

An Iron Hand upon the People: The Law Against the Potlatch on the Northwest Coast, by Douglas Cole and Ira Chaikin. Vancouver: Douglas & McIntyre, 1990. Pp. 230. maps; illus. \$29.95 cloth.

Obtaining evidence that would convict is a very difficult matter; naturally the Indians who take part will not divulge the proceedings, and those who dont [*sic*] take part (who are few) have their own reasons for not wishing to become implicated in any prosecution proceedings.

— Cst. George H. Clark, B.C. Police, 15 June 1931, speaking of Kwakiutl resistance to the potlatch law.

About two weeks after the authors of this new study of the potlatch law presented their work at a transboundary legal history conference in Victoria, Chief Justice Allan McEachern handed down his decision in *Delgamuukw et al. v. The Queen*.¹ The judgment runs to hundreds of pages, probably the longest ever written by a common law judge, and in it the chief justice holds that the Gitksan-Wet'suwet'en peoples have neither jurisdiction over nor title to their traditional territories. In the course of so ruling, he singles out a promise made by Governor James Douglas in February of 1859. Addressing the Vancouver Island House of Assembly, Douglas had pledged the faith of the government to preserve the Indians' village sites and cultivated fields, and to protect their fishing rights and their right to hunt on unoccupied lands. One hundred and thirty-two years later, the chief justice comments:

It is difficult to read these words without wondering what went wrong for one would think that such a policy, if fairly implemented, would result in Indians having a safe haven in their villages and reserves, the use of all vacant crown land, and opportunities for betterment in the new economy that would place them in a preferred position to enjoy the best of both their own and the white civilization. I shall continue to wonder what went wrong throughout the course of this judgment.²

Only the intellectually arrogant would be rash enough to ridicule this passage. Who among us, after all, has not wondered along similar lines, at least before we began to learn about the history of the B.C. Indian land

¹ *Delgamuukw, also known as Ken Muldoe, suing on his own behalf and on behalf of the members of the House of Delgamuukw, and others v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada* (BCSC, Smithers Registry No. 0843), delivered on 8 March 1991. The conference referred to was held at the University of Victoria between 21 and 23 February, 1991, and was entitled "Law for the Elephant, Law for the Beaver: A Transboundary Conference on the Legal History of the West and Northwest of North America."

² *Ibid.*, at 113-14.

question? But many will be surprised at the chief justice's implication that he remained as bemused at the end of the case as he was at the beginning. The evidence, one presumes, showed that the Douglas policy was not always "fairly implemented"; that the best vacant land was quickly claimed by settlers; that government soon began to regulate and restrict Indian fisheries; that aboriginal title to traditional territory beyond village sites and gardens was denied (although never formally and explicitly extinguished); and that reserves were small. More importantly, the evidence must also have shown that these things happened, in part, because the policy was a temporary one, premised upon a belief that Indians would either be assimilated or become extinct. This of course did not happen: they did not assimilate, at least not in the way Douglas and his successors had hoped, and many reserves are now crowded and desperate. Moreover, most native Canadians wish to remain distinct, self-governing peoples, and for that a land base is required, not the sort of tinkering with the Douglas policy that is recommended in *Delgamuukw* as a substitute.³

That native people have adopted many non-native ways and do not agree on everything that needs to be done to solve their social and economic problems may have influenced the chief justice.⁴ Yet this fact, which is an unavoidable consequence of the disruptive processes of colonialism, surely does not deserve to be accorded such significance. When a European power with superior numbers and technology descends upon an aboriginal society, only some aboriginals tenaciously resist its charms. Many others, recognizing this superiority and justifiably impressed by it, are willing to cautiously incorporate attractive features of the new way. Still others may even embrace its wonders with enthusiasm, especially if doing so might enhance their own position within their society. Although none of these responses need entail the abandonment of traditional rights, they do divide and weaken aboriginal power while the colonizers get on with the business of elbowing the indigenous culture aside; and they also tend to create in government the false impression that openness means surrender and adaptability means a willingness to disappear. As Nisga'a chief Charles Russ told the Northwest Coast Inquiry in 1887: "We took the Queen's flag and laws to honour them. We never thought when we did that she was taking the land away from us."⁵ Of course not: it was a preposterous idea, and

³ See especially his general comments at 1-3 and 299-301 of the Reasons for Judgment (above n.1) and his finding with respect to fiduciary duties at 245-54.

⁴ Needless to say, diversity of opinion is hardly confined to native communities, especially in the Canada of the 1990s.

⁵ Quoted in Daniel Raunet, *Without Surrender, Without Consent: A History of the Nisga Land Claims* (Vancouver 1984) at 89.

one that was asserted with vigour only once native people ceased to be regarded as a threat.

Cole's and Chaikin's new book, in which the authors meticulously explore this splintering effect of colonization in the context of the different attitudes taken by natives (and non-natives) to the law against the potlatch, provides an interesting contrast to *Delgamuukw*.⁶ In their pages the Gitksan emerge as a people that held fast to their traditions, second only to the southern Kwakiutl in their resistance to change. Adapting their ceremonies just enough to avoid direct conflict with the white man's law, the Gitksan "continued to feast, dance and potlatch throughout the period, erecting poles almost continuously into the 1940s."⁷ And so today. On 11 May 1991 a large headstone and naming feast was held at Kispiox to mark both the passing of Ken Muldoe and the transfer of his name, Delgamuukw, to Earl Muldoe, "the third since this trial started."⁸

The law that is the subject of Cole's and Chaikin's study (the first since La Violette's) prohibited the potlatch and the Tamanawas dance, neither of which were defined until the Act had been in force for more than a decade.⁹ First passed in 1884, what began as section 3 of "An Act further to amend the Indian Act" remained on the federal statute book for over sixty-five years.¹⁰ In the interim the section was amended in 1895 to respond to Chief Justice Begbie's criticism in *Regina v. Hamasak* (1889) that the prohibition was too vague, and again in 1918, when the offence was reduced from an indictable to a summary conviction offence.¹¹ The latter change may appear benign, but it was not. Judges had proved unwilling to impose prison terms on Indians who violated the potlatch law,

⁶ Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver 1990). The title is from a letter by Gilbert Malcolm Sproat to the Superintendent General dated 27 October 1879, and quoted by the authors at 15. In it, Sproat urged Ottawa to do whatever was necessary in order to end the potlatch, even to "lay an iron hand upon the shoulders of the people." The potlatch, he wrote, was "like a huge incubus upon all the philanthropic, administrative or missionary effort for the improvement of the Indians."

⁷ Above n.6 at 58-59.

⁸ "Closing Statement of the Chiefs," 14 May 1990.

⁹ See pp. 31-97 of Forrest E. La Violette *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (Toronto, 1961).

¹⁰ S.C. 1884, c.27, s.3. As the authors point out, this measure came into force on 1 January 1885, and followed an order-in-council and proclamation, both of which requested and "earnestly" urged B.C.'s Indians to abandon the potlatch voluntarily.

¹¹ S.C. 1895, c.35, s.6; S.C. 1918, c.26, s.7. The authors discuss the Hamasak case at 35-36. The 1895 amendment is lengthy, but in essence it defined the prohibited activities as ceremonies where presents were made or where human or animal bodies were mutilated.

and as Duncan Campbell Scott, the new Deputy Superintendent of Indian Affairs, well knew, summary conviction offences were triable by justices of the peace. Because Indian agents were justices of the peace, potlatching prosecutions could now be tried by them rather than by the regular courts.¹² Still, none of these stratagems had the sweeping effect hoped for by their sponsors and, notwithstanding the prosecutions, by the 1930s the potlatch — at least in those regions where it had survived Christianization and other influences — was as popular as ever. Although by the time the law was dropped from the Indian Act in 1951 the potlatch had been in decline for over a decade, the evidence marshalled in this book suggests that this was not due solely or even primarily to its prohibition.

The picture that Cole and Chaikin paint in charting Indian resistance to the law — and they “won at least as often as they lost” — is much more complex than apologists for government and even some supporters of native claims might have us believe.¹³ As the authors point out, the law was the product of the zeal of missionaries and a few federal Indian agents, not simply to gain converts but to protect native people from what they saw as dangers to health and economic well-being posed by the potlatch. As such, the law was reformist as well as oppressive, reflecting the extent to which “the assault on Indian culture bemoaned by social activists today was led by social activists of an earlier era.”¹⁴ The law’s opponents, on the other hand, were not restricted to Indians, and included the provincial authorities (the legislature passed a resolution requesting an investigation and possible repeal of the law in 1897); merchants and others who profited from the economic activity generated by feasting; and probably even the public at large, who seem to have enjoyed watching potlatches or were at least prepared to tolerate them.¹⁵ For this and a variety of other reasons (including their own inability to enforce it), neither Ottawa nor most agents wanted to see prosecutions in any but the most extreme cases. Thus the law was invoked when the allegations included the mutilation of living or dead bodies,¹⁶ but otherwise primarily only in one agency, in one eight-year period, against the one people who were most

¹² Agents had been justices for the purposes of the Indian Act since 1881: S.C. 1881, c.17, s.12.

¹³ Above n.6 at 183.

¹⁴ Above n. 6 at 24, quoting John Webster Grant, *Moon of Wintertime: Missionaries and the Indians of Canada in Encounter Since 1534* (Toronto, 1984) at 185.

¹⁵ Above n.6 at 50. Of course, non-native opponents of the law might well have calculated that generosity on this issue would reduce native demands with respect to land and resources.

¹⁶ For example, the prosecution (and eventual acquittal) of George Hunt in 1900, described at 73-75.

opposed to it and most inclined to resort to open resistance: the "incorrigible" southern Kwakiutl.

This restraint is interesting, given that a significant number of Indians had petitioned in favour of the potlatch law and continued to support it. These people were Christian, and the missionaries had persuaded them that to become powerful and whole, they had to deny a part of who they were. Life in European culture was identified as liberal and progressive, life in native culture as coercive and backward or, as Chief Justice McEachern put it, nasty, brutish and short.¹⁷ The fact that European wars were equally nasty, brutish and long, and that life in a Manchester slum was much worse than in a Gitksan village, seems generally to have been overlooked.¹⁸

It is hardly surprising, therefore, that younger converts especially resented being coerced into participating in old ways that they regarded as preventing their advancement. However, even native supporters of the potlatch law did not necessarily buy the rest of the colonial package.¹⁹ Under the leadership of such men as Peter Kelly, the Allied Tribes of British Columbia lobbied vigorously to have Indian title in B.C. recognized, yet declined to accede to Kwakiutl pressure to adopt an anti-potlatch law policy. Kelly was an ordained Methodist minister whose own people, the Haida, had largely abandoned the potlatch when they embraced Christianity, and he had no wish to see it revived. But he would not have understood the argument that abandoning the potlatch was somehow evidence of abandoning the land; quite the contrary.²⁰ It is much more likely that he was afraid that lobbying to repeal the potlatch law would divert energy and support from what he saw as more important issues. Compared to Andrew Paull, the other pre-eminent figure in the Allied Tribes, Kelly did believe

¹⁷ Quoting Thomas Hobbes: see *Reasons for Judgment*, above n.1, at 13.

¹⁸ Dr. John Sebastian Helmcken, a Vancouver Island pioneer quoted in the judgment, was not so quick to condemn aboriginal culture. Looking back at B.C. in the colonial period, he compared it with contemporary Europe, and commented that instead of "small tribes I see large nations — instead of small parties I see legions of soldiers. Instead of a few heads and slaves being taken, I learn of thousands upon thousands slaughtered! What hypocrites we are. . . ." (See Dorothy Blakey Smith, ed., *The Reminiscences of Doctor John Sebastian Helmcken* [Vancouver, 1975] at 330, reproducing a newspaper article of 1890.)

¹⁹ Nor, to be fair, did all missionaries. Duncan of Metlakatla had a relatively enlightened view of Indian title. This is noteworthy because, as Cole and Chaikin point out (at 45-46), Anglicans were usually much less concerned than Methodists "with land questions and sought to apply the weight and authority of the government and its agents."

²⁰ It is interesting that in *Delgamuukw* (above n.1 at 51), the chief justice notes that a survey of 1,000 people conducted by the Tribal Council in 1979 showed that 32% of the sample attended no feasts. One would have thought that by Canadian standards, a 68% participation rate was pretty good.

in assimilation, or at least integration; but he in no way believed that this should affect questions of title.²¹

Some of these questions were raised by Mr. Bill White at the trans-boundary legal history conference referred to earlier.²² White praised Cole and Chaikin for moving “the Indian from the generic realm into a culturally specific area” by carefully distinguishing the different experiences of the different tribal groups and by identifying individuals as well.²³ However, he reminded authors and audience alike that the danger of relying too heavily on documentary sources is that many of those who produced them — such as the agents, former fur traders and missionaries cited by Cole and Chaikin — did not always speak the language of the people they criticized and may well have been blind to much that was going on. For example, during the period when it was illegal to pursue their land claims (1927-1951), native people obeyed the law and stopped bothering government, but they did not cease talking among themselves; nor, whatever appearances may have been, is it clear that the authors are correct in implying that the Salish voluntarily abandoned the potlatch.²⁴ Indeed, as White (who is himself Coast Salish) pointed out, a large potlatch hosted by Julia and Russell Henry of the Tsartlip band was taking place in Saanich at the same time as the conference.²⁵

Because what the authors have written is legal history as much as anything else, some readers may be disappointed by their failure to identify with (or even to identify) a particular theory of the relationship between law and social change. Although they tend, correctly in my view, to side with those historians who assert that native peoples were not a passive mass upon which Europeans imposed their will, what they infer from this is not entirely clear. They sometimes seem to be of the view that the potlatch law was a significant factor in the assault on native culture. At other points in the book their attitude appears to be that it really did not make much difference at all, especially when compared to the influence of Christianity, and to jurisdictions where the potlatch was legal but declined anyway. This

²¹ The portrayal of Kelly in Alan Morley’s *Roar of the Breakers: A Biography of Peter Kelly* (Toronto, 1967) underplays this aspect of the man, as Paul Tennant points out in *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver, 1990) at 252n.

²² See n. 1, above, and accompanying text.

²³ Mr. White kindly supplied me with notes of his remarks.

²⁴ Above n.6 at 60-61.

²⁵ In fairness, it must be added that the meaning of “voluntarily” and “potlatch” are open to debate, and that Cole and Chaikin did not mean to dispute that the potlatch was far from moribund among the Coast Salish today.

may be a genuine and justified refusal to go too far beyond the data, but less understandable is the lack of an appendix setting out the various texts of the potlatch law, and the absence of references in the index to standard legal terminology. Does this reflect a belief that the technical details of the law are unimportant, and is it therefore a clue to the nature of the authors' unstated theory of law and social change? If so, this needs to surface and be defended.

In conclusion it must be stated that this is a book rich in detail, and it is difficult to do it justice in a short review, especially one by a reviewer who felt compelled to take up valuable space by attempting to relate it to the decision in *Delgamuukw*. Nonetheless, to this connection I now return, because at the end of their book Cole and Chaikin address the question of why the Kwakiutl and the Gitksan "persisted with their potlatch to a greater extent than did many of their neighbours."²⁶ They concede that "this exceptionalism is not easily explained," but suggest that,

[a]mong the Gitksan, a probable factor was the close connection between status and ownership of resource territories. The potlatch, as a validation of territorial rights, may have received extra reinforcement as a means of furthering land claims against the government.²⁷

Yet, according to the judgment in *Delgamuukw*, by the time the potlatch law was passed in 1885 the Gitksan and their Wet'suwet'en neighbours had no territorial rights: unbeknownst to them, their aboriginal title had been extinguished twenty years earlier, implicitly, by colonial laws that could not be enforced and that made no mention of either title or extinguishment. Compared to this ruling, the iron hand of the potlatch law is a gentle tap.²⁸ By drawing our attention to this important part of our legal past, the authors have provided us with a useful contrast to the supreme court decision, and done both law and history a genuine service.

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²⁶ Above n.6 at 181.

²⁷ *Ibid.* As Wet'suwet'en chief Gisdaywa (Alfred Joseph) told an audience in Smithers recently, over the years elders literally wore out drums singing songs about their territories. Yet, he said, they are not bitter about the chief justice's decision, because they know that, in the end, they will prevail.

²⁸ Indeed, the Gitksan and Wet'suwet'en hardly seem to have regarded the potlatch law as a threat. In 1890 the people at Kitwanga told the Indian agent there that the law "was as weak as a baby." And as late as 1920 some Hagwilget people merely giggled when the local priest told them not to potlatch "because of the threat of the law." (See above n.6 at 39, 179.)