ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUITY, AND RESPECT FOR DIFFERENCE, Michael Asch, ed., (Vancouver: University of British Columbia Press, 1997)

This is an important collection of articles aimed at restoring momentum to the process of reforming Aboriginal rights law in Canada. That process began with the Supreme Court's clear recognition of Aboriginal rights in 1973 in *Calder*.[1] It continued through the constitutional entrenchment of "existing aboriginal and treaty rights" in 1982 and the positive interpretation of these rights by the Supreme Court in a series of cases culminating in the Court's 1990 decision in *Sparrow*.[2] Alongside these legal developments, especially in the lead-up to the Charlottetown Accord, there was a growing recognition in non-Aboriginal Canada of Aboriginal peoples' *inherent* right to self-government. However, much of this momentum has been lost as the decade of the 1990s has proceeded. As Michael Asch, the editor of this volume, notes, courts and legislatures are now returning to "a reliance on modes of understanding that find their firm footing in the legacy of the British colonial legal system."[3]

These essays make it clear that the key to progressing toward a relationship between Aboriginal peoples and Canada that is truly post-colonial is recognition of the fundamental autonomy of First Nations as political communities. Unless the rights of Aboriginal peoples are accepted and understood as having their own independent source in the historic and ever-evolving societies of Aboriginal peoples, they will be shaped to the convenience and subject to the unilateral discretion of a superior, non-Aboriginal political authority. The authors of all eight essays believe in a relationship that, to use the editor's words, "promotes rather than denies equality of peoples."[4]

Though all of the essays are, in one sense or another, about the "law" of Aboriginal and treaty rights, they deal with very different dimensions of legal experience. Five are concerned with treaties, two with jurisprudence and one with criminal justice reforms. The variety of treatments shows us what a multi-faceted phenomenon this thing called "law" really is, and that in subjecting a relationship to the "rule of law" much will depend on who gets to make and interpret the law.

It is certainly reasonable that so much of such a collection should focus on treaties. It was after all through treaties that Europeans and Indigenous peoples in British North America first tried to regulate their relations with one another. When treaties are not just made by the representatives of two peoples, but also implemented and interpreted mutually and consensually by the peoples concerned, they can provide a foundation for a relationship that is consonant with the equality of peoples.

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[1] *Calder* v. *B.C. (A.G.)*, [1973] S.C.R. 313.

[2] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.

[3] M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) at x.

[4] *Ibid.* at xv.

Ted Chamberlin's essay[5] which opens the volume helps us, in a marvellously insightful way, understand the potential of the treaty relationship in Canadian history. He does this by showing how the underlying theme of Matthew Arnold's *Culture and Anarchy*,[6] written in the mid-nineteenth century when treaty-making in Canada with First Nations was at its zenith, illuminates the basic motivation of both Aboriginal and non-Aboriginal parties to treaties. Both sides wanted to avoid a lawless anarchy by mutually imposing an order on their relationship, but an order through which each could secure the integrity of its distinctive culture. Chamberlin's essay reminds us that this strong commitment to building treaty relationships in Canada occurred at the very time the United States was shutting down the treaty-making process.

At the moral heart of the treaty-relationship is an undertaking to keep your word. In a context where the common means of communication was the spoken word it is the oral text — what the parties understood each was saying to the other — that is fundamental. For Chamberlin "the Canadian breach of trust, [and] the barbarism" came not simply in the Crown's side breaking its promises but also in putting them on paper and then insisting on its "convenient" interpretation of the written text as incorporating the treaties' fundamental meaning.[7]

Chapters by Patrick Macklem[8] and Sharon Venne[9] apply Chamberlin's general point to two of the "numbered treaties," Treaty 9 and Treaty 6. These two essays are excellent demonstrations of the kind of research that can illuminate the original understandings that are "the word" of the treaties.

Treaty 9, the focus of Macklem's study, covers that huge area (130,000 square miles) of Northern Ontario added to the province after the Privy Council's decision in the *Ontario Boundaries*[10] case. In the written text of this treaty, the Aboriginal peoples' right to hunt, trap and fish in off-reserve lands (all but 500 square miles of the treaty lands) were subject to the qualifications that government lawyers typically inserted in all of the so-called "land cession" treaties. These rights would be "subject to such regulations as may from time to time be made by the Government of the Country,"[11] and would not extend to tracts of land "as may be required or taken up from time to time for settlement, mining, lumbering, trading and other purposes."[12] Macklem exposes the deeply ambiguous nature of these and other clauses in the treaty. No explanation is given of the source or nature of the Aboriginal rights that are recognized

5 J.E. Chamberlin, "Culture and Anarchy in Indian Country" in *ibid.*, 3.

6 M. Arnold, *Culture and Anarchy*, S. Lipman, ed., (New Haven, CT: Yale University Press, 1994).

7 *Supra* note 5 at 36.

8 P. Macklem, "The Impact of Treaty 9 on Natural Resources Development in Northern Ontario" in *supra* note 3, 97.

9 S. Venne, "Understanding Treaty 6: An Indigenous Perspective" in *ibid.*, 173.

10 (1884) [unreported] (P.C.).

11 Macklem, *supra* note 8 at 109, quoting J. Long, "Treaty No. 9 and Fur Trade Company Families: North Eastern Ontario's Halfbreeds, Indians, Petitioners and Metis" in J. Peterson & J.S.H. Brown, eds., *The New Peoples: Being and Becoming Metis in North America* (Winnipeg: University of Manitoba Press, 1985) at 137, quoting "Treaty Commissioner's Report," *James Bay Treaty* (Ottawa: Queen's Printer, 1964, reprint of 1931 edition) at 10.

12 Macklem, *ibid.*

as still operative throughout the treaty area, nor how their recognition relates to a provision in the treaty "to cede, release, surrender and yield up rights to the land."[13] Further questions arise about the identity of "the Government" that can regulate these Aboriginal rights and the means whereby lands can be taken up for listed or unlisted purposes, or how the taking up of land for these purposes should affect Aboriginal rights.

To resolve these ambiguities Macklem examines petitions of the Cree and Ojibwa explaining the need for a treaty and documented accounts of Aboriginal understandings of the terms of Treaty 9 and of government objectives and strategies in negotiating treaties. This material shows how wide of the mark (and of Supreme Court *dicta* about treaty interpretation) it would be to resolve the ambiguities in Treaty 9 by conferring on non-native government (least of all the provincial government) an unfettered discretion to do what it likes on treaty lands. Macklem makes a convincing case that an interpretation of Treaty 9 informed by an understanding of what the Cree and Ojibwa were led to believe is that it imposes very strict limitations on natural resource development, in particular hydro-electric installations, that can be undertaken by or authorized by government in Northern Ontario.

Sharon Venne's study[14] deals with Treaty 6, entered into by representatives of the Cree, Assiniboine, Saulteau and Dene peoples on the western plains in 1876. Her research, like Macklem's, demonstrates major discrepancies between the written text of Treaty 6 and the First Nation peoples' understanding of virtually every aspect of the treaty. Venne's research is based on a very thorough listening of oral history as told by Elders. For the Elders, the most serious problems with the text of Treaty 6 concern its treatment of land issues where (like all of the so-called land cession treaties) it uses words like "cede, surrender, and forever give up title"[15] which had no counter parts in the native languages.

This same theme of massive discrepancy between Aboriginal and non-Aboriginal understandings of key historical events is developed in a broader context by John Borrows' analysis of the Proclamation of 1763.[16] Borrows shows that the Proclamation, far from being a unilateral policy announcement by the Imperial Government, is best understood as a peace treaty. He takes us through the events leading up to the assembling at Niagara Falls in the summer of 1764 of approximately 2000 chiefs representing twenty-four nations to consider the Royal Proclamation. Sir William Johnson, the British army's northern superintendent of Indian affairs, presented the Proclamation as the basis for what he hoped would prove "a Pax Britannica for North America."[17]

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13 *Ibid.* at 110.

14 *Supra* note 9.

15 *Ibid.* at 192.

16 J. Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" in *supra* note 3, 155.

17 *Ibid.* at 163, quoting C. Flick, ed., *The Papers of Sir William Johnson*, vol. 4 (Albany, NY: The University of the State of New York, 1925) at 487.

In this setting Johnson did not draw attention to statements in the Proclamation asserting British "sovereignty" and "dominion" over the territories of the First Nations. Instead he solemnly promised that no land was to be taken from First Nations peoples without their consent. The Treaty of Niagara was consummated with the exchange of gifts and presentation of the two-row wampum belt, "a diplomatic convention that recognizes interaction and separation of settler and First Nation societies."[18] The Proclamation and subsequent treaties, Borrows argues, should be interpreted in light of the Treaty of Niagara.

These historical accounts of relationships made between settler and Aboriginal authorities when the power differential was not too great remind us of how divergent the understandings may become when that differential shifts dramatically to the settler side. What can be done then to recover a relationship based on a shared understanding? Aboriginal peoples, having learned how crucial the written word is in the settler culture, when negotiating modern treaties can avoid the traps and weasel words of the Queen's lawyers. The final chapter in the volume by Michael Asch and Norman Zlotkin on comprehensive claims agreements[19] shows that for this to occur the federal government must give up its policy of "extinguishing" Aboriginal rights and instead, in these modern treaties, recognize the primacy and continuance of Aboriginal title.

As for getting back to the original understanding of older treaty relationships, including the Treaty of Niagara, much reliance is placed on Canadian courts these days. Catherine Bell and Michael Asch[20] urge Canadian judges to avoid a line of American, British and Canadian precedents that are built on an out-dated and much discredited evolutionary "social science." This social science, whose premises are writ large in McEachern J.'s decision in *Delgamuukw*,[21] denies Aboriginal peoples at the time of contact the status of being organized societies capable of possessing land and exercising governmental jurisdiction. Therefore, it is totally incapable of recognizing that Aboriginal societies were and continue to be political communities which deserve equality of respect, and which have a right to evolve and adapt to changing circumstances.

Kent McNeil[22] shows how inadequate Canadian judges, like British judges before them, have been in working out a coherent and plausible theory on the source and nature of Aboriginal rights. He is critical of lower court judges who use the *sui generis* nature of Aboriginal rights as a rationale for reducing the scope of those rights to what Aboriginal claimants can prove their ancestors were doing when British sovereignty was imposed. McNeil here, as in his book-length study, makes a strong case for finding

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[18] *Ibid.* at 164.

[19] M. Asch & N. Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations" in *supra* note 3, 208.

[20] C. Bell & M. Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in *supra* note 3, 38.

[21] *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.).

[22] K. McNeil, "The Meaning of Aboriginal Title," in *supra* note 3, 135.

that in common law Aboriginal title embraces an "all-encompassing interest"[23] subject only to the restriction of alienation exclusively to the Crown.

These two jurisprudential chapters show how unreliable Canadian judges have been as interpreters of Aboriginal rights. The Supreme Court of Canada's decisions in the *Van der Peet* trilogy[24] which were rendered after these essays were written provide no grounds for optimism about the courts moving in the direction advocated by these authors. Here we encounter the stark reality of the limits of the knowledge and justice that Aboriginal peoples can expect from courts which, particularly at the higher levels, are staffed overwhelmingly by non-Aboriginal judges.

Emma LaRocque's essay[25] aims at a very different target, the simplistic stereotyping that all too often is found in efforts at adopting criminal justice approaches that are more appropriate for Aboriginal peoples. The focus of her attack is the very lenient sentencing of healing circles in rape cases in Aboriginal communities. She points out how inaccurate it is to regard such a lenient treatment of sexual assault as in accord with Aboriginal tradition. LaRocque supports the principle of Aboriginal self-government but does not want to see the implementation of this principle based on ill-conceived efforts to maintain difference. She makes the further point that Aboriginal societies themselves must grow and change, particularly in meeting standards of justice and decency whose validity transcends particular cultures.

The editor of this volume is to be congratulated for including LaRocque's essay, not only because of the intellectual courage of its author, but also because it points to a missing ingredient in the normative vision of many reformers in this field — the common principles and institutions which Aboriginal and non-Aboriginal Canadians must share if their post-colonial relationship is to be based on a shared citizenship in a single, though deeply federal, over-arching, Canadian political community. A relationship built solely on respect for difference meets only one of the two ideals expressed in the two-row wampum belt; it satisfies the separateness aspect, but not the interconnectedness aspect. The two canoes, Aboriginal and non-Aboriginal, are fated to share the same river. Giving that river a shape and substance that is truly post-colonial is as important as ensuring that one of the canoes no longer threatens to swamp the other.

The editor is also to be congratulated for putting together a collection of essays on the law relating to Aboriginal peoples that contains some of the very best scholarship

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23 *Ibid.* at 153.

24 *R.* v. *Gladstone*, [1996] 2 S.C.R. 723; *R.* v. *N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507.

25 E. LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in *supra* note 3, 75.

available in this field. Though the message is often depressing, it is delivered with impressive and eloquent erudition.

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