ABORIGINAL RESOURCE USE IN CANADA HISTORICAL AND LEGAL ASPECTS edited by Kerry Abel and Jean Friesen (Winnipeg: University of Manitoba Press, 1991)

The book is a compilation of 18 papers selected among those presented at a conference at the University of Manitoba in 1988. The articles were updated and are current to the date of publication.

The title is somewhat misleading. Although each contribution is integral to the overall theme of aboriginal resource use, they touch upon much more. They are diverse in character with material covering matters from Amerindian medical knowledge to the water rights of Indian Reserves in British Columbia to the foundation of aboriginal title to the rediscovery of what it means to be aboriginal in North America.

From an historical perspective, the articles challenge preconceived notions of aboriginal life throughout the period of contact. Several commentators have convincingly dispelled many of the myths and stereotypes of historical aboriginal society, and in particular their resource use patterns. As Olive Dickason demonstrates in her paper, European based society is often dearth in their understanding of the magnitude of Amerindian contribution to botanical and medical knowledge. For example, chocolate was invented by the mexica as a multi-use food staple. Indeed, it was the use by Amerindian society of certain plant decoctions that lead to the development of "the pill."[1]

With respect to the plains tribes, often thought of as dependent solely on bison and other large mammals for survival, Brian Smith demonstrates how they were often significant users of fish as a means of maintenance.[2] Likewise, the extensive use and cultivation of wild rice by the Ojibwa in the northern great lakes region was not the legacy of a "bountiful nature, but of intentional plantings by the Ojibway people."[3]

From a legal perspective, the article by John Milloy on the Plains Cree sense of territory is particularly valuable. In order to understand the legal significance of the plains treaties, it is important to have a knowledge of "Plains Cree attitudes toward the treaty, their understanding of the terms, their motivation for signing or not signing, what they could be expected to understand of the white negotiators' statements and what their own statements can be taken to mean."[4] Milloy makes a valuable contribution in analyzing how the Plains Cree defined territory; an important step in contributing to our understanding of the treaty process from the Cree perspective. Through his analysis, one is confronted with a theory of territorial control unique to the Plains Cree, a form of sovereignty unlike the traditional form normally associated with European nations. Irene Spry, in her article, also provides an analysis of the treaty making process on the plains. She furnishes a view of the treaty negotiations which demonstrate how the Plains tribes

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1. K. Abel & J. Friesen, eds., *Aboriginal Resource Use in Canada Historical and Legal Aspects* (University of Manitoba Press) 1991.
2. *Ibid.* at 42.
3. W. Moodie, *ibid.* at 77.
4. *Ibid.* at 55.

understood the meaning of the treaties and their terms. It is a view which is immensely divergent from the Dominion government's understandings. If nothing else, both the Milloy and Spry papers illustrate the gross inadequacies of applying English sovereignty or property law concepts to First Nations.

Eleanor Blain and Laura Peers in their respective articles are revealing in their treatment of aboriginal dependency on European trade goods. Contrary to certain popular historical accounts that the Natives were substantially dependent on European trade posts for survival, these authors effectively reveal that such was most often not the case. It is only through grey-hazed glasses that such accounts have been made. The weaknesses of some historical accounts of aboriginal dependency is illustrated by the following inquiry by Blain:

> I do not think it is possible to separate economic factors from social and political actions and reactions, particularly in culture contact situations. Account books themselves are not neutral, apolitical documents; they are part of a whole belief system. Their figures represent the values assigned by the accountant's culture to goods, services and time. How can these figures pretend to assign values and motives to people who do not share that culture and belief system?[5]

For example, Peers demonstrates how the acceptance of provisions from the Europeans may have been seen as proper behaviour and a wise resource-use choice by Native groups, and not as indications of dependence and helplessness.[6]

This re-evaluation of aboriginal resource use patterns has significant legal implications. Certainly, the papers by Blain and Peers suggest that Native tribes may not have been in such a weak bargaining position as has often been thought to be the situation. In other words, certain tribes may not have been so easily persuaded to give up as much as the English written version of the treaties otherwise provide.[7] This is particularly true, as Jean Friesen argues in her article regarding the negotiations surrounding treaties 1 and 2. Evidence is presented that the Ojibwa had transferred land to the settler government, but not the resources of the land.

The existing resource-use patterns were to remain as they were at the signing of the treaty. That this resource-use pattern included trading between individual bands and tribes long before the Europeans arrived on the continent is described by several of the authors.[8] The "commercial" element of aboriginal resource-use was not restricted solely to the trade of raw resources such as fish and furs, but extended to the production and manufacturing of items prior to trade, including, in some cases, the mining of resources such as copper.[9] However, Canadian courts have consistently restricted the right to hunt and fish to

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5. *Ibid.* at 103.
6. *Ibid.* at 116.
7. None of the written treaties entered with Native tribes were ever translated into the native language of the tribes party to them.
8. See for example Arthur Ray, *ibid.* at 313.
9. See for example the discussion on the production of Isinglass by the Ojibwa by Holzhamm & Waisberg, *ibid.* at 128.

sustenance needs and have generally excluded any "commercial" element.[10] Such insights into resource-use patterns will have a marked impact on determining the scope of section 35 (1) of the *Constitution Act, 1982*.[11] The logical conclusion based on such resource-use patterns would be that "aboriginal and treaty" rights may be much broader in scope than mere hunting and fishing and may indeed extend to such activities as manufacturing and mining the resources of the land.[12]

There are also several articles which demonstrate the failure of the Federal, Provincial and Territorial governments to ensure that Aboriginal and treaty rights would be protected. Each article in Part III of the book depicts how government action or inaction has resulted in the depletion of aboriginal resources and hence economic subsistence. To the extent that the resource was protected by treaty or aboriginal rights, such actions may amount to breaches of constitutional and fiduciary obligations. Part III contains articles which discuss certain case scenarios around a particular issue. Yet, each article eventually concludes that government action or inaction was largely responsible for the marginalization of aboriginal resource-use patterns. The deplorable social conditions that characterize many Native communities today are the direct result of this marginalization process of traditional economies.

Part IV of the book deals exclusively with the infamous *St. Catherines Milling Case*.[13] The articles by Cottam and Hall are valuable contributions towards understanding the "whys" behind the various court rulings from the Provincial court level all the way to the Privy Council in England. Cottam and Hall unmistakenly conclude that the most influential "why" behind the case was the result of the extent to which racist dogma and ideology were incorporated into the litigation.

Cottam, through his biographical analysis of David Mills, one of the key lawyers for the Ontario government, shows how influential elements of the legal establishment regarded aboriginal peoples at the time. Mills saw the world divided into civilized and barbarous peoples, thereby accepting the principle of racial hierarchy.[14] Thus, it is not surprising that the arguments put forth by the Ontario government included such statements as the following:

> When an Indian tribe found ample means of subsistence in a particular locality, they usually remained, not because they claimed a property in the soil, but because no particular motive presented itself for going

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10. See for example, *R.* v. *Horseman* [1990], 1 S.C.R. 901. and *Delaamuukw* v. *R. in the Right of B.C.* [1991], 3 W.W.R. 97 at 392. But recently, there has been progress towards recognizing a commercial element to the right to hunt and fish. See for example, *R.* v. *Vanderpeet* [1991], 3 C.N.L.R. 161.
11. Section 35 (1) of the *Constitution Act, 1982* reads as follows:
    > The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
12. However, for prairie province aboriginal groups, this broader scope would be subject to the limitation in the Natural Resource Transfer Agreement (confirmed by the *Constitution Act, 1930*, 20 & 21 Geo. 5, c. 26 [U.K.]) as explained in the *Horseman* case, *supra*, note 10.
13. *St. Catherines Milling and Lumber Co.* v. *The Queen* [1888], 14 Appeal Cases 46 (J.C.P.C.).
14. *Supra*, note 1 at 260.

> elsewhere.... The conduct of the Indians no less than their social condition negatives the notion of property in the soil.[15]

The article by Hall attempts to put the case into a present day context. In doing so, Hall exemplifies the extreme magnitude of the racism that prevailed against aboriginal peoples during the victorian era. He shows how such attitudes were embedded into the very Constitution of Canada[16] itself and adds that such "attitudes ... remain firmly embedded still!!"[17]

The reader should not feel comforted by the assumption that the racist attitudes of the Judicial system are no longer a part of Canadian jurisprudence. The article by Arthur Ray only reinforces the conclusion by Hall that such attitudes are indeed part of present Canadian judicial attitude. In his examination of the Gitksan and Wet'suwet'en land claims case,[18] the author portrays a court system which continues to follow the underlying philosophy of *St. Catherines Milling*. To deny, as Chief Justice McEachern did in the *Delgamuukw* case, that aboriginal peoples are human beings who have a right to be treated equally like other human beings, is an atrocity that cannot be maintained in a fair and democratic society.

In short, the book is thought provoking and in a convincing manner exposes the Canadian political and legal system in a way that reveals the magnitude of harm committed against aboriginal peoples. The book is indeed fuel for action. It should aid lawyers, historians, politicians or anyone for that matter who wishes to assist in the movement to achieve true justice in colonial occupied aboriginal territory in North America.

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15. *Supra*, note 1 at 259.
16. *British North America Act, 1867*, 30-31 Vict., c.3 (U.K.).
17. *Supra*, note 1 at 281.
18. *Delgamuukw et. al.* v. *R. in Right of British Columbia and Attorney General of Canada* [1991] 3 W.W.R. Part 2 at 97 (B.C.S.C.) per McEarchern C.J.