

The Criminalization of Non-Assimilation and Property Rights in the Canadian Prairies

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I. INTRODUCTION

The tragic case of Colten Boushie, a young Indigenous man from Saskatchewan, has become an inflection point in Canadian law due to the intersection of Indigenous rights and property law. Boushie was shot and killed by Gerald Stanley, a white man, at his farm; he was subsequently found not guilty of his murder. Boushie's mother, Debbie Baptiste, was informed of her son's death by the Royal Canadian Mounted Police (RCMP) when they entered the family home in the middle of the night, waking small children by their unannounced entry. When Baptiste fell to the ground due to the overwhelming grief over the news of her son's death, the RCMP accused Baptiste of drinking and told her to "get herself together."¹

One question that the Colten Boushie case brings sharply into focus is how policies in Canadian property law have privileged white settlers' property rights as a result of the subjugation of Indigenous human rights. This has created a position of "tutelage" under property law for Indigenous peoples, which was adopted when Canada inherited sovereignty and underlying title to Canadian land from previous European powers which had been present in North America.² The racist policies of assimilation, which are the foundation of Canadian property laws, have helped to form

¹ David McDonald, "Colten Boushie And Settlers' Justice" (13 February 2018), online: *The Tyee* <thetyee.ca/Opinion/2018/02/13/Colten-Boushie-Settlers-Justice/> [perma.cc/9ARW-XADK].

² Gina Starblanket & Dallas Hunt, "How Colten Boushie's Death Became Recast as Story of a Knight Protecting His Castle", *The Globe and Mail* (13 February 2018), online: <www.theglobeandmail.com> [perma.cc/K2CU-44FY].

the legal injustice of the Boushie case; its basis originated in the settler state policy of the “civilization” of Canada’s original inhabitants.

By analyzing how, arguably, the majority of settler-state property law was set up to negate the rights of Indigenous peoples, I intend to emphasize how the concept of defending one’s property has not only allowed Gerald Stanley’s “exculpation from blame”, but also a “tacit justification” of the murder of another human being.³ What is required to correct this is an overhaul of the Canadian property law system, with a focus on negating the abuse of Indigenous men and the abuse of the property law system itself. To acknowledge these abuses to their fullest extent, however, would be acknowledging the shortcomings of a legal property framework that created a country. The implications in making significant changes in property law going forward are substantial.

A. “A Man Defending His Property”

On August 9, 2016, Colten Boushie, a member of the Red Pheasant Cree Nation, and four of his friends drove onto Gerald Stanley’s farm, looking for help with a flat tire.⁴ Stanley testified that he thought the group was trying to steal an all-terrain vehicle and confronted the occupants of the SUV before returning to the house, where he grabbed a semi-automatic pistol and fired two warning shots in the air, saying that he feared his wife had been run over by the SUV that Boushie and his friends had driven onto the property.⁵ Approaching the vehicle with the same gun in his hand, Stanley claimed to reach inside the SUV to turn off the engine and that in the struggle, the gun in his hand “just went off”, shooting Colten Boushie in the back of the head as he sat in the front seat.⁶ Stanley testified at trial

³ Jake Barrett-Mills, Book Review of *Canadian Justice, Indigenous Justice: The Gerald Stanley and Colten Boushie Case* by Kent Roach, (2019) 5:2 *Transmotion* 113 at 113.

⁴ Kent Roach, “Colten Boushie, Gerald Stanley and a case that’s hard to defend”, *The Star* (20 January 2019), online: <www.thestar.com/news/canada/> [perma.cc/E2H8-M3ZJ]; Kent Roach, “Gerald Stanley and Colton Boushie Case” in *The Canadian Encyclopedia* (online: *The Canadian Encyclopedia*, last modified 10 February 2020) [Roach, “Boushie Case”].

⁵ Roach, “Boushie Case”, *supra* note 4.

⁶ *Ibid.* See also Jason Warick, “‘I just wasn’t thinking straight’: Gerald Stanley cross-examined at his 2nd Degree Murder Trial”, *CBC News* (5 February 2018), online: <www.cbc.ca/news/canada/saskatoon/gerald-stanley-trial-lawyer-defence-case-1.4519655> [perma.cc/B58A-L8KT].

that his gun went off accidentally and a “jury of his peers” believed him.⁷

In his opening statement, Mr. Stanley’s lawyer framed the death of Colten Boushie as a man defending his property.⁸ Gerald Stanley’s farm and life in the Saskatchewan Prairies, in general, were portrayed as places where one’s home is one’s castle: “for farm people, your yard is your castle. That’s part of the story here.”⁹ While the current state of property law in the Prairies was acknowledged during the trial, what went unspoken was the connection in Canadian property law between the development of white settlers’ property rights as the result of the subjugation of Indigenous human rights. Boundaries between the defence of property and self-defence (despite self-defence never being employed by Stanley throughout the trial) became fluid partners throughout the trial and haunted the case, seemingly relieving Stanley of guilt and responsibility without him, or any other white male landowner, giving up “land or power or privilege.”¹⁰ Canada, as a settler state that has undermined Indigenous human rights and continues to punish the non-assimilation of Indigenous individuals, has developed property laws which have unintentionally or intentionally (depending on who you ask) provided one of the leading framing devices for this controversial court case, potentially one of the most controversial in Canadian history. The implications that it exposes are numerous.

The case for property law reform in the Canadian Prairies and, consequently, human rights reform, will be explored in several ways throughout the course of this paper. First, I will explore how settler state policies formed the foundation of Canadian property law as racist policies of assimilation. I will also outline the history of these policies and how they controlled Aboriginal title and formed the justifications for the property regime. Secondly, I will analyze the current regime and legislation supporting these policies of assimilation, as well as Indigenous perspectives on these issues. This will be supported by a history of case law, which has led to the criminal association of non-assimilation with property laws. Lastly, I will explore the cultural impact and the framing of Indigenous

⁷ J Duncan, “The Legal Trial of Gerald Stanley: A Second Look at the Case Through the Lens of Law” (12 March 2018), online (blog): *Robson Crim* <www.robsoncrim.com/post/2018/03/12/the-legal-trial-of-gerald-stanley-a-second-look-at-the-case-through-the-lens-of-law> [perma.cc/QW2B-4ETZ].

⁸ Starblanket & Hunt, *supra* note 2.

⁹ Warick, *supra* note 6.

¹⁰ Eve Tuck and K Wayne Yang, “Decolonization is Not a Metaphor” (2012) 1:1 *Decolonization: Indigeneity, Education & Society* 1 at 21.

peoples as “others.” I will also look at how this failure to acknowledge has led to the dominant basis of the Canadian legal system being the protection of white settler property that allows racial discrimination to continue.

The gravity and potential repercussions of the Colten Boushie case have been shown, as it has moved to an international stage. For example, at the United Nations Permanent Forum on Aboriginal Issues, the Boushie case has been presented by members of the Boushie extended family as a human rights infraction that should be investigated.¹¹ This very human aspect of Canadian property law and its racist history need to be acknowledged in order for change to be implemented. The Colten Boushie case is a microcosm of bigger property law issues in Canada and how they are tied to Canadian law’s legal relationship and treatment of Indigenous peoples under the law, a treatment which demands reform. This is not an “Indigenous issue or a Canadian issue – it is a human-rights issue.”¹²

II. SETTLER PROPERTY HISTORY IN CANADA AND THE LOCKEAN MOLD

A. A Brief History of Civilization in Canada

There is a long history of property law in Canada used to justify human rights abuses and disqualify Indigenous peoples’ rights to their land. “French sovereignty in what is now Eastern Canada passed to Great Britain through the Treaties of Utrecht (1713) and Paris (1763). Canada inherited these rights when the Dominion was formed in 1867.”¹³ One of the most widespread beliefs about the historical Indigenous concept of property in North America is the belief that Indigenous peoples, upon European settlement, had no concept of property in the Western sense – that is, that they had no concept of property as ownership over the land and property

¹¹ The case could not be retried because it was found to lack an error of law to be retried on. See David Giles, “Colten Boushie’s family wants UN to investigate ‘systemic bias’ in Canada’s justice system”, *Global News* (1 May 2018), online: <globalnews.ca/news/4179976/colten-boushies-family-wants-un-to-investigate-systemic-bias-in-canadas-justice-system/> [perma.cc/ES8C-FKPJ].

¹² Kelly Geraldine Malone, “Family of Colten Boushie Speaks at UN Forum”, *The Star* (17 April 2018), online: <www.thestar.com/news/canada/2018/04/17/family-of-colten-boushie-speaks-at-un-forum.html> [perma.cc/YUV2-CXUZ].

¹³ Thomas Flanagan, André Le Dressay & Christopher Alcantara, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (London, ON: McGill-Queen’s University Press, 2010) at 27.

that they occupied and possessed.¹⁴ The overwhelming narrative from explorers to the New World has supplemented this sentiment, stating that Indigenous peoples were “savages” and “utter strangers to the distinction of property.”¹⁵

B. The Lockean Mold and its Basis for Western Property Law

This belief in the inherent superiority of the Western concepts of property was supplemented by the beliefs of English Philosopher John Locke.¹⁶ The Lockean concept of private property was the basis for the development of property rights under the law from administrators arriving from Europe and it is the basis of most Canadian property law.¹⁷ It also provided a basis for the justifications of the European regimes to take land from Indigenous peoples.¹⁸ In Locke’s concept of property, “every man has a property in his person” or, in other words, every man has a right to property in which they have laboured upon.¹⁹ Locke emphasized the act of agriculture as the prime rite of passage to this proprietary right, and the Lockean concept of property was put to use to justify English colonial domination for centuries to come.²⁰

C. The Policy of “Civilization” and Aboriginal Title

This policy of “civilization” of the settled land of Canada meant, as Flanagan, Dressay & Alcantara put it:

[R]econstructing... [Indigenous peoples'] property rights in a Lockean mode.... Locke’s theory was capricious enough to recognize the property rights of hunting-and-gathering people; indeed, Locke started his train of thought about property with a foraging example - gathering acorns... Later writers in the Lockean tradition, such as Swiss publicist Emer de Vattel, postulated an actual right of agriculturalists

¹⁴ *Ibid* at 30–31, 42, 60.

¹⁵ James A Clifton, *The Invented Indian: Cultural Fictions and Government Policies* (New Brunswick, NJ: Transaction Publishers, nd) at 145.

¹⁶ David Snyder, “Locke on Natural Law and Property Rights” (1986) 16:4 *Can J Philosophy* 723.

¹⁷ *Ibid*. See also Flanagan, Dressay & Alcantara, *supra* note 13 at 60.

¹⁸ John Douglas Bishop, “Locke’s Theory of Original Appropriation and the Right of Settlement in Iroquois Territory” (1997) 27:3 *Can J Philosophy* 311.

¹⁹ Flanagan, Dressay & Alcantara, *supra* note 13 at 60. See also John Locke & CB Macpherson, *Second Treatise of Government* (Indianapolis, Ind: Hackett, nd) at para 27.

²⁰ Locke & Macpherson, *supra* note 19 at para 50; Flanagan, Dressay & Alcantara, *supra* note 13.

to take land from hunter-gatherers because they (the farmers) would make better use of it.²¹

Historians have argued, however, that this hunter-gather portrayal of the Indigenous populous upon settlement was a creation to justify furthering this Lockean philosophical ideal.²²

Flanagan, Dressay & Alcantara further explain that:

Ignorant of the complex array of property rights that... [Indigenous peoples] had evolved for themselves in the New World,... [Europeans] tended to see... [Indigenous peoples] as hunting and gathering on the land but not otherwise owning it - in short, people without property. They saw property rights not as an outgrowth of the [Indigenous]... culture but as something wholly new that would have been introduced to them as part of the civilizing process. [Indigenous peoples]... had no property rights in the present, but they would have to adopt them in the future to become civilized. It was also completely individualistic;... [Indigenous peoples] would have to adopt individual ownership in fee simple as that concept had developed in British law. There was little appreciation of the complex web of communal, family, and individual rights that were already a part of Indigenous hunting and farming cultures. As historian Sarah Carter put it, some colonials believed that private property would help [Indigenous people] better focus their "hopes, interests, and ambitions. Lacking a fixed abode, they could have no notion of proper family life." The introduction of private property would also quell the violent tendencies that colonials believed to be inherent in... [Indigenous] peoples. "Most Canadians believed that private ownership of property and possession would put an end to Indian warfare, which was viewed as an irrational, bloodthirsty sport, perpetuated endlessly because the... [Indigenous peoples] had little property to lose." Government officials, therefore, saw agriculture and private property as necessary elements for Aboriginal peoples to climb out of savagery towards civilization. Government encouraged Christian missionaries to bring religion, education, and Western concepts of farming and property to the "backwards"... [Indigenous peoples].²³

III. INDIGENOUS LAW CONCEPTS OF PROPERTY IN CANADA

Scholars find inspiration from Western philosophers who saw property rights as evolving through time in a historical context along with other social institutions, as in the works of David Hume, John Stuart Mill, and Friedrich Hayek.²⁴ This approach forms the basis of the view of natural

²¹ Flanagan, Dressay & Alcantara, *supra* note 13 at 60 [footnotes omitted].

²² Eric Dannemaier, "Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine" (2008) 86:1 Wash University L Rev 53.

²³ Flanagan, Dressay & Alcantara, *supra* note 13 at 61 [footnotes omitted].

²⁴ *Ibid* at 16.

rights to property and supports the Indigenous belief that property rights of Indigenous peoples are always present.²⁵ However, settler state law has not reflected this belief; indeed, it has been outright repudiated in Canadian courts over the years, in favour of the Lockean interpretation of property rights.²⁶

Some Indigenous scholars believe that because Canadian law has been formed through a bijuralist mixture of common and civil law, Indigenous law “has often been overlooked by Canadian courts because of its perceived incompatibility with” the Canadian legal landscape.²⁷ Because Canadian courts did not rely on Indigenous sources during its creation and characterization of Aboriginal rights under Canadian law, Aboriginal land rights were obstructed and framed from a settler-state viewpoint. Settler law can be seen to embed itself in every attempt to change it.²⁸ Many sources of Aboriginal evidence, often in the oral tradition, were traditionally rejected under strict interpretation of Canadian evidence law.²⁹ This resulted in very little protection of Indigenous peoples in their own terms, despite traditions and stories of Indigenous peoples that could have been framed as case law precedents.

In particular, Canadian scholar John Borrows suggests that the traditions and stories of First Nations are analogous to legal precedents because they attempt to provide reasons for broad community principles and criticize deviations from these accepted standards.³⁰ He also maintains that “common law cases and Aboriginal stories are... similar because both record fact patterns of past disputes and their related solutions... [, while being regarded] as authoritative by their listeners.”³¹ Throughout Indigenous stories and histories, there are “natural, moral and cultural sanctions” for non-adherence to community values and principles, much

²⁵ Mary L Caldbick, *Locke's Doctrine of Property and the Dispossession of the Passamaquoddy* (Master of Arts, University of New Brunswick, 1997) [unpublished].

²⁶ *Ibid.*

²⁷ See e.g. John Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill LJ 629 at 629.

²⁸ Crawford Kilian, “Colten Boushie: A Final Exam We’re Flunking” (11 June 2020), online: *The Tyee* <theyee.ca/Culture/2019/06/11/Colten-Boushie-Final-Exam/> [perma.cc/Q96n-MAHE].

²⁹ Mary Ann Pylpchuck, “The Value of Aboriginal Records as Legal Evidence in Canada: An Examination of Sources” (1991) 32 *Archivaria* 51.

³⁰ Borrows, *supra* note 27 at 647.

³¹ *Ibid.*

like the common law.³²

However, where Indigenous stories differ from common law precedents is the way that they are recorded and applied,³³ which can lead to difficulty in allowing Aboriginal law to become a respected source under Canadian common law. Indigenous peoples “use an oral tradition in order to chronicle important information”; non-ceremonial stories can change from one telling to another, which does not seemingly fly in the face of common law precedent.³⁴ This is justified, however, by stating that modification of these stories and the reinterpretation of many of the stories’ elements recognize that the context of stories are always changing and need to be adopted to the time and place of the listeners. This allows for a constant recreation of Indigenous systems of law.³⁵

However, there is always the counterargument that settler state law cannot discern, apply, or accommodate Indigenous legal principles. Moreover, perhaps attempting to allow Aboriginal law to enter a common law system could constitute further assimilation. As a result, many tribes, especially in British Columbia, have created well-defined boundaries for the lands that they own, as well as creating new forms of private property ownership under Aboriginal law.³⁶ New treaties in British Columbia have resulted in the Nisga’a, Tsawwassen, and Maa-nulth First Nations adopting forms of a Torrens system of property ownership. This is to negate aspects of *The Indian Act*, which itself has created a position where property is not collectively owned by members of the reserve but held in trust by the Crown for Indigenous peoples’ use and benefit.³⁷

Because private property cannot be owned by individuals on a reserve, some Indigenous band members argue that property that is not owned is treated accordingly: trashed or neglected in a manner one would not treat one’s owned property.³⁸ Other scholars, such as Laurie Meijer-Drees, argue

³² *Ibid.*

³³ *Ibid* at 648.

³⁴ *Ibid.*

³⁵ See generally EJ Dickson-Gilmore, “Finding the Ways of the Ancestors: Customary Change and Invention of Tradition in the Development of Separate Legal Systems” (1992) 34:3/4 *Can J Crim* 479.

³⁶ See generally Christopher Alcantara, “Individual Property Rights on Canadian Indian Reserves: The Historical Emergence and Jurisprudence of Certificates of Possession” (2003) 23:2 *Can J Native Studies* 391.

³⁷ *Ibid.*

³⁸ Judith Lavoie, “Housing Issue Muddied by Neglect”, *Times Colonist* (9 February 2009), online: <www.timescolonist.com/news/local/housing-issue-muddied-by-neglect-1.1641

that the system of reserve “social engineering” implemented after the end of World War II placed Indigenous peoples into a European system of property that had little to do with their history and, therefore, it created a system of paternalistic dependency.³⁹ Thus, it is important that Canadian judges have access to Indigenous examples of property rights as a counterpoint, as it can be a culturally appropriate way to answer many of the issues that property law poses for Indigenous peoples because of the historical development of Canadian law.⁴⁰

IV. HOW CURRENT PROPERTY RIGHTS ARE STILL SHAPED BY EARLY TREATIES AND DISCRIMINATION

Canadian federal government policy has historically implemented legislation with the end goal of having Indigenous peoples “civilized” or assimilated. Indeed, reserves were initially established to provide for the survival and development of Indigenous peoples to adopt a settled and “civilized” way of life, with control and management of the lands vested in the federal government.

A. The *British North American Act*

The *British North American Act*⁴¹ was the first document that granted Canada exclusive and extensive control over Aboriginal rights and land. The Act also granted the Crown the unilateral power to extinguish these rights as it saw fit. The assimilation policy continued from the British imperial government before it, which had three distinct prongs: firstly, assimilation through miscegenation and education; secondly, claimed provisions for the protection of Indigenous peoples from extermination (which went unenforced); and thirdly, centralization, where Indigenous peoples were deprived of their land and placed on reserves in order to be more “well maintained.”⁴²

6> [perma.cc/3434-ZKZS].

³⁹ *Ibid.*

⁴⁰ See generally W Pue, “Evolution by Legal Means” in HP Glenn, ed, *Contemporary Law 1994 Droit contemporain* (Montréal: Yvon Blais, 1994) 1.

⁴¹ *Constitution Act, 1867* (UK) 30-31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*].

⁴² David T McNab, *No Place for Fairness: Indigenous Land Rights and Policy in the Bear Island Case and Beyond* (London, ON: McGill-Queen's University Press, 2009) at 20.

The importance of the third prong of The *British North American Act* cannot go underestimated. By centralizing Indigenous peoples and depriving them of their land, the Canadian government was effectively removing Indigenous peoples from a defining part of their culture and identity while placing them in a position of vulnerability.⁴³ It also placed Indigenous peoples in a property scheme that only the Canadian government could control.⁴⁴

This approach to Canadian property, that excluded Indigenous peoples, lasted until the Supreme Court of Canada ruling in *Delgamukkw v British Columbia* in 1997.⁴⁵ While *Delgamukkw* challenged the contention that Aboriginal title had been extinguished in British Columbia, in particular, it did not challenge Canadian sovereignty over all other Canadian lands, and many aspects of *The Indian Act* were redressed in the ruling.⁴⁶

B. The *Indian Act*

The *Indian Act*⁴⁷ is arguably the most important piece of settler-state legislation regarding Indigenous peoples in Canadian legislative history. It enveloped all previous settler-state legislation into one act, and it was formed with the parliamentary intention of lifting “the red man... out of his condition of tutelage and dependence” and to place Indigenous peoples in a place of manhood.⁴⁸

While the legislation’s openly racist intentions speak for themselves, it also created two systems of landholding:

[I]n the first, “non-enfranchised... [Indigenous peoples] could hold lawful possession (life estate) of reserve lands allotted to them by... [an Indigenous] council with a location ticket issued by the superintendent-general. Under the second... [, Indigenous peoples] enfranchised under sections 86 and 88 [of *The Indian Act*] could gain a fee-simple interest to reserve lands, and upon their death, the lands would go to their children in fee simple.”⁴⁹

However, in the Indigenous communities, these were seen as temporary

⁴³ *Ibid* at 20–30.

⁴⁴ *Ibid*.

⁴⁵ [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamukkw*].

⁴⁶ *Ibid* at paras 4, 37, 40, 51, 70, 81, 114, 141.

⁴⁷ RSC 1985, c I-5 [*The Indian Act*].

⁴⁸ Brett Popplewell, “A History of Missteps [Policy Re: First Nations]” (31 October 2010), online: *Social Policy in Ontario* <spon.ca/a-history-of-missteps-policy-re-first-nations/2010/10/31/> [perma.cc/49Z6-HXN].

⁴⁹ Flanagan, Dressay & Alcantara, *supra* note 13 at 67.

measures designed to assimilate Indigenous “peoples into mainstream society.”⁵⁰ Métis families were also initially limited to possessing a maximum of 160 acres for a family of five under section 125 of the *Dominion Lands Act*, as opposed to white settlers, who could gain a free tract of land from between 160 to 320 acres per head in their family.⁵¹ The historical privileging of white European settlers over Indigenous peoples with regards to land ownership was written into Canadian law from the early formation of property law.

Today, most reserves or Indigenous lands are provincial Crown lands and dedicated to a specific purpose under section 18 of *The Indian Act*; band councils are allowed to make some decisions, such as allowing individuals to take possession of certain areas of land on the reserve, but this decision can be overridden by the Minister at any time.⁵² Customary rights to land are often undocumented and cannot be enforced in Canadian courts, unlike certificates of possession or leases.⁵³ This has led to *The Indian Act* becoming a lightning rod for criticism amongst Indigenous communities for its regressive and paternalistic nature of Indigenous peoples not actually owning the land that they live on (with assets on the reserve not being subject to seizure under the legal process and matrimonial property laws not applying to assets on the reserve).⁵⁴ Members of Indigenous communities are limited in their ability to own land in fee simple title on reserves. This limitation also precludes Indigenous peoples from owning their homes and leveraging land in equity to invest in business opportunities, which places them at a pointed disadvantage relative to the population at large. The poor quality of property rights on many reserves results in higher rates of poverty, lower property values, and less commercial development, which leads to fewer opportunities for Indigenous individuals and a cycle of social inequality as a result of the property law system.⁵⁵

⁵⁰ *Ibid* at 71.

⁵¹ Canadian Geographic, *Indigenous Peoples Atlas of Canada* (Canada: Canadian Geographic, 2018).

⁵² *The Indian Act*, *supra* note 47, ss 18(1)–(2).

⁵³ TM Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials*, 3rd ed (Saskatoon, SK: Purich, 2004) at 3.

⁵⁴ Bob Joseph, *21 Things You May Not Know About the Indian Act: Helping Canadians Make Reconciliation with Indigenous Peoples: A Reality* (Canada: Indigenous Relations Press, 2018)

⁵⁵ Fernando M Aragon & Anke S Kessler, “Property Rights on First Nations’ Reserve Land” (2020) 53:2 *Can J Economics* 460.

According to the Auditor General of Canada, an investment project on reserve can cost up to four to six times more than an investment project not on reserve because investors must first establish tradeable property rights on a reserve in order to do business.⁵⁶

C. First Nations Land Management Act

The *First Nations Land Management Act (FNLMA)* was the first act enacted under federal law in 1999 that gave Indigenous peoples the authority “to create property rights regimes outside of the *Indian Act*.”⁵⁷ The *FNLMA* provided signatory First Nations groups their own ability to create property-right regimes in relation to reserve lands, resources, and environments.⁵⁸

The *Indian Act* provisions relating to land management no longer apply to First Nations bands that have ratified land treaties and have their authority to make their own reserve land allotments. As of April 2013, 35 First Nations bands are operating under their own land codes, and as of April 2014, 30 First Nations bands are developing their own land codes.⁵⁹ However, the issue raised is that only part of *The Indian Act* is negated and that only signatories are included. In practice, this means that the negation of *The Indian Act* under law only extends to those who have developed their own land codes.

D. Case Law

Property rights in terms of both legislation and case law did not develop until the late 20th century. Rights that were previously recognized and subject to constitutional and legislative extinguishment have now become powerful, constitutionally protected rights. The Privy Council held in *St. Catherine’s Milling and Lumber Co v R* that Indigenous peoples possessed a

⁵⁶ Office of the Auditor General of Canada, *2011 June Status Report of the Auditor General of Canada*, ch 4, Programs for First Nations on Reserves (Ottawa: OAGC, 2011), online: <www.oagbvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html> [perma.cc/VNT7-N7DT].

⁵⁷ *First Nations Land Management Act*, SC 1999, c 24; Flanagan, Dressay & Alcantara, *supra* note 13 at 55.

⁵⁸ Flanagan, Dressay & Alcantara, *supra* note 13 at 55.

⁵⁹ Indigenous and Northern Affairs Canada, *First Nations Land Management: Operational and Developmental First Nations* (Winnipeg: INAC, last modified 23 May 2014), online: <www.aadnc-aandc.gc.ca/eng/1327165048269/1327165134401> [perma.cc/FR9W-G6LX].

“personal and usufructory right, dependent upon the good will of the sovereign” over which they enjoyed Aboriginal Title.⁶⁰ While the case of *St. Catherine’s* was the leading case for Aboriginal law for more than 80 years, it was not until *Calder v Attorney General of British Columbia* that Canadian law acknowledged that Aboriginal title to land existed prior to colonialism.⁶¹ The judges participating in the *Calder* decision agreed that Aboriginal title was not dependent upon legislative enactments, executive orders, or treaties.⁶² Rather, they agreed that Aboriginal title is a legal right derived from Indigenous peoples’ historic occupation and possession of their tribal lands.⁶³

Aboriginal rights also took a monumental leap forward with the enactment of the *Constitution Act 1982*, which stated that existing Aboriginal rights are “recognized and affirmed”,⁶⁴ bringing validity to the treaty rights of Indigenous peoples created in Canada between 1701 and 1923. This tentative language was taken by the Supreme Court in *R v Sparrow* and converted into a constitutional guarantee of Aboriginal rights.⁶⁵

However, at this point, we must consider that while the two are often used interchangeably, there is a definite difference between Aboriginal title versus Aboriginal rights. While Aboriginal title consists of exclusive possessory rights to title, Aboriginal rights are the rights to use the land that are guaranteed under section 35 of the *Constitution Act 1982*. This means that even though the acknowledgement of Aboriginal rights under *Sparrow* is an important landmark in Canadian property law, self-governance of the lands for Aboriginal peoples are not guaranteed, even though Aboriginal title as a legal right was first acknowledged in *Calder*.

This was followed in relatively quick procession by *Guerin v The Queen*, which established a *sui generis* right and that the government had a fiduciary duty to Indigenous peoples.⁶⁶ However, it was *Delgamukkw* which is said to state the first definitive statement on Aboriginal title in Canada and how this title may be proven.⁶⁷ It also stated the justification test for

⁶⁰ *St. Catherine’s Milling and Lumber Co v R*, [1888] UKPC 70 at 55.

⁶¹ *Calder v Attorney General of British Columbia*, [1973] SCR 313, 34 DLR (3rd) 145.

⁶² *Ibid* at 390.

⁶³ *Ibid* at 352.

⁶⁴ *Constitution Act*, *supra* note 41, s 35(1).

⁶⁵ [1990] 1 SCR 1075, 70 DLR (4th) 385.

⁶⁶ [1984] 2 SCR 335, 13 DLR (4th) 321.

⁶⁷ *Delgamukkw*, *supra* note 45 at para 114.

infringements of Aboriginal title and set a precedent for Indigenous rights and the use of oral testimony in Canadian courts.⁶⁸

The indeterminacy of these rights was also tackled by the Court in *R v Van der Peet*, which provided a definition of Aboriginal title that was judicially enforceable.⁶⁹ The definition was refined in *R v Powley*⁷⁰ to accommodate Metis rights and in *Delgamukkw*⁷¹ to accommodate Aboriginal title. Also, in *Delgamukkw*, new rules of evidence were announced to recognize the reality that societies that lacked written records when settlers arrived had to be permitted to prove their claims through oral histories.⁷²

In general, the issue of Aboriginal title is an issue for debate only in those areas where treaties have not been signed or where the issue of extinguishment of Aboriginal title is still in question. For example, a large portion of land in British Columbia is not covered by treaties and is, therefore, open to claims based on Aboriginal title. The fundamental objective of the law of Aboriginal title is to reconcile the de facto sovereignty of the Crown with the entitlement of the Indigenous peoples of Canada to the land which they occupied as their traditional homelands before the explorers, traders, and colonists arrived.⁷³

However, some Indigenous scholars argue that the preservation of Aboriginal rights is not enough to move forward in guaranteeing Aboriginal rights tied to property for the future.⁷⁴ Aboriginal rights simply preserve the past; only the recognition of Aboriginal title gives any assurance of economic and cultural self-sufficiency and independence for Indigenous peoples in the future.⁷⁵ Otherwise, if they do not have ties to their traditional homelands, Indigenous peoples will lose their identity as a

⁶⁸ *Ibid* at paras 84, 161–65.

⁶⁹ [1996] 2 SCR 507 at para 33, 137 DLR (4th) 289.

⁷⁰ 2003 SCC 43.

⁷¹ *Supra* note 45.

⁷² *Ibid* at paras 84, 161–65; Richard H Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon, SK: University of Saskatchewan, Indigenous Law Centre, 1990) at 15.

⁷³ Bartlett, *supra* note 72 at 15.

⁷⁴ *Ibid*.

⁷⁵ Paul Joffe, “UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation” (2010) 26 NJCL 121 at 158.

peoples and their very survival will be at risk, along with any chance of self-sovereignty.⁷⁶

V. WHY THE CRIMINALIZATION OF NON-ASSIMILATION AND THE GROWTH OF SETTLER CULTURAL IMAGERY IN THE PRAIRIES HAVE BECOME ISSUES WITHIN HUMAN RIGHTS LAW

In her recent book, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody*, Sherene Razack observes that as settlement proceeded westward, Indigenous peoples were marked “materially and symbolically” as bodies who were “not up to the challenge of modern life, a condition that leaves the settler as legitimate heir to the land.”⁷⁷

This myth of the inevitability of Indigenous disappearance allowed settlers to evade responsibility of the negative impacts of colonization by benefitting from Aboriginal proprietary and cultural loss.⁷⁸ By having property rights that created a position of tutelage and presenting Indigenous peoples as an unwanted subsection of society, it has created a current state in Canada where Indigenous peoples’ mere presence in society challenges settler-state legislative authority. Canada’s creation of property law, therefore, has created a scheme by which its mere existence places Indigenous peoples in a position of vulnerability.

This creation of legislative inadequacy for Indigenous peoples has led to many historic injustices: the hangings of Metis in the Riel Resistance at Fort Battleford, the ruthless industrialism in the development of the Canadian Pacific Highway, the John A. MacDonald policy of starvation, and the culturally genocidal policies of residential schools, to name but a few.⁷⁹

⁷⁶ *State of the World’s Indigenous Peoples*, UNDESAOR, ST/ESA/328 (2009) 1 at 53, online: <www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf> [perma.c.c/CV8-P68X].

⁷⁷ Sherene Razack, *Dying from Improvement: Inquests and Inquiries into Indigenous Deaths in Custody* (Ontario: University of Toronto Press, 2015) at 193.

⁷⁸ See Figures 1 (“It’s Mine”) and 2 (“The New Homeland”) for propaganda examples on Starblanket & Hunt, *supra* note 2.

⁷⁹ The Truth and Reconciliation Commission of Canada concluded in December 2015 in their publication of a multi-volume report that the Indian Residential School System amounted to cultural genocide; this was supported by the definition provided by the UN. See Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation*

However, all were justified in terms of creating a nanny state that, under settler authority, allowed Canadian legislation to treat Indigenous peoples as less than fully recognized individuals under law, leading to a history in Canada steeped in distrust, fear, and injustice.⁸⁰

This leads us back to the relationship between Indigenous and non-Indigenous peoples in the Canadian Prairies (in particular Saskatchewan and the responsibility of this relationship for the existence of the Boushie case). “A recent poll indicated that Saskatchewan residents viewed the relationship between Indigenous and non-Indigenous people more negatively than anywhere else in Canada, and 41 per cent of respondents blamed ‘Aboriginal Peoples’ for inequalities and problems” present in their own legal and societal positions.⁸¹ “Saskatchewan was also the home of the last federally funded Indian residential school”⁸² and the previous case of Cree trapper Leo LaChance, whose murder in 1991 eerily parallels that of Colten Boushie.⁸³

“In 1991, a notorious racist from Prince Albert stood trial for the killing of Cree trapper Leo LaChance. LaChance walked into a pawn shop owned by Carney Nerland, only to be shot in the back and killed by Nerland. Nerland claimed he accidentally fired his rifle” due to mechanical failure or hangfire (a similar justification provided by Gerald Stanley for his “accidental” shooting of Boushie).⁸⁴ While Nerland, head of the Church of Jesus Christ Christian Aryan Nations, pled guilty of the lesser charge of manslaughter and was sentenced to four years, people saw it as another

Commission of Canada, Catalogue No IR4-7/2015E-PDF (Canada: TRCC, 2015) at 1; Stephen Ford et al, *The Queens Law Panel On The Stanley Case And Acquittal* Lecture (Faculty of Law, 2018); Canadian Geographic, *supra* note 51; British Columbia, *Building the Railway* (BC: Government of BC, last visited 3 August 2020); Tristin Hopper, “Here is what Sir John A. Macdonald did to Indigenous people”, *National Post* (28 August 2018), online: <nationalpost.com> [perma.cc/6VWV-69UN].

⁸⁰ Paul Seesquasis, “The Stanley Verdict And Its Fallout Is A Made-In-Saskatchewan Crisis”, *The Globe and Mail* (12 February 2018), online: <www.theglobeandmail.com/opinion/the-stanley-verdict-and-its-fallout-is-a-made-in-saskatchewan-crisis/article37945105/> [perma.cc/4GTE-79LJ].

⁸¹ The Canadian Press, “David MacDonald: ‘Clearing the Plain’ Continues with the Acquittal of Gerald Stanley”, *National Post* (12 February 2018), online: <nationalpost.com/news/canada/clearing-the-plains-continues-with-the-acquittal-of-gerald-stanley> [perma.cc/L3U6-Z6B3].

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ McDonald, *supra* note 1; The Canadian Press, *supra* note 81.

example of white men getting the benefit of the doubt when it came to the murder of an Indigenous man under the pretense of protecting property.⁸⁵ It also did not help the Boushie case because, “[i]n the small world of prairie law, the presiding judge over the Stanley trial was Chief Justice Martel Popescul, who represented... [the defence] in the Nerland trial.”⁸⁶ Many deemed it potentially prejudicial that Popescul did not recuse himself and instead assigned himself to a case with shockingly similar fact scenarios.⁸⁷ After the Nerland trial, “many rightly called for an inquiry to investigate the extent to which Nerland’s racism was a factor in Lachance’s killing, an inquiry which Popescul sought to block on behalf of the RCMP, arguing that police informants might be exposed.”⁸⁸ This led many to question his suitability to objectively preside over the Stanley trial, when Popescul had represented the RCMP in such a similar case involving the murder of an Aboriginal man and the defence of property less than 30 years beforehand.⁸⁹

“Nerland received four years in prison and served three. Stanley is [now] free and gained almost \$90,000 in two days from almost 1,200 people through online crowdfunding.”⁹⁰ Both Leo LaChance and Colten Boushie are dead, and people are losing faith in the Canadian legal system as a result. However, people are also turning to international law to provide social equality before the law where Canadian law has failed.

VI. IS THIS ENFORCED ASSIMILATION?

The protests of Indigenous peoples against the continued existence of the current state of property law and its use to justify the murder of Indigenous men continues to undermine the culture of the settler state itself that was created to force assimilation.⁹¹ The Truth and Reconciliation

⁸⁵ The Canadian Press, *supra* note 81.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Paul Seesequasis, “The Stanley verdict and its fallout is a made-in-Saskatchewan crisis”, *The Globe and Mail* (12 February 2018), online: <www.theglobeandmail.com/opinion/the-stanley-verdict-and-its-fallout-is-a-made-in-saskatchewan-crisis/article37945105/> [perma.cc/ZV2Q-BYHX].

⁹⁰ McDonald, *supra* note 1.

⁹¹ See e.g. The protests over the violent arrest of Athabasca Chipewyan First Nation Chief Allan Adam over an expired license plate: Catherine Porter, “Chief Beaten by Police is Longtime Fighter for Indigenous Rights”, *The New York Times* (28 June 2020), online: <www.nytimes.com/2020/06/28/world/canada/allan-adam-indigenous-alberta.html>

Commission, in Call to Action 45, called on the federal government to repudiate the Doctrine of Discovery while implementing the *United Nations Declaration on the Rights of Indigenous Peoples*.⁹² The Boushie family has now taken their son's case to the United Nations Permanent Forum on Indigenous Issues as a human rights violation.⁹³ While these steps are important and suggest a more optimistic future, some Indigenous advocates and scholars believe that as long as a bijuralist system that does not acknowledge Indigenous property rights continues to exist, there will not be meaningful legislative movement forward in the near future.⁹⁴

Other international avenues for redress have come under consideration under Article 26 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which states that "Indigenous peoples have the rights to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."⁹⁵ This is particularly pertinent considering that the Canadian government initially, upon the creation of the *United Nations Declaration on the Rights of Indigenous Peoples*, refused to endorse the declaration along with the other colonial-based countries such as the United States, Australia, and New Zealand.⁹⁶ The Canadian government said that while it supported the spirit of the declaration, it contained elements that were "fundamentally incompatible with Canada's constitutional

[perma.cc/Y6K6-546]]. RCMP statistics state that 15 of 21 people killed in Manitoba outside of Winnipeg so far this year were Indigenous males. This often leads to gang involvement in order to find a sense of acceptance and belonging and further situations that place Indigenous men in dangerous, life-threatening situations: See Nelly Gonzalez, "Majority of Manitoba homicide victims are Indigenous men, but 'it's not really talked about': advocate", *CBC News* (15 October 2019), online: <www.cbc.ca/news/canada/manitoba/homicide-rate-indigenous-men-boys-manitoba-rcmp-stats-1.5305897> [perma.cc/NL45-H6LZ].

⁹² *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, MB: TRCC, 2012) no 45.

⁹³ Malone, *supra* note 12.

⁹⁴ See generally Kirsten Manley-Casimir, "Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law" (2016) 61:4 McGill LJ 939; John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19:1 Wash UJL & Policy 198.

⁹⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, A Res 61/295, UNDRIP, 2007, Supp No 53 (2007) 1, art 26(1).

⁹⁶ "Working Effectively with Indigenous Peoples: UN Declaration on the Rights of Indigenous Peoples" (14 January 2014), online (blog): *Indigenous Corporate Training Inc* <www.ictinc.ca> [perma.cc/FG89-YASC].

framework”⁹⁷ (mostly due to the *Canadian Charter of Rights and Freedoms* and Section 35 of the *Canadian Constitution*, which enshrines Aboriginal and treaty rights).⁹⁸ However, in May 2016, the Minister of Indigenous and Northern Affairs announced that Canada was now a full supporter of the declaration.⁹⁹ Their previous misgivings about enshrinement of Aboriginal rights within Canadian law, as well as Article 26 itself, which was said to allow for the re-opening of historically settled land claims,¹⁰⁰ seem to have dissipated. Now UNDRIP is in practice in British Columbia.¹⁰¹

This new recognition is logical. Indigenous peoples within Canada have been found to clearly fit into one of the most cited definitions of Indigenous peoples under international law.¹⁰² As such, there is no reason why Article 26 should not be applied enthusiastically, unless the Canadian government continues to be fearful of these historically “settled” land claims. This definition of Indigenous peoples within Canada fitting into the cited definitions of Indigenous peoples under international law was given by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Jose R. Martinez Cobo. He stated that:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now

⁹⁷ Canada, *Statement by Canada’s New Government Regarding the United Nations Declaration on the Rights of Indigenous Peoples* (Ottawa: Government of Canada, 12 September 2007), online: <www.canada.ca/en/news/archive/2007/09/statement-canada-new-governme nt-regarding-united-nations-declaration-rights-indigenous-peoples.html> [perma.cc/GN 9V-J8WX].

⁹⁸ Erin Hanson, “UN Declaration on the Rights of Indigenous Peoples” (last visited 24 July 2020), online: *Indigenous Foundations* <indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples> [perma.cc/2URH-QCRC].

⁹⁹ Indigenous and Northern Affairs Canada, *Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples* (News Release) (New York, NY: Indigenous and Northern Affairs Canada, 10 May 2016).

¹⁰⁰ “Canada Votes ‘No’ as UN Native Rights Declaration Passes”, *CBC News* (13 September 2007), online: <www.cbc.ca/news/canada/> [perma.cc/3G7Y-YDE4].

¹⁰¹ Bill 41, *Declaration on the Rights of Indigenous Peoples Act*, 4th Sess, 41st Parl, 2019.

¹⁰² Christopher C Dykes, “Research Guide on Indigenous Peoples International Law” (2009), online: *Hauser Global Law School Program* <www.nyulawglobal.org/globalex/Researching_Indigenous_Peoples_International_Law.html> [perma.cc/M63K-L6E3].

prevailing in those territories, or parts of them. They form at present non-dominant sectors of society.¹⁰³

The *Universal Declaration of Human Rights* also guarantees the right to private property.¹⁰⁴ This has created a situation where it is beyond debate that the private property and the property of Indigenous peoples are human rights endorsed on an international level.

It is in the international law fora that the legalized removal of Canadian Indigenous children to charter schools met the United Nations definition of a cultural genocide.¹⁰⁵ The Truth and Reconciliation Chair, Senator Murray Sinclair, stated in April 2016, four months before the death of Colten Boushie, that “[i]n many ways, Canada waged war against Indigenous peoples through Law, and many of today’s laws reflect that intent.”¹⁰⁶ The death of Colten Boushie on property that traditionally belonged to his ancestors and the subsequent acquittal of Gerald Stanley only highlights this hypocrisy that is still present in the Canadian property law system.

VII. CONCLUSION: “THE RIGHT LAND FOR THE RIGHT MAN”

In many early twentieth century advertisements encouraging Western settler life, the Prairies were framed as “The Right Land for the Right Man.”¹⁰⁷ It is important to recognize that perhaps this qualification of “The Right Man” under Canadian law is not as a historical of a concept as one would like to believe.

Property law can no longer be seen as simply property law: it is a manipulation of the legal system that lends a veneer of legitimacy to human rights infractions. Lately, there have been some changes in the current law

¹⁰³ “Indigenous Peoples at the United Nations” (last visited 24 July 2020), online: United Nations Department of Economic and Social Affairs: Indigenous Peoples <www.un.org/development/desa/indigenouspeoples/about-us.html> [perma.cc/2R8L-2639].

¹⁰⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 17(1)–(2).

¹⁰⁵ “Genocide” (last visited 3 August 2020), online: *United Nations Office on Genocide Prevention and the Responsibility to Protect* <www.un.org/en/genocideprevention/genocid_e.shtml> [perma.cc/XMU6-N3QM].

¹⁰⁶ “The United Nations Declaration on the Rights of Indigenous Peoples” (last visited 24 July 2020), online: *Amnesty International Canada* <www.amnesty.ca/our-work/issues/indigenous-peoples/the-united-nations-declaration-on-the-rights-of-indigenous-people> [perma.cc/G2DF-7P59].

¹⁰⁷ See Starblanket & Hunt, *supra* note 2; Figure Two, *below*.

following the Stanley trial, most notably the C-75 Amendment to preemptory challenges. However, criminal law amendments are only one in several amendments required if Canada truly wishes to reach the heights of international law ideals. These could include another Royal Commission with a broader mandate, yearly reports, further amendment of property law that explicitly affects Indigenous individuals, and the training of law enforcement in culturally sensitive methods.¹⁰⁸ All that said, the racism embedded in our legal system will likely take as long to undo as it was to be created. And, as long as property law is used as justification for the murder of Indigenous men in the Canadian Prairies, the cases of such men such as Colten Boushie and Leo LaChance will be framed as cases of a white man “defending his castle” rather than the killing of yet another young Indigenous man in Western Canada.

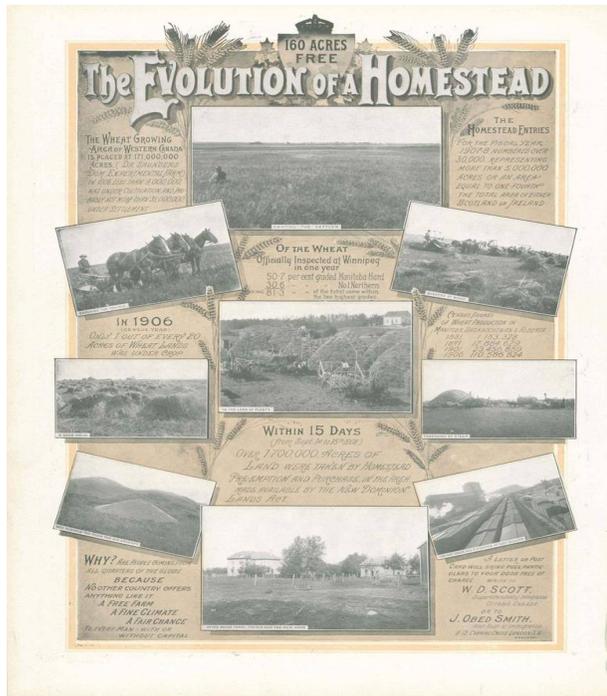


Figure 1 The Evolution of a Homestead (Poster), Canada, Department of Immigration Records (RG 76, vol 273, file 161973).

¹⁰⁸ Kilian, *supra* note 28.

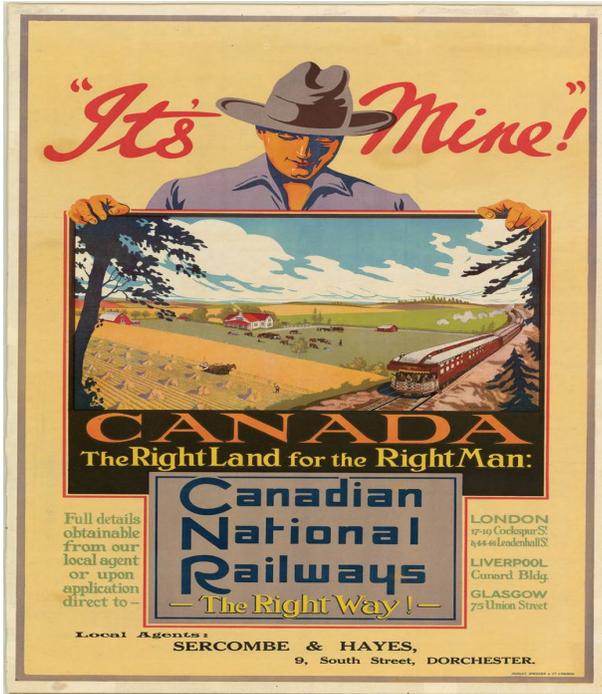


Figure 2 "It's Mine" CANADA: The Right Land for the Rights Man: Canadian National Railways - The Right Way - ! (ID No 2905070) Winnipeg, Library and Archives Canada (No 1991-230-1).