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Book Notes

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BOOK NOTES

ABORIGINAL PEOPLES AND THE LAW: INDIAN, METIS AND INUIT RIGHTS IN CANADA. Edited by Bradford W. Morse. Carlton University Press, 1984. 800pp.

With the rapidly growing interest in aboriginal rights and the law, particularly as a consequence of sections 24, 35 and 37 of the Canada Act, 1982, has come the acute need for organized materials to provide a basis for law school and undergraduate courses on the subject. This need has given rise to a collection of essays edited by Morse admits that this volume does not encompass all relevant aspects of the law in this area, such as those of indigenous government and sovereignty, customary law, Indian Act government, specialized legal services and courts, the criminal justice system and some unique aspects of the law relating to the Metis and the Inuit. However, it does encompass an impressive range of topics. Maureen David contributes a chapter on aspects of aboriginal rights in international law and another dealing more specifically on human rights. David W. Elliott provides a well organized chapter on "Aboriginal Title" as does Richard Bartlett on "reserve lands" and taxation which are useful as a basis for the presentation of courses on these matters. There are chapters dealing with Pre- and Post-Confederation treaties and the implementation of the James Bay and Northern Quebec Agreement. Douglas Sanders considers the application of Provincial laws and Peter Cumming, land claims in northern Canada. Bradford Morse makes a comparative study of the methods undertaken in a number of jurisdictions to conclude land claims agreements. He concludes that the dissatisfaction with present federal policy may encourage greater use of international fora or the courts pursuant to section 35 to resolve the claims.

Although this volume provides a useful basis for understanding the legal history and some current controversies, it fails to attempt any imaginative considerations of the legal potential of section 35. Academic writings do not appear to comprehend fully the significance of a constitutional entrenchment of aboriginal rights. As a result, a case like *Guerin* v. *The Queen*[1] (despite its limitations and although it does not specifically relate to section 35) comes as almost a total surprise and

[1] (1984), [1984] 2 S.C.R. at 335.

shows the Supreme Court to be more imaginative and daring than most commentators in the field. It is unfortunate that this book was completed prior to the advent of *Guerin*, although it was published in 1984. Nevertheless, despite its limitations, it does provide a useful base for courses in the area and hopefully will achieve its aim of promoting the establishment of new courses on native studies.

CONSTITUTIONAL CHOICES. By Laurence H. Tribe. Harvard University Press, 1985. 458pp. DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME. By Richard E. Morgan. Basic Books, 1985. 245pp.

The pressing challenge for all constitutional lawyers is to provide a convincing justification for an activist judiciary in a constitutional democracy. It is a problem that Canadian lawyers will soon begin to feel even more acutely. These two books offer very different advice in the context of American law and politics. With the elegance and attention to detail that has come to characterize his work, Laurence Tribe makes a pragmatic response: rather than exhaust oneself in the futile search for legitimacy, as scholars like Dworkin seem to do, the lawyer must confront the choices that must inevitably be made and suggest appropriate solutions. In this *tour-de-force* of modern American constitutional doctrine, he eschews the Supreme Court's renewed dalliance with a cost-benefit managerial role and espouses a most candid and sensitive attack on the (mal)distribution of wealth and power. In this vigorous account, Tribe leaves hardly any doctrinal stone unturned from interstate commerce to church subsidies through discrimination and free speech.

In contrast, Richard Morgan has little patience with left-leaning liberalism like Tribe's. He believes that time is well past when the "true" spirit and tradition of the constitution must be re-established. With much passion, he decries the encroachment of the state into the private sector with its attendant dilution of community standards and mores. In short, Morgan insists that the "rights industry" has disabled America and "needs to shrink, moderate and ideologically detoxify itself in order to serve effectively as the guardian of the open society rather than its traducer."[2]

Although these books are of differing quality and erudition, they not only serve to highlight the diversity and depth of American scholarship and law, but also the extent of the interpretative and political di-

[2] *Aboriginal Peoples* at 214.

lemmas in which American constitutionalism finds itself. As Canada moves into the formative era of Charter litigation, these two books capture the excitement, the risks, the options that Canadian lawyers will assuredly face.