as the glaciers retreated.

Nicholson (2011), cites Forbis (1992):

“Continuous settlement of the Northern Plains was possible only after the Hypsithermal (5000 BPE) because of : climatic amelioration; The emergence of the modern species of *bison bison*; The use of the dog and travois to travel across the arid sea of grass; The use of tipis and ceremonial structures ; The development of an innovative method of cooking by stone boiling³”

Early inhabitants lived by hunting, trapping, collecting berries, and some horticulture. Their social organization was in tribes, with large tribes broken down into bands. Bands were mobile, following their sources of food, usually through an annual cycle. On the Prairies, the main source of food was the bison. Further east and north, Indians trapped smaller animals, collected berries, and fished. Indians exploited a small ecological niche, with a small population subsisting on the scant resources their technology could extract⁴. The binding constraints on population size were probably the difficulty of finding food, water and shelter during the harsh winter.

Prairie Indians lived off the bison hunt, which provided a good living, though like all such peoples, their position was precariously dependent on the weather and the vagaries of nature. Before the seventeenth century, Indians ate about five or six bison per person per year. In summer, this was easy - the bison gathered into very large herds for the rut. Indians used jumps or pounds to stampede a small number of bison into a pit or

enclosure, where it was easier to kill them. In winter, conditions were hard. Some bison meat could be preserved as pemmican, which involved pounding the meat with fat, roots and berries. Small number of bison could still be found, but winter was a lean time.

Impact on the Indians of the Arrival of Europeans

When horses reached the Prairies, they changed the Indians' lifestyle forever.

“Horses helped Indians do virtually everything – move, hunt, trade and wage war – more effectively, but they also disrupted subsistence economies, wrecked grassland and bison ecologies, created new social inequalities, unhinged gender relations, undermined traditional political hierarchies, and intensified resource competition and warfare⁵.”

On horseback, Indians could outrun the bison, with less risk and greater return.

The bow and arrow worked well from horseback, and in the nineteenth century, the repeating rifle increased the kill rate still more⁶. The annual migration of the aborigines from their summer to winter camps became easier too, with horses able to carry far more than humans and dogs could.

It is hard to date the return of the horse to the northern plains. It is not likely that significant numbers were obtained from the Conquistadores further south. More likely, some horses were stolen, bought or strayed from Spanish cattle ranches in the South-West, probably in the seventeenth century. Before then it was unlikely that the Indians overharvested the bison. Horses appeared in large numbers in the late 1700s, and it would have taken then about 10 to 20 years for the nomadic socio-economic system to develop. It did not then exist for long before Europeans appeared.

There were wild herds of horses as well, with estimates of up to two million in the early nineteenth century. Denhardt regards this as an unlikely source for domestic

horses, regarding the capture of wild mustangs as too difficult⁷. The standard story of increasing herds by horse stealing has also to be a fallacy of composition. The constant stealing of horses will not increase the aggregate number of horses overall. Someone had to be breeding the horses. That does not mean that one or two tribes, in particular the Blackfoot, didn't steal most of their horses. The Blackfoot raided other tribes up to fifty times a year, taking forty to sixty horses each time⁸.

Horses induced Indians to forsake their traditional ecological niche, and switch to the higher-return lifestyle of specialized hunting⁹. On foot, the hunt had been slow and risky. On horseback, Indians could kill bison far more quickly and easily. Previously there had been no serious pressure on the bison population – humans probably took about 2% of the stock per year. On horseback, this increased significantly, to the point that there was pressure on the viability of the stock of bison. Property rights changed from what had in effect been local common property, to unrestricted open access. Hunting technology evolved still further when the repeating rifle superseded the bow and arrow. Europeans joined the hunt too. By the 1830s, there were few bison left on the southern plains, and by the late 1870s, the Canadian Prairies were barren.

Indians, literally starving, were desperate, facing the immigrants who wanted their land to grow grain for export. Using food as a lever, the Indians were induced to sign a series of treaties, that specified the areas into which the Indians would retreat, and the assistance to be given to them. Indians were no longer free people, and had to abide by the treaty rules.

Impact on Indians of the Imposition of Reserve Life

Prairie aboriginal societies had lived in a stochastic equilibrium for many millennia, but subject to natural variations in their environment and food supply. Before the eighteenth century, Prairie Indians had deliberately diversified, mixing farming with hunting, fishing and collecting, thereby avoiding overexploitation of their ecological niche. They probably killed 5 or 6 bison per person per year, or about 2 percent of the total population of bison, resulting in a sustainable socio-economic system¹⁰. However with the coming of the horse, the Indians gave up that ecological role to specialize in equestrian bison hunting, and this was further accentuated when they obtained repeating rifles. The new technology yielded greater returns for less effort than settled farming, so Indian society changed – irrevocably, as it turned out. Previously the successful bison hunter had shared the meat with others of the tribe, but kept the hide. When the trade in robes and leather exploded in the mid nineteenth century this led to a strong incentive to overhunt in order to sell the hides, which they did to get cash for consumerism, particularly of alcohol. By the end of the 1870s, both Indians and whites had hunted the bison to virtual extinction, taking with them the economic livelihood of the Prairie Indians.

Most of the Indians in what became western Canada were forced onto reserves, where the Department of Indian Affairs was to help them establish a new way of life. In practice, the objective of the Department was to ‘assimilate or annihilate’ the Indians, who were in general given as little help as possible. The replacement for the bison hunt was intended to be farming, but that took a while to develop, and few Indians prospered. To survive, Indians participated in the cash economy, by hiring themselves out as farm

labour, cutting wood, particularly for fencing, some market production, and subsequently semi-enforced land sales. They also received some cash payments as part of their treaty settlements.

Indians working as farm labour is particularly poignant, in that they had a generation earlier roamed freely over the land. Similarly cutting fencing materials for the European settlers to fence in the land to keep them out was equally humiliating.

The Indian as Peasant

In the late nineteenth century, therefore, Prairie Indians found themselves in very constrained circumstances. They had lost their livelihood, and the incoming settlers took away most of their land. Indians were forced into reserves, where they had to work out how to survive the new reality.

Otsuka regards peasants as “small-scale, family-based farmers, including both owner cultivators and tenants.”¹¹ Almost all Indian farms were small-scale. For Reserve farms, the issues are not just size, but also land ownership and human rights of the Indians. Peasantry involves primarily rights to land, but issues of rights over one’s own person are also vitally important. In all aspects, the Prairie Indians’ situation was bleak.

The Indians had almost nothing – a few horses, some lodges, and their hunting equipment and skills, now of no value. They needed food; tools, equipment, seeds and animals, for both draught and food production, and the Department of Indian Affairs held the keys to that need. They also needed someone to show them how to use these items to produce food, in the same way that the settlers were.

The Indians were not serfs, in that they were not required to undertake work for the Department, but in many other aspects of their existence they were not free to make the choices that the incoming settlers could. Reserve Indians had only limited ability to manage their farming activities. They had land, held in a form of leasehold, in common with all members of the tribe. Their property rights over land were complex – the Department of Indian Affairs held the land in trust for the Indians, and *de facto* retained substantial control over Indians' activities. Europeans wanted to crush the indigenous inhabitants. Indians didn't produce anything that the Europeans wanted, and they occupied an important factor input that the Europeans felt they could put to better use. The intention of Government policies then was to break down the previous Indian political and social unit from the tribe/band to the individual. In the US, this was attempted through the Allotment Act, and in Canada, it was achieved by economic pressure.

Indians and the Department chose their reserves in consultation. Some were chosen with farming in mind, but many Indians didn't realize that they were losing all non-reserve land forever, and that settlers, who would exclude the Indians in order to grow grains, would quickly take up the non-reserve land. They could choose where on that land to farm, by agreement with the tribe, but they could not choose the scale of their farming. Their activities were restricted by a variety of legal and other imposed constraints.

Treaties allocated varying areas of land to the signatories, but the minimum area given in areas where the Department anticipated grain farming was 160 acres per family, the same as for incoming European settlers¹². At the time, given the available

technology, this was a suitable area for settlers, who had access to the latest equipment. Later some Indian treaties cut this area back to 40 acres. In practice, though, those Indians who did farm used much smaller amounts of land.

The development of agricultural technology over the past two centuries has exacerbated the difficulties of farming at a very small scale. Machinery has increased labour productivity substantially, resulting in farming costs per unit output falling. Indians, working without this machinery, were unable to match the costs of settler farms, and could not flourish.

Several characteristics of Prairie Indian reserve farming are critical to its failure: property rights, scale, lack of access to markets for inputs and outputs. An important aspect of the condition of the Indians was the degree of control they had over the management of their farm, which involved both rights over real property and personal rights. The treaties nominally allocated reserve land to the Indians, but in practice, Indians had only restricted control over their farming activities.

In 1885, Louis Riel led a rebellion by the Métis people, who wanted the same treatment as full blood Indians¹³. The rebellion failed, and Riel was executed, but the Department of Indian Affairs responded by introduced a pass system, which required all Indians to obtain a permit from the Indian Agent if they wanted to leave their reserve. The system lasted from 1885 to 1935, and was used as a means of social and economic control. The pass covered a specific duration and location, thereby restricting the ability of Indians to engage in commerce. The passes had no legal foundation, and were a source of great friction. Indians had also to get a permit to buy or sell anything, whether

buying farm equipment or selling hay. This restricted them from increasing the scale of their activities.

The Indians' future depended on where they lived. Those further north could still do some hunting and trapping. For those who had lived off the bison hunt, change was more radical. The only realistic path to the future was farming. The Blackfoot tribe, who lived in the dry plains area, took up cattle ranching, though the magnitude of their reserves precluded them from large-scale activities. The majority of Prairie tribes tried to switch to grain farming.

Indian Farming

Farming activities varied from place to place, with grain cultivation in what are now Manitoba and Saskatchewan, and horse and cattle ranching in Alberta. The major commercial field crops were wheat and oats, and the most important root crop was potatoes. Small amounts of other field and root crops were also grown. Animal husbandry was a significant source of income only for Indian farms in southern Alberta during the period, though many Indians elsewhere kept a few cows.

If there was one resource that the Canadian Prairies were not short of it was land. The Government was scouring the four corners of the globe for people to come to the Prairies and farm. To regard the Indians, who knew the land better than anyone else, as an impediment to growth, was pure racism.

To achieve economic success in a competitive capitalist economy, which is what the Indians faced, entrepreneurs need clear, comprehensive property rights. Rights have to be explicit, and the user of any resource must have full access to and control over all

inputs and outputs. Only with fee simple are all of these possessed in full, so even European settlers did not enjoy full rights until they had proved up their homesteads. Reserve Indians possessed only limited rights. The Crown owned all reserve land, holding it in trust for the Indians, whose legal status was that of minors. Indian farmers therefore did not own the land they tried to farm, but had only an informal usufruct, with almost none of the basic legal rights held by their neighbouring settler farmers. The Department's agent had to approve any commercial transactions - buying or selling - that an Indian wanted to undertake. An economic system in which some participants face more restrictive property rights than others will inevitably yield greater benefits to those with the greater rights. The U.S. tried a policy of breaking up reservations into individual lots, but the policy worked very poorly, and was disastrous for U.S. Indians. A straight conversion to fee simple title then was not the best solution, given the social structure on Indian society.

Farm Income on Indian Reserves, 1880 to 1910

Figure one shows total income per capita and its main components, between 1890 and 1910, for the Birtle Reserve, a more successful grain-growing area. Income was initially very low, and Indians repeatedly needed help for survival from the Department of Indian Affairs, but after 1900 income from grain and other agricultural activities increased somewhat. Other reserves in the grain-growing areas show similar pictures. Figure Two shows the same information for the Blackfoot Reserve in what is now

Southern Alberta. Here grain was less important than in Birtle, with cattle and manufactures being more important, but the overall outcome is similar.

FIGURE ONE ABOUT HERE

FIGURE TWO ABOUT HERE

Constraints on Indian Farms

The constraints are primarily those on inputs, including lack of expertise, climate, capital (primarily for equipment and animals), farming technology, property rights and the loss of social capital.

a) Access to Capital

Agricultural productivity increased rapidly over the nineteenth century, using a wide variety of new equipment that relied on the substitution of capital for labour. New machines were developed for ploughing, sowing, tilling, harvesting and threshing, etc. The incoming European settlers took all of these up rapidly, but the Indians were not able to do so. Under the terms of the treaties, they received some basic equipment, but none of the newer, more productive machines.

Not only did the Indians not receive any machines; they were actively discouraged from obtaining them themselves. The 1886 Report of the Department of Indian Affairs reports of the Birch River Reserve in the Pas Agency that:

This band have some splendid soil, and asked that they be supplied with a hand mill, a fanning mill, reaper and mower, and that their annuity money be kept back until these articles were paid for. I advised them not to purchase these articles until they became more experienced in

agriculture, and that cradles, scythes and a hand mill would be more suitable at present, in which they concurred.¹⁴

A typical treaty included the following:

It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on these reserves and commence to break up the land, that is to say - two hoes, one spade, one scythe, and one axe for every family so actually cultivating; and enough seed, wheat, barley, oats and potatoes to plant such lands as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid; also to each Chief; for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenters' tools, five hand-saws, five augers, one cross-cut saw, one pit saw, the necessary files, and one grindstone; all the aforesaid articles to be given once for all, for the encouragement of the practice of agriculture among the Indians¹⁵.

The treaties allowed Indians some basic tools for small-scale grain and roots farming, but none of the mechanized equipment used by the incoming settlers. In 1889 Hayter Reed, then Indian Commissioner, announced a new 'peasant' policy for Indian reserves¹⁶. His target was one acre of wheat, a few roots and one or two cows, using only hand tools - a hoe, rake, sickle, cradle and flail. This would yield a bare subsistence standard of living for the Indians, with no prospect of improvement. It would isolate them from the uncertainties of the market economy, but with a precarious existence, at the mercy of the climate. In this way, they could achieve a frugal economic self-sufficiency in the manner of traditional European peasants¹⁷. The new "approved system of farming" was designed to remove Native agriculture from the emergent competitive marketplace of large-scale mechanized operations.

The commissioner invoked a theory of cultural evolution as justification: "Indians could not leap from savagery to civilization without experiencing the intermediate stage

of barbarism¹⁸”. Since individual Indians had no property rights to land, the land they occupied could not be mortgaged to raise capital to equip the farm.

The 1901 Report for Shoal Lake in the Pas Agency of Manitoba notes that the reserve was isolated and inaccessible, with low, poor land. “A most suitable piece of country for a reserve,” where the Indians could cultivate small gardens, tend to cattle, hunt and trap. There was “No chance of outside earnings.¹⁹”

b) Property Rights:

i) European Perception

The attitude towards Indians was similar in the US to that in Canada. "Treaties were expedients by which ignorant, intractable and savage people were induced without bloodshed to yield up what civilized people had the right to possess by virtue of that command of the Creator delivered to man upon his formation - be fruitful, multiply and replenish the earth, and subdue it²⁰.”

In the 1876 Report of the Department of Indian Affairs, D. Laird, the Minister of the Interior, notes:

For these reasons it was essential that the Indian title to all territory in the vicinity of the Lake (Winnipeg) be extinguished, so that settlers and traders might have undisturbed access to its waters, shores, islands, inlets and tributary streams. . . . All these considerations pointed to the necessity of prompt negotiation with the Indians on both sides of Lake Winnipeg for the surrender of *their territory*.²¹²²

The basic approach taken by Europeans towards rights to land is that of John Locke, whose position was that people acquire land by adding their labour to it. In the mid-nineteenth century, the Prairie Indians were nomadic, moving around with the

seasons and the bison, with no fixed agriculture. On this basis, the perspective of incoming Europeans was that the Indians had no ownership rights to the land, so whites could treat it as *res nullius*.

ii) Aboriginal Perceptions

Prior to the great expansion of the bison hunt, that came with the horse and the rifle, Plains Indians had supported themselves in part by settled agriculture, with some form of private property in land. In other areas of North America, too, where Indians still practiced settled agriculture or horticulture, they held land in private ownership, so they understood the concept well. That is not to suggest that the Indians viewed farmed land in the same way as Europeans. To them, land was a part of their heritage and belief system, and was not a commodity one could buy or sell. Farming the land did not destroy their relationship with the earth.

Indian social and economic arrangements had evolved to suit the nomadic bison hunt. As they moved on a regular basis, property rights over small areas of land such as those for agriculture were irrelevant. When settlers arrived in the late 1870s, the only private property held by Plains Indians consisted of moveable effects – clothes, tipis, horses, dogs, cooking and hunting implements, etc. Indians did not own any stocks of resources such as bison or fixed areas of land. Tribes hunted over traditional areas of land, but these had become more contested as the numbers of bison fell, and competition increased over the better hunting grounds.

As the Indians relocated onto reserves, their basic social organization had to evolve to cope with the new conditions. Traditionally, each tribe was a loose coalition under the voluntary coordination of a chief, and members came and went, moving from

tribe to tribe, as it suited them. However when they moved onto reserves, Indians had to adjust into communities that were more static. In order to qualify for Government assistance, reserve Indians had to register on a particular reserve, and so lost their mobility.

The Department of Indian Affairs held reserves in trust for the Indians, on behalf of the Federal Government, so the Indians did not own the land either collectively or individually. The Indians were legally minors, with the Department of Indian Affairs and its agents exercising power over all commercial and most subsistence activities. This power, as Carter has shown, was systematically abused²³. Although overtly intended to help Indians build a self-sufficient economy, the real mission of the Department was to make reserve life difficult in order to drive the Indians off, and become assimilated into Canadian society.

Not all the land Indians chose was well suited to settled agriculture. It was generally reasonably fertile, though proximity to markets was in some cases poor. This was not always the fault of the government negotiators, since in many cases Indians chose the areas in which their reserves were established. The annual Reports of the Department of Indian Affairs contain many references to negotiations between band chiefs and Department agents concerning the location of reserves. In some cases, Reserves were moved if the band found that the land was not suited to agriculture. Many bands chose their location for the convenience of other activities such as hunting and trapping. Status Indians could not apply for homestead land, though later on they were able to apply for 'scrip' for land, but this meant giving up their legal status as Indians.

There was no legal mechanism for subdividing reserve land, since the Crown owned it and held in trust as a unit; however, both parties wanted some form of division, for differing motives. Indians wanted to develop farms, and needed some type of private ownership in order to manage the land effectively. The Department of Indian Affairs developed the perspective that if the reserve could be carved up into pieces suitable for subsistence farming, then a large portion of the land would become surplus to the 'requirements' of the reserve, and could be removed and offered to settlers.

Figure Three shows Bird-Tail Creek Reserve, Number 57, in Manitoba, at the time of the survey. As in most such cases, the survey and accompanying road-allowances were just super-imposed over any pre-existing Indian farming activities. Both the surveyors and the Department ignored such cooperative Indian property rights as had been established. Figure four shows Reserve Number 65, after about half of the reserve was 'surrendered'. This is typical of the many such 'surrenders' that took place, as Reserve Land was declared surplus by the Department, and sold off to 'real' farmers. Even such Indian property rights as were initially accepted were in many cases subsequently retracted.

We have evidence of the subdivision of reserves from the Reports of the Department of Indian Affairs between 1887 and 1896. From these records, we can determine the number of farms, but with no detail of the numbers of workers on each unit, and with a record only of the net area in crops, excluding any areas used for hay, pasture or other activities. The structure of property rights on these farms is also unclear. The farmers certainly did not possess fee simple rights as we now know them, so their usage was restricted.

That is not to suggest that breaking up the reserves into individual fee simple farms would have been a simple, easy solution. The US tried allotting land to individual Indians, and Anderson and Lueck (1992) report that allotment in the US had major effects on reservation land tenure. Firstly, it broke up traditional tribal land holdings. Second, as whites settled on tribal lands, and individual allottees gained fee simple title to their allotments, land owned in fee simple became interspersed with land held under trusteeship. Carlson regarded allotment as “a contradictory policy. An Indian was expected to use his individual initiative to farm his land, yet the property rights he was given were so restricted that he could neither use the land as collateral for a loan nor sell unusable tracts of land²⁴.” By the time the Allotment Policy in the US ended in 1934, over 20 percent of total Indian lands remained in individual trust – i.e. Indians had some ownership rights, but the Bureau of Indian Affairs held them in trust. The overall effect on Indian society was disastrous.

Rights to Self and to Property

Honoré lists eleven standard incidents of ownership²⁵. These incidents are reflections of those conditions necessary for full ownership. All of these aspects of property rights assume the existence of explicit rights, rather than just physical occupation.

i. The Right to Possess

This is the most basic component of ownership. The owner needs to have overall control of the resource. He/she must have exclusive physical occupation, and no one can have the right to evict the owner, who furthermore can exclude others

from the resource. An individual's right to possess needs the backing of a legal support system that will enforce these rules.

This most fundamental aspect of ownership was completely missing from the Indian reserves. The Government owned the land outright, and the Indians were occupiers with only very limited equitable rights to exclude other Indians or members of the Department of Indian Affairs, though the Department could exclude others such as traders, in particular whisky traders. In contrast, European settlers could acquire a 160-acre homestead for a nominal fee, which after a simple three-year proving-up process became their full private property. This fundamental distinction had a profound impact on the ability of Indians to exploit their reserves. They were unable to accumulate capital in land improvements. They could accumulate livestock and equipment, the ownership of which was not contested. Indians could also invest in buildings; however, they did not have the security of owning the land on which those buildings stood. While they remained status Indians on the reserve, they could not invest in the ownership of the land itself, by expanding their lands. This was a major deterrent. Already by the 1890s, it was apparent that the 160-acre homestead given to European settlers was too small for long-run profitability. A major source of capital gain for settlers was to break in their land, from which they reaped the increase in the value of that land. The value of improved land reflected the value of the profitability of the crops that could be grown over the ensuing years. Unable to mortgage their land, this avenue was not open to Indians.

If an Indian left the reserve permanently, then he/she lost their status, with such rights as it conferred. He/she could though buy land and other goods. This would achieve the government's goal of assimilation.

ii. The right to use.

For efficiency, the holder of the property right must have the unlimited right to use the resource. The only appropriate constraints are on activities that create externalities. Nominally, reserve land was available only to Indians, but their right to use the land was highly constrained. A Department agent had to approve any transaction of any sort, buying or selling, with the outside economy. As Carter notes, agents frequently used this power to prevent Indians from acquiring the equipment and animals they needed for farming on anything above a trivial scale. Hayter Reed imposed an illegal Pass System, under which Indians could not even travel off their reserve without permission, and the restrictions severely limited the Indians' ability to exploit their reserves.

iii. The Right to Manage

This refers to the right to decide who can use the land and how. Theoretically, Indians had the right to carry out any activities they wanted to, but in practice the restriction, that any transactions needed approval interfered with this right. Indian land and resource exploitation was therefore subject to the control of the Department of Indian Affairs, although this control was not always a problem. Many agents supported 'their' Indians, encouraging and supporting reasonable farming ventures. Nonetheless, Indian rights to use resources were restricted, which would have impeded entrepreneurialism.

In 1886 on the Blood reserve in the Northwest Territories, the Report of the Department of Indian Affairs noted: ‘... there is some land uncultivated. I advised the Indians to put in more potatoes. They remarked, "What is the use, as we have lots in our cellars that we cannot sell, and more than we can eat.”’ Given that they were not allowed to sell anything without a permit, it is not surprising that the Blood Indians were discouraged.

iv. The Right to the Income

With exclusive property rights, the owner of the rights must receive all the fruits and profits deriving from the use of the resource. He/she must also pay all costs associated with the exploitation of the resource. Under these conditions, the owner faces the appropriate incentives to put the resource to whatever usage optimizes his/her benefit. On Indian reserves, the agent had the right to control all transactions, and some agents used this to interfere with the band’s economic activities. The agent managed the band’s finances, holding the Indians’ money, and thereby controlled the flow of income. Under these circumstances, the ability of the band to generate income from ‘their’ land was significantly constrained.

v. The right to the capital.

This includes the power to alienate the thing, and the liberty to consume, waste or even to destroy it. For full property rights, the holder has to possess the right to alienate the resource during life or death, by way of sale, mortgage, gift or other mode, and the power of disposition and the power of transferring title.

Indians did not have formal rights to individual areas of land. They did have individual ownership of some tools and equipment, though the Department of Indian

Affairs or the band as a collective owned most such items. Indians could not alienate any of the band's land either collectively or individually. However, in the long run, the Department did alienate extensive areas of land, declaring it 'surplus' to the needs of the band. The Department sold the land to settlers, and the Department, not the band, received the payment for it.

vi. The Right to Security

The owner must have immunity from expropriation. Apart from bankruptcy and execution for debt, transmission of ownership must be consensual.

The Government did not push Indians off reserves en masse, but they did expropriate large areas of land from the reserves. The mechanism used by the Canadian government was to allocate areas of land on the reserves to individuals and families, which they did without any legal justification or foundation. The Government then declared any land left over after the allocation as surplus to the needs of the reserve, and expropriated and sold it off to settlers, as Figure Four shows.

vii. The Incidence of Transmissibility

The possession of full property rights requires that the holder should be able to determine the future disposition of the property. He/she should have the right to transmit the property to the holder's successors *ad infinitum*.

Band members as a collective had a weak form of ownership of their reserve land, but they did not possess legal rights over any particular portion of the reserve. Each generation could transmit the right to live on the reserve, but not the right to any particular piece of it. Once the 'surplus' land of the reserve was 'surrendered', there was no land available onto which a new generation could move.

viii. The incidence of absence of term.

The possession of property rights does not necessitate indeterminate possession. Various forms of property right such as leasehold have finite terms. For others the term may not be finite, but it may nonetheless be possible for others to determine the possession, such as leasehold without fixed term. An infinite term implies transmissibility, since all humans are mortal. Bankruptcy can determine some otherwise infinite terms, resulting in surrender of all property.

Reserves as a whole were established on infinite terms, and Indians were explicitly not allowed to mortgage the reserve land, so there was no danger of them defaulting and losing land in that manner. Restrictive laws though caused many Indians to lose their status, and with that went the right to live on the Reserve. The communal property right persisted, but not an individual right.

ix. The duty to prevent harm.

An owner may not use property to harm others, or allow others to do so. This constrains all property owners equally, so there is no difference between settlers and Indians in this context.

x. Liability to execution.

An owner's interest may be taken away for debt, and he/she is also liable to taxation. Since Indians were unable to use 'their' land as security for debt, the possibility of execution did not arise. Under treaty terms, Indians were also not liable to taxation, so this incidence did not disadvantage treaty Indians.

xi. Ownership and lesser interests: residuary character.

Easements, short leases, licenses, etc. There are numerous minor incidents, which have no particular bearing on Indian property rights.

Indians had only a very limited legal interest in the land, but they did have an equitable interest. In theory then they could have sued the DIA for failure to execute the legal aspects of the trust. In practice, though the relationship was one of highly unequal power, and the Indians did not possess the political or legal power to peruse their interests. In terms of human rights, again these were restricted, to achieve the goal of getting Indians to assimilate into society.

Figure Five depicts the arbitrariness of much of the reserve allocation process. The four reserves shown were just packed into adjacent rectangles, with no concern for topography, soil or water.

Only with fee simple are all of the necessary rights fully possessed, so even European settlers did not enjoy all rights until they had proved up their homesteads. Reserve Indians however did not fully possess any of these rights.

To achieve economic success in a competitive capitalist economy, entrepreneurs need clear, comprehensive property rights²⁶. That does not imply that the only feasible structure for rights over land is fee simple. What is essential is that rights must be clearly specified, and, most importantly, the user of the land must have full access to and control over all inputs and outputs. This was almost entirely missing from Indian farms, and the Department of Indian Affairs had almost complete control over all inputs other than labour, and total control over the marketing of output. Aboriginal farmers had only very limited usufruct rights over the land.

Any production process such as farming requires a number of different inputs, typically classified as land, labour, capital, energy, etc., each of which contributes in a specific way to the production of the output. When property rights are poorly specified it is not clear how much of the value produced should go to each of these factor inputs. In particular, since no one owned the reserve land used for the farm, was there a return to that land? With no market, there was no explicit price, but the land was an essential factor input, and if it had been possible to sell productive reserve land, it would have commanded a price or rent, so there was an implicit return. The actions of the Department of Indian Affairs destroyed this value.

There may have been an informal market for labour on reserves, with some workers paid a fixed wage. With no one 'owning' the land, though, it is unclear why workers would not farm for themselves²⁷. For workers who assisted an Indian farmer, how much of the crops and animal products of the farm should have gone to each of those who worked to produce them? In the absence of payment of wages equal to the marginal value of what each worker produced, the commercially optimal amount of labour is not used.

In 1886 Dewdney, then Indian Commissioner, was instructed by the then Prime Minister, John A. Macdonald, to give land to individual Indians, though there was no legal basis on which to do so. There was a major advantage to the government in breaking up the reserves in this way, in that once every Indian had been allotted land, the remaining area of the reserve could be declared 'surplus', and sold to white settlers, as Figure Five shows.

Other factors that aggravated Indians' difficulties included the loss of their social capital, which had been focused on the bison hunt; the short summers that limited grain growing; the Indians' lack of farming expertise; and the disastrous economic position the Indians were in after the extinction of the bison.

Conclusion

Reserve agriculture got off to a very shaky start in the 1880s and 1890s. Indians tried to adapt to the new way of life, but a variety of technical and institutional constraints held them back. There was continuing hardship on the reserves, with frequent food shortages. The activities of Hayter Reed were certainly problematic, but he was not the only problem faced by Indian farmers. Once Reed was gone, with improved access to equipment and with wheat markets developing, farming progressed marginally, with some Indian farms developing a slight surplus, albeit far smaller than those of settlers.

In the early days of Canadian Prairie farming, with only hand equipment, there were few economies of scale, and the 160 acres settler were given was more than sufficient – most settlers farmed less. Over time, the economies of scale in grain production increased, as equipment improved and new seeds were developed, and settler farms expanded. As this happened, the magnitude of the problems caused by the constraints the Indians faced grew more acute, and the opportunity cost of their inability to grow increased.

An important issue was the way in which property rights on the reserves developed. Anderson and Hill observe that it is essential that property rights evolve from the bottom up. "Whether people fight over valuable resources or engage in cooperation

and trade depends on how property rights are defined and enforced²⁸.” Robak considers that people are more likely to obey laws that they have agreed²⁹. She notes that in the US: “allotment failed because it privatized the land among individuals without understanding the existing tribal and family structures or the property rights structure that accompanied it³⁰”.

The Indians` previous way of life, the nomadic bison hunt, was irretrievably lost, and with it went their social capital. Indian society had been well adapted to the previous way of life, and it could not change quickly to the new necessities. They were used to hard physical work, but did not have the expertise for market farming, particularly of grain. There were several years between the loss of the bison and the move onto reserves, during which many bands starved. Indians were therefore also highly demoralized when they settled on the reserves.

The issue of the legal subdivision of reserves is complex. In terms of neoclassical economic analysis, full individual property rights are essential for commercial success. However, that does not mean that that particular set of institutions would have worked for aboriginals, coming from their distinctive socio-economic history. Over the millennia, Indians evolved a set of institutions that were appropriate to their circumstances, involving communal activities and sharing institutions very different from those of the European settlers. These institutions had been adapted to the circumstances of the bison hunt, and at first had worked well. However, the intervention of the horse, the rifle, and subsequently the markets for the output of bison hides and the ‘input’ of alcohol had disrupted their society³¹. The mix of property rights institutions that developed on

reservations in the US was not successful, and it is clear that the institutions in place on the Canadian Prairies worked poorly.

It appears that, from their protestations at the constraints imposed, Indians wanted to participate in commercial farming. The Department of Indian Affairs sabotaged the early years, and Indian farms never did develop into viable large-scale operations. Some farmers gave up in frustration, and others did not start. A few prospered, but many had eventually to give up their status and move off the reserves away from the band in order to acquire the additional land they needed.

The interrelated problems of climate and technology eased by about 1900. The forced departure of Hayter Reed reduced but did not eliminate the racist attitude of the Department of Indian Affairs. Grain prices on international market rose, enhancing the profitability of wheat farming. A critical constraint that remained was that of property rights within the reserves. The basic structure was inappropriate to market activity, and a change to individual, exclusive ownership did not accord with the Indian social system. Indian farming was therefore hamstrung before it could develop.

The aggregate number of Indians was relatively small, and they had little political voice, so their needs were largely ignored. The primary objective of the Dominion government concerning Western Canada in the late nineteenth century was to gain political control, and to build markets for the manufacturing industry of the east. Indians were in the way, and had to be cleared off the land as quickly and cheaply as possible. Pushing them onto reserves, where they could eke out a subsistence living or be driven off, solved the problem at a minimal economic and political cost.

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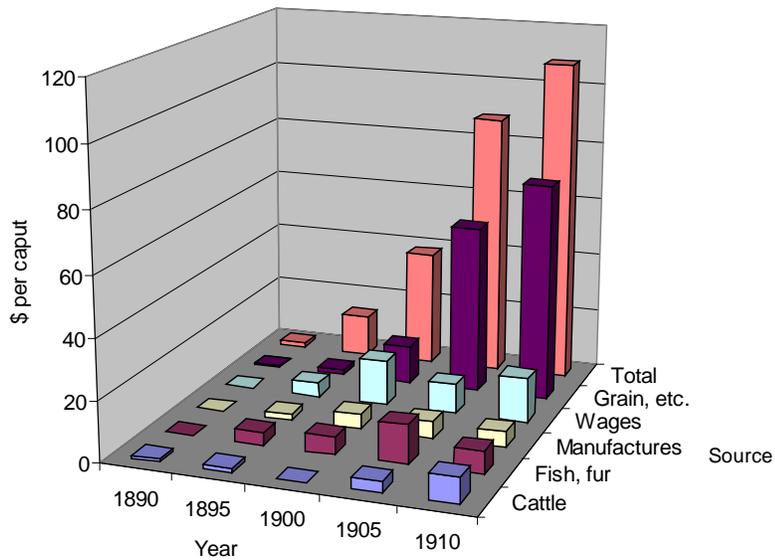
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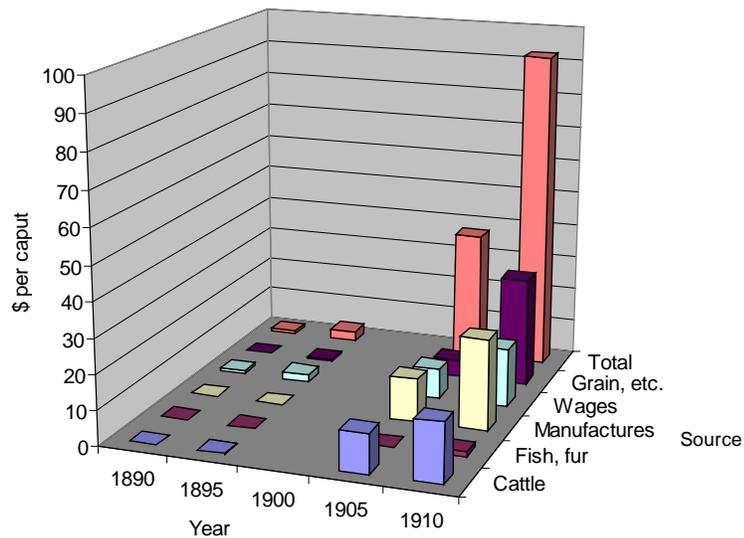
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Figure One
Birtle Reserve, Income per Capita, by source



Source: Canada: Sessional Papers, Reports of the Department of Indian Affairs

Figure Two
Blackfoot Reserve, Income per Capita, by source



Source: Canada: Sessional Papers, Reports of the Department of Indian Affairs

Figure Four
Indian Reserve Number 65, 1909

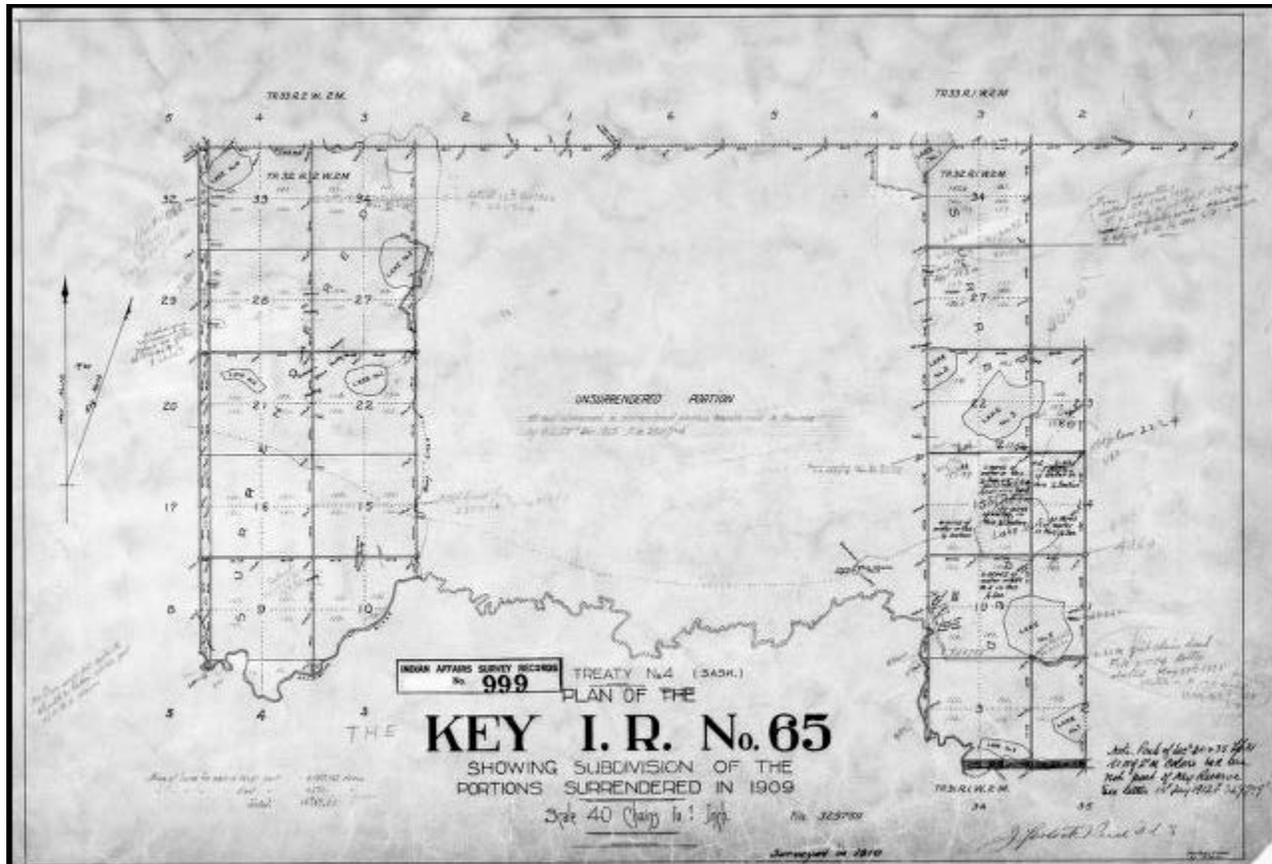
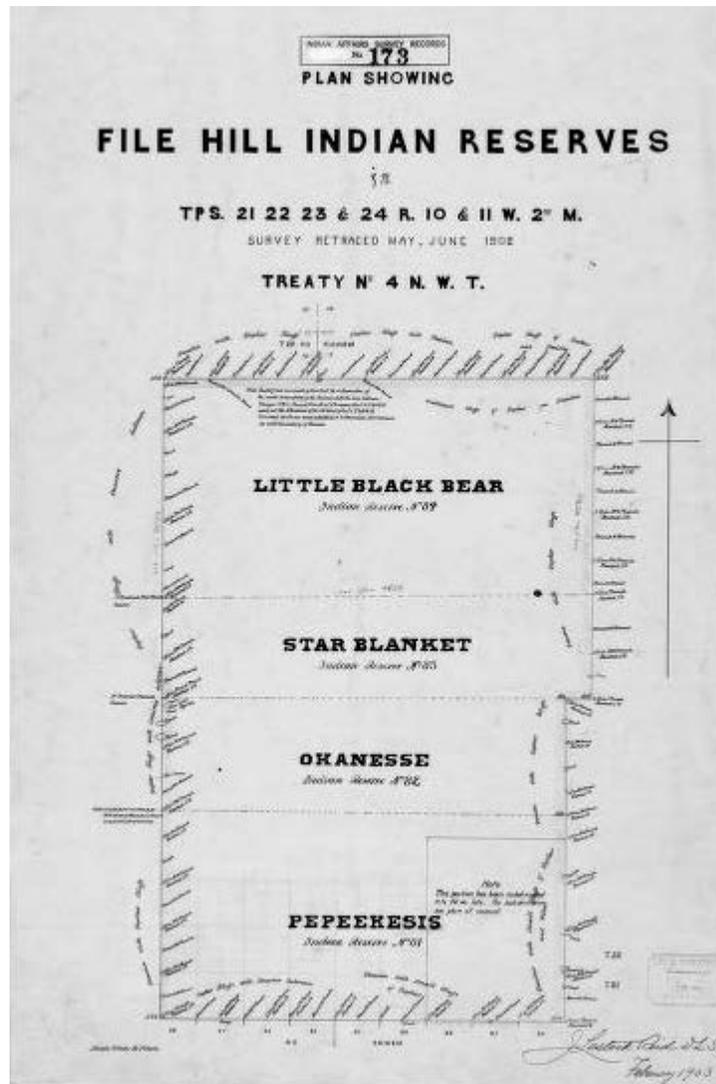


Figure Five
Pepeepkesis, Okanesse, Star Blanket and Little Black Bear Reserves, NWT, 1902



Notes

¹ I acknowledge the helpful comments on other versions of this project by participants at : the Canadian Network for Economic History Conference; International Congress of Historical Sciences; Canadian Economics Association Conference; Twentieth International Congress of Historical Sciences, Canadian Network for Economic History Conference; “Homesteading Reconsidered” Conference, University of Nebraska; Asia-Pacific Business and Economic History Conference, Gakuin University, Tokyo 2009, 15th World Economic History Congress 2009, First World Congress of Environmental History, 2009

² Nicholson,

³ Forbis 1992, cited in Nicholson, 58

⁴ I use the term Indian here as equivalent to other ways of referring to the aboriginal people of the North America. In Canada the term “First Nation” is commonly used, but this does not have currency outside Canada

⁵ Hämäläinen 2003, 834

⁶ When hunting with bows and arrows, the ownership of a kill could be claimed by markings on the arrow. The rifle did not have this advantage.

⁷ Denhardt, 1947, 103

⁸ Ewers: (187, 191)

⁹ Isenberg 60

¹⁰ Isenberg 2000

¹¹ Otsuka, Keijiro. “Peasants” In: Durlauf, Steven N. and Lawrence E. Blume (eds.) *The New Palgrave Dictionary of Economics* (2nd. Ed.) On-line 12 July 2013

¹² Initially, some tribes received 640 acres per household, but this was not in grain-growing areas, and didn’t last long.

¹³ The Metis people were the descendants of fur traders (mostly French, some English) and Indians.

¹⁴ Report of the Department of Indian Affairs, 1886, p 133.

¹⁵ Morris 1880, Appendix, 333

¹⁶ Canada, House of Commons, Sessional Papers, 1889, Vol. 23 #12, p 48.

¹⁷ Titley, 103

¹⁸ Carter, 1990, 212-13.

¹⁹ Report of the Department of Indian Affairs, 1901, p. 92.

²⁰ Governor George Gilmer, cited in Utley 1984, 36.

²¹ Italics added

²³ Carter 1990.

²⁴ Carlson 1981, 133.

²⁵ Honoré, pp165 – 179.

²⁶ Clarke and Kohler, 2005

²⁷ The same factor resulted in a lack of wage labour for European settlers during early settlement (Ward 1994).

²⁸ Anderson and Hill 2004, 14.

²⁹ Robak 1992, 7.

³⁰ Robak 1992, 22.

³¹ Isenberg 2000.