

## REVIEW ESSAYS/NOTES CRITIQUE

### Boxing the Four Corners of Aboriginal Self-Government

HERE'S A STORY. A left-leaning legal scholar, a political scientist interested in problems of national identity, an Aboriginal lawyer and a right-leaning historian square off in a dispute over the future of Aboriginal self-government. Their punch lines can be summarized in a few words. Patrick Macklem argues in *Indigenous Difference and the Constitution of Canada* (Toronto, University of Toronto Press, 2001) that Aboriginal self-government is entirely consistent with, if not required by, the constitution of Canada as revised in 1982. Pow! Alan Cairns replies with a haymaker in *A People's Dream: Aboriginal Self-Government in Canada* (Vancouver: University of British Columbia Press, 2000), warning that a system of self-absorbed Aboriginal governments will fray Canada's social fabric. Ouch! Dan Russell throws the next punch as he observes in *Indigenous Difference and the Constitution of Canada* (Toronto, University of Toronto Press, 2001) that Aboriginal self-government seems to work tolerably well in the United States and so may also work in Canada. Thud! Finally, Tom Flanagan moves in for the kill with a right hook: self-government, he argues in *First Nations? Second Thoughts* (Montreal & Kingston: McGill-Queen's University Press, 2000), will keep Aboriginal people backward and oppressed. Kapow!

These books are about hopes and fears. Macklem is the idealist. He constructs a logically coherent legal paradigm for Aboriginal self-government that would delight any law professor, but has little chance of sending Canadians to the streets in support. In the world of legal reasoning, consistency is virtue and elegance is power. But Ottawa is not listening to law professors or to judges any more, as Jean Chrétien made clear in response to the Supreme Court's 1999 decision on Mi'kmaq treaty fishing rights.<sup>1</sup> Ottawa listens to fears these days, and our other contestants have a lot of them.

Cairns fears a balkanization of Canada, claiming the conceptual "middle ground" between assimilation of Aboriginal people and the nation-to-nation separatism he sees in the report of the Royal Commission on Aboriginal Peoples (RCAP) and Ottawa's current Aboriginal self-government policy.<sup>2</sup> In Cairns' view, "shared citizenship" is necessary for Aboriginal and non-Aboriginal people to "feel responsible for each other".<sup>3</sup> Fear of "loss of community" reverberates from cover to cover of this book, like the "do you still love me" refrain of a rock song.

Flanagan contends that self-government is a dead end for Aboriginal peoples. He is right about the present and future danger of bureaucratic elitism and the co-optation of small, client governments. No need to go to the Third World for examples; one has only to look at non-Aboriginal Canada. But the risk of inefficiency, even tyranny, should not deprive Aboriginal peoples of the "right to make their own mistakes", as

1 Russel L. Barsh and Sakej Youngblood Henderson, "Marshalling the Rule of Law in Canada: Of Eels and Honour", *Constitutional Forum*, 11,1 (2000), pp. 1-18.

2 Cairns, *Citizens Plus*, pp. 7, 86.

3 Cairns, *Citizens Plus*, pp. 92, 155, 187, 201.

Gandhi put it, if that is their choice (unless there are significant threats to others).

It is difficult to ascertain precisely what Russell fears; he rambles indecisively. I think he fears white Canadians' fears, and Aboriginal peoples' fears of white Canadians, because he tries so hard to convince his readers that Aboriginal self-government is really nothing to fear. Aboriginal readers may even wonder why their leaders are so worked up about getting it.

Behind the discussion of issues lurk crucial, tacit assumptions about Aboriginal society and Canadian society. One key assumption is Aboriginal cultural distinctiveness. Macklem and Flanagan mark the poles. For Macklem "Indigenous difference" is a large and largely incommensurable moral divide whilst in Flanagan's Canada most Aboriginal people are like recent immigrants and will freely Canadianize once freed to do so. Cairns takes an intermediate position, assuming some meaningful but commensurable difference and a considerable degree of shared Canadian experience. Russell appears to agree with Macklem but, like Macklem, fails to present much in the way of concrete examples of the cultural gulf. Before we debate the further institutionalization of differences, it would be convenient to see if we can agree on the nature, extent and significance of the differences that already exist. To what extent are we confronted with fundamental differences of an inherently and pervasively moral character, such as according communal cooperation and harmony an absolute priority over individual liberty, as may be claimed (for example) by Anabaptist communities in Canada?

### **Round One: Castles in the Air**

"People cannot be made virtuous by an order-in-council, or sober by a municipal by-law", Canadian economist and essayist Stephen Leacock wrote in one of his unusually serious moments. "It is the fault of younger people, and especially of academic people, to think that society can be made and fashioned by law. It is part of the very innocence of their optimism".<sup>4</sup> I tend to agree with Leacock that, in the field of social development, law is more a product than a cause. This is not to say that laws do not often intimidate people into doing things they might not otherwise do such as paying their taxes, or that clever legal scholarship does not sometimes inspire people to reconsider their normative beliefs. On the whole, however, I am doubtful that cohesive societies or good marriages are invented on paper. As Leacock stressed, the feelings must already be there; law can then clarify, solemnize and discipline the relationship people are already largely inclined to embrace.

Patrick Macklem's contribution to the self-government debate is a work of pure legal reasoning: a book-length effort to extract the essence of recent Canadian Supreme Court decisions and create a road map to the Third Order of Government. Macklem takes it as given that "a unique constitutional relationship exists between Aboriginal people and the Canadian State" as a result of four undeniable "factual differences" between Aboriginal and non-Aboriginal Canadians: cultural distinctiveness, indigenosity, prior sovereignty and treaties.<sup>5</sup> The root of his argument, however, is not so much historical fact as liberal social theory. Aboriginal

4 Stephen Leacock, *My Discovery of the West* (Boston & New York, 1937), p. 255.

5 Macklem, *Indigenous Difference*, p. 4.

peoples “warrant constitutional protection because [they] face unequal challenges in their ability to reproduce their cultures”, retain their homelands and express themselves effectively in the political process.<sup>6</sup> Special measures are required, not to confer on Aboriginal peoples a privileged position but to offset disadvantages. As such, the special constitutional status represented by section 35 of the *Constitution Act, 1982* is not only consistent with the liberal ideal of social equality but a condition of Canada’s legitimacy as a just and democratic state.<sup>7</sup>

Macklem insists that his ultimate goal is “equality”.<sup>8</sup> However, he painstakingly deconstructs the concept of “equality” to demonstrate its substantive emptiness. Equal in what respects? Equality can only be applied after we have agreed on what characteristics of individuals and groups are relevant or should be equalized. Equality of height or hair colour is a meaningless goal. Equality of income has more “legs” as a proposition but is not embraced by any Western country. To some extent, we agree in law and policy that some people and groups either need not, or should not, be treated exactly alike. We do not pretend that wheelchair-bound individuals can leap staircases, and we build ramps for them. We treat men and women as equal in their rights and responsibilities, except to the extent of those physiological differences that are intrinsic to biological gender. In the case of Aboriginal peoples, Macklem argues that the gap to be addressed is political, and that the only effective remedy is a “just distribution of powers” between Aboriginal governments and the federal and provincial governments: Aboriginal self-government.

Macklem carefully distinguishes his notion of substantive equality from cultural relativism.<sup>9</sup> Equality of results may require the privileging of Aboriginal communities, but all Canadians would still play by one set of constitutional rules as component parts of a single state. This argument assumes that the cultural specificities of Aboriginal peoples are commensurable with the rest of the Canadian cultural “mosaic” – that is, consistent with the range of values and beliefs that other Canadians generally share. In terms used by international legal scholars, then, what Macklem proposes is neither assimilation nor separatism, but *integration* within a large and complex state already composed of unequal parts. Macklem aptly reminds us that Canada is already constitutionally a plural society, not only in the weak sense of the multiculturalism clause in the *Canadian Charter of Rights and Freedoms*, but also in the more robust sense that the constitution confers special status on Québec, on linguistic diversity and, through provisions for separate schools, on religious diversity – not to mention the different terms of Confederation applied to the Prairie Provinces and Newfoundland.<sup>10</sup>

This is similar to the argument for “geometric equality” that Sakej Henderson and I made 25 years ago in the context of U.S. Indian tribes.<sup>11</sup> It is also analogous to the basis in Canadian and U.S. constitutional law for affirmative action or reverse

6 Macklem, *Indigenous Difference*, 5, pp. 287-8. Culture is a “resource” and as such, like land or a college education, must be considered in the overall equitable distribution of resources and opportunities within society. See Macklem, *Indigenous Difference*, pp. 71- 2.

7 Macklem, *Indigenous Difference*, pp. 7, 10, 211-21.

8 Macklem, *Indigenous Difference*, p. 288.

9 Macklem, *Indigenous Difference*, pp. 40-6.

10 Macklem, *Indigenous Difference*, pp. 62-4.

11 Russel Barsh and Sakej Henderson, *The Road; Indian Tribes and Political Liberty* (Berkeley, 1980).

discrimination in the case of “visible minorities”. Macklem is at pains to persuade the reader that equality is a permanent rather than transient challenge for Aboriginal peoples so as to distinguish Aboriginal rights from the transitional protections and benefits extended, for example, to African Americans and Canadian women. Here I believe he fails to remain faithful to his philosophical framework. If the goal is equalizing the ability of Aboriginal peoples and other Canadians to thrive and continue to enjoy distinctive lifestyles and beliefs, it seems to follow that special rights should persist only so long as serious challenges remain. We must identify the obstacles to Aboriginal self-expression and self-realization clearly, and ascertain whether they can be eliminated by social change rather than be perpetually offset by compensating rights or benefits. Let us consider racism for instance. Are we ready to concede that it is a permanent defect of Canadian society? Or dare we predict that racism may wither (and not merely shift its shape and appearance) if Aboriginal people and other Canadians become, in Leacock’s term, “culturally inter-permeated” as neighbours?

Macklem does not venture into this muddy normative and empirical bog. Instead, he shifts his argument to a conceptually distinct foundation: prior occupation of Canada, prior sovereignty and treaties. The Dickson Supreme Court concluded in the 1980s that Canada’s relationship with Aboriginal peoples is *sui generis* – that is, the result of unique historical facts such as treaty-making.<sup>12</sup> If Aboriginal rights flow from historical events, rather than contemporary disadvantage, they are arguably perpetual rather than transient in nature. Indeed, Aboriginal rights thereby become a legacy, or inherited privilege, and like individual family legacies should remain largely at the disposal of the inheritors. There are two logical problems with this approach. Disadvantage can also be a function of history: a history of slavery or discrimination for example. To narrow the field to Aboriginal peoples, there is no escaping the central role of treaties as agreements to respect and protect specific indigenous legacies.<sup>13</sup> The Canadian state is an edifice of historical agreements, many of which are regarded as “constitutional” even if they do not appear in schedules to the *Constitution Act, 1867* or the *Constitution Act, 1982*. To respect agreements only if they were made amongst non-Aboriginal peoples would be racist. On the other hand, many Aboriginal groups lack treaties. Macklem maintains that they should have the same Aboriginal rights as groups that made treaties, for to do otherwise would be unfair.<sup>14</sup> But then the justification for special rights is not treaties but fairness.

The advice of the comedy business is “buy the premise, buy the gag”.<sup>15</sup> Macklem builds an internally consistent castle of rights on logical foundations that seem obvious to Aboriginal peoples, and are largely accepted by the Canadian Supreme Court, but remain subject to energetic public dispute. Can we convince Canadians to

12 Macklem, *Indigenous Difference*, p. 252.

13 Prior occupation seems more problematic to me because it is too easy to argue in reply that our society does not guarantee the family farm forever and that financial compensation should suffice as a remedy for any past loss. Contending that only Aboriginal peoples have strong spiritual relationships with the land, moreover, is debatable as a contemporary generalization. And as Tom Flanagan argues, many First Nations are claiming lands they have occupied no longer than their neighbours. I support land rights as a matter of justice, but let us be fair with facts.

14 Macklem, *Indigenous Difference*, p. 251.

15 I confess that my late stepfather, a secondary school English literature teacher, moonlighted as a stand-up comedian in clubs in the 1980s.

buy the premise?

Macklem makes no direct appeal to the self-interest of non-Aboriginal Canadians. He takes it for granted that Aboriginal rights can be accommodated within the Charter of Rights and Freedoms and by Canadian federalism without undermining democracy or the human rights of others. From my own experience, I believe that a fair accommodation is possible, with careful design, and only after a majority of non-Aboriginal Canadians can see some advantage in sharing power that is more concrete than public self-congratulation as a just society and example to the world. Instead, Macklem makes a legally plausible case for including “positive rights” (legally enforceable preferential fiscal arrangements) in the box of Aboriginal rights.<sup>16</sup> This flows logically from his premise. If Aboriginal peoples have a right to perpetuate their distinctive cultures, it follows that they have a right to the financial and technical resources required to actually enjoy that right.<sup>17</sup> As an analogy, the right to education enshrined in international human rights instruments means more than a defence against discrimination in schools; it also implies a priority call on state resources to pay for teachers and tuition, without which the right is merely theoretical. Macklem is legally and philosophically on solid ground here. However, he has no answer for citizens who fear that greater spending on Aboriginal education inevitably means higher taxes or less education for their own children.<sup>18</sup> Without addressing those issues, the most elegant argument in the world for Aboriginal rights will fail politically.

Macklem’s treatise on self-government is an elaborate ellipsis for the right to self-determination. This is clear in his argument that the Supreme Court has given too much weight to “reconciling” Aboriginal interests with the interests of the Canadian state, and his contention that Aboriginal people – and not the courts – must define what is integral to their cultures and therefore deserving of constitutional protection.<sup>19</sup> He concludes that Aboriginal laws must be paramount within Aboriginal territories.<sup>20</sup> If all this is true, why should Aboriginal peoples not have a right to separate from Canada? The strongest case for continuing to live together is pragmatic, not legal.

But Macklem is not much concerned with empirical matters, as demonstrated by his marginal interest in the actual nature or extent of Aboriginal cultural distinctiveness. Although he states that “some aspects” of Aboriginal cultures are “unique” to Aboriginal peoples, he does not identify them apart from a reference to Aboriginal peoples’ shared experience of resisting European control.<sup>21</sup> At another stage of his analysis, he refers to a “profoundly spiritual relationship with the land”.<sup>22</sup>

16 Macklem, *Indigenous Difference*, pp. 234-7, 252.

17 Macklem, *Indigenous Difference*, p. 248. Macklem then falls back on his alternative argument of redressing disadvantage (p. 255), but of course this would necessarily imply testing the right periodically against the persistence of the need.

18 Macklem is confident that, with experience, courts will find ways of *quantifying* states’ legal obligations to finance economic and social rights. See Macklem, *Indigenous Difference*, p. 263. The problem is in ordering Parliament to appropriate funds for specific purposes as opposed to ordering bureaucrats to do their jobs differently.

19 Macklem, *Indigenous Difference*, pp. 166-9, 189-93.

20 Macklam, *Indigenous Difference*, pp. 178-80.

21 Macklem, *Indigenous Difference*, p. 48. But many immigrants brought histories of oppression with them to these shores (see pp. 56-7).

22 Macklem, *Indigenous Difference*, pp. 50-1, 287.

He goes to some pains to convince the reader that cultures change, as do their priorities and what matters the most to them, making it hazardous to define culture in terms of what was “traditional”.<sup>23</sup> In the end, he concedes that cultural difference *per se* is insufficient as a basis for establishing special legal rights, and simply asserts as self-evident that self-government is an “Indigenous difference” separate and apart from “cultural difference”.<sup>24</sup> But this seems to be nothing more than an assertion that Aboriginal peoples should have the right to self-government: if not because of cultural difference, then why?

There are other points at which Macklem makes assertions that appear plausible but beg for empirical analysis. He cautions against viewing First Nations as bounded or exclusive entities, reminding us that all cultural identities and groupings are “porous” – that is, overlapping, multiple and situational.<sup>25</sup> But how does this apply to section 35 rights? Is it appropriate for an individual to enjoy rights in multiple First Nations? Current law treats each First Nation as exclusive and allows membership in one alone. Macklem is correct sociologically, but he does not address the legal implications of his point and his unsatisfactory discussion of the *Norris* case demonstrates the importance of addressing it.

Macklem characterizes spirit dancing as a cultural element of the “Coast Salish Nation”, and describes *Norris* as a dispute over an individual’s refusal to be initiated into spirit dancing by his “Nation”.<sup>26</sup> There is no institutionalized Coast Salish Nation, however, just more than 50 Indian bands or First Nations in British Columbia and Indian tribes in the State of Washington that historically spoke Coast Salish languages. What “Nation” does Macklem have in mind? Cultural identities crosscut existing political entities (the “bands” declared by the responsible minister under *Indian Act*) in much or all of Canada, hence Aboriginal self-government may involve overlapping and conflicting claims by the present-day institutional successors of historical societies.<sup>27</sup>

Similarly, Macklem goes to great lengths to argue that the Charter should apply to First Nations only in exceptional cases, lest the courts “reorganize Aboriginal societies according to non-Aboriginal values”. But he gives no examples of value conflicts that would pose a serious choice between respect for “Indigenous difference” and upholding the Charter.<sup>28</sup> It is impossible to discuss future Charter conflicts usefully in a vacuum. If Aboriginal and non-Aboriginal cultures are commensurable, the Charter should not pose a serious threat to Aboriginal governments. If the two cultural universes are so different as to make the core values of one a threat to the other, perhaps we cannot live in a single county after all.

For all its intellectual elegance, Macklem’s treatise ultimately stands uneasily on

23 Macklem, *Indigenous Difference*, pp. 55, 64-6.

24 Macklem, *Indigenous Difference*, p. 59-61, 53.

25 Macklem, *Indigenous Difference*, p. 53.

26 Macklem, *Indigenous Difference*, pp. 52-3. The case to which he refers is *Norris v. Thomas*, [1992] 2 C.N.L.R. 139 (B.C.S.C.).

27 Macklem, *Indigenous Difference*, pp. 55, 64-6. Macklem argues against equating culture with “tradition”, contending that indigenous cultures continue to evolve and change and have a right to do so freely. I agree; however, the fact that a number of people live on one reserve or vote for one chief does not mean that they share one culture, old or new.

28 Macklem, *Indigenous Difference*, pp. 195, 208-10, 216.



two alternate and apparently contradictory paradigms: one grounded in doing justice by correcting undeserved disadvantages and the other in keeping our agreements. Lawyers learn to plead their cases in the alternative, affording judges several possible grounds for decision that may be mutually reinforcing but are more often mutually exclusive. Which arm of Macklem's argument is fair to Aboriginal peoples and might also seem practical to a broad cross-section of Canadians?

Macklem stands on firmer ground when he argues that treaties are constitutional accords: they are already a part of the constitution and our task is to clarify what we must do to observe them fully.<sup>29</sup> I would go so far as to say that he understates the historical case for respecting treaties by focusing on British and North American court decisions to the exclusion of the long record of diplomatic practices among European empires.<sup>30</sup> Nearly hidden within Macklem's meticulous review of the case law is a key policy argument for treaty implementation: the legitimacy of Canada, in broad historical terms, may depend on Canada's ability to show that it acquired Aboriginal territory by consent.<sup>31</sup> Canada's legitimacy continues as long as Canada continues to undertake faithfully the conditions attached to Aboriginal consent. Respect for treaties is then what distinguishes (or should distinguish) Canada from the colonial powers and more recent international aggressors. But do Canadians care?

Many do. Unfortunately, what they care about is losing their stake in Canada as it now exists rather than building a more indigenized Canada. For them, Macklem provides cold comfort.

### **Round Two: Separation Anxiety**

In *The White Castle*, Turkish novelist Orhan Pamuk imagined a captive Venetian merchant and an Ottoman aristocrat who grow so entangled in each other's ideas that they eventually exchange places: the Ottoman returns to Venice and the Venetian retires to a life of study and reflection in Istanbul.<sup>32</sup> Who is really the Turk and who the Italian? Alan Cairns enters the Aboriginal self-government fray with a book-length essay about identity that explores the same philosophical landscape: who is Aboriginal, who is Canadian and are they or can they be the same?

Cairns questions the supposed incommensurability of Aboriginal and mainstream Canadian values.<sup>33</sup> He observes that Aboriginal people have overstated their differences and exaggerated the negative aspects of European culture as a way of gaining public and political attention after more than a century of marginalization and indifference.<sup>34</sup> I share Cairns' concern that difference is overstated in the contemporary Canadian discourse of Aboriginal rights, and agree that it represents a response to the way similarity has been pressed upon Aboriginal people for over a century, more or less successfully.<sup>35</sup> Canada as a whole tends to stress difference in dealings with its southern neighbour, for parallel reasons, although similarities

29 Macklem, *Indigenous Difference*, pp. 136, 153-6.

30 Macklem, *Indigenous Difference*, pp. 136-44.

31 Macklem, *Indigenous Difference*, p. 156.

32 Orhan Pamuk, *The White Castle*, trans. Victoria Hollbrook (New York, 1991; New York, 1998).

33 Macklem, *Indigenous Difference*, p. 8.

34 Macklem, *Indigenous Difference*, p. 44.

35 Macklem, *Indigenous Difference*, p. 95.

between the two countries are greater than anyone cares to admit. Canadian nationalism has not prevented Canada and the U.S. from continuing to increase their economic and strategic interdependence.

Cairns is also correct in pointing out that many Aboriginal people in the past, and a growing number at present, chose to participate in mainstream Canadian society. But it is important to distinguish between *assimilation* (the term Cairns consistently applies to this phenomenon) and *integration*.<sup>36</sup> The former implies a disappearance of difference, whilst the latter describes a sharing of loyalties and institutions at a broad level *without* the disappearance of difference. All immigrants have integrated to a considerable extent into Canadian society: they earn wages, pay taxes and shop alongside other Canadians. Some are more assimilated than others, however, retaining little of their mother tongue or their religious or cultural practices and beliefs. No better examples of the importance of this analytical distinction can be offered than the self-styled Québécois *pur laine*, who is profoundly integrated into Canada yet fiercely unassimilated, and the Anabaptist colonies in the Prairies. By classifying all Aboriginal people who live and work outside Aboriginal communities (such as Indian reserves) as “assimilated”, Cairns conceals a crucial factual assertion behind his terminology.<sup>37</sup>

Cairns concedes that official efforts to “assimilate” Aboriginal people were often arrogant and “callous”, and that Aboriginal people who tried to “assimilate” were often rebuffed or persecuted by non-Aboriginal Canadians.<sup>38</sup> These facts undermine his crucial assumption that individual Aboriginal people have had “choices” and have exercised that freedom to become Canadians – a choice he accuses Aboriginal leaders and fuzzyheaded academics of taking away from them. Indeed, Cairns disputes that any “Indian” was ever “enfranchised” involuntarily, despite evidence to the contrary.<sup>39</sup>

I have difficulty with Cairns’ recurrent intimation that Aboriginal people must limit or dispense with self-government because its separating influence will weaken the extent to which Aboriginal people and other Canadians “feel responsible for each other”. He is certainly correct in stating that Aboriginal people and their communities are already deeply enmeshed in the Canadian state and Canadian economy, and that electoral power in Ottawa and the provincial assemblies is indispensable to realizing Aboriginal people’s aspirations fully.<sup>40</sup> Aboriginal people being human, they are capable of a “modernizing Aboriginality” that is adaptable and cosmopolitan,

36 This distinction was the subject of a lengthy scholarly debate at the International Labour Organisation in the 1980s. See, for example, Russel Barsh, “Revision of I.L.O. Convention No. 107”, *American Journal of International Law*, 81, 3 (1987), pp. 756-60 and Russel Barsh, “Indigenous Peoples in the 1990s: From Object to Subject of International Law?” *Harvard Human Rights Journal*, (1994), pp. 33-86. See, more generally, S. James Anaya, *Indigenous Peoples in International Law* (New York, 1996).

37 Cairns, *Citizens Plus*, pp. 58-61, 123-2.

38 Cairns, *Citizens Plus*, p. 59, 66.

39 Cairns, *Citizens Plus*, p. 49. The best-documented example of involuntary enfranchisement involved Native women whose legal status changed automatically when they married non-Native men; this was challenged successfully at the UN Human Rights Committee in *Lovelace v. Canada*, UNDOC CCPR/C/DR/R6/24 (31 July 1983) and led to 1985 federal legislation reinstating the “Indian” status of thousands of “enfranchised” women and their children. To be sure, these women did not lose their Canadian citizenship by regaining their Indian status.

40 Cairns, *Citizens Plus*, p. 90.



inclusive of overlapping identities and does not require territorial or social isolation from other cultures.<sup>41</sup> Why, then, is local self-government such a threat in the hands of Aboriginal peoples, any more than for non-Aboriginal towns and cities?<sup>42</sup>

It is true that many Aboriginal communities are “poor, anomic, and characterized by social breakdown and malaise” and that many are internally complex if not divided.<sup>43</sup> Self-government will not solve all Aboriginal socio-economic problems, nor will it offer much direct support to the large number of Aboriginal people who live in predominantly non-Aboriginal towns and cities.<sup>44</sup> Small Canadian towns are also often poor, conflicted and not particularly effective in advancing social welfare, but these facts do not justify an elimination of municipalities. Cairns questions the utility of Aboriginal self-government, standing alone, without engaging the problem of how Aboriginal governments can safely and effectively participate in a hierarchy of jurisdictions in a strong federal state. But perhaps this is because Canada itself is no longer a strong federal state, and it can be rather embarrassing to pretend that Canadian federalism will work for Aboriginal peoples when it is struggling to work for the political majority.

Cairns’ avowed target is “parallelism”, which he defines as a layer or “order” of governments that coexist with, but do not participate directly in, the provincial or federal orders. He claims that all proponents of Aboriginal self-government embrace parallelism including Sakej Henderson and myself, dismissing our proposal for treaty federalism as “differ[ing] only in the instrumentality” proposed for establishing a separate and divisive Aboriginal political order.<sup>45</sup> I suggest that Cairns errs. What he calls parallelism is only half of what we call treaty federalism. We conceive that an Aboriginal community must exercise a measure of collective internal responsibility for its members and its territory (if any) as well as share in making external decisions (federal or provincial) that necessarily affect the community. This means true equality between provincial and Aboriginal self-government, with internal legislative authority *and* representation in external legislatures. Cairns concedes that we have explicitly included national representation in our proposals, but warns the reader that what we *really* mean is that First Nations governments will speak on behalf of their members.<sup>46</sup>

Even if this were so, would it mean the end of Canada? The United States Senate was appointed by state legislatures for more than a century, Canada’s Senate is appointed by the government of the day and the British House of Lords continues to

41 Cairns, *Citizens Plus*, pp. 99-104, 106-7, 206. Cairns promotes what he describes as “outward-looking Aboriginality” as opposed to a narrowly ethnocentric identity. I have associated myself elsewhere with the spirit of Gandhi’s comment that he would open the windows of India to breezes from every direction but let none of them blow him over.

42 Cairns concedes that many national constitutions “distribute governing power to provide leverage for a people to strengthen their abilities to adapt to incoming pressures in ways that preserve continuity with the past”. See Cairns, *Citizens Plus*, p. 108. It is unclear why he thinks this principle will have such adverse consequences if applied to Aboriginal peoples, unless the only point of his book is to add the caution: “in moderation”.

43 Cairns, *Citizens Plus*, pp. 111-2, 186.

44 Cairns, *Citizens Plus*, pp. 113-4.

45 Cairns, *Citizens Plus*, pp. 179-81. On page 94, however, Cairns curiously refers to our proposal as “radically different” than the others, without explaining how it differs.

46 Cairns, *Citizens Plus*, pp. 181-2. Our constitutional proposals on behalf of the Mi’kmaq argued for reserved seats in Parliament like the reserved Maori seats in New Zealand’s upper house.

be constituted by inheritance. Until the 20th century, a majority of the adult residents of these countries could not vote due to *de jure* restrictions of race, gender or class. Someone more cynical (or realistic) than I would argue that the real decision makers in contemporary states are high-level bureaucrats, consultants, campaign contributors and lobbyists, who are neither elected nor publicly called to account. I share Cairns' belief that the direct election of all decision makers is more democratic and accountable than indirect representation through elected intermediaries, and I would commend the direct election of senators for Canada. It does not follow that Canada will fall apart if the Senate continues to be appointed. All republican forms of government involve some degree of indirect democracy: this is what makes them "representative" in form, rather than an Athenian or "town hall" democracy.<sup>47</sup>

According to Cairns, Aboriginal defenders of unconditional Canadian citizenship will inevitably arise as a result of demographics: the Aboriginal population will increase, urbanize and (at least in urban centres) enjoy upwardly mobility, giving rise to a growing class of persons who cherish being Canadian, subsume their Aboriginality within a broad Canadian identity and express themselves through federal and provincial elections.<sup>48</sup> He cites no evidence. On the contrary, many of the strong advocates of "parallelism" that he identified could be described as successful urban Aboriginal professionals. Perhaps, like educated Africans of the mid-20th century, they are eager to create new state institutions in which they will enjoy a degree of power currently denied to them by the national party system. Cairns' analysis assumes (once again) that Aboriginal people enjoy options and will increasingly choose Canada – whilst the facts suggest that educated Aboriginal people continue to perceive closed doors, glass ceilings and "no dogs or Indians" signs.<sup>49</sup>

If proponents of national unity are to succeed, they must understand the basis for separatist sentiments. In Québec, the PQ tide rose until Ottawa realized that separatism drew much of its momentum from economic frustration. Trudeau appreciated this, and transferred jobs and wealth to his province during the Quiet Revolution; Chrétien eventually addressed it, meeting the PQ on pocketbook issues rather than arguing constitutional law. Cairns fails to investigate the social facts that make "nationhood" attractive to Aboriginal people, and thus fails to make arguments that could change Aboriginal people's minds.<sup>50</sup>

Instead Cairns is content to criticize high-level policy pronouncements such as the 1996 report of the Royal Commission on Aboriginal Peoples (RCAP), which he faults for emphasizing territorial self-government over individual economic success and for paying little attention to Aboriginal people living in cities or to people of Aboriginal

47 It may be worthwhile contemplating the status of Puerto Rico in the United States, which does not elect voting members of Congress but only its internal legislature; on the whole, Puerto Ricans appear to value U.S. citizenship while remaining ambivalent about Puerto Rico achieving full statehood.

48 Cairns, *Citizens Plus*, p. 173.

49 Cairns cites no empirical data of Aboriginal electoral participation. See, for instance, Russel L. Barsh, Michelle Fraser, Faye Morning Bull, Toby Provost and Kirby Smith, "The Prairie Indian Vote in Canadian Politics 1965-93: A Critical Case Study from Alberta", *Great Plains Research*, 7, 1 (1997), pp. 3-26.

50 Pocketbook politics has not eliminated Québec nationalism but, combined with tacit transfers of power to the Québec government, it has met separatism halfway. Ottawa has tried the same strategy on Aboriginal peoples in vain. Perhaps an incorrect diagnosis of the problem is to blame.

descent who no longer identify themselves as Aboriginal.<sup>51</sup> I agree that the RCAP focused on integrating Aboriginal “nations” into the architecture of Canadian federalism rather than assimilating individual Aboriginal people into Canadian society, and that the RCAP report lacked any clear vision of a more indigenized Canada that could appeal to non-Aboriginal citizens.<sup>52</sup> These issues did come up within the RCAP proceedings; however, the balance of opinion favoured empowering Aboriginal peoples through the recognition of “nations” that could negotiate the future shape of Canada from a position of strength. Commissioners did not want to speak for all Aboriginal people, but proposed a more representative mechanism.<sup>53</sup>

It is true that the RCAP placed much more faith in a regime of legal rights enforced by the Canadian courts than in strengthening Aboriginal participation in national electoral politics; it is also true that internal self-government *without* national electoral power could further isolate and weaken Aboriginal peoples politically.<sup>54</sup> But dissecting the corpse of the RCAP is now academic. Aboriginal leaders sought and won the principle of guaranteed special parliamentary representation at Charlottetown only to lose it again in a referendum vote held *before* the RCAP was struck. The RCAP was offered to Aboriginal leaders in the wake of the Charlottetown vote and the Kahnasetake Mohawk crisis. Ottawa was, in effect, implementing the self-government model Cairns abhors even before the RCAP issued its report. We must ask why Ottawa has pursued self-government *without* ever officially responding to the self-government recommendations made by the RCAP. And we must recognize that national representation based on the New Zealand model is off the table because a majority of Canadians took it off the table – and Ottawa is in no hurry to put it back in play.

The root of our critical disagreement is Cairn’s failure to acknowledge the events that led to the emergence by the 1990s of a “nation-to-nation” discourse of parallel paths under the banner of the Two-Row Wampum. His narrative jumps from the adoption of a constitutional guarantee of “aboriginal and treaty rights” in 1982 to the RCAP as if nothing of relevance occurred in the intervening 14 years. He blames the polarized discourse of Aboriginal rights on “nationalist elites”, whom he argues no longer represent a majority of Aboriginal people; instead, “assimilated” Aboriginal people, whom Cairns equates with everyone that lives and works off reserve, are now more numerous.<sup>55</sup> What I saw in the 1990s, from the vantage point of directing community studies on Prairie reserves and border towns, was a string of political and bureaucratic stalemates in Ottawa and organized resistance to Aboriginal empowerment by many local business and civic leaders.<sup>56</sup> This is not to dismiss Cairns’ concerns about a self-serving Aboriginal bureaucracy that both relies upon

51 Cairns, *Citizens Plus*, pp. 122-8, 131-2. See also pp. 184-5.

52 Cairns, *Citizens Plus*, pp. 132-5.

53 At least this was my experience as a sometime researcher, reviewer and drafter for the Commission.

54 Cairns, *Citizens Plus*, pp. 144-51.

55 Cairns, *Citizens Plus*, pp. 78, 184. I grant that there are many people of Aboriginal ancestry in Canada that have little emotional investment in being “Aboriginal” nor any wish to live under Aboriginal governments. What is problematic is Cairns’ lack of critical distinction between assimilated Aboriginal people and Aboriginal people that seek work off-reserve for purely economic reasons such as employment or housing.

56 Cairns acknowledges a “residue of imperial mentality” in the Canadian government but is curiously silent about stubborn residues of racism in grassroots Canadian society. See Cairns, *Citizens Plus*, p. 89.

and justifies itself as the defender of their people against a self-serving Euro-Canadian bureaucracy. On the contrary, such concerns formed the core of my professional disillusionment with the treaty renewal process on the Prairies.<sup>57</sup> But Aboriginal elites learn to deploy extremely nationalist language precisely because it appeals to Aboriginal constituents that continue to experience racism, exclusion and frustration with their neighbors.

Significant to my way of thinking is Cairns' speculation that the First Ministers' Conferences on the clarification of Aboriginal rights (1983-87) would have made more progress had some of the federal and provincial negotiators been Aboriginal persons.<sup>58</sup> Having Aboriginal people on one side of the table and "white" Canadians on the other created the appearance of a profound "racial" and cultural divide. Cairns does not ask why this happened, or why it is still happening in treaty negotiations.<sup>59</sup> Instead, Cairns reassures the reader that more brown faces will appear on the Crown side as Canada's Aboriginal population continues to grow, urbanize and improve its economic status. In other words, Cairns views assimilation as a simple function of demographics – mainly of upward mobility. This assumes that Aboriginal people are underrepresented in electoral politics simply because they are few in number and relatively poor. It also assumes that educated, successful Aboriginal people will identify more strongly as Canadians than as Blackfoot, Mohawk or Haida. I suggest that exactly the opposite is true: identity today remains a concern for the privileged as well as the underprivileged, albeit arguably for somewhat different reasons.

When Cairns accuses other scholars of an "unremitting focus" on strengthening Aboriginal peoples' collective power,<sup>60</sup> he implies, but does not expressly state, that the perpetrators are non-Aboriginal.<sup>61</sup> But if they include successful, urbanized Aboriginal people, his arguments based on the free choice to be Canadian appear to collapse.

Cairns concedes that the Chrétien Government fostered Aboriginal "suspicion" by ignoring nearly all of the recommendations made by the RCAP.<sup>62</sup> The problem is deeper and longstanding. Many, perhaps most, Aboriginal people feel no better off than they were 30 years ago when Trudeau recognized "Indians" as a rock on the road to Canadian unity. Is this the fault of fuzzy thinking by the RCAP or monomaniacal academics? Cairns can repeat as often as he likes that Aboriginal people are Canadian citizens and already participate in the wider field of Canadian economy and society,

57 Russel L. Barsh and Chantelle P. Marlor, "Renewal or Rhetoric?" Treaty Renewal on the Prairies", paper presented at the Association for Canadian Studies, Ottawa, 2 June 1998.

58 Cairns, *Citizens Plus*, p. 173.

59 He complains, however, that the treaty process will be divisive because of this fact. See Cairns, *Citizens Plus*, p. 195.

60 Cairns, *Citizens Plus*, p. 179. Cairns, in contrast, appeals for a more "broad-ranging debate with checks and balances". He acknowledges the importance of pursuing justice, but contends that advocates of self-government display "a lack of concern for what moral ties bind us together" (see pp. 177, 184-7). I suggest that Aboriginal scholarship has, in fact, been preoccupied with "what moral ties bind us together" in the form of treaties. Cairns implicitly regards national unity as a *more important* moral tie than living up to agreements – not an unreasonable argument, but one that should be explicit.

61 Cairns dwells on John Borrows' "heterodox" remarks that he is both Anishinabe and a Canadian, without clarifying whether this perspective makes Borrows unique amongst scholars or amongst Aboriginal people. See Cairns, *Citizens Plus*, p. 206.

62 Cairns, *Citizens Plus*, p. 87.

but the problem is that they *feel* like neither citizens nor equals.<sup>63</sup> I do not think this is simply a misjudgment of Canada on their part. Rather, I have come to believe that most Canadians would be happier not having to share their daily lives with Aboriginal people who remain Aboriginal in behaviour rather than mere colour or label. Most Canadians are more comfortable with choosing between assimilation and the parallelism of the Two-Row Wampum than a multilayered pluralism in which the lives of non-Aboriginal Canadians would change and merge to some degree with those of Aboriginal communities and cultures. How many Canadians learn to speak Aboriginal languages? That is frankly rhetorical, but I suspect that readers of this review will find it easy to test my proposition amongst their colleagues and neighbors.

Cairns' alternative to self-government is disappointing: he resuscitates the corpse of "citizens-plus" introduced by the 1966 Hawthorne Report, on which Cairns worked as a young researcher. "I hope that I am driven by more than nostalgia", Cairns confesses.<sup>64</sup> The cornerstones of citizens-plus are the full *equality in citizenship* of Aboriginal peoples and the entrenchment of *special rights* – in this context, special transfer payments to Aboriginal individuals. Cairns concedes that Ottawa has long deployed *equality* and *citizenship* to "package assimilative policies", and that Trudeau and Chrétien rejected citizens-plus because it would give Aboriginal people permanent subsidized status.<sup>65</sup> The terminology of citizens-plus, and its burial by Liberal governments, may have something to do with its reflexive rejection by Aboriginal people today.<sup>66</sup> Cairns' proposed remedy is a bad proposal because it is a welfare state proposal. It would entrench individual subsidies without sharing collective power. Fundamentally, citizens-plus assumes that most Aboriginal people would assimilate if they could.

Although Cairns is a political scientist, he makes few distinctions between factual and normative assertions, indulging in the sins he attributes to scholars on the other side of his argument. Nowhere is this more problematic than in his condemnation of present-day land claims and treaty negotiations. Cairns complains that the negotiating framework treats Canada and First Nations as "separate actors" when, in fact, "Aboriginal people are represented on both sides of the table".<sup>67</sup> With respect, this assumes the conclusion; whether Aboriginal people are represented *in fact* by federal bureaucrats, and not merely in theory or law, is a question that must be answered empirically. If Canada's Aboriginal people lack electoral power – a key factual issue that Cairns studiously avoids – then they are not in any meaningful sense "represented" in Ottawa. This is precisely the problem that Aboriginal leaders and

63 "It would be naive to assume that a magic wand can bring into being at the level of emotions a strong sense of citizenship belonging by Aboriginal peoples", Cairns admits. "History forbids such an outcome". Cairns adds, "We need not, however, give added momentum to the divisive legacy of history". See Cairns, *Citizens Plus*, p. 200. I think this begs the central question Canada must face – building an environment that fosters feelings of "belonging" – and again reveals Cairns tacit assumption that racism is a thing of "history".

64 Cairns, *Citizens Plus*, p. 13.

65 Cairns, *Citizens Plus*, pp. 165-6, 168.

66 Cairns, *Citizens Plus*, pp. 161-4. Embraced by many Prairie First Nations in the 1970s, citizens-plus was later jettisoned by most Aboriginal leaders as begging the question of how Aboriginal peoples and their lands became part of Canada in the first place.

67 Cairns, *Citizens Plus*, p. 191.

scholars want Ottawa to tackle in earnest. We cannot simply define it away with political theory or warn that facing facts will be divisive.

Why *is* it so dangerously divisive to treat Aboriginal people and Canada's elected governments as "separate actors" for the sake of settling Aboriginal peoples' legal status within Canada? Cairns tells us that we are already married because we live in the same house and share the kitchen. Aboriginal people respond that they have the smallest room, that everyone eats the food they leave in the refrigerator and that the trash gets left in front of their hallway door. They say that when they complain, they are ignored or dismissed as troublemakers. Is this a marriage? I would say it needs counseling, followed by a clearly worded agreement about resources and responsibilities. This is a fundamental intellectual knot for Cairns: he cannot imagine how a contract can make a relationship stronger. Call it a pre-nuptial agreement between Aboriginal people and all other Canadians, who have lived together and fought a lot; neither side can live without the other, but both are a little anxious about the consequences of "tying the knot" forever. Relationship counselor Cairns says: "You're *already* married, stupid!"

In the final analysis, the greatest weakness in Cairns' argument may be his failure to take a cue from Dan Russell and make a comparative study of the situation to the south – as distasteful as that may be. American Indians have long enjoyed legally separate tribal governments and participated minimally in the U.S. federal and state elections.<sup>68</sup> I have argued elsewhere that U.S. Indian tribes are nevertheless *more* assimilated into national culture than indigenous peoples elsewhere in the world, sharing American attitudes and beliefs to an extent that has no equal in the Americas or Australasia.<sup>69</sup> Applying Cairns' analysis, the U.S. approach should have had precisely the opposite effect. And while the rhetoric of U.S. Indian leaders and legal scholars condemns the state governments as the arch-enemies of Indian cultures, I can attest from experience as a tribal official that there is extensive and growing administrative cooperation between state and tribal institutions. Arguably, this level of integration could not have developed until tribes first secured the power to say "no" to the states. So to the U.S. let us go.

### **Round Three: Dream Interpretation**

The Aboriginal contender is particularly disappointing for his lack of clarity or consistency. All lawyers have two hands, goes an old gag: on the one hand, . . . but on the

68 Cairns warns of dire consequences of using "nation-to-nation" terminology without acknowledging that terms such as "sovereignty" and "government-to-government relationship" have been in routine official use in the United States for many years. See Office of the President, "Memorandum of April 29, 1994: Government-to-government relationships with Native American tribal governments", Federal Register, 59 (1994), pp. 22951-5. Strengthened federal protection of tribal governments has led to the growth of intergovernmental agreements between tribes and the United States. See Jeffrey S. Ashley and Secody J. Hubbard, *Negotiated Sovereignty: Working to Improve Tribal-State Relations* (Westport, CT, 2004).

69 Russel Barsh, "The Challenge of Indigenous Self-Determination", *University of Michigan Journal of Law Reform*, 26, 2 (1993), pp. 277-312. Cairns does not refer to the *Final Report of the American Indian Policy Review Commission* (1976), which emphasized "tribal sovereignty" and resulted (among other things) in the establishment of a standing Senate Committee on Indian Affairs staffed largely by American Indians.



other hand, . . . Dan Russell has at least three or four hands up his sleeve. Not only does he equivocate about Aboriginal cultures, history, law and his own recommendations, he makes little reference to any scholarship or views other than his own. Quite a feat, taking on all sides of an argument single-handedly without knocking yourself out!

His goal, he explains, is to help dispel Aboriginal peoples' own doubts about self-government and answer the question "Can it be done?"<sup>70</sup> Four assertions eventually take shape in his discussion: 1) there are no useful models of Aboriginal self-government in Canada; 2) U.S. tribal governments offer "a workable alternative" model;<sup>71</sup> 3) over the years U.S. courts have clarified the powers of Indian tribal governments to such a degree that it would be wise to import the American formulation into the Canadian constitution and 4) the alternative of negotiating modern-day treaties is a very bad idea.

Russell avoids a crucial threshold question: is the US a valid comparison for this purpose? He remarks at one point that the constitutional and legal framework of the U.S. is "similar to that of Canada", and at another point concedes that the sociopolitical realities of the two countries are "remarkably different".<sup>72</sup> In what ways are they similar or different and with what implications for comparability? Russell is silent. The reader must accept his authority on this point. Russell's description of American Indian law is moreover fraught with errors and overgeneralizations, and ignores the critical literature produced over the last 35 years by American Indian legal scholars. He repeatedly relies on the Navajo Nation as an example, when they are only one of more than 300 modern-day tribal governments (albeit one of the largest).<sup>73</sup> What about the others?

According to Russell, the conceptual basis for tribal self-government in the U.S. is the tribes' status as "domestic dependent nations", which he contends has been "often used and refined" by U.S. courts.<sup>74</sup> In fact, the courts have rarely used that concept since the 1830s.<sup>75</sup> Since the 1940s, judges and legal scholars (not to mention tribes themselves) have spoken of "sovereign nations" that possess "residual sovereignty". Russell can only miss this by failing to read anything that U.S. Indians have written about their own legal history. But he goes further, and lays out seven principles that he contends are "clearly" contained in the U.S. definition of "domestic dependent nations".<sup>76</sup> In fact, his principles summarize U.S. Supreme Court decisions on "residual

70 Russell, *People's Dream*, pp. ix, xi, 89. I have chosen to focus on this aspect of Russell's book and not to dwell on his 45-page critical summary of the RCAP report. Russell warns about "the threat posed by the RCAP report" (p. 201), but I think there is little danger that this dead horse will continue to kick – except perhaps as fodder for doctoral dissertations and academic speculation.

71 Russell, *People's Dream*, pp. 11, 109. This occasions the first of many careless generalizations: U.S. tribes "have always been self-governing" (p.14). As Sakej Henderson and I described in "Tribal Courts, the Model Code, and the Police Idea in American Indian Policy", *Law & Contemporary Problems* 40 (1976), pp. 25-60, the period from 1871 to 1968 was marked by suppression or co-optation of tribal institutions and indirect rule through new legislative and judicial institutions organized by federal bureaucrats: self-government only in the narrowest possible sense.

72 Russell, *People's Dream*, p. 11, 65.

73 He also summarizes, in *People's Dream*, on pages 107 and 119, two tribal court decisions, from the Hopi and an unidentified Pueblo, but does not identify his sources.

74 Russell, *People's Dream*, pp. 66, 84.

75 For the origin and fate of this concept, see Barsh and Henderson, *The Road*.

76 Russell, *People's Dream*, pp. 67, 70-2.

sovereignty” since the 1970s, with some yawning errors to which I will return.

Russell downplays the persistence of the so-called “plenary power of Congress” to legislatively extinguish tribal rights, treaties and property interests, as long as it does so explicitly (like the notwithstanding provision in the Charter of Rights and Freedoms). Congress has refrained from exercising its plenary power since the early 1950s except in a few cases – notably in the regulation of reservation gambling enterprises (the Indian Gaming Regulatory Act). This is a reflection of growing Indian economic and political power in the United States, not of the majesty of U.S. law; indeed nothing seems to deter the U.S. Supreme Court in its mission to find a way of justifying anything the federal or state governments may wish to do in Indian country.<sup>77</sup>

Russell’s summary of the civil jurisdiction of Indian tribes is rosy and wrong. “For all practical purposes,” he explains, state governments only exercise jurisdiction in cases that “only affect non-Indian interests”.<sup>78</sup> That is what the Supreme Court *says* it is doing. However, it has employed a “balancing of interests” test to conclude repeatedly that Indian interests simply are not important enough to protect.<sup>79</sup> In the *Brendale* case, for example, the Supreme Court struck down tribal land use regulations within part of an Indian reservation on the grounds that some non-Indians lived there.<sup>80</sup> In practice rather than theory, the U.S. test is straightforward: tribes can do nothing that affects non-Indians. But according to Russell, U.S. tribes freely exercise “almost unlimited power over anyone who enters the reservation”.<sup>81</sup> Since he is fond of using Navajo examples, perhaps he should take a look at *Means v. District Court*, in which the Navajo Supreme Court felt obliged to go to great lengths to justify its jurisdiction over AIM activist Russell Means, who married a Navajo woman, lived on the reservation and then refused to answer charges of spousal abuse.<sup>82</sup> If U.S. law is so good and so “clear”, why are tribes losing jurisdictional ground? Why should Canada board a sinking ship?

Russell’s response is that Indian tribes have successfully maintained or revived culturally distinctive laws. His evidence is chiefly from the Navajo, where I worked as a law clerk 30 years ago. Russell misconstrues the principles of Navajo customary inheritance law, contending that the estate is divided equally amongst all the survivors when, in fact, equal division was introduced by the Bureau of Indian Affairs in the 1920s to the dismay of Navajo families.<sup>83</sup> He also turns to the Navajo to prove that

77 Russell mentions in passing, on pages 36 and 72, that Congress can override tribal laws. On the judicial erosion of tribal government since the late 1970s, see David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin, 1997).

78 Russell, *People’s Dreams*, p. 27.

79 Wilkins, *American Indian Sovereignty*; Russel Barsh, “Indian Policy at the Beginning of the 1990s: The Trivialization of Struggle”, in Fremont J. Lyden and Lyman H. Legters, eds., *American Indian Policy; Self-Governance and Economic Development* (Westport, CT, 1994), pp. 55-69.

80 *Brendale v. Confederated Tribes of the Yakima Nation*, 392 U.S. 408 (1989).

81 Russell, *People’s Dream*, p. 28.

82 *Russell Means v. District Court of the Chinle Judicial District*, No. SCCV-61-98 (Navajo S.C. 1999); the rulings of the Navajo Supreme Court are available at <http://www.navajo.org> (accessed 24 April 2004).

83 Russell, *People’s Dream*, p. 32. My paper “Navajo Tribal Courts, Property and Probate Law, 1940-1972”, *Law & Anthropology (Internationales Jahrbuch für Rechtsanthropologie)*, 6 (1991), pp. 169-95, which first appeared as a manual for Navajo tribal lawyers, reviews trends in probate decisions from the case files of the Navajo tribal courts.

“harmony” is the underlying objective of the U.S. tribal court system.<sup>84</sup> I am a longtime fan of the Navajo judiciary, but it is scarcely representative. Amongst hundreds of tribal court systems, the Navajo is one of the few that invoke customary law at all.<sup>85</sup> It could be argued that the U.S. legal system created the opportunity for the Navajo legal system to evolve as it did. But it could just as reasonably be argued that the U.S. legal system has had absolutely nothing to do with the persistence of Navajo customary laws, and everything to do with other tribes’ loss of their traditions. Russell fails to address the key questions: If harmony is so deeply rooted in Aboriginal cultures, why is there so much violence in Aboriginal communities? What explains the exceptional cases, such as the Navajo, where traditional laws have revived?

Worst of all, Russell waffles. Given the importance of the U.S. record to his argument that self-government “can work” in Canada, he is only willing to affirm to his readers that Indian self-government “perhaps” made Indians better off than they were in the days when they were administrative wards of the Bureau of Indian Affairs.<sup>86</sup> This is not a breathtaking endorsement of the U.S. model.

Russell then goes to pains to convince the reader that the *Canadian Charter of Rights and Freedoms* should not apply to First Nations because it would suppress distinctively Aboriginal collective rights.<sup>87</sup> He may be correct that relatively little has been written about the tension between individual and collective rights within Aboriginal cultures, but he makes no effort to address what *has* been written.<sup>88</sup> He omits the only Canadian case that invoked individual freedom to trump Aboriginal cultural duties and the one recent U.S. case that exempted Aboriginal traditional laws from the Bill of Rights.<sup>89</sup> Russell’s only concrete Canadian example of a Charter

84 Russell, *People’s Dream*, p. 106. Curiously, Russell cites none of the widely quoted judgments of Navajo Chief Justice Robert Yazzie on the issue of individual responsibilities, which are available in print in the *American Indian Law Reporter* loose-leaf service and on-line at <http://www.navajo.org> as noted above.

85 Russel Barsh, “Putting the Tribe into Tribal Courts: Possible? Desirable?” *The Kansas Journal of Law and Public Policy*, 8, 2 (1999), pp. 74-96. Likewise, Russell asserts that U.S. tribes have been adopting “culturally appropriate” laws since the 1960s, but only offers the Navajo as an example. See Russell, *People’s Dream*, pp. 30-1.

86 Russell, *People’s Dream*, p. 35.

87 Russell, *People’s Dream*, p. 90, 129-30. He makes a subsidiary argument that the Charter is not as important as it seems since the principles it contains are relatively new, still evolving and explicitly derogable. See Russell, *People’s Dream*, pp. 116-7.

88 See Russell, *People’s Dream*, pp. 93, 96 and 103. Existing scholarship on this topic includes works by John Borrows, Taiaiake Alfred, Patricia Montour, Emma LaRocque, Joyce Green and Navajo Chief Justice Robert Yazzie. See also Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, ON, 1999) and my reviews of this dialectic in “Indigenous Peoples and the Idea of Individual Human Rights”, *Native Studies Review*, 10, 2 (1993), pp. 35-55 and “The Nature and Spirit of North American Political Systems”, *American Indian Quarterly*, 10, 3 (1986), pp. 181- 98. Russell likewise argues that Aboriginal cultures are threatened by freedom of speech (pp. 111-2) without mentioning the vast literature on legal mechanisms for protecting cultural interests, including reports and guidelines by UN agencies. See, for example, Marie Battiste and James [Sakej] Y. Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon, 2000) and Rebecca Brackley, “Protecting Cultural Representations: Intellectual Property Protection of Indigenous Culture”, *Canadian Intellectual Property Review*, 17, 2 (2001), pp. 377-404.

89 For the Canadian case, see *Norris* (discussed above). See also Russel Barsh, “Banishing the Spirits: Indian Agents and the Pacific Northwest Winter Dance Religion”, *Journal of the West*, 39, 3 (2000), pp. 54-65 for the cultural practices behind *Norris* and a parallel U.S. case in which I represented Coast

conflict with Aboriginal values is gender discrimination: specifically, some First Nations' reluctance to repatriate women who had lost their status by operation of the pre-1985 "band" membership rules in the *Indian Act*. He intimates that gender discrimination was understandable and possibly justified in this case, because the women at issue chose to "marry out" of their communities and their traditional responsibilities.<sup>90</sup> This assumes that Aboriginal societies are usually matrilineal and that Canadian law merely respected traditional arrangements. Coast Salish peoples reckon kinship bilaterally, by comparison, and it is not easy to determine whether a person has "married out" or married *into* a community.

This is not the only point on which Russell generalizes broadly about Aboriginal values. To reassure Canadians who may be anxious about the consequences of relieving First Nations from obligations under the Charter, he asserts that Aboriginal societies are deeply democratic and egalitarian but neither addresses differences between indigenous societies nor cites any historical, ethnographic or oral historical sources.<sup>91</sup> He maintains that democracy and human rights *must* be deeply rooted in Aboriginal societies because the Founding Fathers [sic] of the United States copied their constitution from the Six Nations.<sup>92</sup> Without debating the historical validity of this claim, it is fair to ask how representative the Six Nations government was of other Aboriginal societies. One example proves the rule in Russell's geometry.

Similarly troubling is Russell's insistence that harvesting rights such as hunting, fishing and trapping are "surely collective community rights".<sup>93</sup> Which indigenous legal systems does he have in mind? Three in which I have worked – the Mi'kmaq,

Salish elders charged with kidnapping and child abuse in connection with initiation ceremonies. Although Russell criticizes existing academic works as uselessly "theoretical", his contribution to the field is also largely speculative. See Russell, *People's Dream*, p. 103. For the recent American case, see *Santa Clara Pueblo v. Martínez*, 436 U.S. 49 (1978), which held that strictly patrilineal membership criteria did not violate the Equal Protection Clause (compare the patrilineal criteria of Canada's *Indian Act* removed by Bill C-31 in 1985). Russell does not mention the Indian Civil Rights Act (1968) which applied most, but not all, of the provisions of the U.S. Bill of Rights to tribal governments. This is especially surprising since he proposes a similar approach to the Charter issue in Canada. See Russell, *People's Dream*, pp. 135-44.

90 Russell, *People's Dream*, pp. 120-1.

91 Russell, *People's Dream*, pp. 99-101, 133-4. Aboriginal people also "car[e] for others" and possess more "understanding and sensitivity" than other North Americans (pp. 117- 8, 129). In a different context he admits "the cultural teachings of Aboriginal peoples vary from region to region across Canada" (p.143); but if this is so, he should be more careful before generalizing from one or two examples.

92 Russell, *People's Dream*, p. 99. Russell cites neither of the original historical studies of that connection: Bruce E. Johansen, *Forgotten Founders: Benjamin Franklin, the Iroquois, and the Rationale for the American Revolution* (Ipswich, MA, 1981) or José Barreiro ed., *Indian Roots of American Democracy* (Ithaca, NY, 1992). My own research in the 1970s convinced me that Jefferson and Franklin had drawn some (but not all) of their inspiration from their personal contacts with the Six Nations and the Southern Confederacy, and I was one of Johansen's dissertation advisers. But sweeping generalizations to the effect that the U.S. Constitution copied the Six Nations' Great Law are careless and inaccurate.

93 Russell, *People's Dream*, p. 96.

the Coast Salish and the Navajo – regarded productive resources such as fishing sites as individual or family property and never as the property of the band, tribe or nation.<sup>94</sup> Equating family property with ownership by the present-day “tribe” or “First Nation” can have significant adverse effects on sustainable management as well as the distribution of wealth within American Indian or Aboriginal communities.<sup>95</sup> Nevertheless, I must agree with Russell that there can be little progress on the issue of potential Charter conflicts with self-government until First Nations spell out their own visions of human dignity, rights and responsibilities and make public commitments to live by them.<sup>96</sup>

Russell seems seriously uninformed or confused about the current state of treaty negotiations within Canada. Within two pages he states that provincial consent is “not required” yet also that the provinces “would have to agree”.<sup>97</sup> He tells the reader that treaty renewal is a Prairie issue, completely overlooking the treaties, treaty activism and recent court decisions involving the Mi’kmaq and the Six Nations in Atlantic and central Canada.<sup>98</sup> He complains that the “deemed as treaty” provision in section 35 of the *Constitution Act, 1982* lacks an enforcement mechanism only to concede a few pages later that section 52 (the judicial supremacy clause) is “perhaps” such a mechanism.<sup>99</sup> He explains that Aboriginal people traditionally treated men and women “fundamentally as equals” and in the next paragraph says that men and women were treated “differently”.<sup>100</sup> Thinking aloud can be useful if the exercise illuminates a complex problem and its solution. In this instance, the ground trod is already familiar and the compass is spinning wildly.

The point of Russell’s exploration of modern-day treaties is nonetheless valid if altogether unoriginal: using the Nisga’a Final Agreement as a foil, he argues that treaties are too costly and too unequal (as between First Nations and Canada and amongst First Nations involved in different negotiations).<sup>101</sup> Canadian courts will continue to interpret the constitutional acts and the Charter in ways that tip the balance of interests in favour of non-Aboriginal people.<sup>102</sup> What, then, is the alternative route to empowerment?

94 See Russel Barsh, “Coast Salish Property Law: An Alternative Paradigm for Environmental Relationships”, paper presented at William & Mary School of Law, Williamsburg, VA, 26 March 2004; Russel Barsh, “*Netukulimk* Past and Present: Mi’kmaq Ethics and the Atlantic Fishery”, *Journal of Canadian Studies* 37, 1 (2002), pp. 15-42; Barsh “Navajo Tribal Courts”.

95 Russel Barsh, “Backfire from Boldt: The Judicial Transformation of Coast Salish Proprietary Fisheries into a Commons”, *Western Legal History* 4, 1 (1991), pp. 85-102.

96 Russell, *People’s Dream*, pp. 135-44. He also recommends funding Aboriginal research centers to draft model codes and constitutions for First Nations to show the Canadian public concretely how self-government would be exercised.

97 Russell, *People’s Dream*, pp. 41-2.

98 Russell, *People’s Dream*, p. 43.

99 Russell, *People’s Dream*, pp. 47-9.

100 Russell, *People’s Dream*, p.133. Likewise, he concedes that the exercise of self-government by hundreds of existing “bands” would be impractical and politically divisive but summarily dismisses this concern, stating that Aboriginal people are too sensible to remain divided into such small polities (pp.38-9). My experience has rendered me more cautious.

101 Russell, *People’s Dream*, pp. 56-7.

102 Russell, *People’s Dream*, pp. 59-60, 77-83. His proposed solution is a separate national constitutional court composed mainly or entirely of Aboriginal judges (pp. 62- 4). Now that’s a “realistic” proposal!

The final chapter of Russell's book is entitled *Building Trust and Confidence*. It cheered me to read those words. At last, the real issue! But I was quickly disappointed. Russell begins by reassuring us that a "majority of Canadians favour greater recognition of Aboriginal entitlements"; therefore the federal and provincial governments require no additional political motivation in this direction.<sup>103</sup> Not only is the premise erroneous, but Russell subsequently waffles again and complains that government is stalling progress on self-government and dividing First Nations on the issue.<sup>104</sup> What Aboriginal people need most now, he explains, is to "find an effective way to communicate their self-government aspirations" to the public and public officials.<sup>105</sup> They must explain how self-government will actually work "with specificity", and to help them do this Russell proposes establishing a new "arms-length federal agency to research and generate policy suggestions regarding Aboriginal matters".<sup>106</sup> That is exactly what we need: another royal commission!

The capstone of Russell's recommendations is an amendment to the *Constitution Act, 1982* he claims will bring the U.S. concept of tribal self-government into Canadian law. His proposed text is completely different from anything U.S. courts have ruled since the 1830s: it would simply give all First Nations laws *supremacy* over conflicting federal and provincial laws.<sup>107</sup> That is decidedly *not* the status of U.S. tribes, which are subject to most federal enactments, and many state laws as well, because of "plenary power" and the "interests" test. Why drag the confused reader through several chapters admiring the situation of U.S. Indian tribes, only to propose a formula that goes far beyond the powers the U.S. has permitted tribes to retain? How would this help persuade Canadians to give First Nations far more power than their American cousins? Russell does not say.

I think I have found him out. He is a trickster who wants Canadian First Nations to think that everything has already been worked out in the States, so that all they need to do is chant "domestic dependent nations" in front of the Parliament buildings. TKO.

#### **Round Four: Still the Frontier**

Tom Flanagan is unquestionably the champ in this ring for forthright, personally engaging prose leavened with a measure of humility not frequently encountered in works of political and social criticism. Indeed, the ease with which Flanagan marshals

103 Russell, *People's Dream*, pp. 199, 205-6.

104 See, for example, David Martin and Chris Adams, "Canadian Public Opinion Regarding Aboriginal Self-Government: Diverging Viewpoints as Found in National Survey Results", *American Review of Canadian Studies*, 30, 1 (2000), pp. 79-88. A review of other recent polls can be found in Russel Barsh, "Aboriginal Peoples and Canada's Conscience", in David Newhouse, Cora Voyageur, and Daniel J.K. Beavon, eds., *Hidden in Plain Sight: Contributions of Aboriginal Peoples to Canadian Identity and Culture* (Toronto: University of Toronto Press, in press). Russell cites no source for his assertion. Russell's waffling can be found in *People's Dream*, pp. 202, 205.

105 Russell, *People's Dream*, p. 204. This initiative must include educating Canadians to understand that the violence and political corruption on reserves is merely a result of Ottawa's suppression of traditional conflict-resolution practices (see p. 214).

106 Russell, *People's Dream*, pp. 204, 207-11. Earlier, Russell argued that it was unfair for Ottawa to ask Aboriginal peoples to be more "specific" about their conception of self-government.

107 Russell, *People's Dream*, p. 74.



history, linguistics, law and current events in his cause belies the profoundly troubling thesis that underpins nearly all of his arguments: Aboriginal peoples were uncivilized, and what has brought them into the civilized bosom of Canada was inevitable and for their own good – if not always pretty. In criticizing the “new Aboriginal orthodoxy” of Native sovereignty and self-government, Flanagan articulates a viewpoint that undoubtedly resonates with a large number of Canadians. It deserves to be addressed with something more than scorn.

Flanagan fears a Canada redefined as “an archipelago of aboriginal nations that own a third of Canada’s land mass, are immune from federal and provincial taxation, are supported by transfer payments from citizens who do pay taxes, [and] are able to opt out of federal and provincial legislation”, amongst other evils.<sup>108</sup> He contends that this will not only leave most Aboriginal people “poor and dependent”, it will impoverish Canada as a whole: “That is certainly not the vision of Canada I had when I immigrated in 1968” from the States.<sup>109</sup>

Flanagan organizes his challenge around seven assertions that he contends expose the key fallacies of the “new orthodoxy”: 1) Europeans had just as much right to occupy the continent as Aboriginal peoples had done millennia earlier; 2) Europeans indeed had a better right to the continent because they had the advantage of “several thousand years” of more advanced civilization; 3) Canada’s Aboriginal peoples had not progressed to the stage of forming nation-states, and were therefore neither “sovereign” nor “nations” when first encountered by European powers; 4) reinterpreting treaties to reflect Aboriginal viewpoints is not only bad historiography but “expensive and mischievous”; 5) Aboriginal title is vague and impractical as a legal basis for returning land to Aboriginal peoples; 6) existing reserves are physically incapable of sustaining real economic growth; and 7) “in practice, aboriginal government produces wasteful, destructive, familistic factionalism,” welfare dependency and administrative elitism.<sup>110</sup> All of these contentions ultimately revolve around three broad questions of fact: What were Aboriginal societies like in the distant past? What are they like today? What were the laws and practices of European empires during the intervening period? It is worthwhile exploring what Flanagan regards as facts as well as the uses to which he puts them. Many of his arguments represent what attorneys call “mixed questions of facts and law” – that is, assertions that confuse what is and what we would like it all to mean.

A reasonable starting point is Flanagan’s attempt to torpedo Aboriginal title. In a survey of a handful of books and articles on North American archaeology and linguistics, most of them in the secondary “popular science” literature, Flanagan makes the point that the evidence thus far points to multiple waves of peopling of the Americas mainly, if not entirely, within the last 4,000 to 10,000 years.<sup>111</sup> Early

108 Flanagan, *Second Thoughts*, p. 5.

109 Flanagan, *Second Thoughts*, pp. 5, 21. Flanagan also wins the congeniality award for self-disclosing candour.

110 Flanagan, *Second Thoughts*, p. 6-8.

111 Flanagan, *Second Thoughts*, pp. 12-3, 16-7. We might forgive Flanagan for uncritically repeating the “megafaunal extinction” hypothesis, which posits that early humans arriving in the Americas during the last glacial epoch set about exterminating the large mammals that once inhabited this hemisphere such as elephants, camels, horses and rhinoceros. Human handiwork was originally suggested as a cause of the disappearance of megafauna because of a mere coincidence in time: humans arrived

European visitors, moreover, observed Native peoples battling fiercely over territory “suggest[ing] a pattern of behavior that likely prevailed in earlier centuries”.<sup>112</sup> Aboriginal peoples are therefore really “Siberian-Canadians” and Europeans simply “a new immigrant wave” with the consequent right to “take control” of the land just as Aboriginal peoples themselves had previously done.<sup>113</sup> As satisfying as it may be for Flanagan to puncture Aboriginal assertions of immemorial occupancy and deep-seated spirituality, claims of Aboriginal title are based on the simple fact of being here *first* – not forever nor peacefully.

Flanagan eventually concedes this point, but in a shift from history to philosophy he argues priority in time has “little to do with rights”.<sup>114</sup> It does not matter who was here first. He does not arrive at this conclusion from the archaeological and historical facts to which he has just devoted a dozen pages. Rather, he gives several examples of present-day Canadian government benefits such as healthcare that are allocated amongst citizens solely according to *need*. It is interesting that he does not mention property rights, which are nearly always grandfathered and inheritable. He applies the principle of equal access to government benefits to his analysis of Aboriginal property rights, instead treating both Aboriginal and non-Aboriginal property rights the same way.

Not content with one flawed argument about Aboriginal title, Flanagan makes a second. Since Aboriginal people did not always respect the peaceable possession of land amongst themselves, they do not deserve to invoke priority of time against Europeans.<sup>115</sup> It is risky to embark on this kind of reasoning. It would entitle Canadians to abuse recent immigrants if their countries of origin had done nasty things.<sup>116</sup> It would justify sacking every country that has violated human rights and bar the courtroom door to every person whose forebears ever mistreated others. Who will cast the first stone?<sup>117</sup>

As a third argument, Flanagan observes that Europeans plainly had greater power,

during the same 4,000-year period that the animals disappeared. However, climate was also changing profoundly during that era and it cannot be discounted as a cause. There is no direct evidence of human over-harvesting and indeed very little evidence of human hunting of large soon-to-be-extinct mammals; large-scale human harvesting of bison appears in the archaeological record several millennia later. See Russel Barsh, “Taking Indigenous Science Seriously”, pp. 153-73, in Stephen Bocking, ed., *Biodiversity in Canada: Ecology, Ideas, Action* (Toronto, 1999) and Russel Barsh and Chantelle P. Marlor, “Driving Bison and Blackfoot Science”, *Human Ecology*, 31, 4 (2003), pp. 571-93.

112 Flanagan, *Second Thoughts*, pp. 17, 19.

113 Flanagan, *Second Thoughts*, pp. 6, 22.

114 Flanagan, *Second Thoughts*, p. 21.

115 Flanagan, *Second Thoughts*, p. 23.

116 Canadians could do so – abuse recent immigrants – unless we assume that only “good” people emigrate from nasty countries. Flanagan seems implicitly to adopt this assumption: European immigrants arrived here unburdened by the wrongs of their ancestors, but Aboriginal peoples have no right to complain because *their* ancestors were nasty.

117 According to Flanagan, Aboriginal peoples maintain the position that “the only legitimate inhabitants of the Americas have been the Indians and Inuit”, implying that they are unwilling to respect the rights of non-Aboriginal Canadians (p. 25). On the contrary, the express goals of the treaty and land-claims processes have been described in terms such as “co-existence”, “partnership” and political equality of Aboriginal and non-Aboriginal communities.

and they exercised it to take land from Native peoples. “Government depends on power”, he explains.<sup>118</sup> But this accepts the debatable proposition that “might makes right”, and makes no distinction between power and rights – a distinction that is central to the notion of Rule of Law, of a government of laws and not of men.

If the reader remains unconvinced that Aboriginal peoples lost their land fair and square (by them having been here only 4,000 years or by sometimes being nasty to each other or by being militarily weak), Flanagan points out that Canadian courts did not give a second thought to Aboriginal title until 1990,<sup>119</sup> and complains about adverse economic consequences of entrusting land to First Nations governments collectively rather than to families or individuals.<sup>120</sup> Neither argument addresses the underlying issue of the justice of the historical taking.

Still not convinced? Flanagan plays his trump card: civilization. Europeans were justified because they were civilized and Aboriginal peoples were not. This is scarcely a novel argument. It is precisely how European intellectuals defended imperialism for four centuries, until comparisons of the moral value of societies were rendered unfashionable by early-20th-century anthropology. Flanagan maintains that there are *objective* bases for distinguishing civilized societies from uncivilized ones.<sup>121</sup> Relying on two popular works by classical archaeologists, he defines “civilization” in terms of urbanization, agriculture, craft specialization, monumental architecture and a centralized state apparatus.<sup>122</sup> By this test, he declares all of the historical Aboriginal societies north of Mexico uncivilized and therefore without any rights whatsoever against civilized Europe.<sup>123</sup>

Even if we accept Flanagan’s definition of civilization, it is difficult to see how it supports any moral or legal inferences. Why do “civilized” societies have the right to eat “uncivilized” societies? Let us excavate Flanagan’s reasoning. By definition, “civilized” societies represent considerable accumulations of wealth, technology and

118 Flanagan, *Second Thoughts*, p. 25. He also reminds us that European empires repeatedly *claimed* sovereignty over territories in the Americas, as if a mere unilateral assertion of right can ever decide a moral dispute (pp. 52-3, 61-2). If his point is that Europeans made these claims and *got away with them*, we are back to “might makes right”.

119 Flanagan, *Second Thoughts*, pp. 120-30. This argument is based on a selective reading of the case law that fails to distinguish between legal fictions and historical or ethnographic facts. See, similarly, Flanagan’s selective presentation of the jurisprudence of *terra nullius* (pp. 56-58) which conveniently omits the efforts of the Spanish and British Crowns to control the taking of Native lands as well as his review of European treaty practice which omits (among other faults) French diplomacy with the Algonquins and Six Nations and summarily rejects all recent Canadian Supreme Court rulings as mere “judicial legerdemain” (pp. 25, 134-6, 140).

120 I wholeheartedly share Flanagan’s concerns about the adverse economic consequences of collectivizing natural resource rights; see Barsh, “Backfire from Boldt”, pp. 85-102. I do not agree that this is a justification for disregarding Aboriginal peoples’ underlying claims to a larger share of property.

121 See Flanagan, *Second Thoughts*, pp. 29-31, where he defends a kind of Social Darwinism.

122 Flanagan, *Second Thoughts*, pp. 32-3.

123 Because Aboriginal peoples were uncivilized, by definition they did not have nation-states and therefore could not have possessed “sovereignty” or made real treaties. See Flanagan, *Second Thoughts*, pp. 6, 60-1, 134-5. These arguments are derivative of Flanagan’s position on civilization. See his quibbling over whether Aboriginal societies were large or complex enough to justify calling them “nations” instead of “tribes” (p. 70).

political power. This enables them to feed larger populations and raise standards of material wellbeing.<sup>124</sup> Ergo, the spread of civilization is good for everyone.<sup>125</sup> Taking the lands of “uncivilized” peoples is just because they benefit materially from becoming civilized. However, it can be argued with equal force that civilized societies have much greater power to do harm – for example, they can wage much more destructive wars and maintain ruthlessly efficient police states. Civilized states have been efficient administrators of genocide. Whether particular peoples have gained more than they have lost through involuntary civilization would appear to be a question of fact, rather than a matter that can be settled by mere conjecture.

Aboriginal Canadians *are* better off, Flanagan asserts.<sup>126</sup> He recognizes that they do not think so, however, and that they are the poorest, most marginal sector of Canadian society with the greatest social “pathology”. Are they just too stubborn to appreciate the gift European civilization has given them? Or is it possible that Aboriginal peoples think that they could have achieved as high a degree of civilization by themselves, if either left alone or afforded an opportunity to trade freely with Europeans as independent societies? Flanagan either assumes that Aboriginal peoples would *never* have achieved civilization on their own or that some greater good was achieved by civilizing them *sooner* – even if by the sword. He notes that expansion into the Americas enabled Europeans to continue to increase their numbers. This argument assumes that maximizing human population is inherently good and recognizes that Europeans had exhausted the resources of their own continent: curious grounds for making moral claims today when overpopulation threatens global human survival. Flanagan would reward Europeans for living unsustainably in the past. For consistency, would he also award thinly populated Canada today to Bangladesh or China?

It is not inappropriate to recall here that Fascist Italy invoked “civilization” in the 1930s when it overran Ethiopia or that Nazi Germany justified its invasion of neighbours in pursuit of a bit more *lebensraum*. Strict application of Flanagan’s argument would put Germany in the dock for attacking *civilized* countries while it would exonerate Italy. No such distinctions can be found in the judgments at Nürnberg. But we all know that Nazis and Facists were *evil* people, unlike the ancestors of Canadians.

Europeans did not prevail in the Americas because of “evil intent and bad faith” as Aboriginal leaders contend, Flanagan explains, but because they formed the vanguard of the “great drama” of the global spread of civilization.<sup>127</sup> Civilizing the Americas was “inevitable”; therefore, questions of justice and morality are simply “beside the point”.<sup>128</sup> Flanagan analogizes this with death: since it is inevitable, there is no point in arguing that death is bad. But his logic confounds means and ends and would make it acceptable to murder people for *any reason at all*. They will die eventually, so the way they die is “beside the point”. Does the end (civilization) justify any and all

124 Flanagan, *Second Thoughts*, p. 35.

125 Flanagan, *Second Thoughts*, pp. 40-5.

126 Flanagan, *Second Thoughts*, pp. 46-7.

127 Flanagan, *Second Thoughts*, p. 39. While Flanagan contends that Aboriginal peoples gained no rights by being first to occupy the land, he suggests that Europeans gained the right to supremacy by being first to get civilized.

128 Flanagan, *Second Thoughts*, pp. 39, 60-1.

means of achieving it?

Perhaps to boilerplate his argument Flanagan plays the race card, describing the Old World as *5,000 years* more advanced than the Americas.<sup>129</sup> It is true that agriculture began in the Fertile Crescent several thousand years before we have evidence of farming in the Americas. However, the northern European ancestors of most Canadians were still “barbarians” until the Roman legions marched through Gaul 2,000 years ago, about the same time that Central Americans domesticated maize.<sup>130</sup> Most denizens of the British Isles lived in a state of “barbarity” (as Flanagan defines it) until the Norman unification of an English state in 1066 AD, only a few centuries before they swarmed into North America. Spanish *conquistadores* compared the Aztec capitol of Tenochtitlán to the major cities of Europe. Flanagan rejects the relevance of Mesoamerican cities to the cultural potential or moral standing of Aboriginal Canadians. He has no difficulty, however, treating Western Europe as “civilized” the moment the first irrigation ditches were dug at Ur and Babylon in western Asia.<sup>131</sup>

Finally, Flanagan’s argument depends on dismissing the evidence of diplomatic relationships and mutual recognition between European powers and Aboriginal societies, particularly as found in treaties. In a tour-de-force of reading court decisions selectively and out of historical context, he argues that treaties are limited to what is written because oral history is inherently unreliable.<sup>132</sup> He downplays the extent to which documents are also unreliable and often biased by their authors – which is why the Canadian Supreme Court decided to weigh both kinds of evidence: oral on the Aboriginal side, textual on the European side. Contrary to Flanagan’s accusation that the Justices have been inventing new rights in treaty cases, they have been trying to achieve a fair approximation of what was actually agreed upon when diplomats met under such difficult conditions, spoke different languages and came from different legal traditions.

Flanagan’s strongest suit is his argument that First Nations governments are, and will continue to be, economically unviable and politically corrupt. Existing First Nations are small in numbers and territory and do not seem likely to coalesce happily into larger units – at least not without a substantial loss of cultural autonomy, which was the point of the self-government exercise.<sup>133</sup> Aboriginal governments mimic the

129 Flanagan, *Second Thoughts*, p. 6. Flanagan asserts that the entire scheme of Aboriginal affairs is based on racial discrimination, blames non-Aboriginal Canadians for social problems that only Aboriginal people themselves can fix and isolates Aboriginal people from Canadian society (pp. 194-6). It may be countered that Aboriginal affairs is a system of inherited property (members of a First Nation inherit interests in a reserve and usually in economic benefits secured contractually by a treaty as well) based on lineal descent rather than racial classification. Merely being brown or having an Aboriginal blood type does not suffice to register as an “Indian” or obtain federal benefits as one. See *Morton v. Ruiz*, 415 U.S. 199 (1974) and also L. Scott Gould, “Mixing Bodies and Beliefs: The Predicament of Tribes”, *Columbia Law Review*, 4 (2001), pp. 702-72.

130 *Vide* two great ethnographic works of the Roman historian Cornelius Tacitus: *Germania* and *Britannia*.

131 On trade and cultural ties between Mesoamerica and Aboriginal Canada, see my review of the current literature in “Indigenous Peoples and International Order: The Aboriginal North American World-System”, *Balayi: Culture, Law and Colonialism*, 3 (2001), pp. 87-111.

132 Flanagan, *Second Thoughts*, pp. 136, 161-4. To demonstrate the unreliability of Aboriginal oral history he offers a few examples of conflicting versions of traditional stories told by Alberta elders.

133 Flanagan, *Second Thoughts*, pp. 78-9, 96.

structure of the Department of Indian Affairs and Northern Development, a poor model for efficiency or participatory democracy, and allocate resources according to kinship more than individual merit or needs.<sup>134</sup> Flanagan insists that familial conflict is inherently worse on reserves than elsewhere in Canada because of their small size.<sup>135</sup> But if size were the issue, thousands of small Canadian towns must be just as nasty!

First Nations governments are top-heavy, according to Flanagan, and tend to be *rentier* states; all lands and resources are government owned and controlled, minimizing the freedom of individuals to earn a livelihood without ingratiating themselves to public officials and thus chilling individual enterprise as well as dissent.<sup>136</sup> He points out that Aboriginal people worked for wages and managed to get by until the Depression when, like other rural Canadians, they began moving to towns.<sup>137</sup> Since the launch of welfare programs in the 1950s, however, the proportion of Aboriginal people receiving transfer payments has increased while Aboriginal economic development programs frequently amount to little more than inefficient wage subsidies and cronyism.<sup>138</sup> Aboriginal people are not all disadvantaged, Flanagan concludes, and do not all deserve special treatment.<sup>139</sup>

I am in sympathy with Flanagan on many of these points; I have made many of them myself.<sup>140</sup> However, it is misleading to repeat a handful of press reports of waste and corruption on Alberta reserves without admitting that such things also happen in non-Aboriginal governments.<sup>141</sup> The headlines of Canada's national newspapers are rife with reports of official misconduct. In the wake of the billion-dollar scandals attributed to the Mulroney and Chrétien governments, it may reasonably be supposed that federal politicians divert more money from public treasuries than all First Nations combined. It is like the policy debate over white-collar crime. Poor and socially marginalized people commit a lot more thefts, but when the well-dressed executives of a corporation steal, it is a whopper. The pervasiveness of political corruption and waste in Canadian government (and other governments) does not excuse imitation by First Nations, but it undermines any implication that First Nations are structurally predisposed to greater criminality. What is true, I would argue, is that First Nations have less to steal, find it harder to hide what they have stolen and impose proportionally greater burdens on their constituents.

134 Flanagan, *Second Thoughts*, pp. 94-5, 97.

135 Flanagan, *Second Thoughts*, p. 99.

136 Flanagan, *Second Thoughts*, pp. 101-4.

137 Flanagan, *Second Thoughts*, pp. 167-73.

138 Flanagan, *Second Thoughts*, pp. 175-7, 186-91. Like Cairns, Flanagan accuses the RCAP of emphasizing, expanding and developing reserve lands rather than developing Aboriginal human capital; he argues (correctly, I believe) that in the absence of expertise, a large land base will simply be leased (pp.179-85).

139 Flanagan, *Second Thoughts*, p. 22.

140 See, for example, Barsh, "The Challenge of Indigenous Self-Determination" and Russel Barsh, "The Red Man in the American Wonderland", *Human Rights*, 11, 3 (Winter 1984), pp. 14-7, 36-44. Flanagan offers some practical suggestions for the better functioning of the First Nations governments that he argues have no right to exist: strengthening fiscal accountability, decentralization, land reform, formula funding, self-taxation and more support for Aboriginal people in urban centers. (pp. 107-11, 196-8). Taken by themselves, without Flanagan's *angst*, they are reasonable and worth serious consideration.

141 Flanagan, *Second Thoughts*, pp. 92-3.



In *Surviving as Indians*, Menno Boldt called for a communal alternative to the creation of bureaucratic microstates.<sup>142</sup> Flanagan criticizes this as impractical and would presumably also argue that small communal systems are inevitably corrupted by kinship loyalties.<sup>143</sup> Boldt was thinking about the Mennonite and Mormon communities of Alberta, where he and Flanagan lived and where I taught for several years. What makes a small society a relatively fair society? In my international experience in indigenous and tribal societies, justice was the responsibility of religious institutions that crosscut and thereby counterbalanced kinship, such as Blackfoot “sacred societies”. Such institutions tended to be targets of government interference because they represented organized spiritual and intellectual centers of resistance, without which tribal societies tended to be weakened by parochial family interests.<sup>144</sup> What has taken the place of sacred societies as defenders of higher ideals than family loyalty? Not, I submit, Aboriginal professional associations.

Flanagan’s doubts about the liberating potential of Aboriginal self-government are well founded, and it is unfortunate that he dilutes them by his efforts to demolish the moral, legal and historical arguments that Aboriginal peoples are due some consideration as First Nations. By attacking the moral claims of Aboriginal peoples, he makes himself too easy to dismiss as a retrograde racist.

### **No Winner**

As the authors retire to their corners, key questions remain: Why is there limited support for Aboriginal self-government in Canada? Has the section 35 implementation process slowed to a snail’s pace because of racism, public resistance, policy incoherence or cost? And what can a book do to change our destiny?

Cairns argues from philosophy, Macklem from history and law, Russell from a modest comparative perspective, and Flanagan from newspaper headlines and outrage. Macklem cautiously states in passing that “to the extent [that is, if and only if] Canada aspires to a just constitutional order”, Ottawa must realize Aboriginal self-government.<sup>145</sup> Does Canada so aspire? Even assuming that Ottawa mandarins think about such things, do many Canadians? Arguments of justice toward Aboriginal peoples may have been effective in the past when built around images of Third World poverty and social “pathology” (to borrow one of Flanagan’s terms). It is difficult for relatively comfortable, affluent Canadians to condone starvation and despair halfway around the world, much less in the next town. But there is a difference between abhorring needless hunger and death and paying to end it. Taxing ourselves for justice is a hard “sell” even in Canada.

According to Macklem, “law distributes bargaining power among the parties” in society.<sup>146</sup> But from whence comes the power to make laws? Law can shift power from non-Aboriginal Canada to Aboriginal Canada only to the extent that political opposition is weakened. What will weaken it?

142 Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto, 1993).

143 Flanagan, *Second Thoughts*, p. 95.

144 In the case of the Pacific Northwest, the government undermined the tribal societies through the suppression of the potlatch and winter-dance religion. See Barsh, “Banishing the Spirits”.

145 Macklem, *Indigenous Difference*, p. 194.

146 Macklem, *Indigenous Difference*, pp. 77, 96.

Macklem says (in effect) we should do it because we agreed to it in 1982 – albeit implicitly. Russell says we should do it because Aboriginal peoples want it and it has not been so bad down in the U.S. Canadians do not like to be lectured about what works in the States. If Flanagan has one thing to say to us, it is that history and law are always open to dispute and that they never end an argument. Like other people, Canadians want to know, “How am *I* affected?”

According to Cairns, shared citizenship is what holds Canada together; therefore, diverting Aboriginal peoples from national electoral politics to internal self-government is bad and assimilation is the only alternative. He offers no insights into the possibility that local self-government can be reconciled with shared national institutions although Canada and the world are filled with examples. Nor does he support his assumption that Aboriginal self-government will be inherently more *divisive* than provincial or municipal self-government. He cites no studies of the political behaviour of Aboriginal people, and seems to assume that Aboriginal people will dumbly follow the most extreme opinions of academics and politicians. But within his argument lurks a major contradiction: his focus on the “diaspora” population of Aboriginal people (or persons of Aboriginal descent) that live in predominantly non-Aboriginal communities including Canada’s larger cities negates the thrust of his assertion of the divisiveness of self-government.<sup>147</sup> If the “diaspora” population is already a majority, is growing and is becoming more Canadian (as Cairns asserts), is not the threat of division self-correcting demographically?

Cairns is the Chicken Little of this debate. Even Flanagan can live with the U.S. concept of “domestic dependent nations” and views the U.S. system of tribal government as not so “ominous” because it is limited to internal matters.<sup>148</sup> Unlike Québec nationalism, Flanagan observes, Aboriginal nationalism poses no real threat to the future political integrity of Canada.<sup>149</sup> By comparison, Cairns’ proposal for resurrecting “citizens-plus” is arguably more divisive and anti-democratic than the Balkanization he fears. It would amount to a perpetual affirmative action program, associating special benefits with an individual’s status as Aboriginal (or being of Aboriginal descent). I suggest this would racialize Aboriginal status more deeply than self-government, which would be a function of residence, choice of lifestyle and political affiliation, rather than descent alone.

What we need in these difficult times is clear thinking about how Aboriginal *and* non-Aboriginal Canadians will be included in the process and benefits of Aboriginal self-government. We do not need more arguments from the elite perspectives of what the law says, what history teaches, what happened elsewhere or just plain old wishful thinking.

During my brief tenure as adviser to the Treaty Commissioner in Saskatchewan, I recruited former premier (and RCAP member) Alan Blakeney as a sounding board. The first day we met at my office in Saskatoon, I asked Alan what he thought the new Treaty Commission could best do to improve relationships between First Nations and their white neighbors in the province. After a moment’s reflection, he answered:

147 Cairns, *Citizens Plus*, p. 185.

148 Cairns, *Citizens Plus*, pp. 6, 65-6.

149 Flanagan, *Second Thoughts*, p. 87.

“Build hockey rinks together”. That simple, practical advice has stuck with me. Neither government reports nor academic tomes create broader communities of interest. Working together to achieve small but concrete, everyday benefits is vastly more powerful. For some curious reason, however, Canada appears to be stuck in an elite intellectual discourse on unity and social justice that never penetrates to the grassroots.

Perhaps this is a corollary of the Canadian philosophical idealism that I found refreshing when I began working with Native peoples on both sides of the international border during the Trudeau years: if Québec or the West or First Nations are restless, then let’s redesign the country and make everyone happy! This stands in sharp contrast to the realism and cynicism of American politics. Yet Canada is still arguing about the wisdom of Aboriginal self-government 70 years after the U.S. just went ahead and did it. This is not to suggest that the U.S. system of “tribal” government is perfect, for it is not. But it exists and continues to evolve in practice and through many conflicts both within tribes and between tribal, state and federal officials. Is it better to reflect and debate for a century in an effort to get it all right the first time? I am reminded that the Charter of Rights was nearly debated out of existence before Trudeau decided to take decisive action and drive it over the opposition. Inclusion of section 35 was also a last-minute act of political pragmatism and decisiveness rather than reflective deliberation.

So why do we have these books? Intellectual activity has its own momentum and three of the authors teach at universities; perhaps the fourth aspires to do so as well. All of the authors were beneficiaries of public and private grants to write their books, and all benefited from federal publication subsidies.<sup>150</sup> Both Flanagan and Cairns fault academics for inflaming Aboriginal expectations without seriously considering the adverse effects on Canada; yet both of them appear to be part of the problem they criticize.<sup>151</sup> Perhaps they should both consider building hockey rinks.

*[T]he spirits  
should have noticed  
how our thoughts wandered  
those first days,  
how we closed our eyes against them  
and forgot all the signs.*  
—Wendy Rose, “Story Keeper”<sup>152</sup>

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150 These subsidies came from the Social Sciences and Humanities Research Council (Macklem, Russell, Cairns) and the Donner Foundation (Flanagan).

151 Cairns, *Citizens Plus*, pp. 174-9; Flanagan, *Second Thoughts*, pp. 4, 7-8, 99.

152 Wendy Rose, *The Halfbreed Chronicles and Other Poems* (Albuquerque, 1985), p. 27.