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In reviews of each other's book, two authors present radicall

Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples,
by Sharon Helen Venne
Theytus Books, 1998

Reviewed by Tom Flanagan

This book is not an easy read. Written as a Master's of Law thesis at the University of Alberta, it is replete with esoteric jargon and long quotations from opaque legal documents. Nonetheless, it is a significant piece of scholarship, because the legal developments it describes will eventually have an impact on all Albertans.

Ms. Venne's focus is the Draft Declaration on the Rights of Indigenous Peoples. The origin of this document goes back to the 1970s and the activities of the World Council of Indigenous Peoples. In response to pressure applied by that organization, the United Nations established a working group on indigenous peoples in 1982. After years of working, the working group produced the declaration, which is now crawling through the Byzantine discussion procedures of the United Nations.

If it ever emerges from the labyrinthine subcommittees of the UN's Commission on Human Rights and its Economic and Social Council, the Draft Declaration will go to the General Assembly for a final vote. If approved there, it will have the same status as the Universal Declaration of Human Rights adopted by the General Assembly in 1948—not part of international law as such, but a powerful expression of opinion, and a signpost towards the future evolution of international law.

States with important indigenous populations, e.g., Canada, the United States, Australia and Chile, are worried about the wording of the draft declaration and are using the discussion process to try to limit its reach. A major concern is that the draft declaration speaks of "indigenous peoples" and ascribes to them the right of "self-determination." Even though never clearly defined, these are talismanic words in the vocabulary of the United Nations and of international law. Established states rightly sense a potential challenge to their sovereignty.

Ms. Venne makes it obvious that challenging state sovereignty is the main point of the exercise. "The goal of indigenous peoples," she writes, "is to act and be treated as subjects—and not as objects—in international law." The only subjects in international law are states. They have full legal personality, which allows them to sign treaties, wage war, join the United Nations, and do all the other things that states do. Other entities—individuals, corporations, non-governmental organizations—are objects of international law, though some are considered to possess a degree of legal personality allowing them to do specific things in the international arena.

Although Ms. Venne scarcely alludes to internal Canadian politics in this work, the international debate over subject status and self-determination for indigenous peoples is essentially the same as the Canadian debate over the so-called inherent right of aboriginal self-government. In the last quarter century, aboriginal peoples in Canada have succeeded in changing their designation from bands or tribes to nations, indeed First Nations; and along with the new vocabulary comes a claim to possess an inherent right of self-government existing outside of and prior to the Canadian Constitution. It can be recognized in, but is not derived from, the Constitution.

This line of argument leads directly to the highly publicized statement of Matthew Coon Come, the newly elected National Chief of the Assembly of First Nations: "I am not a Canadian." It would be interesting to know whether or not Ms. Venne thinks of herself as a Canadian. Perhaps not, to judge from the description on her book's cover: "Sharon Helen Venne (Old Woman Bear) is Cree but, through marriage, a citizen of the Blood Tribe in Treaty Seven."

The Canadian government was quick to adopt the new vocabulary of aboriginal nationalism and self-government, at least rhetorically. It now uses the term "First Nations" in all public statements, even in drafting legislation; and in 1995 the Liberal cabinet issued a policy statement endorsing the inherent right of self-government. In practice, however, the Canadian government still acts as a state with sovereign power over aboriginal peoples, despite their repeated calls for "nation to nation" relationships.

A case in point: last fall's conflict over lobster fishing in Miramichi Bay. The Burnt Church Reserve claimed the right to set its own quota, but the Minister of Fisheries and Oceans

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TIZENS OF ONE COUNTRY?

different views on the place of indigenous people in Canada

First Nations? Second Thoughts,
by Tom Flanagan.
McGill-Queen's University Press,
2000

Reviewed by Sharon Venne

Reading Tom Flanagan's latest attempt to explain indigenous peoples is like watching a traffic accident: horrific but strangely fascinating. Flanagan asserts that he intends to dissect public policy toward indigenous peoples, yet Canadian policy fails to hold his attention. Instead, he focuses on issues that he attributes to the Royal Commission on Aboriginal Peoples (RCAP), which he views as the source of much false information about the rights of indigenous peoples. Flanagan's book is his response to a conference in Montreal where participants reviewed RCAP's final report and where his view was a distinct minority.

Flanagan is one of far too many academics who persist in maintaining a colonizer view not only of their own world but of the reality of indigenous peoples (the colonized) as well. This outdated view is incisively described by James Blaut in *The Colonizer's Model of the World*; Blaut clarifies how the colonization of indigenous America has been presented in history and law from the colonizer's perspective. A popular tenet of this view is that European colonizers and their descendants are modern, progressive and developing, while the indigenous societies are decaying and disappearing. Flanagan underscores with every keystroke his affiliation with the colonizer's dominance.

Throughout *First Nations? Second Thoughts*, Flanagan introduces each new topic with his own idea of how it ought to be defined. Not surprisingly, indigenous peoples and societies are presented as uncivilized and not keeping pace with the modern world. Owing to his failure to refer consistently to indigenous measures of indigenous reality, Flanagan's arguments are often flawed.

Consider, for example, his contention that indigenous Canadians are actually colonizers too, having migrated across the Bering Strait. Flanagan accepts this hoary theory without any analysis or support. Claude Lévi-Strauss, George Gaylord Simpson, Vine Deloria Jr. and Ward Churchill are among the many scholars who have questioned the erroneous thinking that led to this theory. To paraphrase Deloria in *Red Earth, White Lies*, the theory persists in the minds of those who base their ideas on dogma. The indigenous ownership of this continent—and the rights related to it—cannot be swept away by fallacious reasoning.

While accepting the Bering Strait theory wholly, Flanagan confuses his argument by drawing on inaccurate information: "The now popular image of aboriginal rights based on '30,000 years of history' is highly misleading" (page 17). If Flanagan wants to infer that the first humans to populate the Americas via the Bering land bridge only 10,000 years ago, how does he account for the human bones and artifacts buried under a 50,000-year-old alluvial fan in California? Flanagan strives to resurrect the argument that indigenous peoples are not indigenous at all and that lands in North America were terra nullius—ideas initially contended in the late 1700s when the eastern colonies wished to claim the right to the settled lands they had "discovered." Legal analyses that rely on thin theory to uphold a biased view are not worthy of serious consideration.

Although Flanagan is apparently writing about indigenous peoples, his book constantly reminds readers about the contributions of the colonizers. One of their major contributions to civilize the wild lands, Flanagan avers, is democracy. In his dissertation, Flanagan fails to mention that the United States Constitution is based on the pre-contact laws of the Haudenosaunee. Nor does he recognize that all 600 or so indigenous nations had their own customary law, governing system and treaties long before the colonizers arrived in their territories. In fact, Flanagan falls short in recognizing the lengthy histories and social development of indigenous peoples before colonization.

Flanagan has always been hard on the oral tradition by which indigenous peoples know their own past. I wondered if, in the chapter "Treaties, Agreements, and Land Surrenders", he might be about to recognize the validity of the oral treaties of indigenous peoples, including the oral understanding of the written treaties. He starts this chapter with a reference to the 1969 Vienna Convention on the Law of Treaties, under which an oral treaty is as valid as a written one. However, Flanagan never ventures

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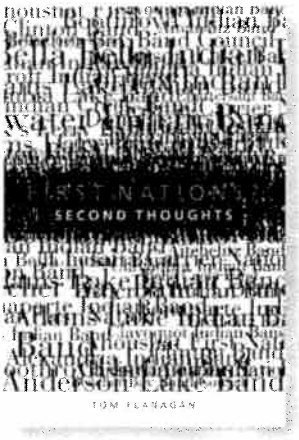
Excerpt from *First Nations? Second Thoughts* by Tom Flanagan



Eight of the propositions in the aboriginal orthodoxy are particularly dubious. They are stated below in italics, followed by my own contrarian positions. The rest of the book consists of eight chapters, each devoted to one of these propositions, plus a short conclusion.

Aboriginals differ from other Canadians because they were here first. As "First Nations," they have unique rights, including the inherent right of self-government.

Aboriginal peoples were in almost constant motion as they contested with each other for control of land. In much of Canada, their present place of habitation postdates the arrival of European settlers. Europeans are, in effect, a new immigrant wave, taking control of land just as earlier aboriginal settlers did. To differentiate the rights of earlier and later immigrants is a form of racism.

Aboriginal cultures were on the same level as those of the European colonists. The distinction between civilized and uncivilized is a racist instrument of oppression.

European civilization was several thousand years more advanced than the aboriginal cultures of North America, both in technology and in social organization. Owing to this tremendous gap in civilization, the European colonization of North America was inevitable and, if we accept the philosophical analysis of John Locke and Emer de Vattel, justifiable.

Aboriginal peoples possessed sovereignty. They still do, even if they choose to call it the "inherent right of self-government."

Sovereignty is an attribute of statehood, and aboriginal peoples in Canada had not arrived at the state level of political organization prior to contact with Europeans. The "inherent right of self-government" would be acceptable in contemporary Canada if it had the same meaning as the American formula of "domestic dependent nations" possessing "tribal sovereignty"; but in fact it means much, much more.

Aboriginal peoples were and are nations in both the cultural and political senses of this term. Their nationhood is concomitant with their sovereignty.

The European concept of nation does not properly describe aboriginal tribal communities. Unless we want to turn Canada into a modern version of the Ottoman Empire, there can be only one political community at the highest level—one nation—in Canada. Subordinate communities, such as provinces, cities, and ethnic or religious groups, cannot be nations.

Aboriginal peoples can successfully exercise their inherent right of self-government on Indian reserves.

Aboriginal government is fraught with difficulties stemming from small size, an overly ambitious agenda, and dependence on transfer payments. In practice, aboriginal government produces wasteful, destructive, familistic factionalism.

Aboriginal property rights should be recognized as full ownership rights in Canadian law and entrenched, not extinguished, through land-claims agreements.

Contemporary judicial attempts to redefine aboriginal rights are producing little but uncertainty. Recent Supreme Court of Canada decisions define aboriginal title in a way that will make its use impossible in a modern economy.

The land-surrender treaties in Ontario and the prairie provinces mean something other than their words indicate. Their wording needs to be "modernized"—reinterpreted or renegotiated—to recognize an ongoing relationship between nations.

The treaties mean what they say. Their reinterpretation, while it might not be as far-reaching as the redefinition of aboriginal title in British Columbia and Atlantic Canada, has the potential to be both expensive and mischievous for the economies of all provinces in which treaties have been signed.

Aboriginal people, living and working on their own land base, will become prosperous and self-sufficient by combining transfer payments, resource revenues and local employment.

Prosperity and self-sufficiency in the modern economy require a willingness to integrate into the economy, which means, among other things, a willingness to move to where jobs and investment opportunities exist. Heavy subsidies for reserve economies are producing two extremes in the reserve population—a well-to-do entrepreneurial and professional elite and increasing numbers of welfare-dependent Indians.

Our Elders *continued from pg. 32*

asserted his responsibility of managing the lobster fishery in the interests of all Canadians (a bit of a joke, actually, considering the terrible mess the federal government has made of so many fisheries). In the end, the minister sent his department's enforcement officers to pull the Burnt Church fishermen's lobster traps out of the water. That's how you assert your own sovereignty but not how you treat another self-governing nation.

Another case in point: Robert Nault, the Minister of Indian Affairs, has recently announced his intention to bring in a First Nations Governance Act to amend and update the self-government provisions of the Indian Act. He wants to address, among other things, the waste, nepotism and corruption that are all too common in the politics of Indian reserves. His suggestions for improving matters include greater reliance on self-funding through local taxation, more disclosure of financial information, creation of an apolitical aboriginal civil service, and impartial administration of band elections.

These all sound to me like good ideas, but Matthew Coon Come was quick to question the minister's right to proceed. Mr. Coon Come's position is that these are aboriginal governments, so only aboriginal people have the right to change them. I suspect Sharon Venne would agree with her national chief. If your goal for indigenous peoples is to have them become subjects of international law, it is surely incongruous for the Parliament of Canada to pass legislation changing their institutions of government.

As I said at the outset, this is not an easy book. Most readers will find it impenetrable. But anyone seriously interested in aboriginal politics should buy it and read it carefully—partly because it is a treasure trove of information about the attempts of aboriginal activists to use the international system for their own purposes, partly because it shows just how high the stakes are.

If the 633 First Nations in Canada are ever recognized as subjects of international law, Canada will be finished as a sovereign state. Ms. Venne's book suggests she would welcome that outcome.

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beyond the first article of the convention. While he describes the fact that much of the legal system in Canada seems to be listening to the oral evidence of the indigenous peoples, he fails to realize that Canada is finally moving in the same direction that international legal norms have been for decades.

In the treaty chapter, Flanagan makes a number of misleading statements about Treaty 8, which was negotiated over a number of years in dozens of locations in western and northern Canada. A simple reading of the original documents, or of René Fumoleau's *As Long as This Land Shall Last: The History of Treaty 8 and Treaty 11*, would have provided accurate background on this treaty-making. Rather, Flanagan cuts and pastes selective quotes from a variety of sources to construct an argument that the indigenous peoples did not know the nature and meaning of the treaty-making. And, for the record, the Dene who negotiated and concluded Treaty 8 in 1900 and 1910 have not—as Flanagan sweepingly claims—decided to repudiate their treaty. Most indigenous peoples understand that the state of Canada has consistently tried to repudiate, through land claims, the treaties negotiated between indigenous peoples and the British Crown.

An unforgivable omission in Flanagan's treatment of treaties—particularly given the active participation by Canada's indigenous peoples—is the work done by the United Nations. In July 1999, the United Nations special rapporteur tabled the final report of his study of treaties concluded between indigenous peoples and European Crowns. Reference to the three progress reports tabled since the study began in 1989 could have prevented Flanagan from erring in his analysis.

For instance, the special rapporteur noted that, while indigenous peoples have had their populations substantially reduced, their territories limited and their governments subjected to domestic limitations since contact and colonization, nevertheless the original status of the treaties has not been diminished, as these factors have been imposed on indigenous peoples. The final report states that the treaties continue to be "fully in effect and consequently are sources of rights and obligations for all the original parties to them (or their successors) who shall fulfill their provisions in good faith."

Canada's repudiation of the treaties between indigenous peoples and the Crown—an acceptable policy for scholars, like Flanagan, who uphold the colonizer's world view—is not a valid international legal principle. Neither is the doctrine of discovery, nor the notions of terra nullius and conquest. In the Western Sahara case, the International Court of Justice refuted these doctrines as invalid; Flanagan mentions Western Sahara without applying it to his analysis. If he had, his analysis would have to be quite different.

First Nations? Second Thoughts is a disappointment. While the title might lead the unsuspecting to anticipate creative or refreshing ideas, the content is second rate and out of date. When an author bases a book about indigenous peoples on the notion that they're not indigenous, perhaps it is time to find a new subject.

Sharon Venne (Old Woman Bear) is a doctoral student at the U of A.