Book Review

Robert J. Miller
Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny
Westport, CT: Praeger Press, 2006

Reviewed by Jerry Hammersmith

In his review of this book in *Ground Swell*, Dr. William Batt of Albany, NY says:

> Author Robert J. Miller, an Associate Professor at the Lewis & Clark Law School in Portland, Oregon, as well as being Chief Justice of the Court of Appeals for the Confederated Tribes of the Grande Ronde Community of Oregon, is a citizen of the Eastern Shawnee Tribe of Oklahoma. In this book, he moves outside of the Eurocentric paradigm of conventional legal reasoning characterizing so much of U.S. and Canadian notions of real property. Miller presents a tightly written challenge to five hundred years of this tradition. He argues (p.175) that American history and law can take on a richer meaning and understanding within the contexts of the legal background and justifications for many historical, law related and political principles.

This reviewer argues that the same observations are as true of Canada and other colonial states as they are of the U.S.A. In both the U.S.A. and Canada, the Doctrine of Discovery was explicit—finders, keepers.

Although Miller's book is six years old, it carries some messages of current application not only for the U.S.A., but also for Canada. Beginning with popes in the 11th century, the Doctrine of Discovery was widely understood by the time North America was being invaded and occupied by Europeans. England initially claimed sovereign possession of most of the continent, assuring that land titles came directly from the King's grace. Batt continues:

> Miller outlines ten elements to the Doctrine of Discovery (pp. 6 – 8):
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> 1. First Discovery;
> 2. Actual Occupancy and Current Possession;
> 3. Preemption/European title;
> 4. Indian title;
> 5. Tribal limited sovereign and commercial right;
> 6. Contiguity;
> 7. Terra nullius;
> 8. Christianity;
> 9. Civilization;
> 10. Conquest."

This reviewer adds that although, following George III's Royal Proclamation of 1763, immigrants in the U.S.A. responded with a revolution while immigrants in Canada did not, in both cases Europeans and their descendents claimed property and sovereign right over Indigenous lands. First discovery was considered to create a claim, even if considered incomplete, of title. In what was to become the U.S.A., a revolution was fought over whether the British Crown or Immigrants' Institutions would claim title to Indigenous lands and resources. In what was to become Canada, immigrants stayed loyal to the Crown and treaties were negotiated between the Crown, in the right of Canada, and Indigenous Nations.

Thomas Jefferson, in the U.S.A., like Sir John A. MacDonald at a shortly later time in Canada, envisioned a trans-continental nation well before many of his compatriots did. This makes them each a pivotal figure in the history of his nation.

This reviewer agrees with reviewer Dr. Batt that Robert Miller is too sophisticated a scholar to use contemporary political beliefs as a basis on which to judge values and practices two centuries ago. Still we must understand Jefferson and MacDonald, as products of their time, in revisionary light.

Batt observes that Miller recognizes that in the U.S.A. the legacy of treaties as well as statutory and case law leaves parties as seeing themselves locked into a cul-de-sac, limiting flexibility to rectify past injustices. This reviewer observes that while much of the same is also true in Canada, the courts up to and including the Supreme Court of Canada, have occasionally and unpredictably shown a willingness to rectify past injustices.

As Batt points out, Miller begins his book by proposing that "it is time for the United States to try to undo more than 200 years of the application of the ethnocentrically, racially and religiously inspired Doctrine of Discovery to American Indians and nations" (p.6). He ends by stating that laws could (and should?) be devised "to reduce the Discovery burden on Indians and their governments" and that "the 'heavy hand' of the all-powerful 'Discovering' nation and federal paternalism needs to be reduced." (p.177). Few people would argue with him so far as this goes. However, Batt sees this solution as a very weak ending to a powerful analysis.

In Canada, debate continues over the provisions of treaties, statutory and case law between the Crown and Indigenous peoples and their impact on Federal, Provincial, Territorial and Indigenous governments. Indigenous peoples have shown a preference for negotiation over litigation. The same is less true for Federal and Provincial governments. Indigenous peoples and governments have led the way through the Courts. Governments, with the possible exception of Yukon and Northwest Territories seem to have needed Court decisions before acting to attempt to reduce the Discovery burden on Indigenous peoples and their governments. The same has been true in efforts to reduce the 'heavy hand' of Federal, Provincial and Territorial paternalism.

Some Canadian attempts which allege to be intended to reduce the Discovery burden on Indigenous peoples and their governments include, but are not necessarily limited to:

1. The 1975 James Bay and Northern Quebec Agreement;
2. The 1984 Inuvialuit Land Claim in N.W.T.;
3. 1992 Treaty Land Entitlement Agreement in Sask.;

4. 1993 Sahtu Dene and Metis Land Claims Agreement in N.W.T. ;
5. Delgamuukw 1998 Supreme Court Decision recognizing aboriginal title as a "right to the land in itself," deriving from First Nations original occupation and possession at the time the Crown asserted sovereignty. The Court also stated that the Federal and Provincial governments may infringe upon Aboriginal title under conditions for justification but that fair compensation would be due at the time of such infringement.
6. Sechelt First Nation AIP in 1999;
7. Tsawwassen First Nation Treaty in 2007;
8. 2007 Supreme Court Xeni Gwet'in Supreme Court decision on Aboriginal title;
9. Calder Supreme Court decision, leading eventually to the 2010 Nisga'a Treaty in B.C.

This reviewer finds it interesting that, in the current debate, existing Canadian models for change that are being ignored by the Canadian Parliament include:

1. The West Bank First Nation near Kelowna, B.C. – For West Bank First Nation, the Indian Act has been replaced by the West Bank Self Government Act. <http://laws.justive.gc.ca/eng/acts/W-6.2/>;
2. Senate Bill S-216 introduced by Senator Gerry St. Germain and ignored after 2nd reading in 2006. Provisions in the Bill would make West Bank-like self-governance options available to each First Nation choosing that methodology. <http://www/parl.gc.ca/Content/SEN/Bills/39/public/S-216/S-217_1/S-216_text-e.htm>;
3. Yukon Self-Government legislation that has made West Bank-like governance options available to Yukon First Nations for several years. <http://laws.justice.gc.ca.eng/acts/Y-2/page-1.html>.

For some reason, governments and media continue to ignore these options.

About the author:

Dr. Jerry Hammersmith is an international teacher and management consultant with experience as a small business owner/manager. He has taught in Canadian and New Zealand Universities and has done community economic development and strategic planning in Indigenous communities in Canada, Zimbabwe and New Zealand. He has served as a provincial cabinet minister and a territorial deputy minister. He is currently on the Aboriginal Leadership and Management faculty at the Banff Centre and serves as CESO/SACO Volunteer Associate, serving Canadian Indigenous and Developing Nations communities. He can be reached at jhammersmith@sasktel.net

References

Batt, William. 2007. Review of *Native America, Discovered and Conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny. Ground Swell*, July-August.