

## BOOK REVIEWS

Asch, Michael (Editor): *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*. Vancouver: UBC Press, 1997, xv + 284 pp., ISBN 0-7748-0580-3.

*Aboriginal and Treaty Rights in Canada* is an extremely valuable collection of eight essays edited by one of Canada's foremost anthropologists, Professor Michael Asch, who has also contributed a seven page introduction as well as co-authoring the second and concluding chapters with two different legal academics. Asch is concerned that Canadian courts and legislatures have returned in recent years to relying upon a vision of the relationship with Aboriginal peoples that is grounded in the British colonial legal system rather than confronting the challenges reflected by the Supreme Court of Canada's decision in *Calder* in 1973 and the recognition and affirmation of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*. This book is, therefore, his effort to spark a debate that might lead to a renewed willingness to engage in the more fundamental debate that these two seminal events suggested would occur.

Asch summarizes the central question that was posed to the nine contributors, six of whom are lawyers, in these terms:

What are some steps whereby law could take up the challenge issued by Justice Hall in *Calder* to approach legal interpretation and assessment "in the light of present-day research and knowledge" and re-imagine a legal regime that was founded on the presumed equality of peoples and respect for difference — concepts that are in keeping with contemporary Canadian institutions and values? (p.x).

The degree to which the authors themselves take up this challenge naturally is varied; however, the efforts to do so are valiant and largely successful. They also reflect a rather broad array of approaches in seeking to meet this common overall objective.

Professor Asch in his Introduction suggests that this collection can be subdivided into three main components. The first three chapters were intended by him to set forth general themes that could be adopted as "interpretive frames" of reference by the judiciary and politicians to "promote the ideals articulated by *Calder*" (p.x). The opening salvo, "Culture and

Anarchy in Indian Country" by J. Edward Chamberlin, is a fascinating exploration of British/Canadian and First Nations mutuality of motivations for engaging in the treaty process in the 1870s. He uses as his foundation for British/Canadian thinking Matthew Arnold's *Culture and Anarchy*, published in 1869, which Asch pays the ultimate compliment of being called "one of the most important books written in English in the nineteenth century" (p.3). In his view, Arnold was arguing that critical choices had to be made to avoid the spectre of anarchy that he feared on both the individual and collective level in both social and spiritual spheres due to excessive materialism and subversive pluralism. The latter, to Arnold, was causing the disintegration of a common culture with shared, permanent values that would result in the collapse first of cultural standards to be followed by a similar result in civil society at large. Chamberlain argues that First Nations on the Prairies were contemporaneously engaged in an equal exercise of examining the potential disasters for their societies brought about by the influx of settlers that threatened the maintenance of community identity with a continuity of cultural values.

Chamberlin asserts that the leaders of both settler and Indigenous societies at this time understood that each represented a separate polity such that the objective of treaty-making was to avoid the anarchy that would inevitably result from two competing polities in the same territory without some agreed to mechanism for determining their relationships with each other. He suggests that both parties to the treaty negotiations were clear in their oral statements that they shared common objectives and understandings to forge a clear relationship respecting separateness at the same time as established social, economic, military and political ties. The focus of the non-Aboriginal descendants solely upon the written text of the numbered treaties coupled with the mistaken image that the First Nations were powerless, defrauded and starving at the time of the negotiations has created a completely false impression about the nature of the negotiations and the contents of the agreements achieved. He emphasizes the necessity of respecting the oral versions of the treaties, the "spoken texts", if one is to give an accurate and contemporary interpretation to the terms of the treaties as well as to the political relationship they created. For Chamberlin, "they are the texts upon which the political authority and the cultural integrity of *both* sides ultimately depend, bulwarks against the anarchy of relativist political (which is to say, legal) interpretations and the chaos of cultural pluralism" (pp.36-37).

The penultimate chapter by Sharon Venne likewise advocates the importance of the spoken text of the numbered treaties through providing a Cree perspective on Treaty 6. She summarizes a lifetime of learning from

Cree Elders about the content of the treaty as conveyed through oral history that contrasts markedly from the written text in English. Venne also examines in detail the respective authority delegated to the negotiators of Treaty 6 to demonstrate that the Elders' version of the treaty is more reliable. She clearly describes the limitations on the power of the Chiefs and Headmen that has been too often misunderstood by the Crown's representatives who thought the Cree political system was similar to the British in its hierarchical nature since the Chiefs possessed so much stature. Venne points out that the written text also begins and ends with a summary of the authority of the Chiefs and Headmen; however, it is erroneous in suggesting that they could surrender the land in full as the land was owned by the women due to their "spiritual connection with the Creator and Mother Earth" (p.190). Thus, the male Chiefs and Headmen were limited to negotiating the sharing of the land rather than its sale. The women did not participate directly in the negotiations specifically "to protect their jurisdiction and possessory rights" (p.192). She concludes by calling on the Canadian government to recognize the proper position of the traditional governments of Indigenous peoples who entered into the treaties (rather than the *Indian Act* bands) and to respect the true content of Treaty 6 while also reminding Indigenous peoples that they must "believe in the story first of all, and practice that belief" as the story of the Elders must be "told, recognized, recorded and sanctioned" (p.206).

Asch and Catherine Bell pursue a different tack in their paper, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation". After first examining the role of precedent and the doctrine of *stare decisis* within the common law system as often providing a restraint on judicial creativity, they demonstrate that the courts do have the capacity to overrule or set aside prior decisions in appropriate circumstances. They focus upon the detrimental impact that most of the Aboriginal title decisions have had upon the rights of the Aboriginal Peoples of Canada to date and suggest that this is largely a function of the inaccurate historical and dated ethnocentric legal theories relied upon by decisions grounded in the 19th century. The dramatic change, or perhaps better put as the revolution in anthropological theory during the 20th century is analyzed and compared to landmark decisions of the Judicial Committee of the Privy Council (*Re Southern Rhodesia*), the US Supreme Court (*Johnson v. McIntosh*, which is erroneously referred to as *Johnston* throughout the essay), and more recent ones of the Canadian courts (*Baker Lake* and *Delgamuukw*). They conclude that Canadian courts have misguidedly or out of convenience chosen to be bound by prior decisions that are based upon faulty legal, historical and anthropological information. They urge the judiciary to engage

in a fulsome reappraisal of the way the precedents have been used as to remove the structural biases placed in the path of Aboriginal litigants such as the requirements upon them to prove through extensive (which is inordinately time-consuming and expensive to generate if it can even be found at this late date) that they lived in societies at the time of contact, how their institutions functioned, with what jurisdiction and systems of property ownership, etc. They propose that the onus of proof should be lifted to those who would challenge prevailing anthropological theory that all peoples lived in societies which were organized, that maintained jurisdiction over their members and their territory with recognized ownership over land. A byproduct of this approach would be to concentrate judicial attention upon the fundamental question of upon what basis did the Crown "legitimately acquire ownership and jurisdiction over Aboriginal peoples and their lands" (p.73). A series of decisions rendered by the Supreme Court of Canada in 1996 (most particularly *Regina v. Van der Peet*) compound the difficulties delineated by Asch and Bell. The *Delgamuukw* case, which they critique in some detail (as does Kent McNeil in a later chapter), may provide a way out of this morass as the decision of the British Columbia courts they reviewed was appealed to the Supreme Court of Canada with oral argument occurring on June 16 and 17, 1997 (judgement reserved).

The emphasis upon cultural equality advanced by Asch and Bell is a central theme of the essay by Emma Larocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications". Larocque seeks to raise profound ethical issues and provoke careful assessment of "popular premises concerning notions of culture, healing and sexual offender-victim mediation programs" (p.76) while at the same time discussing the valid role of contemporary human rights thinking within modern Aboriginal societies. In what some might consider a bold endeavour, she challenges the "growing complex of reinvented 'traditions' which have become extremely popular even while lacking historical or anthropological contextualization" (p.76), with a particular concern that these "traditions" distort Aboriginal culture in the extreme and threaten the role of women in Aboriginal society. Larocque is not eschewing the importance of true Aboriginal traditions, rather she attacks the false depiction of traditional Aboriginal justice principles, in particular through the use of charts comparing Aboriginal and European justice paradigms as if each was uniform and can be readily encapsulated in such "stereotypes, generalizations, oversimplification and reductionism" (p.78). A major part of her concern is that such thinking has formed the basis of many Aboriginal mediation programs which in practice cause severe damage to many Aboriginal women who have already been victims once through sexual assault. Larocque does argue that Aboriginal traditions

should be part of the new justice systems that Aboriginal communities must create, but that they must be incorporated in a contemporary context that "protect the contemporary human rights of all individuals" as "[e]veryone must be safe from personal violence and political interference" (p.96).

The next three contributions are centered upon particular legal issues flowing more directly from Aboriginal and treaty rights questions. Patrick Macklem examines historical information surrounding the negotiations of Treaty 9 in northern Ontario to flesh out an alternative interpretation of the import of the treaty as it relates to competing claims on natural resources by the provincial government and third parties. After briefly summarizing the core legal principles on treaty interpretation and the background to the decision to engage in treaty negotiations by all three parties (the Province of Ontario was not only the major beneficiary of the treaty but also a direct party to the negotiations as required by a Canada-Ontario agreement reached in 1894), Professor Macklem proceeds to examine the terms of the written text and some of the primary and secondary material concerning the First Nations' understanding of its terms in accord with the suggestions of Chamberlin. The thrust of his contribution, however, is to argue that even if one is limited to the written version that the Aboriginal understanding of treaty terms is an essential legal component to ascertaining its proper interpretation. He concentrates upon the wildlife harvesting rights clause to assert that its breadth is such that natural resource development in the territory covered by Treaty 9 cannot occur unilaterally except pursuant to valid federal legislation (not provincial under his assessment of the distribution of legislative authority in light of the 1996 decision of the Supreme Court of Canada in *Badger* [see Bell]). A federal statute to be effective in sanctioning competing users could only occur in very limited circumstances, in Macklem's view, to comply with the *Sparrow* test of the Supreme Court. The validity of this core presumption has been placed in considerable doubt in light of the virtual gutting of the *Sparrow* test by the Supreme Court in 1996 in the *Van der Peet*, *Pamajewon*, *Gladstone* and *N. T. C. Smokehouse* judgements (McNeil, 1997; Burrows, 1997).

The next essay is a masterful yet succinct review of Aboriginal title law in Canada since the landmark decision of the Supreme Court in *Calder* in 1973, which Kent McNeil incorrectly describes as occurring "[o]ver thirty years" ago (p.135). The mandate he sets for himself is to examine two critical issues that the courts had left unresolved at the time of his writing, i.e., the origin of Aboriginal title as well as its nature and content. He utilizes the B.C. Court of Appeal decision in *Delgamuukw* as the vehicle for his review, and his critique of the majority judgement is cogent. One of the difficulties in writing on legal issues, especially for inclusion in a book subject

to publishing delays, is the risk of being out-of-date before the book comes off the press. This common problem unfortunately arises in McNeil's essay as his analysis is overtaken by the release of six decisions by the Supreme Court of Canada in August and October of 1996 that he can only refer to in the tag end of a footnote (p.253). The Supreme Court has now given important clarification to the law regarding Aboriginal title, as unsatisfactory as it may be, but McNeil's contribution is one that is still worth reading, although with this caveat in mind.

The sixth chapter is by John Burrows who seeks to correct the widespread "misunderstanding" that the Royal Proclamation of 1763 is a "unilateral declaration of the Crown's will in its provisions relating to First Nations" (p.155). He argues that the "First Nations were not passive objects, but active participants, in the formulation and ratification of the Royal Proclamation" (p.155) through the negotiation of the Treaty of Niagara in July and August of 1764 by over 2000 chiefs representing 24 Nations from Nova Scotia to the Mississippi. Professor Burrows describes the historical and political background to both the Proclamation and the Treaty as well as drawing upon speeches made by Sir William Johnson during the presentation of the Covenant Chain and wampum belts at Niagara along with subsequent statements that demonstrate the common understanding of the Treaty's terms. This reviewer would suggest that Professor Burrows has overstated his assertions somewhat when he suggests First Nations were actively involved in the formulation of the Royal Proclamation. While it is clearly true that military, political and economic might of the Indian Nations was well understood by the British and was a major impetus to developing the Proclamation as well as drafting parts of it to seek the support of these Nations, that is not the same as suggesting their representatives were involved in its "formulation". Burrows also indicates that the Proclamation contained clauses antithetical to the Indian vision so as to advance the Crown's dominion and accommodate the interests of the colonists. Furthermore, it is unnecessary to assert that the Proclamation is a bilateral document to meet his objective of demonstrating that it was incorporated into the Treaty of Niagara and ratified as such by the Indian Nations who participated in that Treaty. This Treaty stands on its own feet as a fundamental agreement between the Crown and Indian Nations in the eastern half of the continent which has received far too little attention by historians, lawyers and governments in Canada. The Treaty also can be used to clarify or reinterpret the wording in the Proclamation, at least as it affects the relationship between the Crown and the First Nations descended from the Treaty parties. On the other hand, the ratification of the Proclamation and the negotiation of the Treaty of Niagara does not automatically

transform the former into a negotiated document in general or extend its reach to First Nations that were not party to the Treaty itself. This essay was previously published (Burrows, 1994) in a longer form in which he examines and critiques in detail the conventional Canadian interpretations of the Proclamation unlinked to the Treaty of Niagara as well as comments upon the implications of his approach for the debate on self-government and sovereignty. Asch is to be commended for including this chapter in the collection so as to ensure that the significance of the Treaty of Niagara reaches a larger audience than the readers of law journals.

The final chapter is another co-authored piece by Asch but this time with Norman Zlotkin. In it, the authors criticize the federal government's policy on comprehensive claims negotiations (particularly its position on extinguishment of Aboriginal title as a requirement to achieve a modern treaty and the limited alternatives to extinguishment that it instituted in 1986) in contrast to Aboriginal perspectives. They argue that the federal policy (1) is counter-productive, (2) fails to achieve its objective of certainly, (3) is inconsistent with constitutional affirmation of existing Aboriginal rights in section 35(1) of the Constitution Act, 1982, (4) is contrary to fiduciary obligations, (5) may be inconsistent with international human rights standards (this one is a bit of a stretch, at least until the *Draft Declaration of the Rights of Indigenous Peoples* being developed within the United Nations is adopted, as it suggests Aboriginal title as land tenure is a human right such that the requirement of extinguishment is discriminatory), (6) impacts negatively upon the perceptions that many Aboriginal peoples have of their relationship with Canada, and (7) is based upon an ethnocentric bias which relies upon colonial legal precedents to justify Crown sovereignty and dominion over the territory now known as Canada. They sketch out a proposal based upon affirmation of Aboriginal title as a permanent aspect of Canadian law and relations so as to develop a new foundation built on mutual respect and accommodation.

While this goal is obviously desirable and many of their arguments are well taken, the article suffers somewhat from a few shortcomings. The detailed report produced by the Royal Commission on extinguishment and released in early 1995 (not in 1993 as footnote 9 at p.270 indicates) is mentioned largely only in passing while the major study released in September of 1995, on extinguishment undertaken for the federal government by retired Associate Chief Justice Alvin Hamilton (who was previously co-commissioner of the Aboriginal Justice Inquiry of Manitoba) through numerous hearings precisely on this topic with Aboriginal groups, provincial governments and third parties is acknowledged as having been conducted but never even cited. This essay would have been much stronger if these

two important reports had been analyzed in detail and compared with the proposals of the authors, which show significant similarities to these two studies in many respects, as Otis and Edmond have done (1996). Asch and Zlotkin are also markedly out-of-date in their analysis of the federal government's policy on self-government and its relationship to comprehensive claims. They criticize the federal policy of 1986 as if it were still in effect in limiting self-government negotiations to a narrow range of jurisdiction and precluding constitutional protection for the agreements reached regarding governance. This policy became defunct on a *de facto* basis with the change in the federal government in October of 1993 in accordance with instructions from the then Minister of Indian and Northern Affairs, the Hon. Ronald A. Irwin, issued early in 1994 and was fully dead with the release of the federal negotiation position on the inherent right of self-government in August of 1995, which is not referred to by the authors. Despite these flaws and a few more minor ones (such as using the same lengthy albeit excellent quote from Leroy Little Bear at pp.216 and 228), the contribution remains a valuable addition to the literature.

*Aboriginal and Treaty Rights in Canada* is definitely a book that anyone interested in these fundamental issues in Canada as well as the development of a new partnership among Aboriginal Peoples and the non-Aboriginal population should acquire. While the papers are somewhat uneven in meeting the mandate set out by Asch in his introduction, they all make a significant contribution to our understanding and assist in re-imaging "a legal regime founded upon the presumed equality of peoples and respect for difference" (p.x) that is so necessary to obtain a brighter future for us all.

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While publication of poems and essays by American Indians reaches back to the late 18th century, this little novel, first published in 1891 by H.J. Smith and Co., Chicago, is widely understood to be the first written by a woman of American Indian heritage. Republished by the University of Nebraska Press in 1997, it is obscure enough to have eluded even A. La Vonne Brown Ruoff, in that most comprehensive bibliographic survey of American Indian writing, *American Indian Literatures* (Modern Languages Association, 1990) although as editor of the new edition of *Wynema*, Ruoff more than makes up for the oversight. The announcement of the first edition, in the 6 June, 1891 volume of *Our Brother in Red*, quoted in Ruoff's informative introduction, presages 106 years of obscurity "...we look forward with pleasure to a time when our other duties will permit us to read the book," puffs the announcement. It advances the condescension evident in the publisher's preface of the original edition, in which Callahan's work is offered notwithstanding its "crudeness and incompleteness." This fine new edition will renew access to a genteel but still penetrating understanding of