ABORIGINAL LAND TENURE REFORMS IN CANADA
A Discussion of "Beyond the Indian Act"

David Newhouse and Heather Shpuniarsky
DEPARTMENT OF INDIGENOUS STUDIES, TRENT UNIVERSITY

> In the words of Hernando De Soto, the co-chair with Madeline Albright of the UN Committee for Legal Empowerment of the Poor, "You don't have to travel to Zambia or Peru to see dead capital. All you need to do is visit a reserve in Canada. First Nation people own assets, but not with the same instruments as other Canadians. They're frozen into an Indian Act of the 1870s so they can't easily trade their valuable resources."
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> Manny Jules, Standing Committee on Finance, 15 September 2009

INTRODUCTION

This paper explores the Aboriginal property rights proposal put forth by Thomas Flanagan, Christopher Alcantara and Andrea Le Dressay in their recent book titled *Beyond the Indian Act: Restoring Aboriginal Property Rights* (2010). To situate their proposal, this paper provides some additional background on other Aboriginal land reform efforts in Canada that have occurred over the past forty years.

In general, the proposal set out by Flanagan and his colleagues represents one of the latest proposals for converting "Lands reserved for Indians" into lands where Indian individuals and Bands enjoy full property rights. The foundational argument for this change is based on the work of respected Latin American economist Hernando de Soto's *The Other Path* (1986) and *The Mystery of Capital* (2000). De Soto argues that one of the reasons why urban slum dwellers in the third world are so poor is that they suffer from a deficient system of property rights that prevents them from using their small parcels of land or houses as collateral in loans and hence they are unable to "unlock" the capital contained within them. The establishment of property rights that are "secure, easily defined, enforced and traded" (Flanagan et al. 2010: 171) is the foundation of modern Aboriginal economies. Flanagan et al. see Indian reserve lands as representing "unlocked capital" as a result of the restrictive property right provisions of the Indian Act. Unlocking the potential of reserve lands requires the development of a new regulatory environment for Indian lands. Unlocking reserves enables "ownership of underlying title by First Nations Governments and secure individual property ownership affirmed by guaranteed title" (2010: 169).

Since the Royal Proclamation of 1763, Indian lands have been sequestered from the main economic space of Canada and have had a restricted set of property rights. Fee simple title, necessary to unlock the capital within, is not one of the property rights enjoyed by Indian individuals or Bands. Since 1969, with a growing emphasis on economic development and resolution of land claims, there have been several pro-

posals which attempt to do this and at the same time respecting the desire for protection of the land in the case of default or sale. Flanagan and his colleagues argue that the way forward is to create a system of property rights that provides fee simple title to land for individuals and a reversionary right to Indian Bands. They propose the passage of a First Nations Property Ownership Act as a way of enacting this system in Canada. This would provide, on a voluntary basis, a fee simple title for individuals for Indian land and a reversionary title to Indian Bands in the event of sale or default by individuals or others.

THE FLANAGAN PROPOSAL

In *Beyond the Indian Act: Restoring Aboriginal Property Rights*, the authors put forth a concept of Aboriginal property ownership.[1] It is important to understand the difference between property and land. What is being proposed is the transformation of land into property, essential for effective participation in the Canadian capitalist economy. The basis of a successful economy, they argue, is one in which secure and exchangeable property rights exist. Flanagan et al state that the objective of their proposed First Nations Property Ownership Act "... is to assist them to unlock the tremendous economic potential of First Nations land, to become productive contributors to the Canadian economy, and to provide a mechanism that will allow them to create the level of prosperity that other Canadians take for granted" (Flanagan et al. 2010: 172).

The authors believe, with good reason, that one of the main obstacles to First Nations on reserve economic development and entrepreneurship is the lack of an effective "property rights framework". Under the Indian Act, communities do not own their own land in fee simple. While land can be divided using certificates of possession and lease, as well as customary landholding regimes, it is difficult to pledge land as collateral. Use decisions require the involvement of the federal Crown that has legislative control over reserve lands and the responsibility to manage them for the benefit and use of the First Nations. In addition, the provincial Crown possesses underlying or reversionary title.

Under the Indian Act, First Nations in most cases cannot use their land as collateral for bank loans. This makes it difficult for many Aboriginal entrepreneurs to gain funding to start their businesses. However, Flanagan et al. argue we are in an era of "red capitalism" (2010: 4) and maintain that business opportunities in Aboriginal communities are greater than ever. Yet investments are hindered by the lack of security in Aboriginal property rights such as they exist under the Indian Act. A multi-layered bureaucracy that an investor must access to begin business on reserve translates into increased legal costs and an increased time commitment to bring the project to fruition. For potential investors, this loss of revenue and uncertainty does not seem attractive.

Manny Jules,[2] the author of the forward to this book, maintains that property ownership and complex market economies are long established practices among First Nations peoples. He frames the proposed *First Nations Property Ownership Act* in terms of a restoration of rights that have been removed by the Indian Act. He believes that First Nations governments must work toward seeking national support for this initiative, in order to continue and enhance creative economic development.

Based on the work of Manny Jules and the Nisga'a, Flanagan et al. propose federal legislation that would provide for First Nations communities to establish a property rights system

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1 De Soto states: "Every asset — every piece of land, every house, every chattel — is formally fixed and updated records governed by rules contained in the property system. Every increment in production, every new building, product, or commercially valuable thing is someone's formal property. Even if assets belong to a corporation, real people still own them indirectly, through titles certifying that they own the corporation as 'shareholders'" (de Soto, The Mystery of Capital, 2000: 48).

Property ownership is attached to economic prosperity because it allows assets to generate capital because, according to de Soto: (i) They fix the economic value of assets; (ii) They integrate disbursed information into one system; (iii) They make people accountable; (iv) They make assets fungible; (v) They allow people to network; (vi) They protect transactions (op. cit., 49–62).

This is distinguished from the definition of land that, in its noun form, can refer to the ground, specific territory, people within a specific territory, etc. In these definitions, which are vast, property ownership of land and a legal interest within it are a small part (www.dictionary.com).

2 Manny Jules is former Chief Kamloops Indian Band and Chief Commission, First Nations Tax Commission.

supported by a Torrens style land title system. Believing that conditions are now ripe for this legislation, proponents of the *First Nations Property Ownership Act* see it as being complementary to the *First Nations Statistical Management Act, the First Nations Goods and Services Tax, and the First Nations Land Management Act*. The *First Nations Property Ownership Act* would allow communities to opt out of certain sections of the Indian Act and exercise control in jurisdictions that have most recently been exercised by Canada. Second, there appears to be political support for this initiative across party lines. In order for this "escape" legislation to be successful, Flanagan et al. believe it needs to be led by First Nations, enable First Nations powers to replace parts of the Indian Act, support markets on First Nations land, be optional, and create First Nations institutions to carry out these responsibilities (Flanagan et al. 2010: 169).

Flanagan and colleagues recommend that the new Act encompass the following principles:

1. First Nations must gain fee simple ownership title over their current lands.
2. Individual First Nations must have underlying title in their land, so that when there is an issue where individual title is lost or removed by someone else, the title to land reverts back to the First Nation. This involves all of the accompanying responsibility of taxation and management.
3. There should be a Torrens style land title system to manage and record transactions.
4. All accompanying legislation should seek to harmonize provincial and First Nations jurisdictional gaps to provide for investment certainty.
5. It should be an optional piece of federal legislation that releases communities from the land governance parts of the Indian Act.

In addition to these principles, Flanagan et al. state that the First Nations Property Ownership Act must provide First Nations with ownership of underlying title and individual fee-simple title in order to be effective. The federal legislation should anticipate and deal with possible provincial concerns surrounding rights of resumption. It should also create "the titling, registry, and surveying structure to support a Torrens title system" (Flanagan et al. 2010: 169). This can either be done through the legislation itself or by empowering the First Nations to make the required laws. This legislation should integrate all other laws that could be affected by it, thereby reducing transaction costs for development.

Flanagan et al. envision this legislation providing the certainty investors seek for doing business on First Nations land. He states that the First Nation could choose to provide indefeasible title to current landowners, in whatever manner they possess them, or they could provide leasehold and/or strata title. This legislation would be optional and participation in this legislation would have to be supported by the community. The community may choose to apply this legislation only to a specific part of their land or all of their territory. Flanagan et al. argue that the legislation should provide the necessary amount of flexibility and choice for communities who want to participate.

Implementation of the legislation would require the creation of appropriate institutions, over time, for registering title, an assurance fund to cover costs arising from fraud or other risks, and education and training in the new system. The major benefit of the legislation would be to bring selected First Nations lands into the economic space of Canada with full and secure property rights thus improving the foundation for the enhancement of the market economy. There are also additional benefits as Flanagan et al. outline:

1. Reduced Transaction Costs — By creating a First Nations standard for land title and integrating these standards with other provincial and federal laws and provisions costs would be reduced. In addition, standards skills would be transferable across jurisdictions and between First Nations. These cost reductions would be accompanied by improved infrastructure and investor certainty, which would allow for greater investment and increased employment.
2. First Nations Home Ownership — This system would allow First Nations to participate in open-market residential developments. This may result in an easing of the strain of housing shortages placed on current First Nations governments. In addition, home ownership allows for the building of

equity that could be used to start businesses. Finally, tradable properties allow for people to move to greater areas of economic opportunity while still remaining on First Nations land.

3. Lower Costs of Government — With improved rates of employment and increased wealth, there will be a smaller need for First Nations social programming that is directed toward alleviating poverty.
4. Higher First Nations Revenues — A First Nations land-title system will generate growth and wealth for the First Nation itself. Particularly if the First Nation is collecting property taxes, etc.
5. Reduce Number of Disputes — In regards to estates, particularly in the area of multiple heirs, the land-title legislation would ensure a more efficient transition. If there is no will, it may easier to clear multiple titles through sale and if there are no heirs the title reverts back to the First Nation. In addition, a title system would provide a way of transferring title in the event of marital breakdown, because the property could be sold on an open market and the money then divided.
6. Improved Incentives — This system would create a group of people who directly benefit from these policies who would advocate for an improved investment climate. He states that the property ownership system would provide incentive for First Nations resolution of land claims.
7. International reputation — Property ownership would be recognized internationally as a hallmark of achievement. Participation in this act would reject assimilation and recognize underlying First Nations title to the land.

THE TORRENS SYSTEM

The fundamental difference between the Torrens system and other land registry systems is that only the act of registration can change ownership of land, not a private agreement between sellers. This system is based on elements that generate secure title such as registration, certainty of title in the registry, a system of priorities for ranking competing interest, and assurance that the registered owner is the true owner of the title. This is much different than the current land registry system under the Indian Act that is considered to be a deeds system. In this system, the registrar files the records but does not determine their legality nor does the registrar have any involvement in the effect of these documents. The risk lies with the parties. In order to alleviate this, the parties purchase title insurance that increases the cost of the transaction. This is unnecessary in the Torrens system (Taylor 2008: 9–17).

The Torrens system is a dominant land tenure system throughout much of the former British Empire. Baxter and Trebilcock in a 2009 study referring to Australia's experiences with converting Indigenous lands into a Torrens land system, found the "... central challenges are the accurate and appropriate spatial characterization of lands when boundary definitions may operate differently (e.g., according to topographic features rather than mathematically defined parcels), and the integration of overlapping rights, restrictions and responsibilities on Indigenous lands. The existence of functional as well as spatial rights in land — e.g., different rights of use held by different 'owners' to the same physical area — may also present challenges" (Taylor 2008: 118).

OTHER CONTEMPORARY PROPERTY RIGHTS SYSTEMS

It is important to consider the concept of land property rights in the context of other land property right models that have been implemented in Aboriginal self–government agreements over the last four decades.

James Bay and Northern Quebec Act

Following the historic *Calder* (1973) decision, the James Bay Cree entered into negotiations with the Quebec government. These negotiations resulted in the James Bay and Northern Quebec Act (1975) and ushered in a new era of treaty negotiation between First Nations, provinces and the federal government. In this agreement, claim to Cree traditional lands are surrendered while the received land is divided into three categories, each with different rights and interests. Category I lands are reserved for Cree communities and they have municipal-type jurisdiction over these lands. However, Quebec

has rights to the sub-surface and mineral rights and if these minerals are required by the province then compensation will be given to the communities in the manner legislated by the Indian Act. Category I lands may only be sold to the province of Quebec. Category II lands lay just outside of Cree communities proper and fall under provincial jurisdiction. The Cree retain exclusive harvesting and hunting rights on these lands and any development, mineral extraction, etc. must be done with the consent of the community affected. Category III lands refer to areas where both First Nations and non-First Nations can exercise hunting and harvesting rights, though non-First Nations must exercise these rights within provincial game laws. The agreement is silent on individual property rights.

Sechelt

The *Sechelt Indian Band Self-Government Act, 1986*, was the first piece of legislation passed after the pledge of the federal government to pursue community self-government negotiations. This Act recognizes the Sechelt Band authority to exercise powers such as to enter into contracts and agreements; acquire, sell and dispose of property; and spend, invest and borrow money. The community created its own constitution establishing its government, membership code, legislative powers and system of financial accountability. Among these powers are the abilities to pass laws concerning access to and residence on Sechelt lands, administration and management of lands belonging to the band, and local taxation of reserve lands. The Sechelt Government owns Sechelt lands in fee simple and can be disposed of pursuant to the regulations set out in the Sechelt constitution. The most common analogy for the Sechelt model of self-government is a municipal style government, where federal and provincial laws are frequently applicable.

In addition, the Sechelt were one of the first signatories to participate in the BC Treaty Process in 1994. They are at Stage 5 of the six stage process. This treaty would enhance the self-government agreement by creating the ability to add land to the existing territory, ownership of surface and sub-surface rights, commercial fishing licences, and $52 million.

Gitxsan

Following the seminal *Delgamuukw* ruling in 1997, the Gitxsan offered to enter into a treaty process with both Canada and British Columbia. However, in 2008, the Gitxsan hereditary chiefs issued an Alternative Governance Model, which stood in opposition to the current models of Treaty Governance undertaken by other First Nations in British Columbia. According to the Gitxsan, they are not interested in creating a parallel society. Rather, they view the treaty process as one that brings them into Confederation and makes them full participating members in Canadian society. The Gitxsan propose a governance model based upon their traditional governance system, organized around their hereditary chiefs and houses. They propose the dissolution of band council government and want those funds to be diverted toward the provincial government for the delivery of services. This means that the Indian Act would no longer apply to the Gitxsan and federal and provincial delivery of services would continue as usual but with room for a voice of the Gitxsan. The Gitxsan are not interested in "Treaty Settlement lands" and instead opt to maintain a relationship with their territory of over 33,000 km. This means that "[t]he economic value of our collective inherited interest (which is neither fee simple nor sovereign but is certainly real, court-ordered and subject to definition) is to be realized by the process of accommodation articulated by the Supreme Court of Canada. In practical terms this will presumably be effected by a combination of own investment, arrangements with external investors, and revenue sharing agreements with governments, especially the provincial in the case of resources" (Gitxsan Treaty Team 2008: 6–7). In addition to being able to determine the use of territory and resources, the Gitxsan Alternative Treaty Model states that the Gitxsan people will be able to inherit property as part of their shared interest in the land.

Nisga'a

After the enactment of the treaty, one of the first acts passed by the Nisga'a Nation was the Land Title Act in 2000. They chose to implement a Torrens land-title system, which "does away with the need for a chain of titles to a property as is common in a deeds registry

system" (Flanagan et al. 2010: 163). Diane Cragg, Registrar of Land Titles for the Nisga'a Nation, describes the Torrens system as "a way of expressing traditional values through a new means". Traditionally a statement of interest, or the passing of the name, in land was always done through a large gathering where the history or the adaawak was shared and witnessed. Now, through the Torrens system, it is the title certificate that establishes that history and it is publicly available for everyone to access (Flanagan et al. 2010: 164).

Under this system, the Nisga'a Nation owns its lands in fee simple. They retain underlying title and exercise jurisdiction in the areas of estates, land management, etc. The nation is discussing whether or not they will be granting individual fee-simple property rights. If they are able to provide assurance of these rights against fraud, these individual property rights would be as secure as property rights anywhere in Canada (Flanagan et al. 2010: 165). The Nisga'a title system is compatible with the BC land title system so that if desired, both systems can be used. The standards for the Nisga's system are in keeping with the requirements of the BC system. This system has also allowed for a significant cost reduction in doing business on Nisga'a lands. By creating property rights that are similar to the rest of the province, creating a searchable database, and providing a transparent process with timelines, potential investors are not shouldering any extra costs. When and if the Nisga'a begin to provide individual title, there will be an effective dispute resolution mechanism in place for dealing with matrimonial property and estates. There is a slight difference with the Torrens system and the Nisga'a land title system: their system allows for the registry of some "cultural land interests" (Flanagan et al. 2010: 165).

Tsawwassen

The Tsawwassen First Nation Treaty was enacted in April of 2009. Part of the BC Treaty Commission, it is the first urban treaty in BC and it is the first treaty negotiated within this process. This treaty allows for the creation of a Tsawwassen Constitution and the Tsawwassen government is enabled to pass municipal level laws in addition to being able to administer some provincial services such as education and health care. Tsawwassen also provides for non-Tsawwassen (those that live on Tsawwassen lands) participation in its government in decisions that significantly affect them. The Tsawwassen First Nation also retains rights to make laws concerning resources on their territory. They may harvest wildlife and fish in their territory but they are subject to conservation laws.

Regarding land and property issues, the Tsawwassen treaty provides for ownership of Tsawwassen land in fee simple. Tsawwassen territory, which is comprised of 290 hectares of former reserves and 372 hectares of former Crown provincial land, is owned in fee simple by the Tsawwassen government. In addition, they also own an additional 62 hectares from the surrounding area, though this land will remain under the Corporation Delta jurisdiction. The Nation has the option of adding to their territory as leases in the surrounding area become due and they will hold the first right of refusal option for purchase. The treaty also provides taxation powers to the Tsawwassen First Nation, as well as a share in taxes collected by the province of British Columbia.

HISTORICAL CONTEXT OF INDIAN LAND REFORM — FROM PROTECTION TO PARTICIPATION

It is difficult to discuss First Nations property rights without providing a glimpse at the historical landscape in which these land reforms are situated. Until recently, it was widely held that First Nations peoples did not have institutions of private property prior to the arrival of Europeans. First Nations peoples have consistently held and managed land for thousands of years. Complex systems were developed and used to establish and maintain relationships with the land. Territorial ownership was recognized and land was seen as the property of clans, families and individuals. Ownership carried with it a set of responsibilities for use, maintenance and protection of the land and its resources. It is fair to say that early European newcomers may not have recognized many of the practices as part of a land tenure system, as they saw ownership through their own cultural lenses. Much of North America was seen through the lens of "terra nullius" that looked for particular types of activities as the basis for an ownership claim.

Beginning in 1763 with the Royal Proclamation and the Treaty of Niagara in 1764, the policy of the British government regarding Indian land was one of protection. The British Crown used the Appalachian Mountains as a natural boundary between land that could be settled by non-Aboriginal people and Indian Territory. The Crown was also the only entity that could negotiate treaties and land surrenders and the Indian people could only surrender/sell their land to the British Crown (Miller 2009: 67–73). A new category of "Indian land" was created with a limited set of property rights.

There was an influx of settlers into what was to become Canada and the British government reaffirmed itself as the only body to which the Indians could cede their land. During this period the Crown concluded a number of land cessations and treaties. Eventually, these treaties included specific lands be "set aside" for Indian communities known as reserves. Individual ownership of land by Indians was not contemplated. The processes for surrenders/sales/ceding of land to the Crown reflected a view that Indian land was collectively possessed. It became an offense for non-Aboriginal peoples to encroach or trespass on these lands (Bartlett 1990: 11). Indians at this time were considered to be subjects of the Crown and in need of protection from the non-Aboriginal settlers. The Crown's policies of the protection of Indian lands continued alongside the policies of civilization in the 19th century.

Individual ownership of land was widely accepted as one of the hallmarks of civilization and it was thought that owning land in this manner would facilitate Indian people's integration into British Canadian society. The Gradual Civilization Act of 1857 formally entrenched a policy of civilization of Indian peoples. It provided for enfranchisement and linked it to the concept of private property ownership. When Indians who sought enfranchisement had met all the requirements and passed a three-year probation, they would receive an individual allotment of reserve land that they owned in fee simple. The allotment was considered their share of reserve land. This land would then cease to be part of the reserve (Milloy 1991: 147–8) and be subject to taxation and seizure for payment of debts. The British North American Act of 1867 gave Canada control over Indians and Indian lands. Canada continued the civilization policies of previous years and passed the Gradual Enfranchisement Act in 1869. This act continued to tie individual land ownership to enfranchisement but also introduced the location ticket that provided some limited rights of possession associated with individual tracts of land and it meant that it could be passed to heirs upon death (op. cit., 150–52).

With the Indian Act of 1876 the rules surrounding Indian land continued to evolve. The location ticket system continued with the insertion of the need for approval of the band council in addition to that of the superintendant-general to gain one (ibid.). The amendments to the Indian Act in 1951 ushered in a change in policy for the Canadian government. Many of the most restrictive laws were removed, though the goal for integration into Canadian society remained. The location ticket system was recognized as outdated and was replaced by the certificate of possession system. This system is more fee-simple like, as people were able to use the property as they saw fit, yet people who have a Certificate of Possession may only transfer or sell the certificate to another band member and that transaction must be approved by Indian Affairs. Band members, then, are able to gain possession of individual tracts of land through certificates of possession, leases and customary landholdings (Baxter and Trebilcock 2009: 73).

In the 1960s the Canadian government realized that conditions on reserves and for First Nations people on a whole were not improving. The Hawthorn-Tremblay Report was released which recommended that First Nations people be recognized as "Citizen's Plus". The main plank of economic development policy, according to Hawthorn-Tremblay, was to encourage the movement of Indians away from reserves to take jobs in nearby cities and towns. Indian land rights were not specifically addressed by the report's authors. Participation in local natural resource development was viewed as secondary. The federal government response to this report was the Statement on Indian Policy of the Government of Canada (1969), known as *the White Paper*. This document proposed a number of changes to Indian Policy, including the repeal of the Indian Act, a rejection of land claims and a statement that First Nations people should be integrated into mainstream Canadian society. Within this paper, the government recognized the cumber-

some land tenure system established by the Indian Act was a source of frustration and held people back from full economic participation in Canada. The White Paper recommended an Act which provided for steps toward owning reserve land in fee simple and that the management of those lands would be in the hands of the bands if they chose. It made clear that this would be a gradual process whereby bands could choose the specifics of how they wanted to manage their lands (Statement on Indian Policy, 1969). The ultimate goal would be total band control over land and ownership in fee simple and the removal of the Canadian government as trustee.

The wording of this section of the White Paper is not unlike the premise put forth in Flanagan and his colleagues. Flanagan et al. emphasize the cumbersome and inefficient nature of the current land tenure system on reserve and links this to the challenge of attracting investors and using the land as collateral for economic benefits. Flanagan et al. link the benefits of fee simple property ownership to the alleviation of poverty on reserve through the attraction of potential outside investors in businesses and other economic ventures. The White Paper speaks of full participation in Canada, as do Flanagan et al. The White Paper proposals sought to remove the existing protections of land and First Nations peoples. The main difference is that Flanagan et al. propose indefeasible and reversionary rights or underlying title to First Nations land be vested with First Nations.

After the rejection and subsequent withdrawal of *the White Paper*, spurned by the principles established in *The Red* Paper (the response authored by Harold Cardinal and presented by the Indian Association of Alberta), an intense period of negotiation directed at improving the political, economic and social status of First Nations began. New land management regimes were negotiated as part of comprehensive claims agreements and the self-government policies of the federal government. The principle of local solutions rather than template solutions is foundational, as are the principles of protection and First Nations ownership. Self-government discussions and agreements have highlighted the need to develop approaches to economic development that go beyond new government programming.

In 1985, a new category of Indian reserve land was created. Section 25 of the Indian Act allows Indian Bands to designate land, ie conditionally surrender their interests in the land to the Crown and to use the land in economic development projects. This new category was seen as a measure to facilitate development while protecting land. The Report of the Royal Commission on Aboriginal Peoples devoted considerable effort to developing a set of principles that could be used as the basis for securing lands for "economic self-reliance, cultural autonomy and self-government" (RCAP 1996: 573–74).

Consistent with the principle of local solutions, some communities began to approach the province and the federal government to find ways to address their own issues. For example, Manny Jules and the community of Kamloops in BC thought that the provincial collection of taxes on lease holdings on reserve was wrong. It resulted in double taxation to the leasees, as the province collected taxes with no services in return while the community had to charge the leasees for services that they were providing. The courts maintained that the only way to change collection of property taxes was to change the Indian Act and this community proposed that property tax jurisdiction on First Nations lands be transferred to the communities. The First Nations Property Tax Act was an optional piece of legislation that was passed in 1988. The collection of these taxes has helped to expand the revenues of the participatory First Nations, in addition to expanding the amount and quality of services provided (Flanagan et al. 2010: 143–44). To facilitate the implementation of this Act, the Indian Taxation Advisory Board was created in 1989.

This act was followed in 1997 and 1998 by the First Nations Sales Tax on Selected Products Act, which allowed First Nations to collect GST on sales of fuel, alcohol and tobacco on their land. This was expanded in 2003 with the First Nations Goods and Services Tax Act so that communities could collect GST on all eligible products and services. However, only a few communities are opting into this legislation unlike the property tax legislation (op. cit., 147).

In 1999, the First Nations Land Management Act (FNLMA) was passed. This legislation allows participating First Nations to make laws on their land that are common to all local governments in Canada. For example, First Nations can make laws concerning zoning, land use, conservation, development, and possession. This Act

requires a community to create its own land code, with the support of the community, by which all First Nations, potential investors and developers must abide. These codes are specific to each First Nation and can look different from one community to the next. To facilitate the implementation of this Act, the Lands Advisory Board was created (First Nations Land Management Act, 1999).

One of the criticisms of the FNLMA is that due to the possible uniqueness to the land codes and corresponding laws across First Nations communities, investment by outsiders may be more complicated. Flanagan and colleagues argue that providing a model land code would decrease the costs of doing business in these communities because there would not be a diversity of different laws with which to become acquainted. In addition, they criticize the lack of a central institution to aid communities with model land codes and zoning regulations (Flanagan et al. 2010: 118–19). In essence, Flanagan et al. recommend federal legislation so that there are not as many land codes as there are communities. There would be only the main act and some flexibility with in its parameters. First Nations communities who participate in the First Nations Property Ownership Act could choose to apply their land-title system to a specific part of their land and could limit tenure to leasehold title or they could apply the land title system to all of their land and institute comprehensive fee simple ownership (Flanagan et al. 2010: 170). These are not the only choices as they emphasize that this legislation must be flexible and provide for an "infinite" number of choices in between. However, if there are infinite choices for the way First Nations choose to exercise their property ownership this may not counter their own critique of the diversity of Land Codes under the FNLMA.

In 2005, the First Nations Fiscal and Statistical Management Act was passed. This legislation allows First Nations to access capital markets for infrastructure financing. Those First Nations who have opted into it have the powers of a local government to pass laws pertaining to non-payment of property taxes or violation of land use rules. The First Nations Commercial and Industrial Act was passed the same year and is meant to fill in regulatory gaps that may exist between provincial and federal laws and regulations regarding development on First Nations lands. This allows development projects to proceed as planned and not become tied up in unnecessary jurisdictional disputes (First Nations Fiscal and Statistical Management Act). This is designed to attract potential investors because they will not have any extra costs and they will be familiar with the regulatory regime in place.

These various pieces of optional federal legislation are designed to work in concert with one another. It is apparent that through these Acts, First Nations can achieve a higher degree of control over their land and what happens on their land than is possible under the Indian Act. In addition, these Acts allow First Nations the potential of accessing revenue that can expand their economic capacity. Though these acts provide First Nations with various tools to create laws and a measure of *de facto* sovereignty over lands, reversionary title to First Nations lands still remain with the Crown. In these pieces of legislation, First Nations governments are not provided with the ability to leverage their land nor provide individual title.

Looking back at the history of land reform as it applies to First Nations peoples in Canada, one can see the evolution of how the Canadian government has understood the legal relationship between First Nations people and land. This began with the initial understanding of First Nations interest in the land as being no more than usufructuary and fee simple ownership being tied to those who were considered "civilized". Recently, communities can opt out of certain parts of the Indian Act under the FNLMA and create their own land codes, laws, etc. The evolution is literally one of protection to participation.

The First Nations Property Ownership Act fits into this picture quite nicely. Indeed, it echoes some of the arguments toward fee-simple ownership on reserve mentioned as early as the White Paper. It stands to provide much of the local control possible within the FNLMA but goes further in that it guarantees title in fee-simple, creating a legal recognition of underlying First Nations title to their lands. Flanagan et al. imply that this Act, then, would be more beneficial, for this reason, than a self-government agreement where at the end Canada still retains underlying title. Used in conjunction with the FNLMA, FNCIDA, FSMA, etc., this Act could

theoretically provide many of the elements of a local/provincial government.

Flanagan et al. argue that the public good is advanced in this case through the provision of certainty for investors that flow from clarifying and modernizing the property rights of Indian reserve land. Certainly, there is much to be gained from this clarification and from the development of a common system of recognized and granting land title. We should also recognize that capitalism is a remarkably resilient and adaptable system that is able to adjust world wide to a vast array of systems of land tenure. Negotiation of rights is a key feature of the system that allows for local variation and practice.

Securing First Nations underlying title to the land, reversionary rights are an attractive asset to this proposal as these do not exist in self-government agreements. It remains to be seen whether or not Canada and the provinces will agree. The proposed change represents a large change for them. While the Crown can act in the right of Canada and provinces, it remains to be seen whether the Crown in the right of First Nations is a concept that will gain resonance, either among federalists or Aboriginal nationalists.

Supporting First Nations communities to develop and implement the proposed property rights is key. This legislation depends greatly upon the state of the governing institution of the First Nation, which under the Indian Act, flows through the band council. Good governance and a comprehensive vision of the future, not to mention a collective understanding of relationships and responsibilities to the land, are necessary to participate in this legislation. It appears as though this legislation would favour communities with larger governance structures, as many people would be necessary to begin, monitor and participate in the carrying out of this land tenure system.

In this vein, Baxter and Trebilcock (2009) emphasize three broad challenges that need to be examined further before communities and the federal government undertake the architecture of this legislation.

1. Regionalism — it is not possible to apply uniform legislation to the diversity of First Nations communities, lands, experiences, visions, and capacities. They suggest more research into how it would be possible to accommodate diversity within such federal legislation and recommend looking at the FNLMA, as well as particular provincial legislation that would allow for regional diversity. The range of economic opportunities possible vary with the location of the First Nation and the legislation would have to allow for the differences between the realities of a small reserve in northern Manitoba, a medium sized community in New Brunswick and a large reserve in Ontario that is closer to urban centres. It is acknowledged that there will be as many challenges that arise as there are First Nations and that there must be more than simply stated flexibility to deal with them.
2. Different Economic Outcomes — communities need to balance different economic interests. This legislation allows for both collective and individual property rights in fee simple and the ensuing legal responsibilities. In communities there will be a number of different ways that First Nations community members will seek to exercise their rights and responsibilities and this must be balanced with and understanding of collective interests.
3. Federal Government — finally, Baxter and Trebilcock (2009: 119–21) maintain that the involvement of the federal government in the evolution of this legislation is very general. The authors believe that the federal government's position should be clarified and their commitment to transitional programming and the phasing out of current programming (such as loan programs already in place) should be clearly stated.

In the context of the evolving and complex arena of Aboriginal property rights, Aboriginal and treaty rights, self-government and treaty negotiations and as an expression of a way of moving forward in a modern capital economy, the ideas contained within the Flanagan et al. proposal are worth further consideration and discussion. Defined, secured and enforceable property rights are foundational to participation in modern market economies. It is important to understand that Aboriginal political objectives are broader than economic development. Protection and enhancement of cultural property, equitable distribution of wealth, enhancement of

individual choice, development of accountable and effective First Nations governments are also important goals that need to be examined as well when considering such fundamental issues of land reform. Balancing First Nations cultural values and customs with contemporary individual rights is also an important aspect to be explored in some depth. The wholesale adoption of a new system of property rights, however attractive, ought to occur with informed public discussion and debate.

One might also examine, in some depth, the lands rights evolving in the BC Treaty models, looking at them through the lens of land protection and market acceptance. It would be helpful to conduct research on the impact and effects of those property management regimes that have been implemented to determine if they are resulting in significant changes as forecast. It would be helpful to understand what other institutions and policies have been put into place to make them work as well as understand better the implementation issues. Land reform of such significance does not occur without other effects. For example, how have those First Nations that have fee simple regulations prevented the concentration of land among a small group people? How have these new regimes helped local entrepreneurs? Who has benefited and how are important questions? There is also an implicit assumption in the Flanagan et al. proposal that First Nations residents are resident on Indian reserves. As more than half of the First Nations population resides in urban centres, the application of the property rights concepts in this environment needs exploration. After all, De Soto's work was stimulated by his observations of urban poverty.

CONCLUSION

In summary, the Flanagan et al proposal represents the latest attempt to transform Indian land into a form of property that would be attractive to full participation in a market economy. It is a shift away from the protectionist policy of the Indian Act. It proposes that First Nations communities would have reversionary title to reserve land, that First Nations individuals would be able to hold reserve land in fee simple title and that reserve land could be sold to outsiders and still remain under the jurisdiction of the local First Nation, a situation similar to land in other jurisdictions in Canada. Flanagan and his colleagues argue that the future of Aboriginal peoples lies in greater institutional integration and homogeneity with those of the mainstream. While integration and homogeneity are important public goods, so too are separateness and diversity. This distinction is critical if First Nations hope to reflect their customs and culture in their own property regimes in the future.

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