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FNSP 400 Practicum
December 20, 2012

The Louise Mandell Legal Research Collection: A Literature Review

Introduction to Topic

The field of First Nations law has been transformed in the last forty years through cases such as *Delgamuukw*, *Sparrow*, and *Van der Peet*; Louise Mandell has been a part of this transformation in the Canadian legal system. After graduating University British Columbia Law school, Mandell began working in Native land claims with the Union of B.C. Indian Chiefs in 1977. Since then, Mandell has participated in cases dealing with Aboriginal rights, Aboriginal title, and Treaty rights; she has also participated in famous Indigenous legal cases such as those outlined above as well as participating in the fight for Section 35 in the *Constitution Act, 1982* (Native Investment and Trade Association 1-7). The work she has done has influenced the way that Aboriginal law is approached and her work will continue to be influential in the future of First Nations law.

This literature review looks at the writings available on the subject of Aboriginal law as it relates to the legal work of Louise Mandell. The focus is on literature that discusses her connection with the field of Aboriginal law and ways in which she has helped to shape and form law to grant Aboriginal rights. The paper will focus on literature that is within the “Louise Mandell Legal Research Collection” at the Union of B.C. Indian Chiefs Resource Centre and will analyze the themes that are apparent within their resources. There are a wide range of sources available within the UBCIC holdings; these resources range from pamphlets to conference proceedings to books. The sources are also written by a wide range of people:

scholars, writers, lawyers, anthropologists, etc. and focus on ways in which the legal system has changed in its ways of dealing with First Nations.

The literature looks at research that has been done within the fields of First Nations Studies, Legal Studies, and, of course, First Nations Law. The field of First Nations Studies gives insight to the history and struggles of Indigenous peoples in Canada. The field of legal studies provides a framework and background for understanding how Canadian law operates and controls the framework from which colonialism emerges. The field of First Nations Law considers the implications of bridging the two worlds, the colonial world and the Indigenous world, within the courtroom to allow for mutual understanding. Some key questions that come up in the literature review are: How has First Nations law changed throughout the years? How can there be more space for Indigenous law within the Canadian legal system in the future? And, finally, how has Louise Mandell's work influenced various aspects of Aboriginal law?

Published Literature

A large body of the literature is devoted to how the Canadian legal system has approached First Nations rights in the past and how it has changed within the last forty years. In the 1970s, First Nations could not be "recognized or affirmed" in having Aboriginal rights (Morellato vi). Since Section 35 in the *Constitution Act, 1982* was established, First Nations have been able to go to court to challenge their rights as Aboriginal people. First Nations can now challenge Canada's sovereignty through the court by asserting Aboriginal rights, Aboriginal title, and treaty rights as well as enforcing the Crown's fiduciary obligations and the Crown's duty to consult and accommodate (Morellato vi). These changes are a huge contrast from forty years ago; in the

1970s, courts were not even aware that Aboriginal title and rights were something that should be negotiated with First Nations (Archibald 24).

Kent McNeil discusses this evolution of Aboriginal Law in *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia*. The book discusses how the relationship Canada has with First Nations is shifting; before the change, Canada believed they had complete control over First Nations; now, however, the government sees that the relationship includes certain “obligations” to these peoples (McNeil 354). The government now has “legally-enforceable duties” to First Nations such as fiduciary obligations and the duty to consult and accommodate. These enforceable duties mean that the government cannot avoid constitutional obligations it has made with Indigenous people (McNeil 355). The courts have also changed in that they have acknowledged that Indigenous viewpoints need to be taken into account during court trials (McNeil 96).

John Borrows and Leonard Rotman also discuss the evolution of Aboriginal law in their book, *Aboriginal Legal Issues*. This book provides a comprehensive view of how different specialties within Aboriginal law have transformed throughout the years. For example, they focus on Aboriginal Title and how cases such as *Delgamuukw* have transformed this field of law. Borrows and Rotman conclude that Canada’s sovereignty is now being “challenged” by First Nations in the courtroom, something that did not happen years ago (Borrows and Rotman 104).

The body of literature that discusses the transformation that has taken place within Aboriginal law in the past forty years gives insight into the context from which Mandell worked; she had to fight against biases and ignorance in the courtroom with every case she worked on to overcome the shortsightedness of the Canadian legal system. These texts are critical in

understanding how far Aboriginal law has come in the last forty years. This is necessary to understand the scope of and significance of Louise Mandell's work in the field. Working in Aboriginal law is about decolonizing the Canadian legal system, a daunting task and one that Louise Mandell has been willing to take up. Trying to assert Aboriginal rights through the courtroom was and still is a difficult task. It not only requires understanding law and the ways in which Indigenous rights can be negotiated, but it also requires drive to try to change viewpoints and discourses that judges operate within (Aboriginal Law in Canada 4).

Another set of resources available at UBCIC demonstrate Mandell's influence in Aboriginal law through discussion of the Delgamuukw decision. Delgamuukw is a case that has impacted Aboriginal legal issues in many important ways. The case established that as long as First Nations can prove the occupation of a territory before colonization, continuity with the land to the present, and exclusive use over the land, they have Aboriginal title. Delgamuukw is also important in that it was the first case that saw oral history and tradition as valid evidence within the courts (McNeil 103). This case has opened the way for Aboriginal title to be proved and forced the Canadian government to consider the division of power between the provincial court and the federal court (McNeil 249). Mandell worked on this case as one of the lawyers on behalf of the Gitksan and Wet'suwet'en First Nations.

Many of the sources approach Delgamuukw from academic viewpoints, analyzing the effects and influence that the case has caused. Some sources use Delgamuukw as a point of comparison with Australian Aboriginal law or with other court cases within Canada. Richard Bartlett and Jill Milroy's book, *Native Title Claims in Canada and Australia: Delgamuukw and Miriuwung Gajerrong*, dissects the Delgamuukw decision along with the Miriuwung Gajerrong

case in Australia to look at the different ways in which these two cases have influenced and shaped Aboriginal law. Other sources focus solely on Delgamuukw like Maria Morellato's book *Aboriginal Law Since Delgamuukw*. In this book, Morellato discusses how Delgamuukw has impacted First Nations law, but there is still much more that needs to be addressed within the court system (Morellato ix). Delgamuukw gave rise to seeing the land as a "legal interest" within the courts; bringing in new ideas of land within the legal system is the starting stages of seeing a blend between Western ideas of legality and Indigenous legal views (Morellato vi).

A third theme represented in the UBCIC resources reflect on ways in which Canadian law could be blended with Indigenous law. Although cases that have come to the court in the last forty years have been transformative, there are still many areas in which the Canadian law can be improved to allow for Indigenous self-government and self-determination. One book that discusses this theme is *Recovering Canada: The Resurgence of Indigenous Law*. In this book, Borrows delves into ways in which court cases need to push the Canadian government to act in more decolonized ways in the future. Borrows believes that Indigenous law needs to be blended with Canadian law in order to create a system that can have justice for First Nations (Borrows xii). For Borrows, having Indigenous legal traditions embedded within Canadian system is not only a matter of justice, but also a matter of benefitting Canada. Indigenous ideas about ways of living and being sustainable could help Canada be more aware of the environment (Borrows 54).

A fourth set of resources includes Mandell's own writings and speeches also give insight into the influence that her perspectives have had on Aboriginal law. This body of work that includes articles, conference presentations, and speeches by Mandell, is critical to understanding Mandell's own positioning within Aboriginal law. In her notes from the FNLC meeting in 2008,

Mandell speaks of “The Ghost” apparent within the courtroom. This “ghost” is the subverted colonialism that is still a part of the Canadian legal system, refusing to allow for equality for First Nations (Mandell “FNLC” 1-2). This article shows that Mandell is aware of the continued influence that colonialism has in Aboriginal law and that she sees that part of being a lawyer in Aboriginal law is uncovering the biases and history that is apparent in the Canadian legal system.

In her “Speaking Notes at SFU Convocation Address, Mandell gives advice to graduates that being in the moment, sharing one’s talents, and knowing one’s ambitions is critical to having a joyful, passionate life (Mandell “SFU” 2-5). Her speech is full of insight into how her own career and work as a lawyer have changed her ways of approaching the world. By reading speeches and presentations, Mandell’s own voice and perspective is seen:

I was honored to have stumbled into a beautiful dream - which led me to a life of unimagined beauty and personal satisfaction. This was a collective dream for justice. This dream was one of love. My work has been a love story - my love for my clients and theirs for me; my love for my partners in law and in life; and theirs for me. I have spent my work life in the company of love; with people who love the land, who lovingly named each bay and inlet, passing stories orally from generation to generation. (Mandell “SFU” 5)

This quote shows how the work that Mandell has done is now a part of her and how she views Aboriginal law as a form of justice. Few of the other resources show the passion that is heard in Mandell’s work. This body of work that shows who Mandell is through her own writings is essential to understanding the influence she has in the field of Aboriginal law.

Analysis of Literature

The resources give some context to who Louise Mandell is by describing her career and her perspectives on Aboriginal law. Having this knowledge is also nice to understand the how various court cases and legal theories are related. Knowing where scholars still have questions and worries, like the feasibility of blending Indigenous legal traditions with Canadian legal traditions, gives a focus to where further research should be done. Another struggle with these resources is that a lot of the information has to be inferred. Not many materials actually discuss Mandell's work specifically or her accomplishments, so other researchers should approach the sources with a critical mind. This means looking at the resources with a focus on seeing how court cases and legal theory can help to give context to Mandell's career. Questions that still need to be answered include: Where should Aboriginal law be in ten years? If it is possible to bridge Indigenous law with Canadian law, how should this be done?

The resources with the "Louise Mandell Legal Research Collection" contains some of the most prominent work within the field of First Nations law and it is comprehensive in its scope of court cases and legal theory related to Mandell's career. The resources contain not only books and articles, but also pieces written by Mandell and information on the various cases she has worked on. The resources available within the UBCIC Resource Centre tend to focus on critical, scholarly approaches to Aboriginal law as it relates to Louise Mandell's career. This creates a highly academic legal collection that gives a good foundation for Aboriginal legal issues. There does need to be attention to the fact that the information, for the most part, is all from scholarly sources and that additional sources need to be added that demonstrate who Mandell is as a person.

The collection could include more sources that allow for understanding Mandell's influence and career a little bit better. It is important to recognize that a huge part of understanding Louise is left out when only focusing on scholarly books, articles, and publications. The sources are very academic sources, but there needs to be more personal and approachable sources that get at the heart of what it means to be in First Nations law - what sacrifices are made and what kinds of relationships are build with First Nations. Personal stories will add a lot of respect and understanding to what Louise has done.

The information is a solid representation of the information that is available in written form, but further research should be done that looks at Louise Mandell in a more personal way. Doing interviews with colleagues and former students would allow for personal stories to be apparent. The interviews should focus on ways in which Louise's role has influenced others in the field and has influenced communities. Interviews could also focus on where Aboriginal law should go in the future.

Louise Mandell has worked on many of the critical cases that have changed the ways in which the Canadian government has approached the rights of Aboriginal people. By giving rights to Aboriginal people that did not exist before, the court is creating headway into also understanding that Indigenous peoples of Canada deserve to be treated in a very different way than they have been treated in the past. For Mandell, bringing these issues to court is not about Canada granting rights in order to validate the fact that Indigenous people deserve to have rights and tradition, but bringing these issues to court gives the judges the ability to reconsider how colonial law applies to matters of Indigenous justice (Aboriginal Law in Canada 4-5). Bringing matters of Indigenous rights to the court is a matter of finding a common ground between

Indigenous legal traditions and Colonial legal traditions; it is about making compromises between two discourses. This is the influence that Mandell has had on the field of Aboriginal law, she has made the court recognize where compromises need to be made to allow for equal power relationships with First Nations.

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