EMERGING JUSTICE? ESSAYS ON INDIGENOUS RIGHTS IN CANADA AND AUSTRALIA by Kent McNeil (Saskatoon: Native Law Centre, University of Saskatchewan, 2001)

I sat down to write this review on 2 January 2002, my cranium still reverberating with year-end surveys of everything from terrorism to fashion. Perhaps for that reason the first question I asked myself was how this book stacks up against other studies published in 2001. I am tempted to answer that it was last year's most important publication in its field. However, since I do not pretend to have read everything that was published about Aboriginal rights last year, I will simply say that I learned more from it than any other legal publication I read in 2001, and that I will keep it close to hand for future reference.

Professor McNeil has been publishing important commentaries on Aboriginal legal rights for a decade or more. While some of them are both well-known and influential, a number of them have been published in off-the-beaten-track periodicals and other relatively obscure places. In this book he has pulled together the most important of these essays, updated them where necessary, and added two major new pieces, as well as a useful index.

The result is a valuable compendium of essays about most of the major themes in Canadian Aboriginal law: Aboriginal rights in general; restrictions on Aboriginal rights under s. 35 of the *Constitution Act, 1982*;[1] Aboriginal title to land; native land claims; the impact of native land claims on the boundaries of Quebec; the federal government's fiduciary duty to Aboriginal peoples; Aboriginal self-government; the applicability of the *Canadian Charter of Rights and Freedoms*[2] to Aboriginal governments; and the effect of the division of powers between the federal and provincial orders of government on Aboriginal title. There are also three essays about the extinguishment of Aboriginal title and the relevance of native laws and customs in Australia.

Although some of these topics are dealt with in more than one essay, and there is a certain amount of inevitable overlap, there is very little unnecessary duplication, and the various pieces fit together remarkably well. The one exception to that general pattern is the Australian material, which does not cover nearly as broad a range of topics as the Canadian essays, and contains rather less comparison between the constitutions of the two countries than one would have wished.

Professor McNeil holds strong opinions concerning the things about which he writes. Those opinions tend to advocate much more extensive and more powerful rights for Aboriginal peoples than most Canadians would support. Although his tone is moderate (not always: his delightful likening of the federal government's refusal to accept responsibility for the Metis people to "a rodeo clown, dodging jurisdiction as if it were

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1 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

2 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

a Brahma bull"[3] is one of a few amusing exceptions), his conclusions are frequently critical of the courts.

Those conclusions, supported by thorough research and close reasoning, are often persuasive. That is not to say I agree with all of McNeil's conclusions. I don't think he is justified, for example, in condemning the Supreme Court of Canada for holding that s. 35 rights can be regulated by Parliament.[4] The addition of s. 35 to the Constitution in 1982 did not, in my opinion, remove Parliament's existing power under s. 92(24) to make laws concerning "Indians and lands reserved for the Indians." Section 91(24) and s. 35 have equal constitutional status and must, in my opinion, both yield somewhat to the other. To assert, as McNeil does, that s. 91(24) must always give way to s. 35 is to deny the principle of constitutional balance that I believe McLachlin J. (as she then was) enunciated on behalf of a majority of the Supreme Court of Canada when she stated in the Nova Scotia Speaker's case, that "one part of the Constitution cannot abrogate another part of the Constitution."[5]

Nor do I agree with the question mark in the book's title if it was intended to mean, as I think it was, that it is debatable whether the evolving law of Aboriginal rights in Canada is just. Of course, since the evolution is far from complete, it can't yet be concluded with complete, or even reasonable, certainty that justice will eventually emerge. But my assessment of the remarkable body of Aboriginal jurisprudence that has developed over the past couple of decades is that it is generally headed in a satisfactory direction. Total justice can never be expected. In the real world legal justice is a matter of averages. I consider a body of law to be "just" if the legislatures and the courts get it right significantly more often than they get it wrong.

This book, and future publications we can look forward to from this thoughtful, thorough, and dedicated scholar will contribute substantially to improving the average.

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3 K. McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001) at 309.

4 *Ibid.* at 195, 281ff.

5 *New Brunswick Broadcasting Corp.* v. *Nova Scotia (Speaker of the House of Assembly)* (1993), 100 D.L.R. (4th) 212 at 273 (S.C.C.).