

## ABORIGINALS AND THE CROWN: CONFERENCE AT OSGOODE HALL LAW SCHOOL

Three Conferences are being held at Osgoode Hall Law School during the 2014-15 academic year, each of which will bring together academic experts to present their thoughts and research on an important aspect of Canada's Crown. These Conferences are organized by the Osgoode Constitutional Law Society (OCLS), with generous help from the Monarchist League of Canada, and the York Centre for Public Policy and Law (YCPPL) which have both provided modest financial support for the series. About 60 faculty, students and guests gathered on October 29 for the first of the Conferences, which considered the evolving legal relationship between Canada's Aboriginal people and the Crown.

The panel for this Conference was comprised of:

- Professor Kent McNeil, a faculty member at Osgoode since 1987, who is considered one of Canada's pre-eminent experts on Aboriginal Law.
- Kerry Wilkins, a Toronto lawyer and Adjunct Professor at the University of Toronto Law School, whose practice has centred on constitutional issues touching Aboriginal peoples.
- Sigma Daum Shanks taught at the University of Alberta's School of Native Studies and the University of Saskatchewan College of Law prior to joining Osgoode's faculty in July, 2014.
- Jeffrey Hewitt is General Counsel to Chippewas of Rama First Nation, and is a McMurtry Clinical Visiting Fellow at Osgoode.

### **Kent McNeil: *The obsolete theory of the Unity of the Canadian Crown and its negative effect on the rights of Aboriginal people.***

Professor McNeil's presentation entered on what he considers the obsolete theory of the unity/"indivisibility" of the Canadian Crown - which does not fit with Canada's federal structure - and of how this long-held theory has a negative impact on the rights of Aboriginal people. His starting point was the recent Supreme Court of Canada (SCC) decision in the *Grassy Narrows* Treaty 3 case in which the Court overturned the principles on which it had relied in *Morris* just 8 years' prior and returned to a theory of the unified Crown, stating that Treaty 3 was with the Crown and not Canada.

The case determined whether the Province of Ontario could “take up” lands covered by the Treaty for purposes such as mining and lumber operations. The Plaintiffs said that the province could not do so, as the Treaty stated that Aboriginals could continue to hunt and fish “...saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her [Majesty’s] said Government of the Dominion of Canada.” (emphasis added). In fact, said McNeil, the Province had been “taking up” lands for these purposes since the end of the 19th century.

The trial judge held that Ontario could not take up lands within the Keewatin area so as to limit treaty harvesting rights without first obtaining Canada’s approval. According to her, the taking-up clause in the treaty imposed a two-step process involving federal approval for the taking up of Treaty 3 lands added to Ontario in 1912.

The Ontario Court of Appeal allowed the appeals brought before it. That court held that s. 109 of the *Constitution Act, 1867* gives Ontario beneficial ownership of Crown lands within Ontario. That provision, combined with provincial jurisdiction over the management and sale of provincial public lands and the exclusive provincial power to make laws in relation to natural resources gives Ontario exclusive legislative authority to manage and sell lands within the Keewatin area in accordance with Treaty 3 and s. 35 of the *Constitution Act, 1982*.

Before the SCC, both Canada and Ontario argued that Ontario - and Ontario only - could take up the lands in question, the agreement of the Canadian government with the Ontario position (similar to its position in the BC *Tsilhqot'in* case two weeks’ previously) troubling McNeil as “disturbing,” as did the Chief Justice’s writing for the Court that, despite the express wording of the Treaty itself, and denying any applicability to Sec 35 rights, that “... although Treaty 3 was negotiated by the federal government, it is an agreement between the Ojibway and the Crown.”

This follows a line of judicial interpretation commencing with that of the Judicial Committee of the Privy Council (JCPC - until 1949 the ultimate appellate body in Canada) wherein Lord Watson ruled that the Crown is distinct from the Dominion and Provincial governments. McNeil observed that this might be fine for a unitary state but did not make much sense for Canada - and raised the question as to who was contracting with whom, leading to an “absurdity” in constitutional cases.

McNeil also cites modern cases, such as *Smith v The Queen* (1983) and *Mitchell*, which seem to accept the concept of legally distinct provincial and federal Crowns.

Moreover, the eminent jurist Boris Laskin wrote in 1969 in *British Traditions in Canadian Law* of how “the maintenance of the concept of the indivisibility of the Crown required a sophistry...which confused the Crown as executive and the Crown as personification of the state, but contributed nothing as to its evident differentiation as federal and provincial executive.” He went on to cite constitutional expert Peter Hogg’s dictum that the idea of Canada as one and indivisible in law “is thoroughly misleading.”

McNeil’s conclusion was that the theory of the unity of the Crown was apparently used by the federal government and courts when it was to the disadvantage of First Nations, but the other way if it were to be to their advantage.

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### **Kerry Wilkins: *Life Inside the Crown ~ The elephant on the table***

Professor Kerry Wilkins’ presentation was particularly interesting for a general audience in that it emanated from his experience as an advisor to the federal Department of Justice, hence his realpolitik appreciation as to how the Crown approaches Aboriginal issues.

He began his presentation by referring to issues confronting the Crown in respect of Treaties, distinguishing between the authorization to do certain things (as in the Treaty 3 ‘taking up’ provisions) and obligations of the Crown that are imposed, such as payment of annuities and providing schools. Considering these issues in the 1910 *Treaty Three Annuities Reference*, the JCPC considered that in the Dominion government’s obligation to pay annuities, it was not acting in concert with Ontario but on its own responsibility in the interests of the Dominion as a whole.”

By 2014, the Chief Justice of the SCC writes four times in *Grassy Narrows* of “The Crown” being responsible for obligations under treaties, and that “the right to take up land rests with the level of government that has jurisdiction under the Constitution.” Wilkins observes, however, that there is nothing to prevent the provinces from paying annuities, making lands available and providing schools – thus that the Crown in Right of Ontario could, practically speaking, assume these obligations in the future. According to Wilkins, in this way *Grassy Narrows* could actually become a “Trojan Horse” for the provinces, who may – as a result –

become liable for Crown obligations to Canada's Aboriginals, which have traditionally been regarded as federal duties.

Wilkins then moved on to his main topic – Life Inside the Crown. In expanding on a witty and apropos metaphor in order to explain how Aboriginal issues appear to the Provincial Crown, Wilkins told the tale of three equally unpalatable alternatives facing a man who awakens to find an elephant perched on his chest. He can allow the elephant to remain; he can grab a gun and blow it away; or he can reason with him. So, why don't governments take more radical action in favour of aboriginal claims?

First, such hypothetical action remains hypothetical until and unless the government means to do it - i.e., has political will; does it - i.e., has the ability to execute its policy; sustains it - i.e., continues with the policy whatever the opposition or cost. Second, it must consider the legal constraints both real and contingent on the Crown, such as the rule of law and possible third party challenges. In respect of the latter, Wilkins mentioned the *Campbell* case in respect of the modern Nisga'a Treaty and fishing rights, in which Gordon Campbell (before he became Premier) challenged the Aboriginal self-government provisions of the Treaty; and the *Willcock* case which challenged diversion programs in the legal system which are not available to non-Aboriginal offenders. Third, questions of legislative design always exist.

Given such complexities, and the general reluctance to act in what might be deemed a 'paternal' fashion, Wilkins asked why should the federal Crown not simply vacate the authorities it holds and leave resolution of the issues to the Aboriginal people themselves. He explained that so doing is difficult for two reasons: a government cannot just surrender its legal authorities unless it is prepared to do so by change to legislation and, more problematically, to the Constitution. It may indeed simply choose not to use or enforce authorities it possesses; but in this it cannot bind a future government, thus violating the sustainability need as articulated previously. Moreover, it must be prepared to defend the legal foundation of any discretionary decision both as to not enforcing laws on the basis of pressure, or of finding a "right" exists.

A legitimate expectation of the Crown is that it governs on behalf of all its people, Wilkins reminded the conferees. Equally, the big boat of government cannot change direction quickly. And it can't just blow itself up when it is out in the water. There may not always be the will to act in a way most beneficial to Aboriginals, and thus such matters are, broadly speaking, considered "inconvenient" in that they

complicate the day-to-day work of the law officers of the Crown, and raise the question of how much “value” will dealing with these issues proactively actually produce.

### **Sigma Daum Shanks: ‘*Some things on my mind*’ - the impact of Historiography upon Legislation**

Professor and Aboriginal activist, Shanks began her remarks in the latter capacity by stating her basic philosophy of hoping for the best yet preparing for the worst. She then excoriated, but did not argue her case - in respect of what she dubbed the dubious constitutionality of the transfer of Rupertsland to Canada 1868-70, and the “awful and illegal” effect of Treaty 6.

Shanks mentioned her concerns at the Courts’ “use of words” such as “historic” vs “historical”, underlining what she claimed is the tendency of historical interpretations “magically transforming themselves into evidence” to the detriment of Aboriginals. Following on this point, Shanks decried the courts’ dismissive use of terms such as “customary law” as but a habit or practice, whereas she sees them as synonymous with “indigenous law” that the judicial process needs to take seriously, ultimately even according it status as a s. 35 right.

That a “secondary source” should often be transmuted into a “primary source” was a second suggestion by Shanks. She argued that collections of Aboriginal stories in books of oral histories should be considered as “legitimate gossip” as for instance the 1969 collection “I am an Indian” which was thought of as “literature” at the time of publication, but which she feels is actually about “law.” Thus the discipline of Historiography, Shanks argues, directly impinges on the status of government and judicial perspectives of Aboriginal rights today.

Shanks concluded her remarks by criticizing lawyers and “their experts” who consider themselves “historians.” She again pointed to the use of books, which she claims have been referenced and classified by those unqualified to do so. The Law, Shanks argues, should interact with social science and the humanities, to the benefit of equitable treatment of Aboriginals.

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## **Jeff Hewitt: Reconciliation of long-troubled Relationships**

Jeff Hewitt is also a First Nations person, raised on Anishinaabe Territory, and legal counsel to the Chippewa of Rama First Nation, home of Casino Rama. His presentation was intensely felt, and focused on Aboriginal understanding of relationships and law, quite different from the written and precedent-based legal system of Canada which he calls “coercive and prescriptive; what to do and how to act,” with access often difficult for women, children, the weak. It is, he says, the difference in legal concept between “those who came and those who were here.”

On the other hand, Hewitt explains his People’s understanding of law as centred on the Aboriginal term *Kistôtewewin* which roughly translates as “living together, with family.” These laws, he says, are internal, derived from the land, kept in the wigwam, transmitted through the generations. He admits that since there is no pan-Aboriginalism in Canada, each tribe’s understanding of that law differs.

He reminded conferees that this distinction seemed less apparent centuries ago. The Royal Proclamation of 1763 refers to “the several Nations or Tribes of Indians with whom We are connected...” and the Treaty of Niagara (October 1764) when Miravawana exchanged the Medicine of coming together, the Wampum of 2000 tribes with Sir William Johnson, who presented him with the Great Belt of the Covenant in the coming together that marked a unique Canadian partnership, based on respect and the exchange of gifts, but which since “has tread on diverse paths.” However, as history would have it, this mutual relationship of respect between sovereign nations was slowly degraded over time to become the relationship of subjugation by the Crown that we see today.

Hewitt asserted that the reconciliation process must begin with an understanding of The Doctrine of the Honour of the Crown and the Duty to Consult, which allows infringements of Aboriginal rights by the government, as long as it honours the fiduciary obligations that the Crown owes Canada’s Aboriginal peoples.

The Governments with which the Tribes treat today should not take advantage of the lack of a single Native voice and position on key issues, yet this is not a view reflected in the explicit written law of s. 35 of the *Constitution Act, 1982*, which, Hewitt avers, reflects a view that Law is “big men with egos clashing” and lies in sharp contradistinction to the Anishinaabe view of “we are all one family.”

Hewitt ended by referencing the Aboriginal custom of Grass Dances - the grass on which one might lie down so that it does not break, and is, at the end, “as though

we were not there.” He continued, “We can be weighted down with proclamations and orders, or we can remember that we once knew how to be friends. Ask the First Nations to lie down, but not to break.” According to Hewitt, it is important that Canada reclaims the original understanding of the relationship between the Crown and Aboriginals, as espoused by the Royal Proclamation of 1763, and the Treaty of Niagara – that is, a familial relationship of mutual support and respect between the various peoples of Canada.

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From the editorial staff of Canadian Monarchist News.