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Book Review: Flawed Precedent: The St. Catherine's Case and Aboriginal Title

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Flawed Precedent: The St. Catherine's Case and Aboriginal Title. By Kent McNeil. Vancouver, B.C : UBC Press, 2019. 334 pages. ISBN: 978-07748-6105-2 (Hardback) \$75.00; 978-07748-6106-9 (Paperback) \$27.95

Common law is a precedent based system meaning previous case law is considered when contemporary legal decisions are made. It is not unreasonable to think that relying on these established cases, cases considered to be good law, would create a strong line of consistent and just decisions overtime. Still, in an adversarial judicial system injustice is evident something that is especially true when this "common law" is applied to the rights of Indigenous peoples.

In *Flawed Precedent* Kent McNeil examines the negative affect that *St. Catherine's Milling and Lumber Company v. The Queen*, an "early seminal case" established in 1888, has had on the interpretation of "Aboriginal title" in Canada. McNeil demonstrates how unsupported and "erroneous assumptions" about Indigenous culture informed this decision and asks whether it is "appropriate to apply the doctrine of precedent in situations where the case law reveals racist attitudes unacceptable by today's standards?" McNeil's position is clear:

"... to the extent that these cases are the product of historical periods when racist attitudes towards Indigenous peoples prevailed, they must be treated with caution and replaced with jurisprudence that acknowledges the legitimate rights of Indigenous peoples as the original inhabitants of North America and that respects the validity of their cultures, including their legal orders. This is particularly necessary in cases where judicial decisions based on ignorance of those cultures resulted in factual assumptions that we now know to be erroneous." (p. 5)

This case was initiated to settle a dispute between Ontario and the Dominion of Canada to decide which jurisdiction had the right to issue a timber permit and therefore reap the bountiful resources found therein. The area in question is Saulteaux Nation territory and had been "purchased" by the "Crown in right of Canada" under Treaty 3 in 1873. The "source and nature of the Saulteaux's land rights" was an important factor in this case and meant that this decision was to become a "leading decision on Indigenous land rights in Canada until the 1970s." (p. 6)

Despite the importance that establishing land rights had in this case no Saulteaux were asked for any input about their land or their relationship to it. The Crown's title was "simply presumed." Rather than using "testimony or documentary evidence" (p. 40) the court relied on the assumptions of English society prevalent at the time which included the "racially hinged theory of social evolution." (p. 15) This theory characterized Indigenous peoples as "primitive nomads" which was "a sufficient reason for denying them title to their lands." (p. 64) However, as McNeil reminds us, the more we learn from Indigenous peoples about Indigenous societies the better we can "dispel prejudiced assumptions." (p. 7)

From a political perspective assumptions were also informed by the thinking behind King George III's Royal Proclamation of 1763 where Indigenous land rights were not considered intrinsic but were "derived from and depended on the bounty of the Crown rather than being sourced in [Indigenous] laws and prior possession of their traditional lands." (p. 17) This assertion was fueled by the "doctrine of discovery," which, as McNeil notes was based on "racist assumptions" and something that has been the subject of "severe criticism, including the condemnation of it by the Truth and Reconciliation Commission in its 2015 report."

This doctrine is the very embodiment of colonization. It was “based on false notions of racial and cultural superiority fabricated to legitimize European subjugation of Indigenous peoples and the taking of their lands.” (p. 51) It gave European nations permission to “acquire sovereignty in North America” simply by finding undiscovered territory and establishing “symbolic acts of possession, treaties among themselves, and mere assertion.” (p. 7)

With those interpretations in play it is not surprising that, Sir Oliver Mowat, the Premier and Attorney General of Ontario at the time, “[denied] the existence of Aboriginal title.” (p. 35) He would only concede that there was a “right of occupancy.” And, as occupants, the Saulteaux had no claim of land ownership and led Mowat to conclude that “prior to the signing of [Treaty 3] in 1873, [the lands] must have been public lands, the only question being whether they were vested in the Crown in right of Ontario or of the Dominion.” (p. 37)

Before we can make any meaningful progress toward reconciliation, we must know the truth. We must understand the truth about how Indigenous peoples have been treated under colonialism and the faulty assumptions that continue to inform our actions today. It behooves us to learn about Indigenous people from Indigenous people and to be aware our own role in a history where cases like *St. Catherine’s* have “distorted the legal conception of Aboriginal title in Canada.” (p. 7)

This is a well written, nicely illustrated and meticulously researched book. Kent McNeil’s analysis provides important political and ideological context and reveals the impact that this particular case has had on legal history in this country. This is a must read for anyone on the path toward respectful reconciliation. In addition, for librarians and researchers, the extensive notes and bibliographic essay makes this first volume in UBC Press’s “Landmark Cases in Canadian Law” a valuable resource for any law library collection.

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