

NATIVE LAW by Jack Woodward (Carswell, 1989) 656 pages

INTRODUCTION

Native Law is a term used to describe the growing body of law relating to aboriginal people in Canada. Jack Woodward's book comes at a time when this area of law has experienced profound changes and dynamic growth. The 626 page book encompasses the full spectrum of native law from the doctrine of aboriginal rights to administration of Indian wills and estates. It is a valuable aid for legal researchers who wish to establish a background in the subject area as well as for practitioners who need to know what law applies to specific issues before them.

The best feature of *Native Law* is its comprehensive treatment of the subject matter. Its principal drawback is that it was issued just prior to the 1990 decisions of the Supreme Court of Canada in *Regina v. Sparrow* (1990) 56 C.C.C. (3d) 263 and *Regina v. Sioui* (1990) 56 C.C.C. (3d) 225, both of which are landmark decisions in native law.

The text is very readable despite having to explain sometimes obscure or byzantine legislation such as the Indian status provisions contained in the *Indian Act*.

ORGANIZATION

Notwithstanding the encyclopedic range of the text, the organization of subject matter is conceptual rather than alphabetical. The author has chosen to organise the subject matter in a logical sequence commencing with the unique legal status of Native people, progressing through a hierarchy of subjects beginning with the constitutional position of Native people, federal and provincial relationships, and proceeding through aboriginal rights, citizenship, native governments and Indian lands. Following this sequence is individual treatment of a range of discrete subjects including hunting rights, culture, family law, estates, criminal offences, motor vehicles, federal program services, practice matters, treaties and various regulations and orders. The book's organization is reasonable with the exception of the placement of Indian treaties near the end of the text rather than alongside the discussions of aboriginal rights or Indian governments.

The treatment of subjects in each of the chapters moves from historical or theoretical background to specific regulations and orders. For example, the chapter on Indian lands starts with the early principles of British, French, Spanish and American law and proceeds to specific legislative provisions such as the *Indian Act*, the *Sechelt* and *Cree-Naskapi* Acts. Other chapters are very specific because of the statutory nature of the subject matter such as motor vehicle and highway traffic laws on Indian reserves.

The author cites some 500 cases, lists approximately 140 statutes and amendment acts, and refers to about 90 articles, books and publications. The bulk of the case law is quite naturally Canadian, ranging from provincial court decisions to the judgements of the Supreme Court of Canada. Although there is some reference to English and American case law, the text does not make reference to many of the court decisions of the common-law jurisdictions. There is no discussion of developments in the other

common-law jurisdictions of Australia and New Zealand where the law relating to the Aborigines and Maoris is undergoing a development similar to the one occurring in Canada.

The closest comparable text to Woodward's *Native Law* is the American work, *Federal Indian Law*, first prepared under the late Felix X. Cohen for the U.S. Department of the Interior. That work is a comprehensive treatment of American Indian law which has undergone revision over the years. Its treatment of the subject matter is more in an essay style than Woodward's text which quotes extensively from legislation sometimes to the detriment of the commentary.

The author could have assisted the reader in understanding the dynamic nature of Native law by incorporating more historical and theoretical treatment of Native law. Discussion of underlying legal history and theories are important in achieving an understanding of the sometimes contradictory and incomplete decisions by courts on native issues. This is done to a certain degree but not sufficiently to overcome a sense of a "static" presentation of Native law in the text.

Woodward's book is published in two forms, a bound text and a loose leaf edition. It is not clear whether the book is to eventually become an encyclopedia on Native Law or an authoritative text on the subject. Considering the excellent beginning that Woodward has made in his commentary on different aspects of Native law, this reviewer hopes that the future direction will be towards that of an authoritative text which provides readers with an understanding of the ideas and concepts embodied in native law. Such a treatment would be more valuable to both researcher and the practitioner in an area of law that is still evolving.

A discussion of six of the more noteworthy of twenty-two chapters follows.

LEGAL RECOGNITION

The first chapter of Woodward's book deals with legal recognition of native individuals and groups. This chapter provides the reader with an account of how Native people have acquired status in Canadian law distinct from other Canadian citizens. Without such an understanding, a person dealing with the subject will struggle with the inevitable question of why Native people should have rights that are different from other Canadian citizens.

The book reviews the earliest references contained in the *Royal Proclamation of 1763* and moves forward to review various contemporary statutory definitions of Indians, Inuit and Metis.

The discussion on Indian status is quite involved. The *Indian Act* provisions as they existed prior to 1985 violated the prohibition against discrimination on the basis of sex contained in the *Charter of Rights and Freedoms*. The 1985 amendments to the *Indian Act* were introduced to bring the Act into line with the *Charter*. However, the federal legislators decided that they would not only amend the legislation for future generations but also to enable those who lost their Indian status to be reinstated.

The Indian status area is significant for practitioners since the number of Indian people who have been reinstated or have applied for reinstatement is now approaching the order of 100,000 people. The disputes arising from disputed entitlements to Indian status and First Nations membership cannot help but increase in the future. In addition, Indian governments are enacting their own membership codes and this will further increase the complexity of entitlement issues.

INDIAN LANDS

Much of the *Indian Act* provisions relate to Indian land. The current Indian surrender provisions are modern day equivalents of the conditions contained in the *Royal Proclamation of 1763*. These provisions require that the Indian First Nations as a group may only surrender their land to the Crown. This constraint on alienation of Indian lands is a basis for the establishment of a fiduciary relationship between Indian people and the federal government.

The text also deals with individual Indian possession of Indian reserve lands. It reviews the statutory provisions contained in the *Indian Act* but devotes only a single page to possession of lands on the reserve by Indian custom. It should be noted that in Alberta, most land on Indian reserves held by individual members is through custom. Whether this subject area will remain outside legislation or court litigation is uncertain.

NATURAL RESOURCES ON INDIAN RESERVES

The topic of oil and gas development on Indian reserves is dealt with in a somewhat cursory manner. There is mention of the *Indian Oil and Gas Act* and a brief discussion in the text. However, there is no substantive treatment of the *Indian Oil and Gas Regulations* which are the working aspect of the legislation. In Alberta, a significant number of the 44 Indian First Nations have oil and gas resources on their lands which are the subject of the *Indian Oil and Gas Act* and attendant regulations. One might wish to refer to the Alberta Law Review article "Indian Oil and Gas: Control, Regulations and Responsibilities" by C.A. Webb as a supplement for this topic. ((1987) 26 Alta. L. Rev. 77).

The text also briefly reviews the *Indian Timber Regulations* and states that the *Indian Timber Regulations* fully govern harvesting of timber on reserves. In Alberta, the regulations are virtually ignored not only by Indian First Nations but also by the federal Department of Indian and Northern Affairs. In British Columbia, the opposite is true.

The whole subject area of natural resource development on Indian reserve should receive more extensive treatment.

TAXATION

There is extensive discussion of the Indian exemption from taxation arising out of the *Indian Act*. Like other areas, recent court decisions are changing how the exemption is to be interpreted.

The reader should note that an area of future significance is taxation by Indian First Nations. The *Indian Act* was recently amended to make clear that the definition of an Indian reserve included lands designated for lease. Previously, courts had held that those lands were not part of the reserve. The inclusion of those lands within the definition of an Indian reserve has the effect of bringing leased lands within the scope of Indian First Nations taxation bylaws. Taxation of developments on those lands will become a significant subject in the future.

HUNTING, TRAPPING AND FISHING

Indian hunting, trapping and fishing issues have often been before the courts and there is a considerable amount of case law available for reference. Woodward's text first discusses aboriginal hunting and fishing rights, then hunting rights pursuant to the natural resources transfer agreements in the three prairie provinces, and finally, treaty hunting rights.

The text also reviews the federal legislation including the *Fisheries Act* and regulations, territorial hunting regulations and finally, the federal *Migratory Birds Act*.

This has been a relatively well developed area of law but is now subject to radical re-examination given the recent decision of the Supreme Court of Canada in *Regina v. Sparrow* and *Regina v. Sioui*.

INDIAN TREATIES

The discussion of Indian treaties focuses on their general nature rather than on their substantive provisions. Discussion of treaty provisions such as hunting rights, health, and education appear in other chapters. The terms of the Indian treaties have yet to be given significant examination and review other than with respect to the hunting, trapping and fishing provisions.

PRACTICE MATTERS

Two chapters of the books deal with subject matters of interest to practitioners. The first is the immunity from seizure of personal Indian property situated on reserves. This discussion is of value to the practitioner who would want to know either the Indian's property rights or, alternatively, the rights of a creditor in respect of Indian property.

Also of interest to the practitioner is the chapter on practice matters. The chapter discusses whether the federal or provincial superior courts have jurisdiction over actions involving Indian First Nations. However, the relevant provisions of *Federal Court Act* have been amended and the amendments have implications for the question of which court has jurisdiction over actions involving Indian First Nations.

RECENT SUPREME COURT OF CANADA DECISIONS

The recent 1990 Supreme Court of Canada decisions in *Regina v. Sparrow* and *Regina v. Sioui* are significant but too recent to have been included in Woodward's book. The text does contain the lower Court of Appeal decisions which were similarly decided. However, the Supreme Court decisions do add a new dimension to Native law.

In *Regina v. Sparrow* the Supreme Court of Canada ruled on the significance and effect of aboriginal rights in Section 35 (1) of the *Constitution Act, 1982*. The case involved Indian aboriginal fishing rights in British Columbia. The Supreme Court held that a fiduciary-like relationship existed between the federal government and the Indian people by operation of s. 35 of the *Constitution Act 1982* which applied to governments' legislative treatment of Indian aboriginal rights.

The Supreme Court decision in *Regina v. Sioui* discusses Indian treaties extensively. The Court's discussion on the pre-confederation English-Huron Indian treaty is demonstrative of the approach the Court will use in considering Indian treaties and is interpreting the rights assured by those treaties.

CONCLUSION

Jack Woodward's *Native Law* is an ambitious attempt to summarize in a single work Native Law in Canada. The subject matter has expanded and changed so rapidly that it is inevitable that any first attempt to survey the whole field will fall short in some respect or other. That is not to say that the book is not useful or valuable, but rather that such shortcomings on a first effort are perhaps inevitable if only for reasons of the timing of publication and the sheer scope of the subject matter.

Any critical comment contained in this review is not to be taken as a criticism but as notification to the reader of forthcoming developments. It is hoped that future editions live up to the book's initial promise and establish the work as an authoritative text for practitioners and researchers in a dynamic area of law. The book is a valuable legal research tool and is highly recommended by this reviewer.

Leonard (Tony) Mandamin
Barrister and Solicitor
Winterburn, Alberta