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THE JUSTICE SYSTEM IN CANADA: DOES IT WORK OF ABORIGINAL PEOPLE?

By Justice Harry S. LaForme

On November 19, 2004, Canada witnessed a landmark event in its judicial landscape, the Honourable Mr. Justice Harry S. LaForme was appointed to the Ontario Court of Appeal. For the first time in Canadian history, an Aboriginal person had been appointed to an appellate level bench.

A Mississauga Indian and a member of the Mississaugas of New Credit First Nation, Justice LaForme was born and raised on his community's reserve in southern Ontario. He graduated from Osgoode Hall Law School in 1977 and was subsequently called to the Bar of Ontario in 1979.

Justice LaForme has enjoyed a diverse and exhaustive legal career. He practiced commercial law as an associate with the firm of Osler, Hoskin and Harcourt before starting his own Aboriginal law practice focusing on Constitutional and Charter litigation. In 1989, he was appointed Commissioner of the Indian Commission of Ontario and, in 1991, he chaired the Royal Commission on Aboriginal Land Claims. He was appointed to the Ontario Court of Justice in 1994 where he served until his 2004 appointment to the Court of Appeal.

Justice LaForme is the proud recipient of 1997 National Aboriginal Achievement Award for the field of Law and Justice and has been honoured to receive Eagle Feathers from Aboriginal elders on three separate occasions. He has published numerous academic articles on Aboriginal law and has been privileged to teach a course on Aboriginal rights at Osgoode Hall Law School.

To honour Justice LaForme and his achievements, the Indigenous Law Journal is pleased to publish the first speech Justice LaForme gave as an Appellate Judge. On February 7, 2005, the Native Law Students' Association at the Faculty of Law, University of Toronto, invited Justice LaForme to the Faculty of Law to speak as part of Aboriginal Awareness Week. He spoke powerfully to the current state of the criminal justice system as it affects Aboriginal people. Below is the text of his speech; we hope you find his words as inspiring and thought provoking as we have.

MĀORI WOMEN CONFRONT DISCRIMINATION: USING INTERNATIONAL HUMAN RIGHTS LAW TO CHALLENGE DISCRIMINATORY PRACTICES

By Kerensa Johnston

This article discusses the Women's Convention and, in particular, the Optional Protocol procedure, in order to examine the extent to which international human rights law may play a role in eliminating discrimination against Māori women in New Zealand. I explore the different kinds of discrimination Māori women experience in New Zealand, such as discrimination that occurs in customary contexts and state imposed discrimination, all of which has been encouraged by sexist colonial laws and practices that affect the role of Māori women in public life. Drawing on feminist Indigenous perspectives, I discuss the challenges Māori women may encounter when engaging with international human rights law and, in particular, the Women's Committee in our attempts to overcome discrimination at home. Although I conclude that there may be some benefits for Māori women who choose to pursue a complaint under the Women's Convention based on state imposed discrimination, we should not, at present, pursue a complaint based on discrimination experienced in customary Māori contexts. This is because international human rights fora, such as the Women's Committee, are not the right places to remedy discriminatory cultural practices that are arguably sourced in tikanga Māori.

"INDIGENEITY" AS SELF-DETERMINATION

By Mark Bennett

There is presently much controversy concerning the legal and political significance of "Indigeneity" in settler states. Recently, Jeremy Waldron set out to critique what he saw as the uncritical use of liberal property morality by supporters of Indigeneity. This paper argues that self-determination is a liberal principle better suited to founding Indigeneity's political significance. To this end, this paper examines self-determination as a liberal principle, and develops a historical approach to it to support the argument that it provides a firmer foundation for Indigeneity in liberal political discourse than liberal property principles.

SOVEREIGNTY IN LAW: THE JUSTICIABILITY OF INDIGENOUS SOVEREIGNTY IN AUSTRALIA, THE UNITED STATES AND CANADA

By Linda Popic

Despite recognizing Indigenous title to land in the early 1990s,¹ Australia's domestic law has consistently refused to accommodate Indigenous claims of sovereignty or self-government. Unlike other common law countries, Australia's High Court continues to propagate the legacy of terra nullius by maintaining that sovereignty claims are non-justiciable by the courts of that state. It claims that the original assertion of sovereignty over Australia by the British is an "act of state" that cannot be challenged. By comparing the reasoning of the Australian High Court with that of the US Supreme Court and Canadian courts, I argue that the High Court's unwillingness to draw these claims into domestic jurisdiction reflects a construction of sovereignty that is unsustainable and unconvincing. Like its common law neighbours, Australia's highest court should acknowledge that the structure of authority in a state is a legitimate issue for its courts, and should deal substantively with the claims of Indigenous Australians.

ESTABLISHING AUTONOMOUS REGIMES IN THE REPUBLIC OF CHINA: THE SALIENCE OF INTERNATIONAL LAW FOR
TAIWAN'S INDIGENOUS PEOPLES

By Stephen Allen

Since the 17 century, Taiwan's Indigenous peoples have been ravaged by a series of Asian colonizers and their ongoing oppression has largely conditioned their present status and treatment within the Republic of China. This paper focuses on the impact successive colonial strategies have had on the Indigenous territorial base and the capacity of Indigenous peoples to protect and promote their discrete cultural identities. However, despite the continuing effects of colonialism, the restrictions imposed by the "Taiwan Question" and the hostility of Asian states to the concept of Indigenousness, Taiwan's Indigenous peoples have secured constitutional recognition and a Draft Indigenous Autonomy Law has been produced, which allows for the creation of Indigenous autonomous regimes. This paper seeks to critique the draft legislation in the light of existing and emerging international law, and to assess its viability as a mechanism for the delivery of effective Indigenous rights.

CASE NOTE

OGAWA V. HOKKAIDO (GOVERNOR), THE AINU COMMUNAL PROPERTY (TRUST ASSETS) LITIGATION

By Georgina Stevens

The Ainu communal property case of *Ogawa v. Hokkaido (Governor)*¹ is an attempt by the Ainu people to hold the Japanese state accountable for its policies of assimilation and mismanagement of their communal property under the paternalistic Former Natives Protection Act. By introducing and providing comment on the recent appeal decision in this Japanese case, it is hoped this case note will make information regarding one of the main litigation struggles currently being undertaken by the Ainu people accessible to a wider English-speaking readership, while at the same time highlighting the similarities in the history and present legal issues faced by Indigenous groups around the world. Government management of Aboriginal assets and the legal remnants of colonization, both issues that arise in this case, are problems that affect Indigenous groups in many countries. However, the Japanese judiciary has not been sympathetic to the Indigenous aspects of the case. The recent appeal decision by the Sapporo High Court upheld the lower Court's findings that the procedure for restitution of Ainu communal property as provided for in the Cultural Promotion Act and carried out by the Hokkaido government was neither invalid, nor void. The Court found the defendant did not know the management details and whereabouts of some of the designated communal property that had been under its control since 1899. Nonetheless, the Court interpreted the restitution provisions of the Cultural Promotion Act narrowly to find the government had met its duty, which was only to return the US\$13,600 of communal property "actually managed" by the governor when the Cultural Promotion Act came into force in 1997.

BOOK REVIEW

PAUL G. MCHUGH, ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS AND SELF-DETERMINATION

Review by Benjamin J. Richardson