2005

Peeling an Orange and Finding an Apple – Book Review of Joseph Magnet and Dwight Dorey eds., *Aboriginal Rights Litigation* (Markham: LexisNexis Butterworths, 2003)

Constance MacIntosh

PEELING AN ORANGE AND FINDING AN APPLE: *ABORIGINAL RIGHTS LITIGATION*, JOSEPH MAGNET & DWIGHT DOREY, EDS. (MARKHAM, ONTARIO: LEXISNEXIS BUTTERWORTHS, 2003)

Aboriginal Rights Litigation[1] suffers from a certain amount of thematic confusion: the reading experience is akin to peeling an orange and finding an apple inside — a lovely piece of fruit but not the one you expected. And if you wanted to make orange juice, you are simply out of luck.

This thematic confusion is illustrated by the contrast between the title of the book — *Aboriginal Rights Litigation* — and the project which the editors ascribe to the book in its introduction, of presenting "an immensely rich volume on a subject rarely treated in the legal literature — Aboriginal peoples off-reserve."[2] So what is the focus of this collected volume? Is it Aboriginal rights litigation? Is it Aboriginal peoples off reserve? Or is it litigating the rights of Aboriginal people who live off reserve? Each of these options would presumably result in different editorial strategies, different decisions about what ought to be included in the volume. Some chapters are reflective of the book's title: Ian Taylor writes about financing Aboriginal litigation; Mahmud Jamal and Derek Bell discuss using class actions to pursue Aboriginal claims; Andrew Lokan assesses the growing role of expert witnesses in Aboriginal rights litigation. Other essays reflect the editorial ascription, and consider the legal positioning of Aboriginal peoples who are non-status Indians, Métis, or status Indians who live off reserve.

The search for thematic continuity in this volume is frustrating. Only a few of the chapters on off-reserve Aboriginal peoples address litigating the Aboriginal rights of this population. The chapters on litigation seldom address the distinct issues which arise when off-reserve Aboriginal peoples engage in Aboriginal rights litigation. At least one chapter, regarding the use of civil litigation to pursue residential school claims, makes only tangential references to Aboriginal rights litigation and the situation of off-reserve Aboriginal people. So what pulls these essays together?

This conceptual polarizing is further amplified with many of the litigation chapters being highly practice-oriented, and most of the off-reserve chapters being more academic in character. This mixed and disjointed treatment creates a risk that the book may not receive attention from any of its potential audiences: those who seek an apple may not pick it up, while those who seek an orange may be thrown off by finding something unexpected under the skin. This would be a serious disservice to many of the contributors, whose strong essays ought to be widely distributed.

What of the flesh of this volume? The editors organized the collected essays into four parts; Part I is a five-page introduction, authored by the editors, Joseph Magnet and Dwight Dorey. Magnet and Dorey convey a compelling image of the fragmented character of Aboriginal societies, communities, and families. They argue that "[t]he pre-eminent

---

1 Joseph Eliot Magnet & Dwight A. Dorey, eds., *Aboriginal Rights Litigation* (Markham, Ont: LexisNexis Butterworths, 2003).

2 "Introduction and Overview," *supra* note 1, 3 at 5.

Aboriginal issue of our time is making Aboriginal societies whole."[3] The book includes a few chapters which speak to this issue, such as Pamela Palmater's essay, in which she queries what options are open to non-status Indians who desire greater inclusion as Aboriginal peoples. Catherine Bell similarly questions the potentially divisive consequences of Métis communities accepting the Supreme Court of Canada's definition of "Métis." There is, however, little argument in the litigation chapters about how litigation may advance this goal of moving towards "wholeness." This contrasts with Paul Chartrand's 2002 volume, in which most of the contributions propose and assess legal routes for advancing the interests of off-reserve Aboriginal peoples.[4]

Part II, "Aboriginal Identity Off-Reserve," includes strong essays by Russel Barsh and Wendy Cornet, as well as the essay by Pamela Palmater described above. A fourth essay, by editor Dwight Dorey, has more the character of a conference presentation than an academic paper but, nonetheless, is an engaging assessment of the future of Aboriginal peoples in Canada. The second editor, Joseph Magnet, also authors a chapter in this part of the book, entitled "Who are the Aboriginal People of Canada." This essay goes beyond the typical scope of such surveys,[5] but nonetheless remains highly descriptive. Magnet details how Aboriginal identity has been defined and the consequences of these definitions, be they inclusion, exclusion or confusion. However, he does not offer a proposal for "making Aboriginal societies whole," apart from granting them room to envision a future in which they are self-sustaining. Wendy Cornet does take up the flag in her essay "Aboriginality: Legal Foundations, Past Trends, Future Prospects."

Whereas Magnet used historic material to compile definitions of Aboriginality, Cornet draws upon some of the same data to substantiate an argument that Aboriginal peoples have been racialized into "Indians," and that this process has affected their ability to assert themselves, and self-conceive, as nations. Cornet's thesis regarding racialization adds a welcome layer of complexity to the well-worn argument that *Indian Act*[6] categories of Aboriginal peoples are both arbitrary and discriminatory.

Cornet also pursues current federal policy for failing to recognize "that Aboriginal peoples are not one undifferentiated 'race,' but rather distinct peoples and nations."[7] Cornet argues for "moving beyond colonial notions of race to the international language of peoples, self-determination and fundamental human rights ... [and entering into discussions about] ...

---

3 *Ibid.* at 3.

4 Paul L.A.H. Chartrand, ed., *Who Are Canada's Aboriginal Peoples?*, Purich's Aboriginal Issues Series (Saskatoon: Purich Publishing Ltd., 2002). In particular, see Russel Lawrence Barsh, "Political Recognition: An Assessment of American Practice," 230; Dale Gibson, "When is a Métis an Indian? Some Consequences of Federal Constitutional Jurisdiction over Métis," 258; Paul L.A.H. Chartrand & John Giokas, "Defining 'The Métis People': The Hard Case of Canadian Aboriginal Law" 268; and Bradford W. Morse & Robert K. Groves, "Métis and Non-status Indians and Section 91(24) of the *Constitution Act, 1867*," 191.

5 See *e.g.* David W. Elliot, *Law and Aboriginal Peoples in Canada*, 4th ed. (North York, Ont.: Captus Press, 2000) at 12-20.

6 R.S.C. 1985, c. I-5.

7 Wendy Cornet, "Aboriginality: Legal Foundations, Past Trends, Future Prospects," *supra* note 1, 121 at 139.

nation recognition legislation ... [which reflects the] ... inherent right to self-government."[8] Is self-government, in and of itself, the answer? Many of the divisions that Canada wrote upon Aboriginal communities may have been incorporated into Aboriginal self-conceptions, as exemplified by bands who ostracize "Bill C-31 Indians."[9] Given the lingering manifestations of colonial policy which may surface in Aboriginal self-conceptualizations,[10] a call for self-government risks the continued marginalization of some Aboriginal populations, where the body making the decision to exclude might be Aboriginal communities themselves instead of the Canadian state. While a more legitimate form of exclusion politics, this would not necessarily be any less arbitrary or discriminatory than the existing system which Cornet has so effectively critiqued. The question left unconsidered is how Cornet's proposed "nation recognition legislation"[11] can advance upon an ethic of inclusion rather than exclusion and displace the persistently colonial state-Aboriginal relationship with its tendency towards marginalization of segments of Aboriginal populations.

Alternative routes for conceiving of or defining Aboriginality are identified in Russel Barsh's chapter, "Who is 'Indigneous'? A Survey of State Practice," in which Barsh provides a unique contribution to debate regarding which populations, around the globe, are 'indigenous peoples.' Prior debate has focused on when indigenous populations are 'peoples,' and how to distinguish indigenous populations from 'minorities.' Barsh turns from these issues of legal philosophy to the empirical question of "actual state practices in formally identifying the holders of collective rights to ancestral territories or local autonomy."[12] Barsh surveys the practices of over 34 states in Europe, North America, Latin America, the Carribean, East and South Asia, North Africa and Sub-Saharan Africa.

Barsh draws his data primarily from country reports submitted to UN human rights bodies. The value of this comparative data cannot be overstated. Nonetheless, given that this is a study of "actual state practices,"[13] what would complement this study is a thorough canvassing of whether and *how* formal state law and policy is *actually put* into practice. There may well be distinctions between the self-reported practices of a state, and what occurs in reality. Barsh's study begs for a foray into this contentious issue.

Where Barsh's essay is a technical survey of how divisions are articulated, Palmater writes "to help reunite our Mi'kmaq peoples who have been wrongly divided through discriminatory registration criteria under the *Indian Act*."[14] She wishes to "support those non-status Indians

---

8 *Ibid.* at 146.

9 See *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. The contest over Bill C-31 Indians is well illustrated in litigation involving the Sawridge Band. See *Sawridge Band v. Canada* [2004] 3 F.C.R. 274 (C.A.), 2004 FCA 16.

10 See for example Patricia Monture-Angus, "Citizens Plus: Sensitivities versus Solutions," in *Bridging the Divide Between Aboriginal Peoples and the Canadian State* (Montreal: Centre for Research and Information on Canada, 2001) 8; Thomas Isaac, "Case Commentary: Self-Government, Indian Women and the Rights of Reinstatement under the *Indian Act*: A comment on *Sawridge Band v. Canada*" (1995) 4 C.N.L.R. 1.

11 *Supra* note 7.

12 Russel Lawrence Barsh, "Who is 'Indigenous'? A Survey of State Practice," *supra* note 1, 93 at 93.

13 *Ibid.*

14 Pamela D. Palmater, "In My Brother's Footsteps?: Is *R. v. Powley* the Path to Recognized Aboriginal Identity for Non-Status Indians?," *supra* note 1, 149 at 150.

who wish to pursue registration under the *Indian Act* and membership in their band as an interim step towards citizenship in their nations."[15] Palmater's argument resonates more strongly as a moral rather than legal one, as her most persuasive writing reflects the impact of having one's dignity denied through exclusion.

One of Palmater's arguments is that the interests of status and non-status Indians coincide, as Canada's approach to defining status will result in the offspring of status Indians not being eligible for status.[16] As a consequence, Palmater argues it is in the best interest of status Indians to work with non-status Indians towards recognition of their rights. Palmater's proposal assumes both that "status" will continue to be a relevant marker for Aboriginality, and that more monies would be made available by the federal government to accommodate and provide benefits to the current non-status population instead of merely stretching out the existing budgets. As the federal government asserts its funding practices are exercises of discretionary policy, and not a lawful obligation,[17] Palmater's proposal asks status Indians to risk their current financial situation becoming stretched quite thin. Palmater's argument is compelling, but may require a closer look at the real or perceived incentives that status Indians currently have to maintain existing distinctions.

The third part of the book is "Aboriginal Litigation: Perspectives and Strategies." This part contains no essays about off-reserve Aboriginal peoples, *per se*, despite the gap in the academic literature on how traditional Aboriginal litigation strategies may, or may not, need to be reconsidered to serve off-reserve Aboriginal peoples. Most of the works collected in this part are practice advice for litigators, and would complement such resources as Mary Macauley's *Aboriginal and Treaty Rights Practice*.[18]

Jamal and Bell assess the possibility and utility of bringing Aboriginal claims as class actions. Although they argue class actions could be useful for Aboriginal litigants, their analysis really only bears out this claim where non-Aboriginal defendants are named as a class. Kent Roach connects the dots between how Aboriginal right claims are framed and available remedies, updating and developing considerably upon his prior work in this area.[19] In "Financing Aboriginal Litigation," Ian Taylor includes brief descriptions of sources of funding, and asserts that Aboriginal peoples litigate primarily as a result of an ineffective (or non-existent) negotiation process and so "[w]hat is wanted is a declaration that will kick start negotiations."[20] Taylor does not substantiate this claim, nor refer to those who warn that negotiation may offer false comfort to Aboriginal peoples, despite this position having been carefully canvassed in Roach's chapter.[21] Based upon his "commonsensical" premise, Taylor takes aim at Jamal and Bell's promotion of class action suits, asserting that "[n]othing is

---

15 *Ibid.* at 154.

16 *Ibid.* at 183.

17 See Constance MacIntosh, "Jurisdictional Roulette: Constitutional and Structural Barriers to Aboriginal Access to Health" in Colleen Flood, ed., *Frontiers of Fairness* (Toronto: University of Toronto Press, 2005) [forthcoming].

18 Mary Macauley, *Aboriginal and Treaty Rights Practice* (looseleaf) (Toronto: Carswell, 2000).

19 See *e.g.* Kent Roach, "Aboriginal Peoples and the Law: Remedies for Violations of Aboriginal Rights" (1992) 21 Man. L.J. 498.

20 Ian Taylor, "Financing Aboriginal Litigation," *supra* note 1, 347 at 349.

21 Kent Roach, "Remedies in Aboriginal Litigation," *supra* note 1, 321 at 328-29.

added by structuring such cases as class proceedings, except additional cost, delay, and complexity."[22]

The scholarly essay in this part, Vella and Grace's "Pathways to Justice for Residential School Claimants," seems generally out of place in this book as it addresses neither of the volume's two "focuses" — and so risks not reaching an appropriate audience. Vella and Grace assess residential school litigation, based upon eight criteria developed in a Law Commission of Canada report to assess the responsiveness of the civil justice system to child abuse within Canadian institutions.

Their analysis reflects the perspective of counsel representing Aboriginal plaintiffs. Through much of the chapter, this results in a nuanced description of how Aboriginal survivors experience the civil justice system. The bulk of the chapter assesses the civil justice system's responsiveness to the Law Commission's criteria. Although for some criteria, such as "fair and unbiased fact finding,"[23] the authors present a strong argument that there are evidentiary inequalities which favour institutional defendants, the discussion of other criteria has more the character of a survey than an analysis. For example, in assessing "accountability," Vella and Grace provide a careful description of findings and quanta for actions brought in vicarious liability, non-delegable duty, breach of fiduciary duty and breach of Aboriginal and treaty rights, among others. However, they do not assess whether these actions or remedies achieve accountability, or suggest criteria for measuring accountability.

Although Vella and Grace find the civil litigation system is unable to address the criteria of "acknowledgement, apology, and reconciliation,"[24] and is open to abusive pre-trial procedural motions, they conclude civil courts are nonetheless a superior option to a dispute resolution process (DR) which Canada had put on the table. Although well-written, the discussion of DR and its comparison to civil litigation is the least satisfying component of this chapter, as it does not apply the Law Commission criteria. As a result, the reader cannot evaluate Villa and Grace's conclusion that litigation remains the preferable route for addressing residential school claims.

Part IV, the last section of the volume, is "Aboriginal Litigation: Doctrine." Its essays all analyze the situation of off-reserve Aboriginal people. Leonard Rotman's chapter reiterates work he has detailed elsewhere regarding the fiduciary relationship between the Crown and Aboriginal peoples,[25] then turns to a novel argument that the Crown owes a fiduciary responsibility to non-status Indians and Métis as the Crown's duty is rooted in historic interactions that occurred prior to the introduction of the status regime. Although Rotman notes the history of Crown-Métis relations is different than Crown-status Indian relations, he only hints at the consequences of this difference, concluding that "[w]ithout reflecting upon the historical and doctrinal bases of Crown-Native fiduciary relations, it will not be possible for courts ... to adequately assess the implications of the Crown's fiduciary obligations ...

---

22 *Supra* note 20 at 350.

23 Susan M. Vella & Elizabeth K.P. Grace, "Pathways to Justice for Residential School Claimants: Is the Civil Justice System Working?," *supra* note 1, 195 at 214.

24 *Ibid.* at 246.

25 See *e.g.* Leonard I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown – Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

to specific off-reserve, non-status and Métis peoples."[26] Like Palmater, much of Rotman's analysis focuses upon the Ontario Court of Appeal's decision in *Powley*,[27] with only cursory reference to the decision at the Supreme Court.[28]

Catherine Bell, on the other hand, takes the *Powley* bull by the horns. Her chapter, "Towards an Understanding of Métis Aboriginal Rights: Reflections on the Reasoning in *R. v. Powley*" illustrates once again her expertise in Métis law.[29] Hers is the only chapter in this book which really gives the Supreme Court of Canada's decision in *Powley*, as well as the lower court decisions, thorough consideration, using them as "an effective catalyst for reflecting on the source, content, and scope of Métis Aboriginal rights."[30]

One of the more troubling fractures that Bell identifies is the discordance between Métis definitions of who is a member of a Métis community, and the manner in which the Supreme Court of Canada has defined who may assert a s. 35 Métis Aboriginal right. Bell predicts some Métis organizations will resist recognizing the legitimacy of the distinctions drawn by the Supreme Court, "as a further attack on their identify and cultural integrity."[31] Bell's chapter rigorously assesses how the *Powley* decision makes Métis people more whole — by recognizing that they are Aboriginal people who possess inherent Aboriginal rights — but also fractures the Métis community into those who can, and cannot, prove the ancestral connection.

The optic shifts to off-reserve Indian band members in Vic Savino's "Off-Reserve Aboriginal People and the Charter: Beyond *Corbiere*," in which Savino describes the Supreme Court of Canada's decision in *Corbiere v. Canada*,[32] and then tops with a four-page conclusion about *Corbiere's* implications. We are unfortunately left without an assessment of what *actually* happened between 1999 (when *Corbiere* was decided) and December 2003 (when this book was published). Savino makes reference to litigation brought by off-reserve Band members, but we are largely left relying upon Savino's early speculations.

The final chapter of the book, "The Aboriginal Peoples' Movement and its Critics," was written by Larry Chartrand, and, like Catherine Bell's chapter, contains rigorously framed argumentation. Chartrand contrasts the positions of several well-respected Aboriginal rights proponents, including Taiaiake Alfred, Patrick Macklem and James (Sakej) Henderson, all of whom have proposed routes "to achieve a *just* relationship between Aboriginal peoples and Canadians."[33] Chartrand makes intriguing distinctions between the premises adopted by non-Aboriginal versus Aboriginal scholars,[34] characterizing Aboriginal scholars as more often representing a route to justice and decolonization by enacting changes from within

---

26 *Supra* note 20 at 385-86.
27 *R. v. Powley*, [2001]53 O.R. (3d) 35 (C.A.).
28 *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 SCC 43 [*Powley*].
29 See *e.g.* Catherine Bell, "Who are the Metis People in Section 35(2)?" (1991) 29 Alta. L. Rev. 351; Catherine Bell, "Metis Constitutional Rights in s. 35(1)" (1997) 36 Alta. L. Rev. 180.
30 Catherine Bell, "Towards an Understanding of Métis Aboriginal Rights: Reflections on the Reasoning in *R. v. Powley*," *supra* note 1, 387 at 393.
31 *Ibid.* at 434.
32 *Supra* note 9.
33 Larry N. Chartrand, "The Aboriginal Peoples' Movement and its Critics," *supra* note 1, 453 at 455.
34 *Ibid.* at 462.

Aboriginal communities, and non-Aboriginal scholars as more often seeking justice through constitutional interpretation and implementation.

Chartrand's essay also responds to the writings of Tom Flanagan and Alan Cairns, whose work presents arguments against Aboriginal self-government (Flanagan on the basis that the whole movement is illegitimate, Cairns on the basis that it is doomed to struggle). Chartrand attacks Flanagan's work as mischaracterizing court decisions, misunderstanding legal principles, using incorrect data, having "fallen victim to narrow Eurocentric understandings that have no juridical significance,"[35] and being based upon the premise that colonization "was and is a good thing,"[36] as Aboriginal peoples "were less civilized that the European newcomers, [so] the newcomers were justified in acquiring land and jurisdictional control over Aboriginal peoples and their territories."[37] Chartrand systematically discredits Flanagan's scholarship, illustrating polarized positions in which there can be no meeting of minds.

Where Chartrand makes his case against Flanagan on the basis of his premises and sources, Chartrand engages the substance of Cairns' argument, arguing that Cairns' conclusions lack support, and that his vision for the future is morally askance. Cairns is an intriguing scholar, given that he grants legitimacy to Aboriginal claims for self-determination,[38] and seeks an accommodation between Aboriginal peoples and Canada which will overcome divisions,[39] but argues the Aboriginal desire for nationhood is doomed unless it has the support of the Canadian public which will be unobtainable if Aboriginal peoples seek "separate, autonomous Aboriginal governments and land bases."[40]

Chartrand accuses Cairns of exaggerating the consequences of Aboriginal autonomy for Aboriginal-Canadian relations, accurately noting that most advocates of "nation-to-nation" negotiations have suggested highly interrelated governance mechanisms, not separation. What Chartrand does not engage is whether Cairns is on to something: Is a degree of public support necessary for Aboriginal peoples to be autonomous? If so, would existing proposals — whatever they actually are — have public support?

Cairns' proposal, that Aboriginal peoples embrace an identity as "citizens plus" (that is, Canadian citizens with extra rights), has been criticized elsewhere as so vaguely argued as to constitute "an academic can-can."[41] Chartrand frames Cairns' proposal as equivalent to asking Aboriginal peoples to agree to a dilution of Aboriginal identity "so that Canadians would be more willing to support the financial and social needs of Aboriginal

---

35 *Ibid.* at 467-68.

36 *Ibid.* at 465.

37 *Ibid.* at 466.

38 Alan C. Cairns, "Empire, Globalization and the Fall and Rise of Diversity" in Alan C. Cairns *et al.*, eds., *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives* (Montreal: McGill-Queen's University Press, 1999) 23 at 45.

39 See Alexandra Dobrowolsky & Richard Devlin, "Citizens Supplicant?: Alan Cairns' *Citizens Plus* and the Politics of Aboriginal/Constitutional Scholarship" (2002) 7 Rev. Const. Stud. 79, especially at 89-96.

40 *Supra* note 33 at 470.

41 Dobrowski & Devlin, *supra* note 39 at 115.

communities."[42] Chartrand's argument engages with issues of basic dignity, and challenges liberal notions that a just result can be achieved through a process of mutual compromise. Chartrand's argument takes a dramatic turn when he asserts that what Cairns asks of Aboriginal peoples is akin to telling an abused wife

> to "suck up" to the husband and be exceedingly nice and generous to him so he does not get mad and turn his anger on his wife. Her actions may be thought of as buying her the right to live in safety from her oppressor. If she is successful in pleasing the husband enough, she may even be able to enjoy certain advantages such as watching television or doing something fun without fear of reprisal.[43]

Chartrand's characterization of Cairns's work is sufficiently distasteful that it successfully brings Cairn's credibility into question. However, it does so in a sideways and emotive fashion, leaving one struggling to follow through with the analogy — is Canada an abusive husband? What are the "fun" things that Canada will not let Aboriginal people do? These side effects are a distracting component of this otherwise compelling moral argument. This chapter presents an extremely compact overview and analysis of a complex set of arguments, and one expects the exchange will continue.

At the end of the day, a reader is left with some practical information, and some scholarly perspectives, about a variety of issues regarding Aboriginal peoples and the law. The reading experience is thus more akin to reading a volume of a topical journal than a book, and one is left wondering why the essays in the book were not selected, revised or edited to provide for stronger thematic consistency, as was done in Paul Chartrand's collected volume.[44] The editors may have done well to have engaged in two book projects, a scholarly volume regarding off-reserve Aboriginal peoples, and a litigation handbook — that is to say, to have called an apple an apple and an orange an orange.

Constance MacIntosh
Assistant Professor
Dalhousie Law School

---

42 *Supra* note 33 at 473.

43 *Ibid.*

44 Paul L.A.H. Chartrand, *Who Are Canada's Aboriginal Peoples?*, *supra* note 4.