"PRIVATIZE RESERVE LANDS? NO. IMPROVE ECONOMIC DEVELOPMENT CONDITIONS ON CANADIAN INDIAN RESERVES? YES."

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Abstract / Résumé

This paper responds to Susan Campbell's "On 'Modest Proposals' to Further Reduce the Aboriginal Landbase by Privatizing Reserve Land" that appeared in *The Canadian Journal of Native Studies* XXVII: 2 (2007). Specifically, this paper suggests that her characterization of Alcantara's work as supporting the privatization of Reserve lands is inaccurate. Instead, the original article and the ones published afterwards argue that it is possible to use market-based approaches to improve economic development conditions on Canadian Indian Reserves. To do so, however, does not require the privatization of Reserve lands.

L'auteur répond à l'article de Susan Campbell intitulé « On 'Modest Proposals' to Further Reduce the Aboriginal Landbase by Privatizing Reserve Land » qui est paru dans la *Revue canadienne des études autochtones* (XXVII, 2, 2007). Plus particulièrement, le présent article soutient que la caractérisation par S. Campbell du travail de C. Alcantara comme un soutien à la privatisation des terres de réserve est inexacte. Au contraire, l'article original et les autres publiés subséquemment mettent de l'avant qu'il est possible d'avoir recours à des approches axées sur le marché pour améliorer les conditions du développement économique des réserves indiennes au Canada. Pour y arriver, par contre, il n'est pas nécessaire de privatiser les terres de réserve.

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In a recent edition of *The Canadian Journal of Native Studies*, Susan Campbell argues that my article, "Individual Property Rights on Canadian Indian Reserves," advocates for the privatization of all Aboriginal reserve lands in Canada. To show that privatization would be disastrous, she suggests that the *Dawes Act* in the United States had extremely negative consequences for its Indian tribes. Based on these experiences, she suggests Aboriginal peoples and policy makers in Canada should oppose and reject all market-based approaches to on-reserve economic development (Campbell, 2007: 34).

Unfortunately, she has misunderstood and mischaracterized my arguments as they relate to individual property rights and economic development on Canadian Indian reserves. Indeed, in none of my publications do I suggest that Canadian Indian reserves should be privatized. Rather, my work acknowledges that the privatization of Indian reserve lands as it occurred under the *Dawes Act* was disastrous. Nonetheless, the failure of the *Dawes Act* in the United States should not automatically lead to a rejection of all market-based approaches to Aboriginal economic development. Instead, my work suggests that it is possible for First Nations interested in participating in the market-based economy of Canada to do so successfully without having to sacrifice their core values and beliefs, including those relating to land tenure.

To defend these arguments, this paper is divided into three sections. The first analyzes several statements in Campbell's article that supposedly indicate that I advocate the privatization of reserve lands. The second section reviews the key findings of my work on individual property rights on Canadian Indian reserves to show how existing property rights regimes have greatly hampered Aboriginal efforts to engage in economic development. The final section discusses several ways that Aboriginal groups interested in participating in the Canadian economy can improve their prospects for successful economic development. None of these suggestions advocate or require the privatization of reserve lands.

Aboriginal Property Rights and Privatization

In my original *CJNS* article, published in 2003, I wrote that "the CP [Certificates of Possession] system gives individual Indians living on reserves property rights that fall somewhere between fee simple [i.e. outright ownership] and life estate interests." Campbell (2007: 221) quotes this statement before providing the following commentary: "Alcantara skated over the *qualitative* difference between reserves as they are now and as they would be—or cease to be—if privatized" (the emphasis is Campbell's). Campbell (2007: 221) also states that "Alcantara implied

that privatization of reserve land would be a modest step in the right direction, one that might even be couched in terms compatible with Aboriginal self-government, or more accurately 'self-administration.'" Her analysis of my original article, however, is inaccurate. Neither my original quote above, nor any other statements in my original article, implied that privatization of reserve lands should occur. Instead, the article simply described how the CP system worked and what historical conditions facilitated its creation. The original paper also offered some suggestions for reforming the CP system, which included modifying the *Indian Act* to deal with the division of matrimonial real property, giving band councils greater control over the granting of leases on Indian reserves, and removing the federal Department of Indian Affairs from CP transactions (Alcantara, 2003: 419-420).

Clarifying the Argument: The *Indian Act* Creates Significant Drag on on-Reserve Economic Development

So what do I in fact argue? Here, it would be helpful to reflect on some of the findings that Tom Flanagan and I have produced since the publication of the first two articles cited by Campbell (Alcantara, 2003; Flanagan and Alcantara, 2004). The puzzle that our research is trying to address is the persistence of poverty on many Canadian Indian reserves. Based on empirical work completed on reserves in British Columbia, Alberta, and Ontario, we suggest that a major source of drag on on-reserve economic development is the *Indian Act.* According to the act, all lands reserved for Indians are held by the Crown to be used by Indian bands to occupy and live on. In practice, however, the bands, through their band councils, exercise primary usage and occupancy rights over all reserve lands (Alcantara, 2007: 424). Band members can gain individual possession of reserve lands through three mechanisms: customary rights, certificates of possession (CPs), and leases. Under customary rights, band members can take possession of a tract of land either through a band council resolution recognizing their ownership, or through informal recognition by community members. In either case, however, the individual's customary rights are not legally enforceable in Canadian courts, meaning that the use of said lands is at the discretion of the band council (Flanagan and Alcantara, 2006).

The second form of property right under the *Indian Act* is the certificate of possession. CPs provide a stronger form of property right to band members because they have a statutory basis. Once granted, CPs are enforceable in Canadian courts, meaning that band councils and other individuals cannot interfere with the band member's use of her

land. The main weakness of CPs, however, is the significant transaction costs stemming from the time it takes to complete CP transactions. An allotment usually requires the approval of the band council and the Minister of Indian and Northern Affairs. Approval from INAC can be particularly time consuming, with one case at Six Nations, near Brantford, Ontario, taking ten years to complete. Transfers and wills can also be time consuming because they require the approval of INAC before they can be completed (Alcantara, 2005).

The final individual property right is the lease, which is quite similar to a lease off-reserve. *Indian Act* leases, unlike the other property regimes, are fully tradable and can be used as collateral for loans and mortgages. First Nations in British Columbia and Alberta have successfully used leases to construct golf courses, commercial developments, and residential developments on their reserve lands. Unfortunately, leases also suffer from significant transaction costs since individuals desiring leases must seek the approval of the band council and/or the Minister of Indian Affairs, depending on the type of lease. As well, some of the leases are administered by Indian Affairs, thus weakening tribal sovereignty. Finally, the courts have called into question the economic viability of such leases. In 2000, the Supreme Court of Canada in *Musqueam v. Glass* ruled that the unique features of reserve land may result in reserve lands having lower land values than their off-reserve equivalents. As a result, First Nations governments and individuals may have to charge lower rents to off-reserve residents who lease their lands (Flanagan and Alcantara, 2005).

Our Solutions

In light of these findings, perhaps surprisingly to Campbell and others, we do not advocate for the top-down imposition of fee simple title writ large and the immediate and universal abolition of Indian reserves in Canada. Indeed, we are highly cognizant of the failure that privatization wrought on American Indian reservations during the *Dawes Act* era. Building on the lessons from that time period, we instead offer some practical suggestions for how interested First Nations might reduce the drag on development that the *Indian Act* has imposed on them. For instance, with respect to customary rights, we suggest that the bands fully document their customary rights through formalized surveys and recording practices, appoint independent committees to oversee their administration, and create rules or foster norms that require band councils to treat these customary rights as legally binding contracts. We also suggest that First Nations consider creating independent dispute resolution mechanisms or First Nation Courts for dealing with disputes relat-

ing to customary rights (Flanagan and Alcantara, 2006: 155-157).

With respect to CPs, I suggest in an article published in *Canadian Journal of Law and Society* that the Department of Indian and Northern Affairs Canada be removed from CP transactions. To do so would require using ss. 53 and 60 of the *Indian Act,* which allow the Governor-in-Council to assign control and management of reserve lands to band councils, or to use other institutional mechanisms like the *First Nations Land Management Act* (*FNLMA*) or negotiated self-government agreements (Alcantara, 2005: 199-200; Alcantara, 2008a). Indeed, my research on the *FNLMA* found that the land codes emerging out of the legislation could significantly reduce transaction costs because they allowed First Nations to exit the land management provisions of the *Indian Act*. Quoting economic historian Leonard Carlson, an authority on the *Dawes Act,* I suggest that the *FNLMA* was a positive development for First Nations interested in pursuing market-based economic development because it allowed Aboriginal peoples "to adapt or retain those features of traditional culture that they chose and to accept or reject ideas and values taken from White society with a relatively small amount of interference from federal agents" (Carlson, 1981: 176-177, quoted in Alcantara, 2007: 431).

Furthermore, we do not suggest that all First Nations in Canada should adopt these proposals. Instead, "we offer a few suggestions for how customary rights [and the other property regimes] could be made to work better for those First Nations that find them to be a good fit with their culture but who also wish to participate successfully in the modern economy" (Flanagan and Alcantara, 2006: 155). In a recent article of mine (Alcantara, 2008b), I suggest that Aboriginal and federal policy makers adopt the principle of subsidiarity when engaging in Aboriginal policy reform. In essence, using the *FNLMA* as a template, different First Nations should consider negotiating with the federal government to establish locally-sensitive framework legislation on the issue of individual property rights. Currently, First Nations have access to three types of land management regimes: the status quo of the *Indian Act* as described above, negotiated self-government agreements, and the *FNLMA*. The latter regime is most interesting because of its potential for solving not only the land management problem, but also other problems relating to Aboriginal public policy in Canada. The *FNLMA* came about as a result of fourteen First Nations who approached the federal government to create a new legislative framework. They hoped to use this framework to exit the relevant provisions of the *Indian Act* to create their own land management regimes. One could imagine other First Nations collectively negotiating alternative legislative frameworks with the federal govern-

ment that were more relevant to their particular needs.

Conclusion

Campbell's article is correct to cast significant doubt on suggestions that Canada emulate the privatization model adopted in the United States. Unfortunately, she is incorrect to suggest that my research advocates this position. Instead, my work identifies several significant obstacles to successful Aboriginal economic development on Canadian Indian reserves and offers a number of market-based solutions that First Nations should consider if they are interested in participating in the Canadian economy. Further work is needed on whether market-based approaches can be integrated with Aboriginal traditional values to produce what David Newhouse calls "red capitalism" (Newhouse, 2000). My work, so far, suggests that this integration is possible and that the privatization of Canadian reserve lands is neither necessary nor desirable.

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