

Emerging Justice: Essays on Indigenous Rights in Canada and Australia

by Kent McNeil,

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WHEN THE FEDERAL GOVERNMENT PUBLISHED its White Paper on Indian Policy¹ in 1968, Canada was a vastly different country. In 1968, Canada as a whole basked in the warm afterglow of the successes of the previous year: the national effort to celebrate the centenary of Confederation and the Montreal World's Fair, Expo '67. Building on the sense of national community, the White Paper sought to promote an assimilationist vision in which the legal distinctiveness of aboriginal peoples would be subsumed into the common citizenship of all Canadians. Reaction was swift and sure. Aboriginal individuals and organizations reacted negatively to the White Paper and sought to promote respect for treaties and other aboriginal rights. Then, in 1973 the Supreme Court decision in *Calder v. Attorney General of British Columbia*² presented the Nisga'a Tribal Council and four bands with both a short-term defeat and a long-term victory. The plaintiffs endured a litigation defeat in relation to their land claim as three members of the Court concluded that Crown sovereignty had extinguished any continuing general aboriginal title in British Columbia. In dismissing the appeal from the British Columbia Court of Appeal, they were joined to form the majority by Pigeon J., whose opinion rested on procedural grounds. However, *Calder* presented a victory for the plaintiffs because three members of the Court, in a strong dissent written by Hall J., expressly recognized the concept of an existing aboriginal title in British Columbia. Thus, the Court had divided 3-3 on the issue of aboriginal title as an existing right of aboriginal peoples. Just nine years later, the distinct rights of the aboriginal peoples were "recognized and affirmed" in section 35 of the *Constitution Act, 1982*.³ Now, twenty-one years later, we can look back on the evolution of aboriginal rights jurisprudence through the finely tuned perceptions of Kent McNeil of Osgoode Hall Law School, York University.

Emerging Justice is a collection of fifteen essays written by Professor McNeil on various aspects of aboriginal law commencing in 1992. Three of the essays are previously unpublished, though one of these is based in part on a previously published work. The essays are presented in three parts with Parts I and II consisting of five and seven articles, respectively, which address particular issues of aboriginal law in Canada; Part III presents three articles on the theme of native title in Australian law. Two of the articles on Canadian law were previously published in the United States and two of the articles on Australian law were published, appropriately, in Australia. While it is commendable to explain Canadian law to our American cousins, I note that in an article on the recognition of aboriginal self-government published in the journal of the Ninth Judicial Circuit Historical Society, Professor McNeil expresses the hope that his discussion of the

1. Canada, Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Indian Affairs and Northern Development, 1969).

2. [1973] S.C.R. 313.

3. Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

proposed Charlottetown Accord, "will contribute to the dialogue on how the political aspirations of the Aboriginal peoples can be accommodated within the Canadian Constitution."⁴ How that contribution can be made by publication in a foreign journal is somewhat difficult to comprehend as the target audience is neither Canadian nor Aboriginal. I mention this small point of interest only to highlight the conundrum facing many academics in this country: where to publish? There is certainly pressure on academics to gain an international reputation for themselves and for their institutions by publishing in foreign, i.e. United States journals. But the underside of such pressure is the loss of voices within Canada and the loss of that contribution to Canadian journals. A fine balance is needed. I hasten to add that no criticism of Professor McNeil is intended by this observation; ten of the twelve essays on Canadian law were either originally published in Canada or are presented for the first time in his book. He has amply contributed his share to furthering the Canadian academy.

As a teacher of Aboriginal Law with a public law disposition, I enjoyed reading Professor McNeil's public law analysis of issues pertaining to constitutional space for aboriginal self-government but, more particularly, his private law analysis of aboriginal title both in this country and in Australia. The collection commences with an analysis of the constitutional and legal significance of the 1898 and 1912 modifications to the borders of Québec under the heading, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" and ends with an analysis of customary or traditional law as a definitional element in aboriginal title in the context of Australia under the heading, "The Relevance of Traditional Laws and Customs To The Existence And Content Of Native Title At Common Law." In between are essays in Part I on such matters as the nature and sources of aboriginal title and on the onus of proof in relation to the existence or extinguishment of aboriginal title; in Part II on matters such as the recognition of aboriginal self-government, the relevance of the *Canadian Charter of Rights and Freedoms* to aboriginal governments, federal and provincial legislative jurisdiction in relation to aboriginal title, and the fiduciary responsibility of the Crown; and in Part III on the various reasons for decision by the High Court of Australia in *Mabo No. 2*⁵ and of the concept of extinguishment in Australian law. Each of these essays demonstrates the strength of Professor McNeil's analytical skills and his comfortable writing style. His is an erudition dedicated to the advancement of aboriginal rights in Canadian law, hence the title of the book. I commend the collection to the reader without reservation.

I do not intend in this brief review to micro-critique the analysis presented in these essays. Instead, I offer a more fundamental criticism which presented itself repeatedly in reading many of the essays included in the collection. With many of the essays focussing on the scope and content of aboriginal title, Professor McNeil demonstrates that judicial reasoning in relation to aboriginal title diverges from the common law rules respecting property interests. For example, in the essay entitled "Aboriginal Title And The Division Of Powers:

4. Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Houghton Boston Printers, 2001) at 173 [*Emerging Justice*].

5. *Mabo v. Queensland (No. 2)* (1992) 175 C.L.R. 1 (H.C.A.), 66 A.L.J.R. 408 [*Mabo No. 2* cited to C.L.R.].

Rethinking Federal And Provincial Jurisdiction,” the author focusses on Lamer C.J.C.’s reasons for his decision in *Delgamuukw*,⁶ in which the Chief Justice stated that the right to exclusive use and occupation of aboriginal title lands is subject to limitations if justified under the test established by the Court in *Sparrow*.⁷ Quoting the Chief Justice that Crown grants of land in fee simple for purposes of exploitation by agriculture or mining may be justified infringements of aboriginal title, Professor McNeil observes:

This implies that governments can justifiably infringe Aboriginal title by creating private interests in land that are inconsistent with Aboriginal titleholders’ rights to exclusive use and occupation. With all due respect, this flies in the face of the protection the common law has always accorded to property rights, and makes the constitutionalization of Aboriginal title by section 35(1) virtually meaningless.⁸

In his essay on the *Mabo No. 2* decision, “Racial Discrimination And Unilateral Extinction Of Native Title,” Professor McNeil criticizes Brennan J. for the conclusion that a Crown grant of an interest in land inconsistent with native title results in extinguishment of that native title. He states:

With all due respect, authority does not support Brennan J.’s limitation of the rule that the Crown cannot derogate from existing rights or interests to situations involving rights or interests derived from its own grants.⁹

Professor McNeil then explains his position by analyzing *The Queen v. Eastern Archipelago Company*,¹⁰ an English Queen’s Bench decision of 1853, and *Bristow v. Cormican*,¹¹ an 1878 decision of the House of Lords to support the principle that the Crown cannot derogate from existing rights or interests. The former case concerned the revocation of the charter of a private trading company and the latter, an action in trespass to fishing rights in Ireland. Both cases fully support the propositions for which they are presented. To further support his argument that the Crown cannot derogate from customary aboriginal land rights pre-dating Crown sovereignty, Professor McNeil discusses *Attorney General for the Isle of Man v. Mylchreest*¹² in which a Crown grant was held to be subject to customary usufructuary rights under Manx law. With all due respect, invoking the principles of common law cases to demonstrate error in the reasoning of the Supreme Court of Canada and of the High Court of Australia is misdirected. Though Professor McNeil acknowledges the characterization of aboriginal title by the courts as *sui generis*, he fails to give full force to that repeatedly emphasized characterization. It is not sufficient merely to acknowledge the *sui generis* nature of aboriginal title by discussing what the court itself identifies as unique to that legal construct, for example, that aboriginal title lands are inalienable except to the Crown. I believe it is important to recognize the message that the courts are really communicating.

6. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1111, 153 D.L.R. (4th) 193 [*Delgamuukw* cited to S.C.R.].

7. *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow* cited to S.C.R.].

8. McNeil, *Emerging Justice*, *supra* note 4 at 272.

9. *Ibid.* at 372.

10. (1853), 22 L.J.Q.B. (N.S.) 196 (Q.B.).

11. (1878), 3 A.C. 641 (H.L.).

12. (1879), 4 A.C. 294 (P.C.).

Sui generis is a nicely packaged way of stating the obvious—the courts are defining aboriginal title and aboriginal rights on a case-by-case basis. This is the common law method. Thus, common law precedents should serve as a basis from which to offer a comparative assessment of judicial treatment of aboriginal rights rather than as a standard by which to assess correctness. The common law is not the source of aboriginal title. It is our means of recognizing that title. As expressed by Lamer C.J.C. in *Delgamuukw*, aboriginal title is grounded in the combination of the common law and the aboriginal perspective, including aboriginal customary law.¹³ It is therefore beside the point to criticize judicial decisions because of variances from common law precedents.

More to the point is recognition of the value informing aboriginal law jurisprudence. It is aboriginality or aboriginalness defined not in terms of contemporary aboriginal societies but as a historical identity. Aboriginal rights, it will be recalled, have been defined by the Supreme Court as pertaining to activities and practices integral to the aboriginal society—what made it what it was—at the time of contact with Europeans.¹⁴ It is that concept of aboriginalness which is constitutionally recognized and affirmed—at least in the interpretation of the Constitution accepted by the courts. Aboriginal title is not an autonomous concept. It is a particular subset of aboriginal rights with the crucial time frame set not at contact but at English sovereignty. Any doubt that aboriginalness is the key to the definition of aboriginal rights is surely laid to rest by the words of Brennan J. in *Mabo No. 2*:

The common law can, by reference to traditional laws and customs of an indigenous people, identify and protect the native title rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.¹⁵

It is this aspect of aboriginal rights jurisprudence that students of the topic find rather frustrating, even depressing, and easily characterize as racist. Aboriginal rights jurisprudence, like the common law itself, looks backward to the dusty haze of history but the peoples affected are the vibrant participants in our contemporary world with all its marvels and challenges. Students note that aboriginal people have not shared in the bounty of this, their land, and lament the limitation that a historical aboriginalness places on the scope of aboriginal rights. The counter to this, of course, is that the constitutional affirmation of aboriginal rights is not intended as a maximum guarantee for aboriginal people; rather, it is a minimum guarantee. The true message is negotiation.

From *Sparrow* onwards, the underlying message from the Supreme Court has been the same: “Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place.”¹⁶ It is in this context that I particularly enjoyed Professor McNeil’s reminder that:

13. *Delgamuukw*, *supra* note 6 at para. 147.

14. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.].

15. *Mabo No. 2*, *supra* note 5 at 59.

16. *Sparrow*, *supra* note 7 at 1105.

The general guarantee in section 35 was intended to be supplemented by 'identification and definition' of the rights of the Aboriginal peoples at a constitutional conference, to be held... within a year of the coming into force of the Act. The conference, chaired by Prime Minister Trudeau, was held in March 1983, and attended by the provincial premiers and representatives of four national Aboriginal organizations... [L]ittle progress was made towards clarification of Aboriginal and treaty rights...¹⁷

The last two constitutional conferences on Aboriginal issues, held in April 1985 and March 1987, and chaired by Prime Minister Brian Mulroney, both failed to make substantial progress towards clarifying the constitutional rights of the Aboriginal peoples.¹⁸

The Charlottetown Accord effort furthered negotiation, but directed the recognition of an inherent right to self-government rather than the definition of aboriginal rights in general. Even the Accord presented a 'best efforts' draft, leaving to further negotiations the specific details of self-government and, in default of successful negotiations, to litigation at the end of the five-year period. Had the Accord been approved in the national referendum, few would doubt that the courts would again be left to complete the task abdicated by politicians.

It is often an easy but unfair criticism of an author to point out what is missing yet desirable in a publication. In this instance, it may not be so unfair. This is not a singular effort, it is a collection of essays and Professor McNeil has not selected all of his worthy writings for inclusion in *Emerging Justice*. In *Delgamuukw*, Lamer C.J.C. credited the author for the convincing argument that proof of possession at law will ground title to land.¹⁹ Yet, Professor McNeil has not seen fit to include in this collection discussion of the concept of occupation sufficient to prove aboriginal title. Instead, we are given numerous points of analytical interest in relation to aboriginal title lands. Without discussion of the concept of occupation sufficient to satisfy aboriginal title, the analysis is deficient. In *Delgamuukw*, Lamer C.J.C. describes the requisite physical occupation in terms of, "the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources."²⁰ This is a narrow view of occupation consistent with the agricultural society that reflects traditional common law values. It posits not large expanses of land under aboriginal title but specific tracts. Without including an analysis of the meaning of occupation, Professor McNeil's discussion of aboriginal title begs the question as to the extent of lands subject to such title. His rather broad vision of land entitlement may be misleading.

The task of defining aboriginal rights in the context of aboriginal/non-aboriginal relations is far from complete. In *Sparrow*, the evidence presented to the court in relation to Musqueam society resulted in a determination that, "the taking of salmon was an integral part of their lives and remains so to this day."²¹ Thus,

17. McNeil, *Emerging Justice*, *supra* note 4 at 168.

18. *Ibid.* at 170.

19. Kent McNeil, *Common Law Aboriginal Title*, (Oxford: Clarendon Press, 1989), cited in *Delgamuukw*, *supra* note 5 at para. 149.

20. *Ibid.* at para. 149.

21. *Sparrow*, *supra* note 6 at 1094.

the Supreme Court found an existing aboriginal right to fish salmon for ceremonial and food purposes. In *Van der Peet*, the Supreme Court observed that fishing, as an activity, is practised by all human societies with an available source of supply and, therefore, reaffirmed that to be an aboriginal right the practice must be integral to the society, in the sense of, "a defining feature of the culture in question."²² Thus, is it the activity of fishing which is recognized as an aboriginal right or fishing for salmon? More recently, the Ontario Court of Appeal in *R. v. Powley*²³ applied the aboriginal law jurisprudence to determine the scope of Métis aboriginal rights. Based on the evidence that hunting as an activity was integral to the Métis society under consideration, the Court recognized an aboriginal right to hunt not limited to specific animals. Are Métis aboriginal rights broader in scope than First Nation aboriginal rights? The Supreme Court will address that issue.

Aboriginal rights continue to evolve. Hopefully, Professor McNeil has not exhausted his interest in this area of the law and his future contributions are awaited. *Emerging Justice* is a worthy effort and will benefit all persons interested in justice for aboriginal peoples.

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22. *Van der Peet*, *supra* note 13 at para. 59.

23. (2001), 53 O.R. (3d) 35, 196 D.L.R. (4th) 221, leave to appeal to S.C.C. granted.