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FOREWORD

Indigenous lawyers face some difficult challenges in confronting the existing injustice created by colonization and racism for the Aboriginal peoples of Canada. In the Canadian justice system that is failing Aboriginal peoples, they have to challenge the existing colonial ideology of contrived superiority of European law and humanity and the psychology of cultural and racial inferiority of Aboriginal peoples. They must revitalize the justice system, decolonize the judicial precedents and renew respect for ecological and human diversity. These multifaceted tasks require not only the establishment of an innovative postcolonial Indigenous legal consciousness based on Aboriginal teaching and law, but also require them to dream and articulate impossible visions to create a postcolonial Canada.

ARTICLES

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Canada's constitution assigns to the provinces general power to govern the lands and resources located within their boundaries but reserves to the federal order of government the authority in relation to "Lands reserved for the Indians." Under Canadian law, the mere existence of this federal power imposes substantial restrictions on provincial authority to regulate these lands and the interests in them. How, then, is one to determine which, if any, provincial measures

having to do with land have legal force on, or in application to, such lands? And which lands, in the end, are subject, under mainstream Canadian law, to provincial, and which exclusively to federal, authority?

Release of the Delgamuukw decision in late 1997 made the task of answering the first of these questions more urgent and the task of answering the second more difficult. We now know that "Lands reserved for the Indians" include not only Indian reserves set aside deliberately but all lands subject to valid Indian claims of Aboriginal title. We do not yet know which lands those are, but we do know that non-Aboriginal people believe they have rights and interests, derived from provincial authorities, in many of the lands that are in dispute. The legal status of those putative rights and interests is now open to question.

This article explores these issues from within the matrix of existing Canadian constitutional law. It argues that provinces, acting as such, have no power to determine or to regulate matters relating to the ownership, possession, occupation, use or disposition of Indian lands, even in the absence of countervailing federal measures, and it doubts that any mechanism now exists in Canadian law to extend, for practical purposes, the reach of provincial measures to such lands. It suggests a test for use in ascertaining which provincial measures generally can, and which cannot, apply on lands reserved for the Indians; it wonders, on constitutional grounds, how provincial law can authorize enforcement on such lands of provincial measures that do apply there; and it documents some of the challenges now facing both Aboriginal and non-Aboriginal peoples interested in clarifying which lands are Indian lands and which are not.

THE REIGN OF THE KANGAROO COURT? EXPOSING DEFICIENT CRIMINAL PROCESS IN AUSTRALIAN ABORIGINAL COMMUNITIES: BUSH COURT

By Natalie Siegel

Most of Australia's Aboriginal people live in communities far from urban population centers. 'Bush Court' is the name given to the justice system administered to Australian Aboriginal people by a magistrate who circuits such communities intermittently. As a result of the way Bush Courts currently operate in remote regions of Australia, excesses of justice administration go unchecked. This means many Indigenous Australians are subject to a sub-class legal system. Bush Courts effectively only exercise criminal jurisdiction and these inequities take the form of lack of due process.

The sources of these problems are diverse, and include poor treatment of Aboriginal people by the Bush Court, the lack of interpreters, poor judicial education and the constraints under which legal counsel for the Aboriginal people must work. These sources are examined in detail in this article. The paper also reveals deficiencies that still exist despite government declarations that they have now 'fixed the problem'. The author spent six months field-researching Bush Courts as they operate in the Northern Territory and Western Australia. This article details the chasm between justice delivery in Australian town-courts and Bush Courts. This research may answer some questions regarding the hugely disproportionate Indigenous over-representation in the Australian criminal justice system.

THE DYNAMICS AND GENIUS OF NIGERIA'S INDIGENOUS LEGAL ORDER

By Remigius N. Nwabueze

This article challenges the colonial delegitimization of Nigeria's customary law. The author describes customary law's fundamental bases, and argues that these bases are what ensured customary law's survival during colonial rule, and also what provide for customary law's contemporary relevance. Globalization, increased international interaction, and the eclipse of tribal insularity necessitate a permanent form of customary law that is decipherable to foreigners and non-Indigenous people of Nigeria. However, the author opines that if rigidification of customary law is to be avoided, then the present practice of proving it as a fact ought to be retained. Factual proof is defended as an incident of the primordial nature and primary source of customary law, rather than any weakness in the comparison of customary law with the received English law.

Under Nigerian law, after a rule of customary law is proved to exist, the court must consider whether it is judicially enforceable, or whether it is repugnant to natural justice, equity and good conscience. The author argues that the 'repugnancy doctrine' was routinely employed in a legal 'cleansing' mission, and was the engine for the imposition of hegemonic, foreign culture. The author suggests caution in the uncritical and contemporary use of the repugnancy doctrine and its precedents. Other instances of non-judicial enforcement of customary law are also considered, such as the contractual exclusion of customary law, and the exclusion of customary law based on the uncustomary nature of the subject matter of litigation.

Finally, the author addresses the specific question of the constitutionality of customary law. Customary law's patriarchal foundation and general discrimination against women and female children are problematic issues that require sensitive and imaginative judicial use of customary law. The author argues that the Nigerian judiciary should undertake careful constitutional and sociological analysis before striking down any rule of customary law. The court should make reference to South Africa's constitutional experience, which has comparative similarities to Nigeria. The article concludes with a call for an interpretive approach to customary law that ensures its survival and adaptation to the dictates of equality in an egalitarian society.

RECOGNITION AND RECONCILIATION: AN ALBERTA FACT OR FICTION?

By Deborah M. I. Szatylo

The centre of the Aboriginal people's livelihood and worldview is their special relationship with the land and its resources. However, increasingly rapid resource development threatens their future relationship with the land and the environment. Despite the Governments of Canada owing both private and public fiduciary duties to Aboriginal people, the devastation of the land continues without their rights and views being fully considered. Nowhere is this more prevalent than in the province of Alberta. While the law regarding the duty to consult has been spoken to by the Supreme Court of Canada and various courts and tribunals outside of Alberta, establishing that the duty exists within Alberta in the natural resource context continues to be a battle.

The author examines the law accumulating in surrounding jurisdictions regarding the duty to consult Aboriginal groups in the natural resource context; how the Alberta government, courts and tribunals have responded to the developing law; and what impact this may have on the oil and gas industry. The author infers that the profitability of Alberta's plentiful resources and the conservativeness of the territory, exemplified most strongly by the government, have thus far prevented recognition of the duty. The law and justice demand more.

SECTION 91(24) AND CANADA'S LEGISLATIVE JURISDICTION WITH RESPECT TO THE MÉTIS

By Mark Stevenson

Section 91 (24) of the Constitution Act of 1867 provides that the federal government has the legislative jurisdiction over "Indians and lands reserved for the Indians." However, the Federal government has consistently held that the Métis fall within the authority of Provincial governments. This has resulted in the anomaly of the Federal government presently claiming jurisdiction for two of the three Aboriginal peoples of Canada—the Indians and the Inuit—while there is a de facto jurisdictional vacuum in respect to the Métis. With the Federal government's assertion of jurisdiction over Indian and Inuit issues has come the Federal allocation of lands and services to persons of those groups. The Métis in the meantime are mostly left to fend for themselves. While the author is aware of the distinction between legislative jurisdiction and responsibility over Métis affairs, this paper focuses on the former in exploring the matter of Federal jurisdiction over the Métis under section 91(24) of the Constitution Act of 1867.

The starting point for this analysis is the Supreme Court decision in Re the term 'Indians' which held that examining documents contemporaneous to Confederation is central to a determination of the scope of the term. As such, much of this article focuses on examining contemporaneous material including the British Parliamentary Papers. It is argued that the reports examined show that the term "Indians" was often used in a generic sense including the Métis. This article also looks at pre and post Confederation legislation dealing with Aboriginals and posits that such legislation generally defines "Indians" broadly enough to include most Métis. Additionally, Métis land grants and treaty entitlements are examined, and it is argued that at least some Métis were considered "Indians" for the purposes of accessing rights under a number of treaties.

The article reasons that the inclusion of Métis under section 91(24) of the Constitution Act of 1867 is consistent with the approach taken by the Supreme Court in Re the term 'Indians' and is consistent with a purposive approach to the constitutional interpretation of s. 91(24) which was to have one central authority responsible for the Aboriginal inhabitants of the Dominion. While the acceptance of Federal jurisdiction over issues pertaining to the Métis is expected to create some complications pertaining to the Métis in Alberta, this article forwards the position that these can and should be overcome in the interest of legal consistency and in the interest of furthering the equity of services and rights available to the Aboriginal peoples of Canada.