

**WITH Dr. Tom Flanagan, Professor of Political Science, University of Calgary and Co-Author of Beyond the Indian Act: Restoring Aboriginal Property Rights**



**Dr. Tom Flanagan** studied political science at Notre Dame University, the Free University of West Berlin, and Duke University, where he received his Ph.D. He has taught political science at the University of Calgary since 1968. He was elected to the Royal Society of Canada in 1996, and was named University Professor in 2007. Dr. Flanagan is best known as a scholar for his books on Louis Riel, the North-West Rebellion, and aboriginal land claims. His book *First Nations? Second Thoughts* received both the Donner Prize and the Canadian Political Science Association's Donald Smiley Prize for the best book on Canadian politics published in the year 2000. He has also published extensively on Canadian politics, elections, political parties, and game theory as a tool for understanding political life. He was interviewed after Lunch on the Frontier in Winnipeg on April 6<sup>th</sup>.

**Frontier Centre: Can you comment on how research shows many First Nations societies holding to conceptions of individual and family property rights prior to and after contact with Europeans?**

**Tom Flanagan:** For this book (*Beyond the Indian Act: Restoring Aboriginal Property Rights*) we reviewed the historical and anthropological literature. We found a rich variety of property systems in North America prior to the arrival of Europeans. Very different ones depending on how different peoples made their livings, but very intricate combinations of collective and individual ownership. Unfortunately this heritage has largely been lost and should be recovered.

**FC: Why do so many scholars and activists perpetuate the idea that Natives are all about collective land ownership?**

**TF:** I think in many cases it's a projection of the European line of thought. Communism is after all a European invention. European intellectuals have always wanted to see other peoples outside of the Western world as an embodiment of a primitive communism that they themselves have lost. So there is that sort of fantasy approach projected onto the original inhabitants of the Americas because this is a very deep tradition in Western thought. Unfortunately Aboriginal people have been the losers because of it.

**FC: What forms of property rights are available on First Nations reserves now? And why are they inadequate?**

**TF:** There are three main forms. One is customary rights, which is simply based on possession and use over several generations by families. Customary rights are sometimes respected and can sometimes be used for building homes and farming, but they're not enforceable in court. They're not mentioned in the *Indian Act*, and the courts won't touch them. So if you have disputes, as you often do, about customary rights they have to be settled by Band Council or by somebody appointed by the Band Council.

The second form is a certificate of possession, which is mentioned in the *Indian Act*. It's sort of like ownership in fee simple except that you can't sell it to anyone except another band member, which means that the re-sale market is extremely limited. There are thousands and thousands of Indians who have homes built on certificated land; but they

can't use it as a savings vehicle or an investment vehicle because it doesn't build up a value that you can get by selling it to somebody else, because the market is so restricted.

The third type of existing right is the leasehold. Nobody knows how many leases there are but probably tens of thousands. Leases are marketable instruments, so once they are created they can be bought or sold. In that sense they are stronger than certificates of possession. But they weakness of a lease is that by definition it's temporary, it comes to an end. There are a lot of ugly stories from reserves about what has happened when leases get close to their termination period, and sometimes Band Councils have decided not to renew the lease because they would like simply to confiscate houses that have been built on it and use them for their own members. Leases are valuable and are the basis of a lot of economic activity on reserves now, but we think the freehold would be better because it's not temporary.

**FC: How would a secure property rights regime on reserve allow for expanded economic activity and the development of a private sector?**

**TF:** Basically by reducing transaction costs. Under the regime of leasehold it is possible to have investment on reserve for various purposes, but it takes a lot of time and money to create the usable property rights for that. So you have to have a lot of lawyers at the table representing the Band and the investor and the Department of Indian Affairs and the Department of Justice and sometimes the Province and so on. You have to write a legal regime from scratch: who's responsible for infrastructure of various types, who's responsible for insuring investments, and all those things that are much more straightforward in the general economy where you have an understood structure of property rights. So that's the short answer: lowering transaction costs makes the investment cheaper and therefore more profitable.

**FC: How would individual natives benefit from owning their own home and property?**

**TF:** We think that this would make a big difference to individual people if the First Nation took the second step of not only owning its own land but also creating individual titles to pieces of it. This would allow individuals, for

example, to obtain mortgages in their own name because the bank could now attach the property if the mortgage was not serviced. So banks could get the property if necessary; therefore, it could be used as security for a loan. Right now individuals on reserves, if they want to get a mortgage, have to have a Ministerial or Band Council guarantee. So now individuals could do this in their own name. Secondly their house could become an investment vehicle or savings vehicle for them because there would be a larger market of purchasers and the value would increase. Thirdly they could borrow against it for other purposes. Say you want to buy a new fishing boat or logging truck or buy some tools and go in to the plumbing trade—whatever you want to do you have that option now of using your home as security. Another side benefit is in case of family breakdown. There is no mechanism in the *Indian Act* for dividing certificates of possession in case of marital breakup. So often one party, in fact it's usually the woman, is forced to leave the family home if the marriage breaks down. The normal way of dealing with marriage breakdown in the larger society is for the family home to be sold. The proceeds can be divided, which finances the parties into starting their new lives. That option isn't available unless the home is owned and can be sold. So these are some of the benefits that we think would improve life for the First Nations that took that step.

**FC: In your book you mention the experience of the U.S. Dawes Act where individual property rights were imposed in a top down manner on Native American tribes by Congress in the 19<sup>th</sup> Century. Why did that fail and how are your proposals different?**

**TF:** The *Dawes Act* was totally top down. It was passed by Congress. It was the idea of well-meaning Indian advocates, many of whom had never been on an Indian reserve. It was done without consultation. It was based on the assumption that there was surplus Indian land that should be sold off. There was no provision for continuing tribal governments. The goal was in fact to liquidate the Indian as a separate category of person. The thought was that each Indian family would get 160 acres and that all surplus land could be sold, there'd be no continuing tribal government or reservations. You'd just have some farmers and ranchers of Indian extraction.

Our proposal is completely different. It is, first of all, generated by First Nations people themselves. Manny Jules was the prime mover and has done extensive consultation with First Nations. If this goes ahead it will be First Nations asking the government to do it. It will be voluntary, not compulsory. So it's bottom up rather than top down. It's premised on the continuing existence of First Nations governments exercising jurisdiction over the land, and there's certainly no assumption that there's surplus land that has to be taken away from Indians. First Nations need all the land that they now have. So it's really, in all the important respects, very different from the *Dawes Act*.

**FC: How would First Nation private property rights help fix on-reserve housing shortages and improve the condition of housing?**

**TF:** The basic problem with on-reserve housing is that there isn't enough private investment. Most homes on reserves are financed through either allocations from the budget of

the Department of Indian Affairs or CMHC programs or some kind of government investment. There just isn't enough government money to provide the housing that is needed, particularly since lack of private ownership means that the housing typically doesn't last as long as it ought to. It's not as well maintained because there's no incentive to increase the value through renovation and maintenance. So introduction of property rights would also introduce pride of ownership, which leads to better renovation and maintenance of houses. Private capital in the form of mortgages for individuals wanting to build or improve their homes and possibly in the form of investors. One of the striking facts of on-reserve housing is that there are almost no apartment buildings or rental markets, but there could be under this proposal and investors could buy a piece of land and build apartments on it and collect rent. That would be another form of private investment that might over time take place. Anyway the key is increasing private investment in housing as opposed to almost totally public investment that we see now.

**FC: In *Beyond the Indian Act* you argue Native communities need a First Nation Property Ownership Act. Can you describe that piece of legislation and how it would be implemented?**

**TF:** This legislation would not amend or repeal the *Indian Act*, it would supplement it. It would create an optional regime of private property which First Nations could opt in to so it's not compulsory. It's only for those First Nations who want to go down this path, and maybe only 5 or 10 reserves initially would be interested but others could join later. We believe that there would be a demonstration effect. We think that the First Nations that went down this path would thrive and that others would see they have better housing, more tax revenue, better schools, etc. and that they would want these things for themselves. It is a gradual, voluntary approach but it's not something that you could do without passing legislation through Parliament.

**FC: In your proposal you mention that First Nations governments would retain underlying land title and privatized land would still be subject to First Nation law. Why is that important?**

**TF:** This is important so that the land reserves are not broken up and taken out of control of the First Nation. We're talking here about First Nation government, similar to local government, exercising jurisdiction over land use things like property tax, zoning, land development by-laws, environmental codes, nuisance, all the stuff that typically is passed by local government. Within our provincial framework there's usually provincial legislation that authorized local governments to create these rules. That's all lacking on reserves today. The federal government has never wanted to fill that void. They don't have the expertise. It's something that the provinces do. We would see First Nations governments being like other local governments in Canada and having jurisdiction over land use. Also underlying title would imply the right of expropriation. I'm assuming the legislation will provide for expropriation with market value compensation as it does in the larger society. So all these tools would mean that the First Nation could continue to say, Yes we control this land. Maybe some

people who are not members of the community could own pieces of land just as you can live in Winnipeg and own land in Toronto but the Toronto government retains all the jurisdiction over the use of the land. So it would be a somewhat similar situation.

**FC: What needs to be done to convince First Nations that private property rights are beneficial to their communities and not deserving of fear?**

**TF:** I think practical demonstration is the only thing that will do that. There are 630 First Nations, give or take, in Canada. Of those, maybe five or 10 are already on the verge of wanting private property rights because they have engaged in development projects already and have seen the limitations of the existing law. They already want to go down this path and beyond that it will be a case of demonstration, of seeing whether or not these First Nations that make this choice do prosper. We're convinced that they will because private property has proven itself. It's the basis of the economy of the entire world. There's no reason why it won't work as well with Indians as it does with anybody else. So you can argue till you're blue in the face. It's not a matter of persuasion. It's a matter of showing with actual demonstration.

**FC: What political and intellectual obstacles remain?**

**TF:** You've got to get the five to 10 First Nations that you need to sign on. That's really up to Manny Jules to do. Once you've done that you've got to draft the legislation. It's going to be a very complicated legislation requiring a lot of expertise in property law. So the drafting itself will be a challenge. Then you have to get it passed in Parliament. I

think that's probably the least of the worries. I think this is something that all parties in Canada can support. There's no party in Canada that's actually opposed in principle to private property. However the timetable could be dicey. In Parliament if you're having elections every couple of years and prorogations and so on the timetable could become unpredictable. But in principle I think there is no reason why this shouldn't happen.

**FC: The Nisga'a nation in BC adopted voluntary fee simple land rights last year. What likely effect could this move have on other First Nations?**

**TF:** I think a huge effect. It shows that it is possible to do this. The Nisga'a could do this because they already are outside of the *Indian Act* as a result of their land claim agreement. They got actual ownership of their land, and that's one of the things that we recommend for our legislation. This will be the first experiment. They'll create several hundred housing lots for people who already have homes in their community. We'll see what happens. Are people using them constructively? It's not that at the moment there's such a big demand for outsiders to buy houses up there. It's probably more that people who live there would like to be able to borrow money to get better logging or fishing equipment. They're taking a very slow and methodical approach to it. They passed the ordinance last fall and now they have to do the surveying. It's been customary rights up until now, so they have to make sure what the boundaries are, so it's all going to take some time. But that's good. As people get more familiar with it, they'll have a chance to see how it works in practice.